

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

Judgment reserved on: 19.09.2018
Judgment pronounced on: 20.11.2018

+ **ARB. P. No.213/2018**

REGANIA HOTELS AND RESORS PVT. LTD.Petitioner

Through: Ms. Anusuya Salwan with Mr.
Vikas Sood and Mr. Nikhil
Mehta, Advs.

Versus

**DELHI TOURISM AND TRANSPORTATION
DEVELOPMENT CORPORATIONRespondent**

Through: Mr. R.K. Dhawan with Ms.
Richa Dhawan, Mr. Anuj
Chaturvedi and Mr. V.K.
Teng, Advs.

**CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J.

Backdrop

1. This is a petition preferred under Section 11 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). The petitioner's prayer for appointment of an Arbitrator arises in the background of following broad facts.

2. The respondent, it appears, had constructed a Coffee Home, *albeit*, on a temporary structure, which was operated by it till 2006. On account of financial losses suffered by the respondent while operating the Coffee Home, a decision was taken to issue a licence to a private entity for operating the Coffee Home. Accordingly, the subject space was handed

over to an entity by the name: M/s Food Plaza Express Kitchen (in short “FPEK”) for a period of 10 years. This step was taken by the respondent after floating a tender inviting bids.

3. Apparently, FPEK ran into losses and thus, in and around December, 2013 - January, 2014 conveyed its decision to surrender the subject space. The aforesaid development propelled the respondent to float an e-tender. The e-tender was put into public realm on 6.1.2015. Via this tender, the respondent invited bids to run a Coffee Home on “as is where is basis” for a period of ten years.

4. It is in these circumstances that the petitioner entered its bid, which upon being accepted, resulted in the tender being awarded in its favour on 26.2.2015. As per the terms of the tender, the petitioner was required to furnish a performance guarantee in favour of the respondent equivalent to a sum of Rs.50,40,050/-.

5. Evidently, on 28.2.2015, that is, within two days of the petitioner being awarded the tender, FPEK surrendered and thereupon vacated the subject space. The petitioner’s representative, it appears, was allowed to inspect the subject space, whereupon, it was found that it was in a worse state than when it had been inspected at the time of filing the bid. According to the petitioner, the earlier operator, that is, FPEK appears to have damaged/removed many assets – boundary walls and flooring was broken; the roof was leaking; the ACs were non-functional; the gate had been removed; the toilets were dilapidated; and the fire detection and alarm system had also been removed.

6. Upon discovering the abysmal state of infrastructure, the petitioner vide communication dated 11.3.2015 brought these aspects to the notice of

the respondent. The respondent, it appears, had inspected the premises and having noticed that the subject space was in disrepair, vide its communication dated 6.4.2015 agreed that there would be moratorium on payment of rent by the petitioner for a period of four months, in order to compensate the petitioner for moneys, it would have to invest in carrying out repairs.

7. It may be pertinent to note that while the correspondence on the state of the infrastructure at the subject space was being exchanged between the parties, the petitioner had taken physical possession of the subject space on 21.3.2015. This was followed by parties entering into a Licence Agreement (in short "L.A.") dated 16.4.2015. Under the L.A., the petitioner was required to pay monthly licence fee of Rs.14,00,014/-. Consequent thereto, the petitioner furnished a performance bank guarantee on 6.5.2015, in the sum of Rs.50,40,050/- in terms of the tender as noted above. Besides this, vide communication dated 18.5.2015, the petitioner sought waiver of the condition requiring registration of the L.A. The respondent, vide a return communication dated 16.6.2015, accepted this request of the petitioner. It is the petitioner's stand that in and about June, 2015, it carried out extensive repairs, which resulted in it incurring substantial expenses.

8. Furthermore, the petitioner claims that on 14.8.2015, it made an application to New Delhi Municipal Council (NDMC) under Section 331 and 332 of the NDMC Act, 1994 for issuance of a Health Licence. The petitioner, it appears, in and about 16.6.2015 via the right to information route, discovered, for the first time that the respondent's tenure as lessee would expire on 31.3.2016 and in that behalf, it had via a written communication attempted to exhort NDMC into signing a fresh

Memorandum of Understanding (MOU). It appears that, since, NDMC was the head lessor of the subject space, vide an intimation dated 8.9.2015, it called upon the petitioner to furnish copies of the agreement executed between the NDMC and the respondent as well as the No Objection Certificate (NOC) issued by the Government of NCT of Delhi in favour of the respondent enabling NDMC to sub-contract/let out the subject space.

