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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ARB.P. 437/2016**

BOUGAINVILLEA MULTIPLEX & ENTERTAINMENT CENTER PVT LTD. ..... Petitioner
Through: Mr Akhil Sibal with Mr. Prantik Hazarika and Mr. Deepak Chawla, Advocates.

versus

INDIA TOURISM DEVELOPMENT CORPORATION LIMITED ..... Respondent
Through: Mr. Ravi Sikri, Senior Advocate with Ms. Shweta Bharti, Mr. Deepank, Mr. Neelesh Sinha, Mr. Shijo George and Ms. Rashmi Gupta, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **17.01.2017**

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') by Bougainvillea Multiplex & Entertainment Center Pvt. Ltd. ('BMEC') seeking appointment of an Arbitrator in the disputes between the parties that have arisen out of a licence deed dated 1st March, 2013 executed by the India Tourism Development Corporation Limited ('ITDC') in favour of BMEC permitting it to operate an international cuisine restaurant-cum-night club under the name and style of Stellar at Hotel Ashok, New Delhi.

2. In terms of the said licence deed, BMEC was granted a licence for a

period of five years commencing from 9th January, 2013. BMEC was entitled to a one-time renewal after the expiry of the stipulated period in terms of Clause 2 of the licence deed. The licence fee was specified in Clause II (1). Under Clause IV (2), BMEC was not permitted to terminate the licence before the expiry of the period of licence except by giving a six months' advance notice in writing. In the event BMEC terminated or abandoned the licence prior to the above said period of notice, it would be liable to pay liquidated damages (LD) equivalent to the licence fee payable to ITDC for the unexpired notice period.

3. Clause V of the licence deed concerned 'Applicable Laws & Notice' and sub-clause (1) therein read as under:

> "1. In respect where provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 can be invoked by the Licensor in respect of the Licensed Space the provisions of the said Act shall apply.
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> In respect of any other dispute or difference relating to the terms of his License Deed, the matter shall be referred to the sole arbitration of the Chairman & Managing Director of ITDC or any other person appointed by him in this behalf. The award given by the Arbitrator shall be binding upon the parties. It is specifically agreed by the Licensee that it will have no objection to any such appointment that the arbitrator so appointed is an employee of the Licensor or he has already expressed view on, for or any of the matters in dispute or difference. The arbitrator so appointed shall have power to extend the time for making an award. The said Arbitrator shall act under provisions of the Arbitration and Conciliation Act, 1996.
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> Except as above, only Delhi Courts will have jurisdiction."

4. The obligations of covenants of ITDC (the Licensor) and BMEC (the Licensee) were set out in Clauses VI and VII of the licence deed respectively.

5. By a letter dated 2nd March, 2015, BMEC informed the General Manager of the Ashok Hotel about a major water leakage from the ceiling at its outlet 'S Pangea' and requested its immediate attention to get it rectified. Another such complaint was made by a letter dated 24th June, 2015. The case of BMEC is that the water leakage problem escalated beyond control on 10th and 11th July, 2015 destroying the complete interiors of Stellar, including the wooden flooring of a major part of outlet, the music speakers, CCTV cameras, lights etc. BMEC states that in response to its letters, ITDC alleged that the outlet had been licensed to BMEC on an 'as is where is basis' and, therefore, the responsibility for fixing the leaking roof was that of BMEC.

6. By a letter dated 6th November, 2015 addressed to ITDC, BMEC terminated the licence deed under Clause-IV (2) of the license deed with effect from 11th July, 2015. By a reply dated 10th February, 2016, ITDC denied that there was any termination with retrospective effect from 11th July, 2015 and instead treated the date of the letter i.e., 6th November, 2015 as a statutory date of six months' advance notice of termination. According to ITDC, the termination would take effect only from 5th May, 2016.

7. On 30th May, 2016, ITDC sent a letter to BMEC to pay the outstanding licence fee for the period up to that date within seven days failing which they would be compelled to auction the materials and goods of the Licensee to recover the arrears. In response thereto on 2nd June, 2016, BMEC sent a

notice to ITDC invoking the arbitration clause and nominating a sole Arbitrator. In response thereto on 7th July, 2016, ITDC took the position that the invocation of the arbitration clause was misconceived in view of the applicability of The Public Premises (Eviction of Unauthorised Occupants) Act, 1971 ('PP Act') to the dispute on hand.

8. It is at that stage that the present petition was filed by BMEC under Section 11 (6) of the Act praying that the Court should appoint an Arbitrator as had been nominated by BMEC in its letter dated 2nd June, 2016 to adjudicate the disputes between the parties.

