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

+ **O.M.P. 620/2010, I.A. 3963/2018 & I.A. 3965/2018**

THE MEDICAL SUPERINTENDENT & ANR Petitioners

Through: Ms. Prabhsahay Kaur, Advocate.
(M-9810158581)

versus

VINOD KUMAR RAI & ANR Respondents

Through: Mr. B.L. Wali, Advocate.
(M-9810755661)

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% **27.07.2018**

1. The present petition has been filed under Section 34 challenging the award dated 20th April, 2010 by which the claims of the Respondents/Claimants (*hereinafter*, 'Respondents') were allowed by the Arbitrator. However, the counter claim filed by the Petitioner was dismissed with the observation that the Petitioners could approach the authority under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (*hereinafter*, 'Public Premises Act') in respect of the admitted license fee which was not paid by the Respondents.

2. The brief background is that the Respondent No.1, Mr. Vinod Kumar Rai was awarded a contract to run a parking lot in Dr. Baba Saheb Ambedkar Hospital, Rohini for a period of one year starting from 2nd April, 2008. Security deposit of Rs.1,52,000/- was made by the Respondents with the Petitioner. The acceptance was conveyed by the Respondents on 24th March, 2008. The license fee per quarter was Rs.3,79,998/- (Rs.1,26,666/-

per month).

3. Since the beginning itself, the Respondents did not run the parking lot and the correspondence between the parties started as early as on 1st April, 2008 itself. There were repeated disputes raised by the Respondents in respect of one of the gates at the hospital, which was not opened and accordingly, the Respondent No.1 continued to dispute his liability to pay the license fee per month. On 25th October, 2008, the Respondents wrote a letter to the Lieutenant Governor seeking 50% reduction in the license fee.

4. The admitted position is that the Respondents were in occupation of the parking garage till January, 2009. The Respondents initially paid two quarters' license fee, but did not pay the license fee qua the third quarter and one month. On 18th September, 2009, this Court had referred the matter to a sole Arbitrator. However, this Court had also observed as under: -

“+Arb. P. No.383/2008 (u/S 11 (5) r/w 11(6) of the Arbitration Act, 1996)

The counsel for the respondents states that reply has been filed. However, neither is the same available on the court file nor has the counsel for the petitioner been furnished a copy of the same. For the sake of expediency and considering the nature of the application, a copy of the reply in the file of the counsel for the respondents has been perused. In the said reply the factum of this court being the appropriate court or of the existence of the arbitration clause or of the invocation of the arbitration clause by the petitioner is not disputed. The plea in para 7 (K-I) (i) of the reply is that the petitioner has unilaterally invoked the arbitration clause without any just reason. It is also pleaded in the said reply that the disputes raised by the petitioner are flimsy.

The petitioner was appointed as a parking contractor by the respondents. The counsel for the

petitioner states and it is also so admitted in the reply of the respondent, that the petitioner has since vacated the parking site. The claims of the petitioner are for remission of license fee paid for the time the petitioner was in occupation/use of the parking site. The reply of the respondents is that in fact there were no grounds for remission and the petitioner is in arrears of license fee.

The aforesaid questions show that disputes requiring adjudication exist. This court in exercise of power under Section 11 of the Act cannot go into the merits of the disputes. However, since from the reply it is borne out that the respondents also have claims against the petitioner for arrears of 'license fee, it is clarified that if the respondent is entitled to invoke the provisions of the Public Premises (Eviction of Unauthorized Occupants), Act 1971, this order shall not come in the way of the respondent.

The arbitration clause is for appointment of the arbitrator by the Lt. Governor, Delhi. The said appointing authority having failed to appoint the arbitrator in spite of notice, the counsel for the petitioner presses for appointment of an independent arbitrator. Choice has been given to the counsel for the petitioner that if independent arbitrator is insisted upon, the petitioner will have to bear the fee of the arbitrator in the first instance. The counsel for the petitioner is agreeable to the same. The counsel for the petitioner states that the claims of the petitioner are in excess of Rs.10,00,000/-. Accordingly, Mr. S.M. Chopra, Retd. Addl. District Judge is appointed as the arbitrator to adjudicate the disputes, subject matter of the arbitration clause in the agreement between the parties. His consolidated fee is fixed at Rs.35,000/- to be borne by the petitioner subject to award as to costs and besides out of pocket expenses. The parties to appear before the arbitrator 15th October, 2009 with prior appointment. ,

Dasti under the signatures of Court Master to counsel for parties.”

