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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 27.09.2017

+ O.M.P.(I) (COMM.) 404/2017

SANJAY FOTEDAR & ANR.

..... Petitioners

Through Ms.Sonia A.Menon & Ms.Pallavi
Shali, Advocates

versus

HINDUSTAN PETROLEUM CORPORATION LTD...Respondent

Through Mr.Sandeep Sethi, Sr.Advocate with
Mr.Sanjay Kapur, Ms.Megha
Kashwal, Ms.Priya Darshani Singh &
Mr.Rajiv Kapur, Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(Oral)

I.A.No.11526-527/2017(exemption)

Allowed subject to all just exceptions.

O.M.P.(I) (COMM.) 404/2017

1. This petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking stay of operation of the notice dated 24.09.2017 issued by the respondent to remove any hindrance from the entry of the convenience store situated at Auto Care Centre, Niti Marg, Chanakya Puri, New Delhi.

2. The case of the petitioner is that on 09.06.2005 the parties entered into an agreement whereby the petitioner was permitted to run a convenience

store for motorist at the T&E Station of the Company at Niti Marg, Chanakya Puri, New Delhi, which is an exclusive property of the respondent. The petitioner was to operate convenience store by purchasing the approved products and selling the same to the public by providing necessary man power for that purpose. Admittedly, the term of the agreement was for 11 months. Thereafter, there have been two extensions. The last term expired on 31.03.2008.

3. Thereafter, there has been litigation between the parties. The petitioner filed civil suit for permanent injunction before the Senior Civil Judge (Central), Tis Hazari Courts, New Delhi where initially an injunction order was passed. Thereafter, the said injunction order was vacated by the trial court by order dated 07.01.2009. The trial court held the petitioner to be a mere licensee and rejected the contention of the petitioner that the petitioner was a tenant of the premises.

4. The petitioner, thereafter, filed an appeal before the appellate court. The appellate court vide its order dated 03.05.2011 upheld the order of the trial court.

5. In August, 2012, the petitioner filed a complaint under Section 17 of the Consumer Protection Act where the State Consumer Dispute Redressal Commission, Delhi granted an interim order in favour the petitioner against dispossession. Thereafter by order dated 07.09.2017 the complaint was dismissed holding that there is no element of the petitioner being a consumer within the meaning of Consumer Protection Act.

6. A third round of litigation has now commenced before the writ court. It appears that pursuant to the dismissal of the complaint by the State Consumer Dispute Redressal Commission, Delhi, the electricity of the

petitioner was disconnected. The petitioner filed a W.P.(C) No.8203/2017 whereby this court on 14.09.2017 noting that supply of electricity is essential and cannot be disconnected, directed restoration of the electricity supply forthwith.

7. I have heard the learned counsel for the parties.

8. The learned counsel for the petitioner has strongly urged that she is in possession of the premises for the last 12 years. She submits that at best some reasonable time be granted to the petitioner to enable her client to dispose/remove the inventory of perishable commodities and other products worth about Rs.30 lacs to windup the business. She submits that her client is ready to give an undertaking in case some reasonable time is granted to vacate the said premises. The learned counsel also submits that under clause 31 of the agreement between the parties, the petitioner had to be given at least 30 days time advance notice. She submits that to that extent the communication issued by the respondent dated 24.09.2017 is bad in law.

9. The learned senior counsel appearing for the respondent vehemently opposed the present petition. He submits as follows:

i) The petitioner is guilty of forum shopping. The petitioner has initially filed a suit and managed to persuade the civil court to pass an injunction order in its favour. He also submits that once the trial court vacated the injunction order, the petitioner moved to the appellate court and the appellate court upheld the order of the trial court. Thereafter, the petitioner managed to persuade the State Consumer Forum to pass an interim order in its favour. The State Consumer Forum also dismissed the complaint of the petitioner and vacated the interim order. He submits that in pursuance to the said Order, the petitioner has now approached this court with his third round

of litigation. He also submits the orders of the different courts had not been filed by the petitioner deliberately before this court.

ii) He further submits that the L&DO has imposed the misuse charges on the respondent for having constructed the present convenience store. Reliance is placed on the letter dated 30.08.2011 whereby the L&DO sought to impose misuse charges on the respondent for running the convenience shop. He submits that the respondent proposes to demolish the convenience store and does not propose to carry out the said business in view of the stand of L&DO.

iii) He relies upon the judgment of this court in the case of ***Thomas Cook (India) Ltd. v. Hotel Imperial & Ors., 127 (2006) DLT 431*** to contend that this court has already taken a view that a licensee is not in settled possession and does not have any interest in the property.

10. It is a matter of fact that the license of the petitioner had expired way back in 2008. Thereafter, the petitioner has been surviving in the premises based on interim orders of various courts. One cannot help in reaching the conclusion that the petitioner is indulging in forum shopping. Initially a suit was filed before the civil court where an interim injunction was passed in its favour which was vacated by the trial court. Instead of vacating the premises, the petitioner again persuaded State Consumer Forum to pass an interim order. When that interim order was vacated and he has now approached this court for an interim order. Reference in this regard may be had to the judgment of Supreme Court in ***Union of India and ors. vs. Cipla Ltd. and ors. 2017 (5) SCC 262***. The Supreme Court in the said case while discussing the term "forum shopping" held as follows:

"149. We are not at all in agreement with the learned Solicitor General. Forum shopping takes several hues and shades and Cipla's petitions do not fall under any category of forum shopping.

150. A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. This occurred in *Rajiv Bhatia v. Govt. of NCT of Delhi and Ors.* MANU/SC/0552/1999 : (1999) 8 SCC 525. The Respondent-mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of the child granted by the Delhi High Court to the Respondent-mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping.