9. Apparently, the respondent, perhaps, realizing that the tender awarded to the petitioner would be rendered otiose if the lease is not extended in its favour, wrote to NDMC on 14.9.2015 that it should execute a fresh MOU, as it would otherwise result in financial losses, both for NDMC and itself.

10. Given these developments, the petitioner vide its communication dated 18.8.2015 exhorted the respondent to extend the moratorium qua rent for a further period of four months. The respondent, however, vide its communication dated 24.8.2015 rejected this request of the petitioner and emphasized that it should commence operations *vis-à-vis* Coffee Home with effect from 16.10.2015.

11. Undeterred, the petitioner vide communication dated 14.10.2015, once again, wrote to the respondent to grant a moratorium with respect to rent for a further period of four months, *albeit*, from the date of execution of its tripartite MOU and issuance of licence by the NDMC. In effect, the petitioner sought to prod the respondent to execute a fresh MOU with the NDMC. Apparently on 7.12.2015, the NDMC, in its Council meeting, recommended that the agreement with the petitioner be renewed and that the permission be granted to it to run the Coffee Home on fulfillment of stipulated terms and conditions.

12. The record shows that the respondent vide a letter dated 14.12.2015, rejected the petitioner's request for extension of moratorium. Vide this communication, the petitioner was called upon to sign a revised agreement and to pay licence fee with effect from 16.10.2015. On 7.1.2016, the petitioner wrote to the respondent that it was unable to commence commercial operations and hence, not in a position to pay the licence fee.

13. Resultantly, the respondent raised a demand on the petitioner in the sum of Rs.72,32,314/- vide bill dated 25.1.2016, with respect to licence fee for the period spanning between 16.10.2015 and 29.2.2016. The petitioner claims that vide e-mail dated 12.2.2016, it made certain suggestions qua the draft L.A. sent by the respondent on 14.12.2015. Furthermore, vide another e-mail dated 15.2.2016, the petitioner requested the respondent to raise their demand for licence fee only after it had resolved its dispute with the NDMC. It appears, both these e-mails did not impress the respondent and accordingly, a reminder was sent to the petitioner to pay the outstanding licence fee.

14. Seeing the approach adopted by the respondent, the petitioner escalated the matter with the Chief Secretary, Govt. of NCT of Delhi, vide its communication dated 18.2.2016. Via this communication, it requested the Chief Secretary to prevail upon the respondent not to seek payment of licence fee unless it resolved its outstanding with NDMC. Consistent with its stand, on 18.3.2016, the respondent raised yet another bill in the sum of Rs.16,03,016/- towards licence fee for the month of March, 2016.

14.1 The petitioner claims that since, it did not have any other alternative, on 23.3.2016, it moved a writ petition being W.P.(C) No.2617/2016 in this Court to impugn the demand for license fee raised by the respondent.

14.2 On the said date, the Court granted interim protection to the petitioner subject to the condition that it would deposit Rs.50 lakhs with the Registry of this Court within three weeks from that date and keep the performance bank guarantee alive till further orders.

14.3 The opposite parties in the writ petition, amongst others, included the respondent, that is, Delhi Tourism and Transportation Development Corporation (in short “DTTDC”); the other respondents being the Government of NCT of Delhi and the NDMC.

15. The petitioner has taken the stand that since, on 1.2.2017, NDMC issued in its favour a Health License, it commenced its commercial operation on 05.5.2017. The reason given for hiatus between February and May, 2017 by the petitioner is that the electricity and water connections were restored qua the subject space only on 1.7.2017 and 9.3.2017 respectively.

15.1 It is interesting to note that though, the petitioner commenced its business operations in May, 2017, the Health License, according to it, was valid only till 31.3.2017.

16. Given these circumstances, the petitioner, evidently, via an e-mail dated 17.5.2017, made a request to the respondent to either form a Committee or in the alternative, constitute an Arbitral Tribunal in accordance with Clause 74 of the L.A. to resolve the *inter se* dispute obtaining between the parties. The respondent, however, via letter bearing No.LC/11701/3/2016/DTTDC dated June, 2017 rejected both the requests made by the petitioner via aforementioned e-mails.