5. Thus, the claims raised by the Respondents were referred to arbitration and the Petitioner was permitted to invoke the provisions of the PP Act, 1971. Despite this observation in the reference order, when the Respondent No.1 filed his claims for Rs.14,61,998/-, the Petitioner filed a counter claim in respect of the admitted license fee, for which a cheque was given by the Respondents, which was returned for shortage of funds. Thus, the counter claim was to the tune of Rs.5,30,564/- which was the license fee for four months (Third quarter and one month).

6. The learned sole Arbitrator allowed a single claim of the Respondents/Claimants to the tune of Rs.1,52,000/- which was the refund of the security deposit. Other claims of the Respondents were dismissed. Insofar as the counter claim was concerned, the Ld. sole Arbitrator rejected the counter claim by observing that the Petitioners could approach the authority under the Public Premises Act. The relevant observation of the learned Arbitrator is at page 10 of the award.

“.....The counterclaims do not, therefore, call for any resolution by the alternative dispute resolution machinery of ‘arbitration’. Clause 4 of the agreement itself provides for the manner of recovery of the arrears towards licence fee, namely, under the Public Premises Act. The respondent can take recourse to the recovery of any outstanding on this account including any penalty on the outstanding licence fee by taking recourse to the manner provided for in clause 4 of the agreement between the parties.”

7. The main issue that arises in this case is whether the Petitioners could have raised the counter claims without resorting to the procedure under the

Public Premises Act and whether the matter could have been referred to arbitration at all in view of the clause in the contract that permitted the Petitioners to approach the authorities under the Public Premises Act. The contract between the parties contains the following two clauses: -

“4. that the Total Amount of licence fee for three months amounting to Rs. 37998/- shall be deposited along with the acceptance letter. The licensee/contractor shall deposit the license fees in advance for every three months on or before the 10th day of each quarter by way of Bank Draft in favour of Medical Superintendent Dr. Baba Saheb Ambedkar Hospital Rohini, Delhi. -85. After 10th day late payment will be charged @ Rs. 50/- (Fifty) only per day. In case, license fee, damages, compensation including any other arrear assessed, not paid within 30 days from the due date, the Medical Superintendent, licensor shall have the right to terminate the licence deed without giving any further opportunity. Licensee shall have the right to recover such arrears of revenue under the Public Premises Act.

.....

18. that in case of any dispute or difference, the award of the Arbitrator appointed by Lt. Governor of Delhi will be final and binding in the parties and the court at Delhi/New Delhi shall only have the jurisdiction over the same.”

8. The issue whether the Public Premises Act prevails over the arbitration act or vice versa has now been settled by the Supreme Court in ***International Amusement Ltd. vs. India Trade Promotion Organisation (2015) 12 SCC 677*** wherein it was held that the arbitration clause itself does not exist in cases of dispute covered under the Public Premises Act. The

relevant portion of the judgment of the Supreme Court is set out below: -

“17. Further, it was contended that the Estate Officer having exclusive jurisdiction is not arbitrable and parties by a contract cannot agree to refer the matters in respect of which jurisdiction has been conferred upon the Estate Officer. Therefore, the arbitrability of claims of the appellant covered under Sections 5 and 7 of the PP Act, is excluded. To arrive at the said conclusion, the Division Bench of the High Court rightly placed reliance upon the Constitution Bench judgment of this Court in the case of Ashoka Mktg Ltd., wherein the legal question that arose was as to whether the Rent Control Act, 1995, which is also a Special Act will override the provisions of the PP Act. After interpreting the relevant provisions of the Act, the Constitution Bench of this Court in the above case has held that the PP Act, is a special statute relating to eviction of unauthorised occupants from public premises and therefore, the same will prevail over the Rent Control Act. In the said case it was held that the 1971 enactment did away with the option of the parties and conferred exclusive jurisdiction on the Estate Officer in relation to the public premises. The power and jurisdiction of a civil court to adjudicate matters enumerated under Section 15 of PP Act was withdrawn.”

9. This judgment arises out of a decision of this Court in ***India Trade Promotion Organisation v. International Amusement Ltd. (2007) 142 DLT 342*** decided on 16th July, 2007, wherein the Division Bench of this Court has also taken the same view.

10. Thus, the legal position prevalent on the date when the impugned award was passed was that the disputes would not be arbitrable and would have to be decided under the Public Premises Act. The impugned award having been passed at the time when the legal position did not permit

arbitration to take place in such cases, the arbitration clause thus, is not enforceable in law. Accordingly, the impugned award is set aside. Parties to bear their own costs.

11. Petition is disposed of in the above terms. All pending applications also stand disposed of.

PRATHIBA M. SINGH, J.

JULY 27, 2018

Rekha