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155. Another category of forum shopping is approaching different Courts for the same relief by making a minor change in the prayer Clause of the petition. In *Udyami Evam Khadi Gramodyog Welfare Sanstha and Anr. v. State of Uttar Pradesh and Ors.* MANU/SC/8169/2007 : (2008) 1 SCC 560 it was noticed by this Court that four writ applications were filed by a litigant and although the prayers were apparently different, the core issue in each petition centred round the recovery of the amount advanced by the bank. Similarly, substituting some Petitioners for others with a view to confer jurisdiction on a particular Court would also amount to forum shopping by that group of Petitioners."

11. In my opinion, this is a clear case of forum shopping. There is no equity in favour of the petitioner. His conduct disentitles him to get any

relief from this Court.

12. In *Thomas Cook (India) Ltd. v. Hotel Imperial & Ors.*(supra), this court held as follows:

“25. There are two aspects which require further discussion. The first is with regard to nature of occupancy of the two rooms by the plaintiff. The second being the question of what is meant by ‘due process of law’ in the context that even a trespasser in settled possession can only be evicted by ‘due process of law’.

26. The nature of occupancy is clearly permissive. In fact it does not amount to possession at all. The relationship between the plaintiff and the defendant in terms of the compromise decree was that of Licensor and licensee and not Lesser and Lessee. The plaintiff had use of the two rooms under a license. A license does not create any interest in the property. It merely permits another person to make use of the property. There is no parting with possession as the legal possession continues with the owner (licensor). In *C.M. Beena v. P.N. Ramachandra Rao* MANU/SC/0254/2004 : AIR2004SC2103 , the Supreme Court held:-

Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a license being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful (see *Associated Hotels of India Ltd. v. R.N. Kapoor* MANU/SC/0168/1959 : [1960]1SCR368)

What is meant by parting with legal possession has been explained by the Supreme Court in the context of sub-letting in the case of *Delhi Stationers and Printers v. Rajendra Kumar* MANU/SC/0228/1990: AIR1990SC1208 in the following words:-

Parting of the legal possession means possession with the

right to include and also a right to exclude others. Mere occupation is not sufficient to infer either sub-tenancy or parting with possession.

Keeping these legal principles in mind, there is no doubt that the plaintiff merely had a right to use the two rooms. It cannot be said that the plaintiff was in possession thereof. This is clear from the facts, as aforesaid, that under the compromise decree the plaintiff was obligated to leave the keys of the rooms at the reception at the close of each day; the plaintiff was charged a daily tariff; the control and possession of the rooms was explicitly retained by the defendants; the rights of admission were reserved with the defendants. Under these circumstances it cannot be said by any stretch of imagination that the defendants had parted with possession or that the plaintiff was in "possession" of the said two rooms even during the period prior to the revocation of the license. Therefore, Mr. Kaul's reliance on all those decisions which deal with the question of dispossession without due process is misplaced. For, the plaintiff had a mere right to use, it never was in possession of the said two rooms, much less, in settled possession in which the defendants had acquiesced.

27. This brings me to the second aspect of 'due process of law'. It was urged by Mr Kaul that even if the plaintiff was in unlawful possession it could only be evicted by due process of law and Therefore the plaintiff was entitled to an order of injunction preventing the defendants from removing the plaintiff from the said two rooms except through due process of law. It must be made clear that this argument fails in the context of this case because the plaintiff was never in possession and Therefore there is no question of dispossession in the sense usually understood. The plaintiff had a mere right to use, such right was revocable, it has been revoked and the plaintiff is entitled under section 63 of the Indian Easements Act, 1882 to a reasonable time to leave the premises and take away its goods. The argument also fails because by rushing to court the plaintiff has indeed invited a judicial determination of its status. If it got

an order of injunction it would ensure to its benefit. But, if it did not, then it can't be heard to say that this court has to grant an injunction all the same because otherwise it would give a license to the defendants to forcibly throw out the plaintiff without filing a suit for possession.

28. The expressions 'due process of law', 'due course of law' and 'recourse to law' have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed 'forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing -- ejection from settled possession can only be had by recourse to a court of law. Clearly, 'due process of law' or 'due course of law', here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this 'due process process' or 'due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the 'bare minimum' requirement of 'due process' or 'due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction

action must grant an injunction anyway? I would think not. In any event, the 'recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

13. The trial court in its judgment dismissing the interim application has held that the petitioner is a licensee. In view of the above judgment of this court, it cannot be said that the respondent had parted with possession or the petitioner was in possession or in settled possession. Hence, there is no equity in this regard in favour of the petitioner.

14. Regarding the plea of the learned counsel for the petitioner that in the absence of advance notice of 30 days, letter dated 24.09.2017 is bad in law. It is manifest that the period of license has expired by efflux of time. The question of notice did not arise.

15. I may also add that the petitioner has already availed of a civil remedy. The earlier suit was filed by-passing the arbitration clause between the parties. Now, the petitioner has chosen to approach this court invoking the arbitration clause after having availed of its remedies in the civil court.

16. Keeping in view the legal and factual position, there is no merit in the present petition and the same is dismissed. However, in the eventuality that the petitioner seeks to remove the goods which are lying in the premises, the respondent will ensure access to the petitioner in the premises in question for a period of at least 24 hours for the purpose of enabling the petitioner to take away the goods belonging to the petitioner. The petition stands dismissed as above.

17. A copy of this order be given *dasti* under the signatures of the court master.

SEPTEMBER 27, 2017/v

JAYANT NATH, J.