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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 25th June, 2020

Decided on: 21st July, 2020

+ CS(COMM) 184/2020

& I.A. 4672/2020 (under Order XXXIX Rule 1 and 2 CPC)

DHARAMVIR KHOSLA

..... Plaintiff

Represented by: Mr. Dhruv Mehta, Sr. Adv. with Mr.
Yashraj Singh Deora, Mr. Anubhav
Ray, Ms. Sonal Mashankar, Advs.

versus

ASIAN HOTELS (NORTH) LTD.

..... Defendant

Represented by: Mr. Mukul Rohatgi, Mr. Sandeep
Sethi, Mr. Sidharth Luthra, Sr.
Advocates with Dr. Lalit Bhasin,
Ms. Nina Gupta and Mr. Ranjan Jha,
Advocates.

+ CS(COMM) 185/2020

& I.A. 4674/2020 (under Order XXXIX Rule 1 and 2 CPC)

SATISH KHOSLA & ANR.

..... Plaintiffs

Represented by: Mr. Dhruv Mehta, Sr. Adv. with Mr.
Yashraj Singh Deora, Mr. Anubhav
Ray, Ms. Sonal Mashankar, Advs.

versus

ASIAN HOTELS (NORTH) LTD.

..... Defendant

Represented by: Mr. Mukul Rohatgi, Mr. Sandeep
Sethi, Mr. Sidharth Luthra, Sr.
Advocates with Dr. Lalit Bhasin,
Ms. Nina Gupta and Mr. Ranjan Jha,
Advocates.

+ CS(COMM) 189/2020

& I.A. 4722/2020 (under Order XXXIX Rule 1 and 2 CPC)

ALOK KUMAR LODHA

..... Plaintiff

Represented by: Dr. Abhishek Manu Singhvi, Sr. Adv.
with Mr. Avishkar Singhvi, Mr.
Avishkar Singhvi, Mr. Nipun Katyal,
Ms. Madhvi Khanna, Advs.

versus

ASIAN HOTELS (NORTH) LTD.

..... Defendant

Represented by: Mr. Mukul Rohatgi, Mr. Sandeep
Sethi, Mr. Sidharth Luthra, Sr.
Advocates with Dr. Lalit Bhasin,
Ms. Nina Gupta and Mr. Ranjan Jha,
Advocates.

+ **CS(COMM) 190/2020**

& I.A. 4725/2020 (under Order XXXIX Rule 1 and 2 CPC)

SWEETY SURI

..... Plaintiff

Represented by: Dr. Abhishek Manu Singhvi, Sr. Adv.
with Mr. Avishkar Singhvi, Mr. Nipun
Katyal, Ms. Madhvi Khanna, Advs.

versus

ASIAN HOTELS (NORTH) LTD.

..... Defendant

Represented by: Mr. Mukul Rohatgi, Mr. Sandeep
Sethi, Mr. Sidharth Luthra, Sr.
Advocates with Dr. Lalit Bhasin,
Ms. Nina Gupta and Mr. Ranjan Jha,
Advocates.

+ **CS(COMM) 191/2020**

& I.A. 4730/2020 (under Order XXXIX Rule 1 and 2 CPC)

SITAL DASS JEWELLERS

..... Plaintiff

Represented by: Dr. Abhishek Manu Singhvi, Sr. Adv.
with Mr. Avishkar Singhvi, Mr.
Nipun Katyal, Ms. Madhvi Khanna,
Advs.

versus

ASIAN HOTELS (NORTH) LTD. Defendant

Represented by: Mr.Mukul Rohatgi, Mr.Sandeep Sethi, Mr.Sidharth Luthra, Sr. Advocates with Dr.Lalit Bhasin, Ms.Nina Gupta and Mr.Ranjan Jha, Advocates.

+ **CS(COMM) 192/2020**

& I.A. 4733/2020 (under Order XXXIX Rule 1 and 2 CPC)

CHARU LODHA Plaintiff

Represented by: Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr.Avishkar Singhvi, Mr. Nipun Katyal, Ms. Madhvi Khanna, Adv.

versus

ASIAN HOTELS (NORTH) LTD. Defendant

Represented by: Mr.Mukul Rohatgi, Mr.Sandeep Sethi, Mr.Sidharth Luthra, Sr. Advocates with Dr.Lalit Bhasin, Ms.Nina Gupta and Mr.Ranjan Jha, Advocates.

% Reserved on: 9th July, 2020
Decided on: 21st July, 2020

+ **CS(COMM) 208/2020**

I.A. 4995/2020 (under Order XXXIX Rule 1 and 2 CPC)

I.A. 4999/2020 (under Order II Rule 2 CPC)

M/S. SHANTI VIJAY JEWELS Plaintiff

Represented by: Mr.Vikas Dhawan, Mr.Satyabrata Panda and Mr.Lakshay Garg, Advocates.

versus

ASIAN HOTELS (NORTH) LIMITED Defendant

Represented by: Dr.Lalit Bhasin, Ms.Nina Gupta and
Mr.Ranjan Jha, Advocates.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

CONTENTIONS:

1. The six suits before this Court seek similar reliefs based on similar licences. The prayers in the six suits by the plaintiffs are that they are licencees of the defendant in respect of shops at the shopping arcade in Hyatt Hotel, Bhikaji Cama Place, New Delhi and the terms of the licences, inter alia, were akin to an irrevocable licence in perpetuity in the said shop and thus the termination of their licences by the defendant vide termination notices dated 29th May, 2020 is illegal. Consequently, the plaintiffs in the four suits i.e. CS(COMM) Nos.189, 190 191 and 192 of 2020 inter alia seek a decree of declaration in respect of their status in the shops declaring them owners, execution of the documents of ownership, in the alternative, decree of declaring the licence in favour of the plaintiffs as an irrevocable licence in perpetuity besides injunction. In CS(COMM) Nos. 184 and 185 of 2020 the plaintiffs seek the decree of declaring the plaintiffs owners of irrevocable licenses and declaring them licensees in perpetuity.

2. In terms of the practice directions, since intimation of the suits was given to the defendant, learned counsels for the defendant also entered appearance and at the outset raised the objection with regard to the maintainability of the suits under Section 8 of the Arbitration and Conciliation Act, in view of the clause relating to reference of disputes to arbitration in the licence agreement. Consequently, with the consent of the

learned counsels for the parties, this Court has heard learned counsels for the parties both on the issue of maintainability of the suits as also on the interim injunction applications finally at this stage.

3. Mr. Abhishek Manu Singhvi, learned senior counsel appearing for the plaintiffs in CS(COMM) 189/2020, 190/2020, 191/2020 and 192/2020 contends that the "license agreement" in favour of the plaintiffs was in the nature of creating a right of ownership or in the alternative less than ownership but more than a lease or to say the least was an irrevocable license and thus the notice of revocation dated 29th May, 2020 is non-est. The plaintiffs being the owner and licensee on permanent and perpetual basis of the shop in the Shopping Arcade of hotel Hyatt Regency are in possession and control of the said shop for nearly 40 years. It is contended that merely use of the word licence in the agreements will not make the agreement between the plaintiff and defendant as a mere licence and the plaintiffs cannot be thrown out of the property by merely issuing a revocation notice. The true nature and extent of the rights the plaintiff possessed were far beyond what the law prescribes for a mere licensee, such as, exclusive possession, preemptory right to purchase the property, right to refund of consideration with 10% interest compounded, the payment of mere maintenance charges by the licensee and not payment of any rent, the right to transfer, the right to carry on business at hours suitable to plaintiffs, the insurmountable threshold contained in the agreements required for termination viz. unlawful activity and the defendant's acknowledgements of the rights of the plaintiffs clearly conveys an interest in the property in favour of the plaintiffs. Plaintiffs thus claim that the plaintiffs are the owners of the shops/spaces or have an interest more than a lessee or in the

alternative they are the irrevocable licensees in perpetuity. Reliance is placed in (1960) 1 SCR 368 Associated Hotel of India Vs. R.N. Kapoor, (2002) 5 SCC 361 Corporation of Calicut Vs. K. Srinivasan, (2007) 5 SCC 745 B. Arvind Kumar Vs. Government of India and (2004) 3 SCC 595 C.M. Beena Vs. P.N. Ramachandra Rao.

4. Taking this Court through the terms of the 1st agreement dated 1st September, 1982 as entered between the parties in CS(COMM) 191/2020 it is stated that Clauses 2, 3(h), 3(c) were modified on the same day and by virtue of Clauses 4(a), 4(b), 5 to 9 in the supplementary agreement the intention of the parties was to create an interest in favour of the plaintiff.

5. The policy of the defendants to transfer the permanent interest was common for several shop owners as a part of an initiative to develop commercial Shopping Arcade as an essential activity of the hotel, without having to invest considerable capital of their own. The perpetual lease deed was required by the defendant for a sum of ₹4,36,00,000/- as admitted before this Court on 17th July, 1998 and taking a fair basis for super luxury construction prevalent at that time, the cost would have been at best ₹660/- per square feet and factoring the same, the security deposit paid by the plaintiff was three times the total cost per square feet area. Therefore the defendant transformed and conveyed 5% of the built up area for more than half the value of cost of land. Further, Clause 7 of the agreement provided that once the hotel was permitted by law to transfer the interest i.e. one property was converted from leasehold to freehold, it must first offer the property to the plaintiff at a price not exceeding the amount paid by the plaintiff as security deposit under the license agreement.

6. Even for the limited right to terminate the existing license agreement

on the ground of engagement of the licensee in unlawful business/ activity, a detailed procedure was provided and as per Clause 9 if within 30 days of the notice the breaches/ contraventions were not removed only then the termination of the license was permissible. The defendant company has given no notice of any breach by the plaintiff much less following the due process of law. If agreement between the parties was a mere license as is the case of the defendant, than the onerous condition stipulated in the termination clause was not required to be introduced in the agreement. A combined reading of all the clauses of the agreement and the supplementary agreement clearly suggest that the interest of the plaintiffs was adequately protected and the license was issued merely to regulate the term of occupation and did not alter the status of possession, even assuming it could have been revoked.

7. By grant of permanent possession of the subject property with no interference thereto by the defendants, the agreement between the plaintiff and defendant was not a mere license. The payment made by the plaintiffs was duly acknowledged by the defendants by way of receipts and other contemporaneous documents. From the clauses in the agreement and the supplementary agreement it is clear that the premises was always intended to be conveyed permanently to the plaintiff and at the first instance an irrevocable license was created in favour of the plaintiff in respect of the shops/ premises along with other proportional rights in the said property, with the understanding/ agreement that the transfer documents shall be executed once the prohibition to transfer in law is cleared. Further, increase in the license fee in case of renewal also related to the increase in the maintenance cost only, which indicates that the entire consideration for the

space/ shops had already been received by the defendant at the time of execution of the agreement. The security fee paid to the defendants under the license agreement was far more than the ongoing market rates of the shops/spaces as compared to in the vicinity and after receiving the entire consideration license was executed till the property was converted into freehold.