16.1 It is in this background that the petitioner has preferred the instant petition.

17. Notice in this petition was issued on 13.3.2018. Upon notice being issued, the respondent filed its reply.

15. Broadly, the respondent resists the instant petition based on the following stand taken by it:

(i) First, in W.P.(C) No.2617/2016, the petitioner has assailed two demand notices raised by the respondent. The petitioner, therefore, in a sense has abandoned the L.A., as it sought protection not only against eviction from the subject space, but also recovery of the arrears of damages due and payable under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (in short “1971 Act”).

(ii) Second, the writ court while passing the order dated 23.3.2016, had, *inter alia*, observed that Clause (9) of the MOU dated 5.8.2000 (which was executed between the respondent herein, that is, DTTDC and NDMC), empowered the Chief Secretary, Government of NCT of Delhi to adjudicate upon disputes arising not only between the said entities, but also those which involved the petitioner. Pursuant to the said order, the then Chief Secretary had in fact, rendered a decision in the matter on 8.7.2016. None of the parties, which included the petitioner, had challenged the decision of the Chief Secretary dated 8.7.2016. Consequently, the respondent, based on the said decision, has submitted a draft MOU to the NDMC for execution. The NDMC, in turn, had forwarded the same to the Ministry of Urban Development, whereupon, an agreement was required to be executed between the respondent and the petitioner herein. There is, therefore, no longer a L.A. in existence and instead, what obtained between the parties herein was an *ad hoc* arrangement devised, by the writ Court on 8.11.2016 based on the Chief Secretary’s order dated 8.7.2016.

(iii) Third, the petitioner, as per the order dated 8.11.2016, was required to deposit a monthly rent of Rs.14,00,014/- on or before 7th day of each calendar month. The attempt made by the petitioner to seek variation of this order was repelled by the writ Court and that as a matter of fact, the writ Court vide order dated 12.2.2018 read with order dated 13.3.2018, had directed the petitioner to comply with the direction contained in order dated 8.11.2016. The caveat attached to this order was that in case the petitioner failed to comply with the directions contained in the said order, then, the protection against coercive action granted in favour of the petitioner vide a prior order dated 23.3.2016, would stand dissolved automatically.

(iv) Fourth, the respondent had invoked the performance bank guarantee and had initiated steps under Section 4 & 7 of the 1971 Act. The Estate Officer was seized of the matter and therefore, disputes articulated in the instant petition could not be referred to the Arbitral Tribunal for adjudication.

(v) Fifth, Section 15 read with Sections 5 and 7 of the 1971 Act conferred exclusive jurisdiction on the Estate Officer. The Estate Officer not only has the jurisdiction to order eviction of an unauthorized occupant from public premises, but is also vested with authority to impose damages under Sections 5 and 7 and, more particularly, Clause (a) to (e) of Section 15 of the 1971 Act.

(vi) Sixth, Section 2(3) of the 1996 Act read with Section 5 of the 1971 Act makes it abundantly clear that disputes which are the subject matter of the 1971 Act cannot be referred to an Arbitrator for adjudication.

(vii) Lastly, not only did the petitioner conceal the fact that it challenged the demand orders raised by the respondent but also kept back the decision

rendered by the Chief Secretary on 8.7.2016 and therefore, the instant petition should be dismissed on this short ground alone.

Submissions of Counsel

17. In the backdrop of the stand taken by the parties in their respective pleadings, arguments in support of the same on behalf of the petitioner were advanced by Ms. Anusuya Salwan, while those on behalf of the respondent were made by Mr. R.K. Dhawan.

18. Ms. Salwan submitted that the disputes qua the petitioner seeking appointment of an Arbitrator had nothing to do with the aspects which the Estate Officer would be dealing with under 1971 Act. For this purpose, she relied upon the claims adverted to in paragraph 4 of the petition.