9. In its notice dated 2nd June, 2016, BMEC has crystallised its claims as under:

> "(i) Refund the security deposit of our client amounting to Rs. 2,48,00,000/- which had been deposited by our client in terms of the License Deed (more specifically contained in Clause 3 License Fee & Security deposit);
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> (ii) Refund the license fee amounting to Rs. 10,36,46,133/- paid by our client to ITDC from execution of the said License Deed till date;
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> (iii) Compensate our client for the original capital expenditure incurred by the Company towards setting up of Stellar to the tune of Rs. 16,45,00,000/-;
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> (iv) Pay for loss of business to our client on account of closure of Stellar to the tune of Rs. 1,02,00,000/- per month from the date of termination of said license deed i.e. 11.07.2015;
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> (v) Pay for the loss of reputation and loss of goodwill of our client to the tune of Rs.10,00,00,000/-, which is a direct result of violations of the provisions of the License Deed by ITDC."

10. Meanwhile BMEC filed OMP (I) (Comm.) 326 of 2016 in this Court Section 9 of the Act seeking interim reliefs. In the said petition by orders dated 20th September, 2016 and 4th October, 2016 it was recorded that the possession of the premises had been handed over by BMEC to ITDC. Further, BMEC removed its goods and articles from the outlet in question.

11. The further development that took place was that ITDC on 27th September, 2016 filed an application under Section 7 of the PP Act before the Estate Officer for recovery of Rs.73,09,67,920 for arrears of rent, water charges, electricity charges and damages. On 5th October 2016, notice was issued in the said application to BMEC by the Estate Officer. In response thereto, BMEC filed a limited reply denying any liability and articulating its claims including refund of security deposit, licence fee, compensation of the capital expenditure spent by it in setting up the outlet, compensation for loss of business on account of closure of the business, and compensation for loss of reputation and goodwill.

12. Mr. Akhil Sibal, learned counsel appearing on behalf of BMEC submitted that with the invocation of the arbitration clause taking place on 2nd June, 2016 by BMEC, subsequent to the amendment to the Act with effect from 23rd October, 2015, sub-section (6A) of Section 11 the Act will squarely apply. In terms thereof, if the Petitioner is able to show the existence of an arbitration agreement, the petition is to be allowed and an Arbitrator appointed. All other questions, including maintainability of the claims, have to be examined by the Arbitrator. Mr. Sibal submitted that there

is no provision in the PP Act whereunder BMEC could file a claim before the Estate Officer. On the contrary, ITDC was not precluded from filing a counter-claim before the Arbitrator. In other words, there was no occasion for BMEC in the proceedings before the Estate Officer under the PP Act, to pursue the claims urged by it in its notice dated 2nd June 2016 and have them adjudicated.

13. Relying on the order dated 11th September, 2009 passed by a Single Judge of this Court in Arbitration Petition No. 131 of 2009 (***Nuurrie Media Ltd. v. Indian Tourism Development Corporation Ltd. & Anr.***) where an identical clause was interpreted and an Arbitrator appointed, Mr. Sibal submitted that the disputes raised by BMEC had to be referred to arbitration and the question whether a particular claim was arbitrable or not should be left to be adjudicated by the Arbitrator.

14. Countering the above submissions, Mr. Ravi Sikri, learned Senior counsel appearing for ITDC, referred to the decision dated 25th April, 2016 in Writ Petition (C) No. 588 of 2016 (***M/s Fortune Grand Management Pvt. Ltd. v. Delhi Tourism & Transport Development Corporation***) where it was held that the disputes which are within the purview of the PP Act are not arbitrable and cannot be referred to arbitration. Relying on the decision dated 29th September, 2011 in Arbitration Petition No. 33 of 2011 (***Maruti Suzuki India Ltd. v. India Tourism Development Corporation***), he submitted that the PP Act had vested exclusive jurisdiction in the Estate Officer to determine the disputes arising out of the licence deed and that the disputes raised by BMEC, therefore, could not be referred to arbitration. To

the same effect, he also relied on the decision in ***India Trade Promotion Organisation v. International Amusement Limited (2007) I42 DLT 342***.

15. Mr. Sikri pointed out that if the plea of BMEC were to be accepted, there would be parallel proceedings before the Estate Officer and the learned Arbitrator. At least one of the issues would overlap, viz., whether termination of the licence by BMEC was invalid in view of the failure of BMEC to give six months' advance notice. Relying on the decision dated 28th January, 2011 in CS (OS) No. 1507A/2000 (***Airports Authority of India v. M/s Grover International Limited***), Mr. Sikri submitted that the findings of a Civil Court or an Arbitrator would not be binding on the Estate Officer. Relying on the decision in ***DCM Limited v. D.D.A ILR (2013) I Delhi 337***, he submitted that the judgment of an Estate Officer as regards unauthorised occupation of a public premises would operate as *res judicata*, and in this case, constructive *res judicata*. In support of this proposition, he relied on the decision dated 15th January, 2012 in CS (OS) 1075/2000 (***Ishmali Devi v. D.D.A.***). Reliance was also placed by Mr. Sikri on a decision of this Court dated 20th October, 2016 in Arb. P. No. 518/2015 (***Turkinz v. ITDC***) wherein while interpreting an identical clause, the Court declined to refer the disputes to arbitration.