8. Based on the license agreements between the parties, learned Senior counsel for the plaintiffs contends that the following indicia clearly establish that a right of ownership or in the alternative at least a right of irrevocable licensee in perpetuity was created in favour of the plaintiff:

- i) The renewal was made automatic and it was at the discretion of the plaintiffs with no overt act required for such renewal and mere continuation in possession was deemed enough;
- ii) The termination was prohibited and could only be invoked for the limited and exceptional case of “engagement in unlawful activity” and in no other circumstance;
- iii) No further increase in license fee was provided barring the increase to meet the enhancement of actual maintenance cost;
- iv) The right of first offer to purchase the premises to the plaintiffs, if and when the defendant was permitted to sell as per law and at the price not exceeding the security deposit;
- v) In the event the license is terminated purely on grounds of engagement in unlawful activity by the licensee, it shall be by due process of law and coupled with refund of security deposit with 10 percent compound interest annually;
- vi) The right to assign/transfer;

- vii) The right of exclusive possession of the shop and the defendant could cater only after giving notice;
- viii) The acknowledgement of receipt of ₹8,80,000/- by the defendant in year 1982 with an extra amount of ₹1,20,000 for shop No. L-81 which is almost 3 times more than the prevailing market rates in the vicinity;
- ix) The fact that three similarly placed licensees were paid in excess of 70 lakhs each, over and above their security deposit around the years 2008-2010 for surrendering their rights and handing over “possession” of the shop clearly indicates that the defendant repurchased their rights under the said shops.

9. Challenging the notice dated 29th May, 2020 revoking the license of the plaintiffs, learned counsel for the plaintiffs contends that the requirement that the plaintiffs were doing unlawful activity is not met and the reasons given in the notice, which are enumerated herein under, cannot be grounds for revocation of the license as agreed between the parties.

- i) That the internal and fitting of the Shopping Arcade including but not limited to ceiling, electrical wiring, fire fighting facilities, etc., are nearly 40 years old and in urgent need of total repair and replacement, to ensure compliance with the safety norms as per the applicable law.
- ii) It is no longer financially profitable for the hotel to continue with the Shopping Arcade as presently located.
- iii) In view of the safety and financial requirements, the defendant has taken a conscious policy decision to discontinue and demolish the entire Shopping Arcade.

iv) In order to mitigate the financial impact on business arising as a result of COVID-19 and with a view to align with the global standards of brand 'Hyatt', defendant has decided to use the area in a more commercially prudent and revenue efficient manner with latest safety measures.

v) The Shopping Arcade has been closed for almost three months.

vi) Hence, the revocation of license with one month notice till 30th June, 2020 to remove all goods, materials from the shops.

vii) To clear the outstanding dues of ₹60,552/- till February, 2020.

10. The plaintiffs have placed on record documents to show when two of the erstwhile licensees of the shops at Shopping Arcade settled, the defendant paid a sum of ₹70 lakhs to ₹1 crore in the year 2008 and 2010 respectively which leads to the clear inference as to the amount of money received by the defendant at the time when the license agreement was entered into. Further, the conduct of the defendant in repurchasing the rights in similarly placed shop owners' premises' by paying a consideration of Rs. 71,00,000/- per shop clearly indicate that a similar if not identical bargain was entered into for all the present plaintiffs and defendant clearly acknowledged that there was an interest, charge, lien, proprietary rights, ownership interest of the possessor and the occupiers thereunder. On the one hand, shops in the same arcade were rented at exorbitant price whereas the licence was granted to the plaintiffs for nominal charges towards actual maintenance. This contradiction goes to the root of the matter to depict the true nature of the understanding/ agreement between the parties.

11. Referring to Section 60 of the Easement Act and the decision of the

Supreme Court in Ram Sarup Gupta Vs. Bishun Narain Inter College & Ors. (1987) 2 SCR 555 it is contended that the plaintiffs not only meet the criteria laid down in the said decision but stand on a much higher footing. Referring to the Clauses in the decision of the Supreme Court in B. Arvind Kumar Vs. Govt. of India & Ors. (2007) 5 SCC 745 it is stated that the plaintiffs in terms of the law laid down therein have a much stronger claim to be licensees in perpetuity.

12. In respect of the objections of the defendant that the present suits are not maintainable in view of the Clause 11 in the license agreement providing for arbitration for disputes including disputes relating to interpretation and clarification of the terms of the agreement, learned counsel for the plaintiffs contends that at this stage the prayers in the plaint have to be seen by way of demurer. Since the plaintiffs pray for decrees of declaration which are decisions in rem and not in personam, the same cannot be adjudicated by the arbitrators. Reliance is placed on the decision of the Supreme Court in Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia (2017) 10 SCC 706, Berger Paints India Limited Vs. Taj and Company 2018 SCC Online Karnataka 3356, and BGR Energy Systems Limited Vs. P.S. Techcom Pvt. Ltd. 2018 SCC Online Mad 4714. In any case the arbitration clause in the agreement is unenforceable as the same provides for an even number of arbitrators, the same is impermissible in view of the amendments carried out in Section 10(1) of the Arbitration and Conciliation Act 2015.

13. Mr. Dhruv Mehta, Senior Advocate appearing in CS(COMM) 184/2020 and 185/2020 adopts the arguments advanced by Mr. A.M. Singhvi, Senior Advocate for the plaintiff in the other four suits. He, however, states that in CS(COMM) 185/2020 the facts are slightly different

inasmuch as the plaintiffs therein were permitted to carry out construction and create loft spaces for which separate notices have been issued to plaintiff No.1 i.e. in respect of plot No. U-61A and U-63A. Since the license has been transferred in the name of plaintiff No.2 in respect of shop U-61 notice has been issued to plaintiff No.2 in the said suit. Referring to Section 60 of the Easement Act learned counsel states that provisions of Section 60 are not exhaustive and a license can be irrevocable even under the provisions of the contract between the parties. The plaintiff continues to be licensee for 36 years and thus also from the conduct of the parties it is evident that the license was irrevocable. Thus, equity weaves into a covenant of irrevocability.

14. Since in terms of Section 60 clause (b) of the Easement Act the plaintiff i.e. licensee has, acting upon the license, executed a work of permanent character and has incurred expenses thereon, the license has to be interpreted as a irrevocable one. When the transfer of license in respect of shop U-63 was done, the only transfer charges taken by the defendant were ₹25,800/- whereas the plaintiff received a full consideration minus the consideration of the loft area. Since the defendant permitted part transfer of the licenses which concept is unknown under Section 60, it is evident that the intention of the parties was of creating irrevocable license.

15. A perusal of the documents filed would also reveal that in case of assignment of license, the defendant is charging hardly any amount whereas contemporaneously if the similar space/shop is leased out the defendant is charging hefty amount.

16. Learned Senior counsel also reiterates the decision of the Supreme Court in Ram Sarup Gupta Vs. Bishun Narain Inter College & Ors. (1987) 2

SCR 555. Referring to the decision of the Supreme Court in Booz Allen & Hamilton Inc. Vs. SBI Home Finance Limited & Ors. (2011) 5 SCC 532 it is stated that the cause of action as pleaded in the suit is not an arbitrable dispute and will have to be decided by the Court. He further states that the parties have been in possession of the premises since the year 1984, therefore, a prima facie case is made out in their favour. The balance of convenience also lies in their favour and in case the defendant demolishes the Arcade, as is being threatened, the plaintiffs would suffer an irreparable loss.

17. Mr. Mukul Rohtagi, Learned Senior Counsel for the defendant has vehemently contended that the present suit is hit by the arbitration clause in the license agreements being Clause-11 which is similar in all the license agreements and hence the present suits cannot proceed as the defendant at the outset that is on entering appearance itself has taken the objection under Section 8 of the Arbitration and Conciliation Act (in short the Act). It is contended that arguments of learned counsel for the plaintiff is two folds that the dispute is not arbitrable and the arbitral clause is invalid. It is stated that the license agreements were entered into between the parties prior to 1996 and if the parties do not agree for the arbitration and once an application under Section 11 of the Arbitration and Conciliation Act would be filed it will be for the Court to decide whether a three member or one member tribunal is to be constituted. The clause relating to arbitration is widely worded and provides that any disputes and differences between the company and the licensee with regard to any matter including interpretation of the agreement and the clarifications thereof shall be referred to arbitration, whose decision shall be final and binding on the parties and shall

not be questioned in any Court of law. It is thus contended that since every dispute including the interpretation of the terms of agreement and the clarifications thereof are also required to be referred to arbitrator, even in the best case scenario the case of the plaintiffs being that they owners or in the alternative irrevocable licenses in perpetuity, all these issues can be determined by the arbitrator.

18. The contention of learned counsel for the plaintiffs that since in view of the prayers in the suit, the decree of declaration sought would result in a judgment in rem, this Court is required to determine whether the dispute is arbitrable or not is wholly incorrect proposition. The law laid down as canvassed by the plaintiffs is prior to the amendment brought in the Arbitration and Conciliation Act whereby Section 11(6)(A) was added in w.e.f. 23rd October, 2018 which provides that notwithstanding any judgment, decree or order of any Court, the Supreme Court or the High Court as the case may be shall confine to the examination of existence of an arbitration agreement.

19. Reliance is placed on the decisions of the Supreme Court in Arbitration Petition (Civil) No.28/2018 dated 19th September, 2018 Zostel Hospitality Private vs. Oravel Stays Private Limited, and (2019) 8 SCC 714 Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman wherein the Supreme Court clarified that prior to insertion of Section 11(6)(A) to the Act, the Court was not only required to look into the existence of the arbitration clause but also whether the said clause was valid or not and whether the dispute was arbitrable or not, however after the insertion of Section 11(6)(A) the Court is only required to look into the existence of the arbitration clause.

20. The decisions relied upon by the plaintiff in Himangni Enterprises

(supra) and Booz Allen & Hamilton Inc.(supra) are not applicable to the facts of the present case as the said decisions were rendered in relation to special Acts, that is, Delhi Rent Control Act wherein there is a bar on the Civil Court to entertain the suit in certain conditions. In the decision reported as 2019 SCC OnLine SC 358 Vidya Drolia vs Durga Trading Corporation, Supreme Court doubted the correctness of the decision in Himangni Enterprises (supra). Further there is no bar on the arbitrator granting the decree of declaration. The plaintiff cannot pick and choose parts of the agreement, that is, rely on part clauses of the agreement and not on the remaining.