19. Learned counsel also brought to my notice, the fact that the writ petition had been withdrawn and a detailed order to that effect had been passed by the writ court on 31.8.2018. Furthermore, it was submitted that the termination of L.A. would not *ipso facto* bring to an end the arbitration agreement obtaining between the parties. The submission was that even if a contract is abrogated by a mutual agreement or it comes to an end, by efflux of time or performance or even repudiation, frustration or breach of the arbitration agreement would continue to survive for resolution of disputes arising under or in connection with the L.A. In support of this submission, reliance was placed by the learned counsel on the judgments in ***National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd.***, 2007 (5) SCC 692 and judgment rendered by this Court on 19.1.2015, in Arb. P. No.486/2014, titled: ***I.T.E. India Pvt. Ltd. vs. Delhi Tourism and Transportation Development Corporation (DTTDC)***.

20. Ms. Salwan submitted that the preliminary objection raised on behalf the respondent that the instant petition was not maintainable on account of action being initiated under the provisions of 1971 Act was misconceived for the following reasons:

(i) The respondent had no *locus standi* to raise such an objection, as the respondent is not the owner of the subject space.

(ii) The disputes adverted to in the instant petition pertain to the breach, lapses, delay and fraudulent acts committed by the respondent, which verily would fall within the domain of the Arbitrator and not the Estate Officer.

(ii)(a) In support of this submission, Ms. Salwan once again relied upon the judgment of this Court in ***ITE India Pvt. Ltd case***, as also the following judgments:

(a) Judgment dated 29.9.2011 passed in Arb.P. No.33/2011 titled: ***Maruti Suzuki India Ltd. vs. ITDC.***

(b) Judgment dated 6.5.2014 passed by the Supreme Court in SLP(C) No.5373/2012 titled: ***Maruti Suzuki India Ltd. vs. ITDC.***

(c) Judgment dated 6.2.2009 passed in Arb.P. No.269/2008 titled: ***M/s Exclusive Motors Pvt. Ltd. vs. ITDC.***

(iii) The petitioner had acted in accordance with Clause 74 of the L.A. by serving a notice upon the respondent. Since, the respondent failed to comply with the same, the petitioner is entitled to seek appointment of an Arbitrator from this Court. For this purpose the communication dated 17.5.2017, whereby, the respondent was called upon to either constitute a Committee or in the alternative, appoint a sole arbitrator. Furthermore, reference in this behalf was made to the judgment of the Supreme Court

rendered in *Datar Switchgears Ltd. vs. Tata Finance Ltd. and Anr.*, (2000) 8 SCC 151.

(v) In any event, since, the Managing Director (in short “M.D.”) of the respondent is ineligible in law to appoint an Arbitrator by virtue of the provisions of Section 12(5) read with Seventh Schedule of the 1996 Act, it would follow that he would also be ineligible to nominate an Arbitrator in his place.

21. Mr. Dhawan, on the other hand, reiterated the stand taken in the counter affidavit. It was emphasized that since, the petitioner had failed to comply with the directions contained in the writ court’s order dated 8.11.2016, the interim protection granted to it stood dissolved and accordingly, possession of the subject space has been taken by the respondent in terms of the order passed under the provisions of 1971 Act.

21.1 As per the order dated 8.11.2016 passed by the writ court, the petitioner was required to deposit a sum of Rs.14,00,014/- per month with the Registrar General of this Court. Petitioner’s failure to do the needful has led to a state whereby a sum in excess of Rs.6,06,25,807.75/- is payable under Section 7 of the 1971 Act. In support of this contention, reliance was placed on the order dated 31.8.2018 passed by the writ court.

21.2 Mr. Dhawan submitted that the petitioner has abandoned the arbitration agreement. According to the learned counsel it had ceased to exist; a condition precedent for appointment of an Arbitrator. In support of this proposition, reliance was placed on the judgment of the Supreme Court in *United India Insurance Co. Ltd. vs. Hyundai Engineering and Constructions Co. Ltd.* (2018) SCC OnLine SC 1045.

21.3 The learned counsel further submitted that the disputes, if any, in the instant matter were governed by the 1971 Act. Since the 1971 Act was a

special statute, the disputes obtaining between the parties could not be adjudicated upon by an Arbitrator. Courts according to Mr. Dhawan had consistently held that the matters governed by a special statute are non-arbitral disputes. In support of this submission, reliance was placed on the following judgments:

- (i) ***Natraj Studios Pvt. Ltd. vs. Navrang Studios***, (1981) 1 SCC 523;
- (ii) ***Ranjit Kumar Bose & Anr. vs. Anannya Chaudhry & Anr.***, (2014) 11 SCC 446;
- (iii) ***Central Warehousing Corporation, Mumbai vs. Fortpoint Automotive Pvt. Ltd.***, (2010) 1 Mah LJ 658 (FB);
- (iv) ***Fabiroo Gift House vs. India Tourism Development Corporation***, (2003) 66 DRJ 243 (DB);
- (v) ***Harjit Singh vs. DDA***, 2009 (110) DRJ 566
- (vi) ***Kesar Enterprises Ltd. vs. Union of India***, 1994 (29) DRJ 62;
- (vii) ***Ahsoka Marketing Ltd & Anr. vs. Punjab National Bank & Ors.***, (1990) 4 SCC 406;
- (viii) ***Nuurrie Media Ltd. vs. Indian Tourism Development Corp. Ltd.***, 2009 SCC OnLine Del. 2841;
- (ix) ***Airports Authority of India vs. Grover International Ltd.***, 2011 SCC OnLine Del. 446; and
- (x) ***HDFC Bank Ltd. vs. Satpal Singh Bakshi***, (2013) 134 DRJ 566.

Analysis and Reasons

22. I have heard the learned counsel for the parties and perused the record.

23. In my view, what is required to be examined in the very first instance is as to whether there is any bar under the 1971 Act to the appointment of an Arbitrator with respect to the disputes adverted to in the instant petition.

24. The bar of jurisdiction placed on Courts to entertain any suit or proceedings is provided in Section 15 of the 1971 Act. Section 15 of the 1971 Act provides that no Court shall have jurisdiction to entertain any suit or proceedings in respect of the matters referred to in Clauses (a) to (e) of Section 15. For the sake of convenience, the provisions of Section 15 are extracted hereafter:

“Section 15 in The Public Premises (Eviction of Unauthorised Occupants) Act, 1971

15. Bar of jurisdiction.—No court shall have jurisdiction to entertain any suit or proceeding in respect of—

(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.”*

24.1 A close perusal of Section 15 of the 1971 Act would show that it *inter alia* bars Courts, under clause (d), from entertaining any suits or proceedings in respect of arrear or rents payable under sub-section (1) of Section 7 or damages payable under sub-section (2) or interest payable under sub-section (2A) of the very same Section. Besides this, Section 15 also bars the jurisdiction of Courts generally to entertain a suit or proceedings in respect of the matters referred to in Clause (e), which amongst others, deals with recovery of portion of such rent, damages, costs of removal of any building, expenses of demolition or costs awarded to the Central Government or a statutory authority.

24.2 In addition thereto, under Clause (a) of Section 15, Courts are prohibited from entertaining a suit or proceedings, which involves eviction of any person, who is in unauthorized occupation of any public premises. Section 5 provides for the procedure for seeking eviction of an unauthorized occupant, while Section 7 of the 1971 Act vests the power in the Estate Officer to direct payment of arrears of rent and damages along with interest.

24.3 Pertinently, Section 2(3) of the 1996 Act on which reliance is placed by Mr. Dhawan, in effect, provides that Part-I of the said Act will not affect any other law for the time in force by virtue of which certain disputes may not be submitted to arbitration.

24.4 A joint reading of the aforesaid provisions of the 1971 Act and the 1996 Act would show that the aspects which are referred to in Clauses (a) to (e) of Section 15 of the 1971 Act cannot be adjudicated upon by an Arbitrator. However, shorn of the subject matter which falls within the exclusive domain of the Estate Officer, all other disputes will arise out of or in connection with the Arbitration Agreement, as in this case, to my mind, can be referred to an Arbitrator. This proposition would hold, notwithstanding the submission of Mr. Dhawan that the L.A. is abandoned. The reason being firstly, whether or not the L.A. has been abandoned is an aspect on which a finding has to be returned by an appropriate forum. Secondly, it is well settled that an arbitration agreement would not perish merely because the main agreement of which it forms a part comes to an end. Section 16 of the 1996 Act (apart from the case law on this proposition) emphasizes this attribute of an arbitration agreement. Lastly, Mr. Dhawan's stand that the L.A. has been abandoned *prima facie* does not find favour with him. The orders passed by the writ Court or the decision of the Chief Secretary do not lead to this conclusion; contrary to what Mr. Dhawan has contended.