16. Section 15 of the PP Act which is relevant to the issue arising for consideration in the present petition reads as under:

> "15. Bar of jurisdiction.—No court shall have jurisdiction to entertain any suit or proceeding in respect of—
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> (a) the eviction of any person who is in unauthorised occupation of

any public premises, or

(b) the removal of any building, structure or fixture or goods, cattle or other animal from any public premises under section 5A, or

(c) the demolition of any building or other structure made, or ordered to be made, under section 5B, or

(cc) the sealing of any erection or work or of any public premises under section 5C, or

(d) the arrears of rent payable under sub-section (1) of section 7 or damages payable under sub-section (2), or interest payable under sub-section (2A), of that section, or

(e) the recovery of—

(i) costs of removal of any building, structure or fixture or goods, cattle or other animal under section 5A, or

(ii) expenses of demolition under section 5B, or

(iii) costs awarded to the Central Government or statutory authority under sub-section (5) of section 9, or

(iv) any portion of such rent, damages, costs of removal, expenses of demolition or costs awarded to the Central Government or the statutory authority."

17. The disputes envisaged by Section 15 of the PP Act are those that can be raised by the Licensor of the public premises. There appears to be no scope for the Licensee to raise any claim much less file any counter-claim before an Estate Officer. In the present case, the claims filed by ITDC before the Estate Officer are covered by Section 15(d) and (e) of the PP Act. As already noticed, the question whether BMEC is an unauthorised occupant is

no longer an issue since possession of the premises had already been handed over to ITDC. On the other hand, there seems to be no scope within the ambit of Section 15 of the PP Act for BMEC to put forth any claim and have them adjudicated by the Estate Officer. The claims urged by BMEC in its legal demand notice dated 2nd June 2016 cannot possibly be fitted under any of the sub-clauses of Section 15 of the PP Act.

18. Although there may be an overlap of one issue that may arise both before the Estate Officer as well as the Arbitrator viz., whether BMEC had validly terminated the licence deed by its letter dated 6th November, 2015, further consequential claims of BMEC as regards compensation of loss of business etc. as and other such claims as articulated in its notice dated 2nd June, 2016 invoking the arbitration clause cannot possibly be raised by it before and examined by the Estate Officer. At the same time, BMEC cannot be denied a remedy for the redressal of its grievances.

19. The above fact distinguishes the present case from the facts in the decisions relied upon by Mr. Sikri. In each of those cases, the question concerned the unauthorised occupation of the public premises by the Licensee. For instance, in ***Turkinz v. ITDC*** (*supra*), the said question was yet to be decided by the Estate Officer. It was in those circumstances that the Court held that the question whether the Licensee would have other claims against a Licensor would depend on the outcome of such question which was pending the decision of the Estate Officer. In the present case, however, that question does not arise.

20. Again, in ***Oriental Building &Furnishing Co. Ltd. v. Union of India***

AIR 1981Del 293, the Supreme Court relying on the decision in ***Ashoka Marketing Ltd. v. Punjab National Bank (1990) 4 SCC 406*** held that disputes which fell within the scope of Section 15 of the PP Act could not have been examined in arbitration. In those circumstances, the arbitral Award insofar as it extended the period of lease after declaring the termination to be invalid was held to be not sustainable in law. The facts here, however, are entirely different. They are more akin to the facts in ***Nuurrie Media Ltd. v. Indian Tourism Development Corporation Ltd***. (*supra*) where the Court did appoint an Arbitrator to adjudicate the disputes raised by the Licensee and left the question as regards a particular claim being arbitrable or not to be decided by the Arbitrator.

21. For the aforementioned reasons, the Court is of the view that the objections raised by ITDC to the reference of the disputes by BMEC to arbitration are not sustainable and are hereby negatived.

22. The Court, accordingly, proposes Mr. Justice V. Gopala Gowda, a former Judge of the Supreme Court (Mobile No.08826334009) as the sole Arbitrator to adjudicate the disputes between the parties i.e., the claims of BMEC as articulated in its notice dated 2nd June, 2016 sent to ITDC as well as the counter-claims in relation thereto that ITDC may have against BMEC. The learned Arbitrator will fix his own terms.

23. In the first instance, the proposed Arbitrator will make a disclosure to the parties in terms of Section 11 (8) read with Section 12 (1) of the Act and thereafter enter upon reference. In the event the disclosure is not made within a reasonable time or such disclosure discloses the inability of the

proposed Arbitrator to act as such, it will be open to the parties to apply to this Court for directions.

24. Subject to the above direction, Mr. Justice V. Gopala Gowda will act as Arbitrator and enter upon reference.

25. The parties will appear before the learned Arbitrator on 20th February, 2017 at 1100 am at a venue to be fixed by the Petitioner. If the said date is not convenient to the learned Arbitrator he may inform both parties at least ten days in advance the revised date and time. The costs of the hearing and for the arrangements will be shared equally by the parties.

26. The petition is disposed of. A copy of this order be communicated to the Mr. Justice V. Gopala Gowda forthwith.

S. MURALIDHAR, J

JANUARY 17, 2017
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