21. Learned Senior Counsel for the defendant contends that the pleadings in the plaint are required to be precise. However, the present plaints are full of inconsistencies and contradictions. For example, in CS(COMM) 191/2020 itself, the plaintiff has taken four-five stands. It is stated that the ownership rights were transferred to the plaintiff. However, it is well settled that the right of ownership in an immovable property cannot be transferred without a registered document. Thereafter, it is stated in the plaint that as the property was leasehold at that time from the DDA, it was agreed between the parties that the transfer of ownership will take place after the property becomes freehold which it became in the year 2010. However, till date and even now in the present suit, the plaintiff has not sought a decree of specific performance. Since no relief of specific performance has been sought, the suit is not maintainable under Section 34 of the Specific Relief Act. The plaintiffs thereafter contend that the plaintiffs are licencees on permanent and perpetual basis. The plea of ownership and being a licensee are contradictory and self destructive. The plaintiffs have further stated that

the licence was conveyed for consideration, however, for conveyance/transfer of interest in land, the two modes available are ownership and lease. However, there are no documents in this regard. Plaintiffs have not asserted its right as an owner in the shops/space despite the licence agreement being in place for the last 40 years. As pleaded by the plaintiffs the property having been converted to freehold long back.

22. It is further contended that in view of the inconsistencies and contradictions in the plaint, even though assuming the plaint is maintainable in the absence of plaintiff electing what is its status, no equitable relief can be granted based on contradictory pleas, bereft of material facts. Relying upon Order VI Rule II CPC, it is stated that every pleading is required to contain only a statement in concise form of material facts. The present plaint is neither precise nor contains, the concise statement of facts and hence, liable to be dismissed or in the alternative, no equitable relief of injunction can be granted to the plaintiff.

23. Referring to Sections 60(a) and 60(b) of the Indian Easements Act, it is contended that all licenses are revocable except as provided in Section 60 and cases of all the plaintiffs except in CS (COMM) 185/2020, are neither covered by Sub-Section (a) nor by Sub-Section (b) of Section 60. Further, in terms of Section 61 of the Indian Easements Act, the revocation of licence may be express or implied. In the present case, the defendant has revoked the license by an express notice. The remedy of a licensee in case of termination before expiry of the term of licence is only compensation and no injunctive relief can be granted based on the revocation of the licence. Due process of law has been duly followed as firstly, the revocation notice has been given in writing and secondly, if this Court would apply its mind to the

rights of the parties, then, it is not material who brings the action before the Court, the due process of law stands satisfied. Reliance is placed on the decision in Chandu Lal Vs. Municipal Corporation of Delhi, reported as AIR 1978 Delhi 174, wherein this Court noted the distinction between in a lease and licence. Reliance is also placed on the decisions reported as 127 (2006) DLT 431 Thomas Cook India Ltd. Vs. Hotel Imperial and Others, MANU/DE 2575/2014 M/s.Saptagiri Restaurant Vs. Airport Authority of India and (2014) 210 DLT 359 (DB) M/s.Gesture Hotels and Foods Pvt. Ltd. Vs. New Delhi Municipal Corporation.

24. Mr.Mukul Rohtagi, Learned Senior Counsel for the defendant, on instructions from the defendant, states that it be recorded that there are around 40 shops/spaces in the shopping arcade of the defendant and licences of all shops/spaces in the shopping arcade have been revoked and they have been asked to vacate and no pick and choose policy has been adopted by the defendant in this regard. The defendant wishes to use the area of the shopping arcade for some other purpose so as to be commercially viable.

25. Distinguishing the facts of the suit filed by Satish Khosla being CS (COMM) 185/2020, learned Senior Counsel for the defendant contends that unlike the other suits, the prayer in this suit is a decree of declaration that the plaintiffs are irrevocable licencees in respect of shop Nos. U-61, U-61A and U-63A situated in the shopping arcade, Hyatt Regency and the letter of termination dated 29th May, 2020 is invalid and non-est and consequently pray for a decree of permanent injunction as well. It is contended that admittedly, the plaintiffs are licence holders and pay the same licence fee and there is no clause in the licence agreement with regard to irrevocability of the licence. The constructions so carried out by the plaintiffs by creating

a loft in the shop thereby re-numbering them as U-61A and U-63A was with the consent of the defendant. It is contended that if any construction is carried out pursuant to a licence with permission of the guarantor, Section 60(b) of the Easements Act cannot be attracted. Reliance is placed on the decision reported as 222 (2015) DLT 706 N.D.M.C. Vs. Prominent Hotels Limited. It is further contended that the plaintiffs are estopped from taking the position qua their licencees once they have accepted the said position for the last more than 40 years and have even sought certificates from the defendant with regard to their status as licencees. Reliance is placed on the decisions reported as (2001) Vol. 60 DRJ 562 C.J. International Hotels Limited and Ors. Vs. N.D.M.C. and Ors. and (1982) 2 SCC 555 Ram Sarup Gupta (Dead) by LRs Vs. Bishun Narain Inter College and Ors. Referring to the decision in (1993) SCC Online Bombay 74 Janab Salehbhai Saheb Safiyuddin Vs. The Municipal Corporation of Greater Bombay and Ors., It is contended that the law is well settled that only in cases where the permanent construction is carried out and licensor acquiesces the same by taking no action for removal of the same that the provisions of Section 60(b) of the Easements Act would be applicable. Referring to the terms of the licence in Ram Sarup Gupta (supra), it is contended that the provisions of the licence would indicate that the same was revocable. This Court in MANU/DE/2039/2009 Exclusive Motors Private Limited Vs. I.T.D.C. and Ors. rejected the contention of the licensee therein that he had spent substantial amount of money on the renovation. It was held that carrying out renovation by incurring huge expenses cannot make the licence irrevocable. It is further contended that as held by this Court in 127 (2006) DLT 431 Thomas Cook India Ltd. Vs. Hotel Imperial and Others,

irrespective of the fact that who brings the action, the due process of law has been followed since this Court has entertained the contentions of the parties as has been duly approved by the Supreme Court in the decision reported as (2012) 5 SCC 370 Maria Margadia Sequeria Fernandes and Others Vs. Erasmo Jack De Sequeria (Dead) through LRs. The decision of this Court in Thomas Cook India Ltd. (supra) was upheld by the Division Bench in M/s. Saptagiri Restaurant Vs. Airport Authority of India MANU/DE 2575/2014. Relying upon on the said decision in M/s.Saptagiri Restaurant Vs. Airport Authority of India (supra), it is further contended that the relief of injunction cannot be granted to the plaintiffs as they have no subsisting right. It is stated that unlike lease which can be terminated in terms of the agreement or by efflux of time or as per Section 105 of the T.P.Act, the licence can be terminated at will as licence creates no interest in the property and is a mere permission to use the property. Since the plaintiffs can be adequately compensated in terms of money in case they are able to make out a case, no interim injunction can be granted. Further, the plaintiffs have neither been able to show a prima facie case nor irreparable loss nor balance of convenience.

26. Supplementing the arguments on behalf of the defendant, Mr. Sandeep Sethi, Sr. Advocate contends that in the decision of the Supreme Court reported as (2019) 12 SCC 751 EMAAR MGF Land Limited Vs. Aftab Singh, Supreme Court discussed the entire gamut of Section 8 of the Arbitration and Conciliation Act and held that only where the remedy is excluded by way of special enactment i.e. in cases of Trust, Rent Act, disputes relating to criminal offences, family matters, competition law, insolvency, patents, trademark and copyright etc., that the disputes will not

be arbitrable and in any case, the said issue is required to be gone into by the Arbitrator pursuant to the amendment brought in Section 8 of the Arbitration and Conciliation Act. In the present case, since plaintiff seeks the remedy under the Specific Relief Act for which no special forum for adjudication is provided, the maintainability of the arbitration is not excluded. Referring to the decision of the Supreme Court in Vidhya Dholiya's case, it is contended that a dispute between a licensor and a licensee even where the licensee claims ownership rights or a perpetual licence, can be the subject matter of arbitration and are arbitrable disputes, hence, the present suit is liable to be dismissed on this count.

27. Referring to Section 62(c), (e) and (f) of the Indian Easements Act, it is contended that the licence agreements itself in the recital noted that the purpose of the licence was running a shop in the shopping arcade and since the very purpose is being abandoned, the licences come to an end. Merely because the licences contain a term giving reasons for termination, would not make the licences irrevocable. Referring to the decision of the Supreme Court in 2010 (10) SCC 422 Mumbai International Airport Private Limited Vs. Golden Chariot Airport and Another, it is stated that the Supreme Court deprecated inconsistent pleas of the party at different points of time. Referring to the decision of this Court in 1996 (36) DRJ 342 G.N.Mehra Vs. International Airport Authority of India, it is contended that since the plaintiff can be very well compensated in terms of money in case it makes out a case and there being no question of any irreparable loss or injury being suffered by the plaintiff no injunction can be granted. The disputes between the parties being commercial in nature arising out of an agreement and the plaintiff cannot seek specific enforcement of the agreement since as

per the plaintiff itself, they are mere licencees, the appropriate forum for redressal of disputes if any is arbitration.

28. Mr.Sandeep Sethi, Learned Senior Counsel further contends that at least in three suits, the plaintiffs do not have any subsisting licence as the last renewal in CS (COMM) 189/2020 was upto 31.8.2016, in CS (COMM) 185/2020 was upto to 31.7.2016 and even in CS (COMM) 191/2020, there is no subsisting valid licence agreement.

29. Mr.Siddharth Luthra, Sr. Advocate appearing for the defendant relies upon the decision in 197 (2013) DLT 567 Bharat Petroleum Corporation Ltd. Vs. Delhi International Airport Private Limited and Ors. to contend that in a case where licence is granted, no case for grant of injunction is made out. Learned Senior Counsel has also handed over a comparative chart showing the distinctions in the cases of various licencees.