24.5 More importantly, a perusal of the orders passed by the writ court, including the last order dated 31.8.2018, clearly shows that while permitting the petitioner to withdraw the writ petition, the Court preserved the rights of the parties to pursue their respective remedies.

24.6 Therefore, if the claims which the petitioner seeks to have adjudicated upon by the learned Arbitrator are examined in the context of the observations made by the writ court vide order dated 31.8.2018, there can be no doubt that the arbitration agreement obtaining between the

parties continues to subsist. Briefly, the claims which the petitioner has referred to in the instant petition read as follows:

“Claim No.1: *Claim on account of extra expenditure incurred for the period of March – June, 2015 - Rs.1,02,00,000/-.*

Claim No.2: *Claim on account of extra expenditure incurred for the period of May, 2017 – Rs.25,00,000/-.*

Claim No.3: *Claim on account of Reduction of license fee – As per calculation.*

Claim No.4: *Claim on account of refund of payment towards licence fees – Rs/50,00,000/-*

Claim No.5: *Claim on account of loss of profit – Rs.4,00,00,000/-.*

Claim No.6: *Claim on account of loss of overheads, staff, guards, etc. – Rs.50,00,000/-*

Claim No.7: *Claim on account of failure on the part of respondent for not complying as per REF with respect to liquor licence. – As per calculation.*

Claim No.8: *Claim on account of fraud, mental agony, harassment, etc. since there was no authority to enter into contract beyond 31.3.2016 – As per calculation.*

Claim No.9: *Claim on account of damages – As per calculation.*

Claim No.10: *Claim on account of Release of Bank Guarantee – Rs.50,40,050/-*

Claim No.11: *Claim towards Interest @ 18% On pre-suit, pendent-lite & future – As per calculation*

Claim No.9: *Claim towards litigation – As per calculation”*

24.7 A perusal of the aforesaid extract would show that except for Claim No.9 and 11 all other claims fall outside the realm of Section 15 of the 1971 Act.

24.8 Insofar as, Claim No.9 is concerned, as long as damages do not relate to the area which falls within the scope of ambit under Section 7, I see no difficulty in the same being adjudicated upon by an Arbitrator. However, much would depend as to the manner in which the petitioner proceeds to frame the claim when it lodges its statement of claim with the Arbitrator. The same principle would also apply to Claim No.11, which relates to interest on damages. The interest on account of damages, to my mind, would only be entertained, if at all, by the learned Arbitrator once the nature, basis and the quantum of the claims is made known. These are the matters, which the learned Arbitrator would have to examine, as indicated above, as and when the statement of claim is lodged before him.

24.9 The conclusion reached by me hereinabove, is supported, to my mind, by the language of Clause 74 of the L.A. The said clause reads as follows:

“74. The Courts at Delhi alone shall have jurisdiction to try and/or entertain any suits, complaints and/or any other matter arising out of and/or relating to and/or in connection with this. The License Agreement shall be governed by the Arbitration & Conciliation Act/ 1996. In case any dispute etc. arises out of this Agreement the matter shall be placed before the Managing Director of Licensor who shall appoint a committee to resolve the dispute and if at all an party is aggrieved with the dispute resolving committee report then all matters/questions/disputes or differences whatsoever arising between the parties under or relating to or arising out of this agreement including its construction/meaning operation or effect or out of or relating to this performance or breach thereof shall be referred to in writing by either or both the parties to the Managing Director of the LICENSOR who shall at his/her sole discretion/nominate a person to be the Sole Arbitrator. The decision of the Sole

Arbitrator so appointed shall be final and binding on both the parties.

Further, in case the Licensee does not invoke the arbitration clause and directly goes to the Court, for redressal of his grievances/the Licensee will have to bear the cost of litigation and expenses incurred by Licensor, if the case is decided in favor of the Licensor.”

(emphasis is mine)

25. None of the judgments, which Mr. Dhawan has cited, to my mind, would take a different position. In particular, emphasis was laid by Mr. Dhawan on the judgment of the Supreme Court rendered in ***International Amusement Limited vs. India Trade Promotion Organization and Anr.***, (2015) 12 SCC 677. The facts of this case were broadly as follows:

- (i) The appellant was running an amusement park in Pragati Maidan, New Delhi since 1984, which went by the name “Appu Ghar”.
- (ii) The land on which the amusement park was running was licensed by the respondent to the appellant. At the relevant time, there was a lease obtaining between the Central Government and the respondent.
- (iii) The respondent could not make permanent allotment of the land in favour of the appellant. The appellant, however, claimed that it was a permanent allottee in line with similar allotments made in favour of statutory corporation/instrumentalities of the State and the Central Government. This claim was made by the appellant on the ground that it had made a huge investment in establishing and running Appu Ghar.