30. Rebutting the arguments of learned counsels for the defendant, Mr.Abhishek Manu Singhvi, learned Senior counsel for the plaintiffs contends that the plaintiffs before this Court seek a declaration that the plaintiffs are irrevocable licence holders and further seek injunction from disturbance of their unfettered possession. In the alternative, plaintiffs also seek declaration as absolute owners of the premise and a consequential injunction. The suit is predicated on proving the absolute transfer of title in the property and seeks to formalize the same. The argument of the defendant that the present suit is not maintainable as it is governed by an arbitration clause that seeks to refer the matter to an even number of arbitrators, is contrary to the law of the land on arbitrability. The arbitration clause is restricted consciously to disputes arising under the license agreement only, which are bilateral in nature. The arbitration clause is incapable of

governing any dispute pertaining to rights in a property or title to a property. Reliance of the plaintiffs on certain clauses of the license agreement is only to show the real agreement, understanding and/or arrangement between the parties. The arbitration could at best cover subjects like payment of license fees, maintenance charges, dues, conduct in the stipulated premises, alterations etc. However, an award by the Arbitrator cannot vest proprietary rights in favour of the plaintiffs. Further, any declaration of any interest or lien on the subject property granted by the Arbitrator would not be enforceable in the eyes of law. The plaintiffs have relied upon Booz Allen (supra) to contend that the law in the said judgment is continued to be good law till date and has been duly affirmed in Emaar MGF (supra) where the Supreme Court was interpreting Sections 8 and 11 of the Act post the amendments in 2015. In Booz Allen (supra), the Supreme Court clarified that where an award seeks to bind third parties or affects the public at large and is a judgment in rem which determines the status or condition of the property which operates directly on the property itself, the same cannot be decided by the arbitrator. Consequently, a decree of declaration pertaining to the status, title, condition, ownership and/or proprietary interest will necessarily have to be decided by a Civil Court. The facts in the case of Booz Allen (supra) were very similar to that of the plaintiffs case. The confusion sought to be created by the defendant that in Booz Allen (supra) or even in Emaar MGF (supra), the Supreme Court held that reliefs only under the special enactments cannot be arbitrable disputes, is wholly incorrect. Since in Emaar MGF (supra), the Supreme Court was only dealing with a case of a Consumer Protection Act i.e. before a special forum, the Supreme Court had no opportunity to go into the issue of a judgment in rem and a

judgment in personam. Relying on (1963) 3SCR 22 R. Vishwanathan Vs. Rukn-Ul-Mulk, it is contended that the judgment in rem binds all persons claiming an interest in the property. The plaintiffs rely upon the decision in (2017) 10 SCC 706 Himangni Enterprises Vs. Kamaljet Singh Ahluwalia only on the general principles that in rem proceedings shall not be arbitrable, however, in facts, Himangni Enterprises (supra) was a case dealing with eviction and unpaid arrears of rent whereas in the present case, the plaintiffs seek declaration of rights in the property. Relying upon AIR 1969 SC 78 Dhulabhai Vs. State of M.P., it is contended that the exclusion of jurisdiction of a civil court is not be readily implied and certain strict conditions are required to be applied for determining the question of bar for prosecuting the remedies in the civil court.

31. Rebutting the arguments of the learned counsel for the defendant, it is contended that the attack on the pleadings of the plaintiffs seeking declaration of the interest in the property as owners as well as, as irrevocable licencees, is incorrect. Learned counsels for the defendant have not responded to any of the indicia of ownership as canvased by the plaintiffs and gone on to cite the decisions on licences which have no similarity with the facts of the present case. The argument of learned counsel for the defendant that a license is deemed to be revoked under the provisions of Section 62 of Easements Act is premised on the assumption that the plaintiffs claim their rights purely within the ambit of a Licensee. Section 62(c) of the Easements Act envisages two conditions which when met result in a deemed revocation of license; firstly, where the time period of the license expires and secondly, performance or non performance of an act. In the present case, the agreement is extendable at the choice of the plaintiffs

and thus, qua the plaintiffs, runs in perpetuity as the plaintiffs are not bound by the time and the renewal is automatic so long as the possession remains with the plaintiffs. Further, the performance of the act is an unlawful activity on the premises only and in the termination notice, there is no allegation whatsoever against the plaintiffs for having performed an unlawful activity. The defendant's own decision to demolish and reconstruct the area of shopping arcade for mere commercially viable use cannot be said to come under the ambit of 'property affected by the licence is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right', as envisaged under Section 62(d) of the Easements Act. The arguments of the learned counsel for the defendant based on Section 62(f) of the Easements Act that the purpose of the business has been abandoned and thus there is deemed revocation, is also incorrect. The unprecedented situation of Covid is a temporary situation and the plaintiffs intend to fully resume operation once the situation improves.

32. The arguments of the learned counsel for the defendant that the licences, by their very nature, are terminable/revocable presupposes that the plaintiffs are mere licencees and have no transfer of interest in the property, such an argument is contrary to the wordings of Section 60 of the Easements Act which provides that a licence may be revoked by the grantor, unless-

- (a) it is coupled with a transfer of property and such transfer is in force;
- (b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution. Reliance is placed on the decision in 2006 SCC Online Bom 506 Sumikin Bussan (Hongkong) International Limited v Manharlal Trikamdas Modi, wherein, a Division Bench of the Bombay High Court discussed irrevocability of license, not

only under the heads provided under Section 60 of the Easements Act but from the terms of the contract as well. In the decision of Mumbai International Airport Pvt Ltd v Golden Chariot Airport Ltd (supra) relied upon by the learned counsel for the defendant, though, it is stated that the very idea of a license being irrevocable is a bit of a contradistinction in terms”, however, in the same judgment, it is also stated “whether a contractual license is revocable or not, would obviously depend upon the express terms of the contract and that the question of irrevocability has to be determined on the basis of its individual facts.

33. The defendant has filed no application under Section 8 or even Section 11 of the Arbitration and Conciliation Act and hence, the disputes raised in a civil court have to be determined in the present suit. While, the plaintiffs do not deny the existence of an arbitration clause, however, their claims is that the subject matter of the suit cannot be decided in arbitration and the plaintiffs’ right to file a suit cannot be circumscribed by the mandate of Section 8 and 11 of the Act. The decisions relied upon by the learned counsels for the defendant relates to Section 11 of the Act, wherein, Section 8 was not discussed. Relying on the decision in 2019 SCC Online All 3949 UP Industrial Cooperative Association Ltd v Rajendra Kumar Dhingra, 2018 SCC Online Bom 11462 Sharad v Hemant Kumar, 2016 SCC Online Del 110 Fenner (India) Ltd. Vs. M/s. Bharamaputra valley Fertilizer Corp. Ltd. it is contended that the contention of the defendant that arbitrator alone must rule on per se arbitrability of the dispute, is devoid of any rational basis and is in contravention of the decisions of the Supreme Court as well as various High Courts. Further, an Arbitral Tribunal being a creature of the agreement between the parties, cannot travel beyond the scope of agreement

entered into between the parties. Reliance is placed on AIR 1992 SC 232 Associated Engineering Co. v. Govt. of Andhra Pradesh & Ors. and 1999 (2) ARBLR 316 (SC) Himachal Pradesh State Electricity Board v. R. J. Shah & Company.

34. The decisions relating to neighboring hotels like Ashoka, Janpath, Imperial, Oberoi, etc and Thomas cook as licensees have no application to the present case as the terms in the agreements were contrastingly different. Mr.Dhruv Mehta, Sr. Advocate distinguishing the decisions relied upon by the learned counsels for the defendant in Chandu Lal Vs. Municipal Corporation of Delhi (supra), M/s.Gesture Hotels and Foods Pvt. Ltd. Vs. New Delhi Municipal Corporation (supra), M/s.Saptagiri Restaurant Vs. Airport Authority of India (supra), G.N.Mehra Vs. International Airport Authority of India (supra) and C.J.International Hotels Limited and Ors. Vs. N.D.M.C. and Ors. (supra) contends that all these decisions related to the facts where the entity was a mere licensee and had no rights akin to what are envisaged in the terms arrived at between the plaintiffs and defendant. Referring to the decision in (2008) 1 SCC 494 Sarva Shramik Sanghatana (KV) Mumbai Vs. State of Maharashtra and Ors., learned counsel for the plaintiffs contends that the decision is an authority on what it decides and merely because based on the facts, no injunction was granted, would not amount to laying down the law that on different facts also, no injunction can be granted.

35. Referring to the matter in CS (COMM) 185/2020 titled Satish Khosla and Anr. Vs. Asian Hotels (North) Ltd., it is contended that the plaintiffs in their favour have important clauses in the agreement, that is, the exclusive possession, right to transfer by payment of charges, right to sub-licence and

if the defendant wants to transfer of ownership, it has to be with prior notice to the plaintiffs, these arguments of the plaintiffs were de-hors the arguments of irrevocability under Section 60(b) of the Indian Easements Act. The terms of the licence between Satish Khosla and the defendant are better and on a higher pedestal than in the case of Associated Hotels (supra), wherein the Supreme Court held that the licence was irrevocable. For the first five years, no licence fee was charged from Satish Khosla which fact is not refuted. It is unheard of that the licence is issued for use of the premises free of cost. For the first time, at the renewal of the four shops that a licence fee was charged and that too, only for maintenance. No separate agreement was arrived at for the office space carved out/constructed in the shops.

36. As regards the suit filed by Dharamvir Khosla, case of the plaintiff is based on the irrevocability on contractual clauses. Transfer charges were paid to the defendant by the erstwhile licensee. Further, at the time of transfer, the erstwhile licensee was paid substantial amount of money.

37. Attacking the claim of the defendant under Section 8 of the Arbitration and Conciliation Act for the suit to be non-maintainable, it is contended that no application has been filed as is evident from the reading of Sections 8(1) & 8(2) of the Arbitration and Conciliation Act. Reliance is placed on the decision of the Supreme Court in (2018) 11 SCC 328 Kinnari Mullick and Another Vs. Ghanshyam Das Damani. Further, reliance placed by the learned counsel for the defendant on the decision in Vidhya Droliya's case is misconceived as the same has no precedential value. Till date, the decision in Himangni Enterprises (supra) has neither been set aside nor stayed and thus, the decision in Himangni Enterprises (supra) continues to be good law. Reliance is placed in (2012) 11 SCC 321 Ashok Sadarangani

and Anr. Vs. UOI and Ors. and (2013) 16 SCC 16 State of Maharashtra & Ors. vs. Sarva Shramik Sangh, Sangli & Ors.

38. Argument of learned counsel for the defendant that even in a case of Section 8 of the Act, the issue of arbitrability has to be decided by the Arbitrator, is fundamentally flawed. A party filing the suit cannot be relegated to an Arbitrator to decide the issue of arbitrability and then in case, the said issue is decided against it, to come back by filing the suit again. The decision in Booz Allen (supra) clarifies this distinction in Sections 8 and 11 of the Arbitration and Conciliation Act. Further, the amendments to Section 8 and 11 brought out in the Act have been duly discussed in the decisions in Emaar MGF (supra) and Garware Wall Ropers Ltd. Vs. Coastal Marine Constructions & Engineering Ltd. The arbitration clause between the parties is on an unstamped document and hence, cannot be read in evidence by the parties to the arbitration. In Emaar MGF (supra), learned counsel appearing therein raised the same argument as is raised in the present suits by the defendant and the Supreme Court clarified that the amendments under Sections 8 and 11 of the Act have been brought out to get over the decisions in (2003) 5 SCC 531 Sukanya Holding (P). Ltd. Vs. Jayesh H.Pandya and Another and P.Anand Gajapathi Raju and Ors. Vs.P.V.G.Raju (Died) and Ors. The Supreme Court in Emaar MGF (supra) relied on Booz Allen (supra) and reiterated the law laid down therein. Since Emaar MGF (supra) was again a case of special enactment, the issue of a right in rem and right in personam did not arise before the Supreme Court, hence, the Supreme Court did not go into the said issue.

39. After this Court had reserved judgment in the six suits, that is, CS (Comm.) Nos.184, 185, 189-192/2020, in CS (Comm.) No.208/2020 learned

counsel for the plaintiff stated that he has to make submissions which have not been addressed in the suits earlier and while adopting the arguments addressed by learned counsel for the plaintiffs earlier, his further submission is that even if the plaintiff does not have a right of ownership or a right in rem, however, in terms of Section 40 of the Transfer of Property Act (in short 'TPA') the covenants in the agreement with the plaintiff run with the land and thus an exception to the general rule that all covenants are personal. Since the covenants run with the land, that is, there will be a constant burden of the covenant on the land in view of the terms of the agreement between the parties as provided under Section 40 TPA, the judgment which would be passed would be a judgment in rem even if this Court comes to the conclusion that the plaintiff has no interest in the property. Referring to Section 40 TPA it is contended that the Section has two parts, first part being the beneficial enjoyment and there is an obligation annexed to the ownership though not amounting to interest or easement and that such a right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property but not against a transferee for consideration and without notice of the right or obligation not against such property in his hands. Thus the three requirements under Section 40 TPA for its application are obligation arising out of a contract, and annexed to the ownership of the immovable property, but not amounting to interest therein or easement thereon.

40. Learned counsel for the plaintiff contends that the covenants in the agreement between the plaintiff and defendant in relation to perpetual right of renewal under Clause-2, right to assign/transfer under Clause-6 and restricting the right to terminate under Clause-10 are covenants which affect

the nature, quality or value of the land. Thus the rights of the owner are clearly affected by these covenants as restriction has been placed on his right to revoke the license, obligation has been taken by the owner to permit the licensee to assign and even the assignee has a right to further assign and the obligation taken by the owner to permit successive renewals at the sole option of the licensee. The right to terminate is strictly restricted to only a specified event. Therefore, these covenants touch or concern the land as they affect the nature, quality and value of the land. Reliance in this regard is placed on the decisions of the Supreme Court reported as 1969 (2) SCC 594 R. Kempraj vs. Barton Son & Co., AIR 1967 SC 744 Ram Baran Prasad vs. Ram Mohit Hazra and 1977 (2) SCC 798 Commissioner of Wealth Tax vs. P.N. Sikand . It is contended that the interest of the defendant in the suit property is burdened with the contractual obligations contained in the license agreement and whosoever acquires any interest in the shop, acquires the same with the burden of the contract and even though the covenantee has no interest in the land, by virtue of the equitable rule. Reliance is also placed on the decisions reported as AIR 1941 Bom 198 Rango Ramchandra Kulkarni vs. Gurulingappa Chinnappa Muthal, AIR 1973 Cal 432 Purna Chandra Basak vs. Daulat Ali Mollah, AIR 1980 All 78 Raj Narain Jain vs. IIIrd Additional District Judge and 1948 (2) KB 1 Breams Property Investment vs. Stroudler.

41. Referring to the decision in AIR 1963 SC 1 R. Viswanathan vs. Rukn-ul-Mulk Syed Abdul Wajid it is contended that even the right in personem of the plaintiff on the facts of the present suit would lead to a judgment in rem which would be binding on the creditors, successors, assignees, auction purchasers or any interest or right purchased in the property.

42. It is contended that since the license agreement creates an irrevocable license and the plaintiff has the perpetual right to use the shop, the Easements Act will give way to the special agreement between the parties. It is contended that Section 60 of the Easements Act is subject to a contract to the contrary and reliance in this regard is placed on the decisions reported as 1987 (2) SCC 555 Ram Sarup Gupta vs. Bishun Narain Inter College and 2006 SCC OnLine Bom 506 Sumikin Bussan vs. Manhar Lal Trikamdas, AIR 1950 East Punjab 40 Dominion of India vs. Sohan Lal, AIR 1959 Bom 583 M. F. DeSouza vs. Childrens Education Uplift Society, 2015 (151) DRJ 116 M/s. Saptagiri Restaurant vs. Airports Authority of India. Reliance is also placed on the decision of the Singapore High Court reported as 2000 SGHC 70 Tan Hin Leong vs. Lee Teck Im.

43. It is contended that even though an agreement to sell for a contractual license does not create an interest in the land, however, the same are specifically enforceable and the right to use the premises with successive renewals are perpetual and are exercisable against the world at large and hence cannot be decided by an arbitral tribunal being a private fora. Reliance is placed on the decisions Rango Ramchandra Kulkarni (supra), Purna Chandra Basak (supra) and Booz Allen (supra).

44. Rebutting the contention of learned counsel for the plaintiff, learned counsel for the defendant contends that the three stipulations in the agreement with regard to termination, renewal and assignment do not make the license an irrevocable license. Even by the supplementary agreement on the same day, there is an addition to Clause-10 of the license agreement and no new right is created. The defendant has right to terminate the license however, in this case since the defendant needs to use the area of the

shopping arcade for more financially beneficial purpose, the defendant has not terminated the license but revoked the same. The claim of the plaintiff that renewal of the license is automatic after five years is incorrect as the same was on mutually agreed terms. It is also contended that in case the license was irrevocable and perpetual there was no need for renewing the license and repeatedly requests were received from the plaintiffs for renewal of their license. As regards the clause relating to assignment is concerned even the assignee of the license agreement will have no better rights than the present licensee and he will only be substituted in place of the original licensee on the same terms and conditions of the license. Right of assignment on the same terms and conditions cannot lead to the conclusion that the license is irrevocable. The claim of the covenant running with the land is farce. There is no pleadings in the plaint that the covenant would run with the land. Further no such covenant has been brought out which would show that the same would run with the land. In any case by the nature of the agreement itself, that is, a license agreement, the plaintiff has no interest in the land or the property and his right is limited to use and occupy the stipulated place. There is a vast distinction between revocation and termination and in this regard learned counsel refers to Stroud's Judicial Dictionary to show the distinction. It is contended that the Indian Easements Act, 1882 is a self contained code so far as licensees are concerned and the provisions thereof apply to the nature and revocation of licenses. Reference was made to Sections 52, 58, 62 to 64 of the Indian Easement Act.

45. With regard to the grantor's duty not to render the property unsafe, in the revocation notice the defendant has clearly brought out that since the property is old, the fittings are old, the same needs a total revamping.

Further the grantor's transferee is not bound by the terms of the license. Section 62 provides with the contingency when the license would be deemed to be revoked which includes the fact that when the license is granted for a specified purpose and the purpose is attained or abandoned or becomes impracticable. By revoking the license, the defendant has not committed the breach of any of the terms of the license agreement. It is the admitted case of the plaintiff that they have a license in their favour and hence can have no further rights than a licensee. The Purpose of the license agreement was to run the shop in the shopping arcade and was thus co-terminus with the shopping arcade. Since the defendant is no more going to maintain the shopping arcade, the very purpose of existence and subsistence of the agreement is abandoned.

46. The very fact there is a clause providing for termination of the license militates against the license being irrevocable or the plaintiff having any interest on the land or the property. Reliance is placed on the decision reported as AIR 1965 SC 6103 M.N. Clubwala vs. Fida Hussain Saheb and MANU/SC/0258/1999 Delta International vs. Shaym Sunder. In case it was the intention of the parties to create irrevocable license there was no need to renew the license. The area in the shopping arcade is required for the bona fide requirement of the defendant. The defendant has not disturbed the use and occupation of the shops by the licensees for the reasons there was no serious breach of the terms however, in view of the extraordinary circumstances and keeping in view the vital commercial interest of the company which has huge debt liabilities aggravated by present pandemic crises, the defendant has decided to put the area presently covering the shopping arcade to a better commercial use by creating more food outlets

and meeting rooms. No challenge can be made to the bona fide requirement of the owner of the property to a better commercial use. Reliance is also placed on the decisions reported as 2014 (15) SCC 610 Anil Bajaj & Anr. vs. Vinod Ahuja. The terms of the lease deed with Delhi Development Authority have to be read into the license agreement and what was prohibited under the lease deed could not have been carried out in the license agreements with the plaintiff. Since the license in favour of the plaintiff stands revoked w.e.f. 1st June, 2020 the plaintiffs are not entitled to any interim injunction and the remedy if any available to them is of compensation.

47. Learned counsel for the defendant also highlights on the conduct of the parties whereby the plaintiffs have been writing letters seeking renewal of the agreement. Admittedly the plaintiffs have no registered document in their favour and no interest in the land, hence cannot claim any right in rem or that the judgment passed would be a judgment in rem. The decisions relied upon by the learned counsel for the plaintiff relates to leases, tenancy law and have no application to the license. The entire property of the defendant is lying mortgaged and thus no third party can claim any right in the land. The plaintiffs much less having an interest in the property have no right even of easement. The decision of the Singapore High Court is not applicable to the fact of the present case as the same was based on the new law enacted which is not similar to the Indian Easements Act of the TPA in India. The dispute if any between the parties is arbitrable under the terms of license agreement as held by the Supreme Court in Booze Allen (supra) and Vidya Drolia (supra).

48. Heard learned counsels for the parties.

49. Learned counsels for the defendant have heavily relied upon Clause-11 of the License Agreement in CS (COMM) 191/2020 and similar Clauses in all the other agreements in different suits to contend that the present suit is not maintainable as the license agreement based on which the plaintiffs claim right of ownership or in the alternative right of an irrevocable license in perpetuity and the consequential right of continuous and uninterrupted possession itself contains a clause that disputes between the parties including the disputes relating to interpretation or clarification of the terms of license agreement will be referred to arbitration wherein one arbitrator would be as nominated by the Chairman of the defendant or his authorized person and the other by the plaintiff. Without going into the controversy raised that a two member arbitral tribunal is now barred in view of Section 10 of the Act, this Court notes that prayers in CS(COMM) 191/2020 suit and the identical Prayers in CS(COMM) 189/2020, 190/2020 and 192/2020 seek a decree of declaration that the license in favour of the plaintiff in respect of space/shops/premises at Hotel Hyatt Regency is irrevocable, perpetual, the purported revocation of the license by the defendant is illegal and void, a decree of declaration declaring that the plaintiff has an unfettered right to occupy and use the premises/shop under the irrevocable license till the documents of transfer/conveyance are executed by the defendant, in the alternative a decree of declaration declaring the plaintiff as the absolute owner of the said premises/shop having already acquired the ownership rights in view of the consideration amount paid and documents executed between the parties. In CS(COMM) 184/2020 and CS(COMM) 185/2020, no decree of ownership is sought, however, rest of the prayers are similar.