(iv) The last license agreement, which was entered between the parties was on 6.11.1995. The arbitration clause, which stood incorporated in the said lease agreement read as follows:

“27. The licensed premises are public premises as defined in the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and fall within the jurisdiction of the Estate Officer, Pragati Maidan.

28. In case of any dispute arising out of or in connection with this agreement the disputes shall be referred to the sole arbitration of the Chairman, India Trade Promotion Organization or his nominee whose decision/award shall be final, conclusive and binding on the parties. Application for reference to arbitration shall be made by either party within two months of arising of the dispute.”

25.1 The respondent, it appears, sought vacation of the premises in issue which led to eruption of disputes and consequent lodgment of claims and counter claims. While the appellant took recourse to provisions of the 1996 Act, the respondent invoked Section 4A of the 1971 Act to seek eviction of the appellant. Before the Estate Officer, the appellant had filed an application under Section 8 of the 1996 Act, which was rejected by him. Being aggrieved by the order of the Estate Officer, a writ petition was filed in this Court questioning its correctness. This apart, a petition was also filed under Section 11(6) of the 1996 Act for the appointment of an Arbitrator. A Single Judge of this Court allowed the application for appointment of the Arbitrator. The respondent, however, filed a writ petition challenging the appointment of an Arbitrator by the learned Single Judge. This writ petition came up for hearing before the Division Bench of this Court. The Division Bench allowed the writ petition and held that the

matters enumerated in Section 15 of the 1971 Act could not be referred to an Arbitrator.

25.2 It is in these circumstances that the appellant approached the Supreme Court. The Supreme Court held that having regard to the scope of Clause 28, the same could not be construed as an arbitration agreement and therefore, the dispute obtaining between the parties could not be adjudicated upon by an Arbitrator. In sum, the view taken by the Supreme Court was having regard to the manner in which the clause was framed that it, in substance, provided for appointment of a neutral evaluator and not an Arbitrator in the sense envisaged under the 1996 Act. Importantly, in coming to this conclusion, the Court relied upon not only of its own previous precedents, but also on the following extract from Russel on Arbitration:

“...16.....Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'Arbitral Tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive.... Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an Arbitral Tribunal as opposed

to the expertise of the expert.... An Arbitral Tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion... ”

25.3 Having closely examined, the Supreme Court’s observation and the extract from Russel, according to me, the ratio of the judgment is that the use of the expression “Arbitration”, “the Arbitral Tribunal” or “Expert” in arbitration clause, which relate to resolution of disputes have a persuasive value, though by themselves cannot lead to a definitive conclusion. One of the guidelines articulated is the ascertainment of the issue or dispute obtaining between parties. The example given is that of valuation of an asset on which parties had not taken a defined position, then, the procedure prescribed could be held to be fit for expert determination. Likewise, where defined positions have been taken by the parties, procedure prescribed may be held to be fit for arbitration. Therefore, in sum, what necessarily needs to be examined is the nature of the dispute and agreement obtaining between the parties.

25.4 A careful perusal of Clause 74 of the L.A. would show that apart from anything else, it explicitly provides that it will be governed by the 1996 Act. The said clause further provides that in case of disputes arising out of the L.A., it shall undergo a two stage examination. In the first stage, the M.D. of the licensor, that is, the respondent shall appoint a Committee to resolve the disputes and if a party aggrieved by the decision of the Committee, then in the second stage all matters, questions, disputes or differences whatsoever between the parties under or relating to or arising out of the L.A. including its construction, meaning, operation or effect or out of or relating to its performance or breach are to be referred to in

writing by either or both parties to the M.D. of the licensor, that is, the respondent. The M.D. is given the sole discretion to nominate an Arbitrator. The clause also provides that the decision of the sole Arbitrator shall be final and binding on the parties. The clause goes on to say that in case the licensee (that is, the petitioner herein, does not invoke the arbitration clause and directly approaches the Court for redressal of its grievances, the licensee will have to bear the cost of litigation and expenses incurred by the licensor in case the disputes are decided in favour of the licensor.