50. Plaintiff being the dominus-litis, the maintainability of the suit at this stage has to be decided by way of a demurrer on the pleadings and prayers made in the plaint. Whether subsequently the prayer of a decree of declaration declaring the plaintiff as an absolute owner of the suit premises can be granted or not would be an issue to be determined on the conclusion of the trial however, prima facie the plaintiffs can seek and enforce a decree of declaration in respect of the license in their favour being irrevocable and perpetual permitting them unfettered right to occupy and use the premises/shop.

51. Based on the contentions of the parties, the following issues arise for consideration before this Court:-

I. Whether an objection under Section 8 of the Act can be taken without filing an application?

II. On an objection under Section 8 of the Act, whether the Court can decide that the dispute is arbitrable or not or the parties are required to be relegated to the Arbitrator for decision on the arbitrability of the dispute?

III. Whether claims which are relatable to special statute alone cannot be referred to arbitration or even where there is a claim for a judgment in rem, the dispute cannot be referred to arbitration?

IV. Whether prima facie plaintiffs have a right in their favour creating an interest in the land or the burden of the covenant running with the land to the extent that the same cannot be decided in arbitration?

V. If the present suit is maintainable, whether on facts the plaintiffs are entitled to grant of interim injunction?

52. Before this Court proceeds to decide the issues involved in the suits it would be appropriate to reproduce the three documents between the parties i.e. the license agreement, the supplementary license agreement of the same date and revocation notice dated 29th May, 2020 which are similar in all the suits and based whereon the rights of the parties are required to be determined.

53. In CS(COMM) 191/2020, the licence agreement dated 1st Sep. 1982 reads as under:

“AGREEMENT

An AGREEMENT is made at New Delhi on this the 1st day of September, 1982 between ASIAN HOTELS LIMITEDD, a Public Limited Company incorporated under the companies Act, 1956 and having its registered office at Bhikaji Cama Place, Ring Road, New Delhi – 110066, hereinafter called ‘the company’(which expression shall include its successors and assigns) of the ONE PART and M/S. VIRENDRA KUMAR & CO., a partnership firm, having its office at 1810 Cheerakhana, Delhi- 110006, hereinafter called ‘the Licensee’(which expression shall include its successors and assigns) of the OTHER PART.

WHEREAS the company is constructing a 600 room 5 star deluxe hotel to be known as ‘Hyatt Regency Delhi’ at Bhikaji Cama Place, Ring Road, New Delhi as an essential facility to the hotel customers;

AND WHEREAS the Board of Directors of the company have decided to licence shops in the shopping plaza to intending parties to use the shops for the specified business purposes;

AND WHEREAS the Licensee is desirous to use License shop No. L-79 (measuring 45.51 sq.metres) in the said shopping Plaza (hereinafter referred to as ‘the stipulated space’);

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED, DECLARED AND RECORDED AS FOLLOWS:-

1. *In consideration of the periodical payments hereinafter agreed to be paid by the Licensee and other Licensee’s undertakings*

hereinafter set out, the company hereby licences and authorizes the Licensee to enter upon and use the stipulated space for the purposes of carrying on The Business of Jewellery, Arts, Curios and Handicrafts (hereinafter called 'the authorized purpose) on the days and during the hours to be determined by the company from time to time. Any change in the authorized purpose shall be made only with the permission in writing of the company.

- 2. The licence under this Agreement shall be operative for a period of 5 (five) years from the date the stipulated space is made available to the Licensee (hereinafter referred to as commencement date') for carrying out the authorized purpose. At the option of the Licensee the license under this Agreement shall be renewed for an additional period of not exceeding 5 (five) years at a time.*
- 3. During the currency of this license, the licensee hereby agrees with the company and undertakes as follows:-*
 - a) To pay to the company a sum of ₹7,345/- (Rupees seven thousand three hundred and forty five calculated @ ₹161.40/- per sq.meter only) by 10th day of every month, the first of such payments to be made on commencement date;*
 - b) Not to use the stipulated space for any purpose other than for the authorized purpose;*
 - c) To obtain and to keep in force all permissions and licenses which may be required by law for use of the stipulated space and to comply with any condition which may be attached to any such permission or licenses;*
 - d) To manage and conduct the stipulated space so as to preserve the reputation of the company and its hotel and to abide by the rules and regulations framed by the company from time to time and that nothing shall be done, permitted or committed contrary to any provision made by or under any statute or law for the time being in force or rules and regulations framed by the company and in particular not to use or permit the stipulated space*

to be used for any form of unlawful activities;

- e) Not to make any alterations or additions to the stipulated space or to remove therefrom any of the company's fixtures or fittings therein;*
- f) Not to alter the original colour of the outside of the stipulated space or the facade and front elevation nor erect sun-screens, curtains or blinds on the exterior nor paste any bills, advertisements, posters, notices, cutting, etc. on the glasses, nor permit the same to be made, affixed or altered or erected in any circumstances;*
- g) To have the scheme, specifications and the layout for decor for interior decoration and furnishing of the stipulated space approved by the company and to keep the same – as approved by the company – keeping in view the high standard of a 5-Star luxury hotel, and to carry out, at its own expense, such repair or renovation work as the company may direct as a result of inspection by its representative(s) and that in default the company shall be entitled to carry out such repairs or renovations and to recover the costs, charges and expenses thereof from the licensee;*
- h) To forthwith remove or cause to be removed any goods, articles or exhibits exhibited or exposed for sale or being sold in the stipulated space which in the opinion of the company are obnoxious, obscene or undesirable;*
- i) Not to store or cause to be stored any hazardous, combustible or dangerous goods in the stipulated space nor use any gas, kerosene or electric stove or appliances for preparing any food or beverage item or for any other purpose;*
- j) Not to hold any auction, bids or such other activities without prior written consent of the company.*
- k) Not to display, affix, paint or exhibit any name or writing or anything upon the exterior of the stipulated space without obtaining prior written consent of the company;*

- l) Not to employ for work or otherwise allow any person at the stipulated space who is not of good character and behaviour and/or suffering from any contagious, infectious disease or is not suitably attired or otherwise unsuitable to be seen in a modern 5-Star luxury hotel;*
- m) To forthwith submit, at the requisition of the company, any member of its staff for medical examination by a doctor of the company's choice at the cost of the licensee;*
- n) Shall use route or passage to go to or come out of the hotel premises (for reaching the stipulated space) or any toilet or wash-room as is stipulated by the company for use by persons working at the stipulated space;*
- o) To pay or cause to be paid charges for electricity (including meter hire charges), telephone calls, and other utilities provided by the company at the stipulated space immediately on receipt of bills/ demand by the company. In case of default, the company may at its discretion withdraw the facilities/ utilities;*
- p) Not to do or permit to be done any act which may invalidate or in any way affect the insurance of the building or property wherein the stipulated space is located;*
- q) Not to throw dirt, rubbish, garbage, refuse or permit the same to be thrown in the stipulated space or in the varandah or the passage or in any other portion of the shopping plaza or hotel;*
- r) In the event of any damage or injury being caused to the stipulated space or any property of the company, by the licensee or his servants or agents or any one upon the stipulated space with the acceptance or implied consent of the licensee or as a result of the use of the premises for unauthorized purposes, the licensee shall at its own expense make good all such damage or injury and in the event of his failure to do so within 15 (fifteen) days after occurrence of such damage, the company may make good*

such injury/ damage and the licensee shall indemnify the company against all such costs and charges and expenses in respect thereof;

- s) To charge the customers reasonable price for the goods sold or services rendered and in the event of any complaint, to satisfy the company about the reasonableness of the price and to refund to the customer any amount in excess of the price which is considered reasonable by the company;*
 - t) To forthwith, upon termination of the licence, vacate the stipulated space and remove all its wares, equipments, furnishings, etc. and in default the company's representatives shall be fully entitled to get the stipulated space vacated without being liable to damages or otherwise; and*
 - u) To take out a policy of insurance in the joint names of the company and the licensee against all liability in respect of any damage or loss which may be suffered by any person other than the company or licensee by reason or arising directly or indirectly out of the use of the stipulated space for the authorized purpose and to keep the company indemnified against all such liability.*
- 4. The company hereby agrees with the licensee as follows:*
- a) To permit or cause to permit the licensee, his servants and agents to enter and use the stipulated space;*
 - b) To keep or cause to be kept the premises, in which the stipulated space licensed to the licensee is stipulated, in good condition;*
 - c) To provide the following facilities/ services:*
 - i) Central air-conditioning facilities during business hours;*
 - ii) Cleaning and keeping in neat and tidy condition common passages, lobbies and entrances around the stipulated space*
 - iii) Looking after and attending to the electricity,*

water and sanitary fittings and pumping requirements in the common passages, lobbies and entrances around the stipulates space; and

- iv) Providing watch and ward and the maintenance services for the shopping area, provided that the company shall not in any way be responsible in case of any theft, pilferage or loss,*

Provided that the air-conditioning and telephone services may be shut off and cut off, after giving 24 (twenty four) hours' notice in writing, for the purpose of altering, repairing services or overhauling any apparatus, machine, plant or installations;

Provided further that in the event of failure of the central air-conditioning or the telephone installations due to any reason beyond the control of the company, the licensee shall have no recourse against the company for non-provision of the above facilities/ services; and

- d) To permit the licensee to use the common portions such as entrances, passages, stairways in the shopping plaza as are specifically designated by it from time to time.*

- 5. As security for proper maintenance of the stipulated space and proper conduct and complete compliance of the terms and conditions of the license herein contained, the licensee shall pay to the company an interest-free security deposit of ₹8,80,000 (Rupees eight lakhs and eighty thousand only) in the manner and in instalments as the company may direct, and maintain the said deposit at all times during the continuance of the license. The company shall refund the security deposit immediately on termination of the license and vacation of the stipulated space by the licensee in good and proper condition. If the security deposit is not refunded within 30 (thirty) days of the termination of license/ vacation of the stipulated space, the company shall be liable to pay an interest at a rate which would be 2% (two percent) per annum higher than the then prevailing Bank lending rate from the date of vacation of the stipulated*

space to the date of payment.

6. *The licensee shall have the right to assign/ transfer his/ its right under this license with the written consent of the company on such terms and conditions as the company may notify from time to time in this behalf.*
7. *The licensee may bring upon the stipulated space such equipment as is necessary for the use of the stipulated space for the authorized purpose, provided that while upon the stipulated space all such equipment shall be at the risk of the licensee and the company shall not be liable for any damage/ injury to such equipment.*
8. *The company shall have the right to increase the amount of consideration set out in clause 3(a) hereof on 1st January, 1985 and thereafter every 5 (five) years (in case term of the licence is renewed beyond the initial period of 5 (five) years, provided, however, that such increase shall not exceed 25% (twenty five percent) of the amount so being then charged.*
9. *That company shall have the right to terminate the licence in case of any of the terms of the licence is contravened by the licensee by giving 30 (thirty) days' notice in writing to the licensee to remove the breaches or terms contravened, and on failure of the licensee to remove the said breaches within 30 (thirty) days, the license will stand terminated. In case the licensee is interested in terminating the license, the licensee may do so by giving 60 (sixty) days' notice in writing to the company and the licence shall stand terminated on such expiry of the notice.*
10. *That the licensee is a sole-proprietory/ partnership/ company. Name(s) of the sole-proprietor/ partners/ directors/ controlling shareholders// as on date of the signing of this agreement have been furnished to the company. The licensee hereby nominates Shri _____partner of the licensee (hereinafter known as 'the nominee') who shall be the person who will deal with the company on behalf of the licensee for the purposes of this Agreement. The licensee shall notify, in writing, to the company in case he/ it desires any change will become effective only after the company has confirmed in*

writing its acceptance of the name of the new nominee.

11. *That in case of any dispute, difference, between the company and you, with regard to any matter including interpretation of this agreement and the clarifications thereof, the same shall be referred to the joint arbitration of the chairman of the company or any person appointed by the chairman and the arbitrator appointed by you, whose decision shall be final and binding between the parties and shall not be question in any court of law.*

IN WITNESS WHEREOF the parties hereto have executed these presents the day and year first hereinabove written. ”

54. The Supplementary Agreement dated 1st September, 1982 reads as under:

*“1st September, 1982
M/s Virendra Kumar & Co.
1810 Cheerakhana
Delhi – 110006*

Dear Sirs,

SUB: License Agreement dated 1st September, 1982 between M/s. Virendra Kumar & Co. and Asian Hotels Limited.

1. *As supplement to the captioned Agreement, we clarify/ specify hereunder various clauses and words contained in the said Agreement and the original Agreement dated 1st September, 1982 shall to that extent stand modified/ amended.*
2. *The words “for an additional period of not exceeding 5 (five) years at a time” appearing in clause 2, means additional periods of not exceeding 5 years at a time. And the option under this clause shall be deemed to have been exercised by you, if you continue in possession of the stipulated space after the expiry of the original or extended period of the license.*
- 3 (a) *The words “Rules and regulations (framed by the company from time to time) appearing in clause 3(d) refer to such regulations as relate to the upkeeping and maintenance of the*

stipulated space.

- 3 (b) In respect of clause 3(e), you shall be at liberty to make false roofing and storage space thereupon in the stipulated space.*
- 3(c) You shall be deemed to have complied with the provisions of clause 3(g), if the decor and furnishing inside the stipulated space is in keeping with the high standard of a 5-Star luxury hotel. Unless the decor/ interior decoration or furnishing affects the exterior position of the stipulated space, you shall have full right to have decor, furnishing etc, of your liking.*
- 3(d) Keeping a small fridge and warming of prepared food shall not be a contravention of Clause 3(i).*
- 3(e) The provision of clause 3(n) with regard to use of passage, route, etc. shall apply to members of your staff and not to the partners of your firm.*
- 3(f) In respect of clause 3(o), you shall be at liberty to get your own telephone (s) installed at your cost in the stipulated space.*
- 3(g) The company will determine the “reasonable price” referred to in clause 3(s) – in case of complaint by any customer on the basis of expert advice. This clause will be “invoked in cases where the difference between the reasonable sale price” and the price charged by you is more than 25%. However, you shall have the option to refund the full money and take your goods back.*
- 3(h) The clause 3(t) shall mean, that the company shall get the premises vacated only by due process of law.*
- 4(a) In respect of clause 5, however, in case the company terminate the licence under clause 9 and asks you to vacate the premises and hand over the possession of the stipulated space, the company shall pay to you interest on the amount of deposit made by you at the rate of 10% per annum compounded annually from the date of such deposit upto the date of vacation.*
- 4(b) The deposit of security referred to in clause 5 shall be made in the following manner and instalments:*
 - i) ₹1,76,000/- on the date of signing of the agreement*

- ii) ₹1,76,000/- on or before 30 November, 1982
- iii) ₹1,76,000/- on or before 28 February, 1983
- iv) ₹1,76,000/- on or before 30 June, 1983
- v) ₹1,76,000/- on or before 30 September, 1983

5. For your purposes, terms and conditions “applicable to transfer/ assignment referred to in clause 6 will as follows:

- i) If, the propose transferee is a person of repute and whose business credentials are good, the company shall not withhold the consent for transfer without assigning any valid grounds.
- ii) A transfer fee at a rate not exceeding 10% of the amount of security deposit made by you in terms of clause 5 shall be payable to the company by you where the transfer is to any person, body, company or concern who is not a constituent of your firm. In case of transfer to the constituents of your firm and their legal heirs, there shall be no transfer fee.

6. The provisions of clause 9 shall not be invoked unless you engage in any unlawful business in the stipulated

7. If at any time in future the company is permitted to dispose off the stipulated space, you shall have the first option to buy the same, at a consideration which shall not exceed the amount of security deposit made by you under the Licence Agreement dated 1st September, 1982 except that the condition with regard to use, upkeep and maintenance of the stipulated space shall be such as may be applicable at that time.

8. “In respect of clause 8, increase in license fee on 1st January, 1985 and thereafter shall be related to the actual increase in maintenance cost of the stipulated space”.

9. The company will be responsible for or ensure the payment of all taxes/ charges on air-conditioning and other services imposed or payable in respect of the stipulated space but energy consumed by the licensee or its nominee on the stipulated space.

*Thanking you,
Yours faithfully,
For ASIAN HOTELS LIMITED.”*

55. Defendant issued similar notice to all the plaintiffs on 29th May, 2020 which reads as under:

“Date: 29th May 2020

*To,
Sital Dass Jewellers
Rakyan’Fine Jewellery,
M-31, M Block Market,
Greater Kailash-I,
New Delhi-110048*

Re: Shop No. L-79 Extn situated at the Shopping Arcade, Hyatt Regency Delhi, Bhikaji Cama Place, New Delhi – 110066.

Dear Sir,

You are a Licensee in respect of the above mentioned shop located in the Shopping Arcade at Hotel Hyatt Regency Delhi, Bhikaji Cama Place, Ring Road, New Delhi – 110066 (‘Hotel’/‘premises’). You have been paying a monthly license fee of ₹12,400/- (Rupees Twelve thousand four hundred only) for the use and occupation of the aforesaid shop. You are carrying out the activity of business or trade of jewellery & handicrafts for the benefit of Hotel residents and visitors of the hotel facilities. At the time of grant of license to you, you had made an interest free security deposit of ₹1,20,000/- (Rupees one lakh twenty thousand only).

The Shopping Arcade, where the shop is located is situated on the right wing of the hotel building. The internal and fittings of the shopping arcade including but not limited to ceiling, electrical wiring, fire fighting facilities etc. are nearly 40 years old and in urgent need for total replacement and repairs, to ensure compliance with the safety norms as per the applicable laws. It is no longer financially profitable for the hotel to continue with the Shopping Arcade as presently located.

Keeping in view the safety and financial requirements, the Board of Directors ("Board") of Asian Hotels (North) Ltd. ("the company") has taken a conscious policy decision to discontinue and demolish the entire Shopping Arcade. In order to mitigate the financial impact on business arising as a result of COVID-19 and also with a view to align with the global standards of brand "Hyatt", the company has decided to use the area currently comprising of the Shopping Arcade in a more commercially prudent and revenue efficient manner with the latest safety measures.

In any case, since almost last 3 months the shopping arcade has been closed for any commercial operations due to the present lockdown restrictions imposed on the Hotel as well as on account of health concerns as a result of COVID-19. Therefore, the company has decided to start forthwith the construction/ repair work at the site where the Shopping Arcade is situated.

In view of the aforesaid, the Board has decided to revoke the license for Shop No. L-79 Extn. w.e.f. 01.06.2020.

Please, therefore note that license to use and occupy the aforesaid shop stands revoked w.e.f. 01.06.2020. Despite the fact that the license stands revoked w.e.f. 01.06.2020, you are being given one month's time till 30.06.2020 to remove all your goods/ materials/ belongings from the shop. You may reach to Mr. Narotam Sharma, Director Materials Corporate, email: legal@ahlnorth.com, Mobile: +91987186801 to schedule an appropriate date and time during business hours before 30.06.2020 to remove your belongings from the aforesaid shop. The company has sealed the entire Shopping Arcade to ensure safety and security of your goods and belongings lying in the shops. For visiting the shopping arcade in the Hotel premises, Standard Operating Procedures have been put in place. A copy of the same is attached to enable you to comply with them at the time of your scheduled visit to the hotel premises for the aforesaid purpose.

You are further called upon to clear your outstanding dues amounting to ₹60,552/- (₹sixty thousand five hundred fifty two only) till February 2020 on or before the date fixed for removal of your belongings. Further, as a gesture of goodwill and keeping in view the difficulties being faced on account of COVID-19, the company has decided on 'without prejudice' basis to waive your obligations towards payment

of the license fee for the months of March, April and May 2020.

Upon your compliance with the above to the satisfaction of the company, you may collect the cheque for ₹1,20,000/- (₹ one lakh twenty thousand only), deposited by you as interest free security deposit and simultaneously execute a Letter confirming removal of all your belongings/ articles from the shop as well as a declaration to the effect that no dues are payable to or by either of the parties. Photocopies of the cheque for ₹1,20,000/- dated 29.05.2020 drawn on DBS Bank Ltd., new Delhi towards refund of interest free security deposit along with statement of accounts in respect of the above shop are enclosed herewith.

Please note that in the event of your failure to settle the dues as aforesaid and remove the belongings from the shop within the time period specified above, the company shall be constrained and compelled to dispose of the same in a manner deemed fit and the same shall be done at your risk, cost and consequences and in that event your liability to pay the license fee for the months of March, April and May 2020 shall stand revived and the company shall also be entitled to adjust the security deposit against amounts owned by you to the company. The company shall also be at liberty to take such further and necessary action as may be warranted in law to make recoveries of any amounts due and payable by you which cannot be mitigated by adjustment against the security deposit.

The company expects that in view of our cordial relationship during the period of your license, you would extend your full cooperation as requested above.

Thanking you,

Yours faithfully,

For Asian Hotels (North) Ltd.”