25.5 What emerges from an examination of Clause 74 of the L.A. is that here the use of expression “Arbitrator” is not in the sense of a neutral evaluator. Reason for the same is that not only the parties at the time of execution of the L.A., agreed to have the disputes arising there from governed by the 1996 Act, but have gone on further to provide that if the Committee appointed by the licensor’s M.D. is unable to satisfy the grievances of the aggrieved party, then all the matters, questions, disputes, etc. will be referred to a sole arbitrator. Therefore, while the dispute before the Committee is limited, but once any one of the parties is aggrieved and decides to escalate the matter by having it referred to a sole Arbitrator, then any and every dispute arising out of the L.A. can be adjudicated upon by an Arbitrator. The fact that the provision says that the decision of the sole Arbitrator shall be final and binding between the parties has to be seen in the context of the fact that the arbitration clause itself provides, also providing that the L.A. will be governed by the 1996 Act. In sum, as adverted to above, the Arbitrator as envisaged under Clause 74 of the L.A., to my mind, is not a neutral expert evaluator, who is to take a view on an

issue over which parties have not taken defined position. The claims, which the petitioner has raised would show that the petitioner has taken a defined position, which is sought to be resisted by the respondent.

25.6 Therefore, in my view, the judgment in ***International Amusement Limited*** is distinguishable on facts.

25.7 Thus, apart from the argument advanced by Mr. Dhawan, which was that because of the bar on Section 15 of the 1971 Act, this Court had no jurisdiction to appoint an Arbitrator, Mr. Dhawan, in fact, did not press his submission in the light of the ratio of the judgment in the ***International Amusement Limited*** case. Since, the said judgment was cited by Mr. Dhawan, I have tried to discern the ratio of the judgment and its applicability to Clause 74 of the Arbitration Agreement. The other judgment on which reliance is placed by Mr. Dhawan is the judgment of the Supreme Court is the ***United India Insurance Co. Ltd.*** case. This was a case in which the Supreme Court held that the disputes between insured and insurer were not amenable to the arbitration in the relevant clause i.e. Clause 7, in the Policy in issue. Clause 7 of the Policy provided that where the insured disputed or did not accept the liability, the matter would not be referred to arbitration.

25.8 A careful perusal of the judgment would show that the Supreme Court came to this conclusion based on the language of Clause 7 of the policy, which obtained between the parties. There is no such impediment in the instant case. Moreover, the respondent has laid no foundation for an argument based on the judgment rendered by the Supreme Court in ***United India Insurance Co. Ltd.*** case.

25.9 Therefore, the reliance on the said judgment, to my mind, cannot advance the case of the respondent.

26. The other judgments, which the respondent cited to which I have made reference above, relate to the proposition that the matters governed by special statute are not amenable to the arbitration. In order to avoid prolixity, I do not intend to discuss each and every case, as one cannot quibble with the proposition of law laid down in those judgments.

26.1 I have already indicated hereinabove that the disputes which form the subject matter of Section 15 of the 1971 Act would obviously not fall within the realm of the jurisdiction of the Arbitrator, however, all other aspects/disputes, which arise out of or in connection with the L.A., to my mind, can be adjudicated upon by the arbitration tribunal.

27. Since, the respondent, despite a notice, refused to appoint an Arbitrator in the matter, its power, if any, in law to appoint one stands effaced. As a matter of fact, as rightly submitted by learned counsel for the petitioner, in view of the judgment of the Supreme Court in **TRF Ltd. vs. Energo Engineering Projects Ltd.**, (2017) 8 SCC 377, in any event, M.D. of the respondent would be ineligible to appoint an Arbitrator and this ineligibility would also impact his/her right to appoint a nominee.

28. Therefore, for the foregoing reasons, I am inclined to allow the captioned petition.

29. Accordingly, Mr. R.C. Chopra (Mob: 9818097777), a former Judge of this Court, is appointed as an Arbitrator.

30. The learned Arbitrator will be paid his fee in accordance with the provisions of the Fourth Schedule of the 1996 Act.

31. Costs will follow the result.

**RAJIV SHAKDHER
(JUDGE)**

NOVEMBER 20, 2018/pmc

HIGH COURT OF DELHI



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