Finding on Issue No.I

56. Objection of learned counsel for the plaintiffs that since no application under Section 8 of the Act has been filed by the defendant, hence the plea for rejection of the plaint cannot be accepted, deserves to be

rejected in view of the decision of this Court dated 15th January, 2018 in CS (SO) No.125/2017 Parasramka Holdings Pvt. Ltd. vs. Ambience Pvt. Ltd and another, wherein this Court held that party invoking the arbitration clause does not have to file a formal application seeking a specific prayer for reference of the dispute to arbitration as long as it raises an objection in the written statement that the present suit is not maintainable in view of the arbitration clause in the agreement. This Court following Booz Allens held:

32. *In Booz Allen and Hamilton Inc. (supra), the Supreme Court has held as under:-*

"25. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as "submission of a statement on the substance of the dispute", if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/ appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him."

x x x x

33. *Keeping in view the aforesaid judgments as well as the judgment in Eastern Medikt (supra) and judgments of the learned Single Judge and Division Bench of this Court in Sharad P. Jagtiani (supra), this Court is of the view that the party invoking the arbitration clause does not have to file a formal application seeking a specific prayer for reference of the dispute to arbitration as long as it raises an objection in the written statement that the present suit is not maintainable in view of the arbitration clause in the agreement.*

57. In the present case the defendant on the first day of the appearance itself even before filing of the written statement has raised the objection under Section 8 of the Arbitration and Conciliation Act and hence this objection cannot be summarily rejected on the ground that no application has been filed by the defendant under Section 8 of the Act.

Findings on Issue No.II & III

58. Plea of learned counsels for the defendant is that in view of the amendment to Section 8 of the Act, on an application under Section 8, the Court cannot go into the issue whether the dispute between the parties is arbitrable or not and in the alternatively it is stated that unless the dispute falls within one of the categories as laid down in Emaar MGF and Vimal Kumar Shah this Court would refuse to refer the disputes to Arbitration and that the reliance of the plaintiffs on the decision in Himangi is incorrect as the same is no more good law in view of the decision in Vidya Drolia.

59. In Vidya Drolia (supra) the Supreme Court while dealing with Section 11 (6A) of the Act, has referred the issue "whether the word 'existence' would include weeding out arbitration clauses in agreements which indicate that the subject matter is incapable of arbitration", to a larger bench.

60. Thus the reference to the Larger Bench of the Supreme Court in Vidya Drolia's case is to the scope of consideration before the Court under Section 11(6A) of the Act and whether while examining the existence of an arbitration agreement", the Court can determine whether the subject matter of the dispute is incapable of arbitration. As held by the Supreme Court in (2012) 11 SCC 321 Ashok Sadarangani & Anrs. vs. Union of India & Ors. and 2013 (16) SCC 16 State of Maharashtra & Anr. vs. Sarva Shramik Sangh, Sangli & Ors. till the decision of the Larger Bench of Supreme

Court, this Court is bound to follow the interpretation of law, presently holding the field on the issue of scope of consideration in an application under Section 8 of the Act.

61. In *Booz Allen & Hamilton Inc.*(supra) dealing with the issue, whether in an application under Section 8 of the Act, the Court can go into the issue of arbitrability of the dispute or not, Supreme Court held:

32. *The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of “arbitrability” or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section.*

33. *But where the issue of “arbitrability” arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability will have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.*

x x x x

35. The Arbitral Tribunals are private fora chosen voluntarily

by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties,

not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

(Emphasis Supplied)

62. In R.V.Viswanathan vs. Rukn-ul-Mulk Sayed (1963) 3 SLR 22 Supreme Court noting the distinction between a judgment in rem and judgment in personam as observed in *Cheshire* in Private International Law, 6th Edn, page 653 held:

"It (judgment in rem) has been defined as 'a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided.'.... A judgment in rem settles the destiny of the res itself 'and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence'; a judgment in personam, although it may concern a res, merely determines the rights of the litigants inter se to the res. The former looks beyond the individual rights of the parties, the latter is directed solely to those rights...."

63. Learned counsels for the defendant have rightly contended that the law laid down by the Supreme Court in Booz Allen & Hamilton Inc.(supra) bringing out the distinction between Section 8 and Section 11 of the Act is prior to the amendments brought in Section 8 and 11 of the Act w.e.f. 23rd October, 2015. However, the effect of amendment to Section 8 of the Act was considered by the Supreme Court in Emaar MGF vs. Aftab Singh (supra) and it was held:

"57. The legislative intent and object were confined to only above aspects and was not on those aspects, where certain disputes were not required to be referred to arbitration. Can it be said that after amendment under Section 8(1), the law laid down by this Court in reference to Section 2(3), where large number of categories have been held to be non-arbitrable has been reversed or set at naught. Neither any such legislative intendment was there nor any such consequence was contemplated that law laid down by this Court in context of Section 2(3) has to be ignored or reversed.

58. While carrying out amendment under Section 8(1) of the 1996 Act, the statutes providing additional remedies/special remedies were not in contemplation. The legislative intent is clear that judicial authority's discretion to refuse arbitration was minimised in respect of jurisdiction exercisable by judicial authority in reference to Section 8. The amendment was also aimed to do away with special or additional remedies is not decipherable from any material. The Law Commission 246th Report, the Statement and Objects of Bill and the Notes on Clauses do not indicate that amendments were made for overriding special/additional remedies provided under different statutes. In the event, the interpretation as put by the learned counsel for the petitioner is accepted, Section 8 has to be read to override the law laid down by this Court in reference to various special/additional jurisdictions as has been adverted to and

noted in the judgment of this Court in Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] which was never the intent of amendment in Section 8.

59. The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in National Seeds Corpn. Ltd. [National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy, (2012) 2 SCC 506 : (2012) 1 SCC (Civ) 908] is no more a good law cannot be accepted. The words “notwithstanding any judgment, decree or order of the Supreme Court or any court” were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall be entitled to look into various facets of the arbitration agreement, subject-matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning.

60. Reference is also made to the judgment of this Court in Vimal Kishor Shah v. Jayesh Dinesh Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] . This Court in the above case had occasion to consider the provisions of Section 8 of the 1996 Act in reference to special remedy provided under the Trusts Act, 1882. This Court noticed the judgment of this Court in Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] with approval in paras 40 and 42 which is to the following effect: (Vimal Kishor Shah case [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] , SCC pp. 805-06)

“40. Before we examine the scheme of the Trusts Act, 1882, we consider it apposite to take note of the case law, which has a bearing on this issue. The question came up for consideration before this Court in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] as to what is the meaning of the term “arbitrability” and secondly, which type of disputes are capable of settlement by arbitration under the Act. Their Lordships framed three questions to answer the question viz.: (SCC p. 546, para 34)

- (1) Whether the disputes having regard to their nature could be resolved by a private forum chosen by the parties (Arbitral Tribunal) or whether such disputes exclusively fall within the domain of public fora (courts)?;*
- (2) Whether the disputes are covered by the arbitration agreement?; and*
- (3) Whether the parties have referred the disputes to arbitrator?”*

42. The question to be considered in this appeal is whether the disputes relating to affairs and management of the Trust including the disputes arising inter se trustees, beneficiaries in relation to their appointment, powers, duties, obligations, removal, etc. are capable of being settled through arbitration by taking recourse to the provisions of the Act, if there is a clause in the trust deed to that effect or such disputes have to be decided under the Trusts Act, 1882 with the aid of forum prescribed under the said Act?”

61. After noticing the issues which have arisen in the above case this Court laid down the following in paras 51 and 53: (Vimal Kishor Shah case [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] , SCC pp. 808-09)

“51. The principle of interpretation that where a

specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law, was adopted by this Court in Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke [Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke, (1976) 1 SCC 496 : 1976 SCC (L&S) 70] while examining the question of bar in filing civil suit in the context of remedies provided under the Industrial Disputes Act (see G.P. Singh, Principles of Statutory Interpretation, 12th Edn., pp. 763-64). We apply this principle here because, as held above, the Trusts Act, 1882 creates an obligation and further specifies the rights and duties of the settlor, trustees and the beneficiaries apart from several conditions specified in the trust deed and further provides a specific remedy for its enforcement by filing applications in civil court. It is for this reason, we are of the view that since sufficient and adequate remedy is provided under the Trusts Act, 1882 for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication.

53. We, accordingly, hold that the disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. A fortiori, we hold that the application filed by the respondents under Section 11 of the Act is not maintainable on the ground that firstly, it is not based on an “arbitration agreement” within the meaning of Sections 2(1)(b) and 2(1)(h) read with Section 7 of

the Act and secondly, assuming that there exists an arbitration agreement (Clause 20 of the trust deed) yet the disputes specified therein are not capable of being referred to private arbitration for their adjudication on merits.”

62. This Court held in *Vimal Kishor Shah case* [*Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] that disputes within the trust, trustees and beneficiaries are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. This Court held that the remedy provided under the Arbitration Act for deciding such disputes is barred by implication. The ratio laid down in the above case is fully applicable with regard to disputes raised in consumer fora.

63. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.”

(Emphasis Supplied)

64. Supreme Court in *Emaar MGF* also followed its earlier decision in *A.Ayyaswamy vs.A.Paramasivam* (2016) 10 SCC 386 wherein the Supreme Court in para 35 noting the examples of non-arbitrable disputes also observed that this class of actions mentioned in the said judgment operate in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. It was held that all disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to

be adjudicated by courts and public tribunals. Supreme Court noted that enforcement of a mortgage has been held to be a right in rem for which proceedings in arbitration would not be maintainable.

65. In Emmar MGF Supreme Court in para 30 also noted that not only the proceedings of the Consumer Protection Act, 1986 are special proceedings which are required to be continued under the said Act, despite an arbitration agreement, and that there are large number of other fields where an arbitration agreement can neither stop nor stultify the proceedings.

66. In Mayavati Trading (P) Ltd. (supra) relied by the defendant, Supreme Court was dealing with the amendment to Section 11 of the Act and introduction of Section 11 (6-A) to the Act and did not consider the effect of amendment to Section 8 of the Act as decided in Emaar MGF (supra).

67. Mr. Mukul Rohtagi, Learned Senior Counsel for the defendant has relied upon the decision of the Supreme Court in Zostel Hospitality Private (supra) to contend that even in an application under Section 8 of the Act, the issue whether the dispute is arbitrable or not has to be decided by the Arbitrator and cannot be decided by this Court. In Zostel Hospitality Private (supra) Supreme Court was dealing with an application under Section 11 (6) of the Act for appointment of a sole arbitrator and while dealing with the said application, Supreme Court noted with approval the decision reported as 2013 (15) SCC 414 Arasmata Captive Power Co. Pvt. Ltd. vs. Lafarge India Pvt. Ltd. wherein following the decision of the Constitution Bench in Konkan Railway Corporation Ltd. vs. Ravi Construction (P) Ltd., ((2002) 2 SCC 388, it was held that an order passed by the Chief Justice under Section 11 (6) is an administrative order and not a judicial one. Supreme Court in

Zostel Hospitality also noted the observations in para 34 of Booze Allen (supra) wherein the Court has dealt with the meaning of the term “arbitrability” and stated that arbitrability has different meanings in different contexts. The Court enumerated three facets which relate to the jurisdiction of the Arbitral Tribunal and that one facet of arbitrability is whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement. The judgment also notes that reference was made to Section 8 of the Act and it was opined what the judicial authority should decide. It was clarified that the said ruling was in consonance with the principle laid down in the decision reported as (2005) 8 SCC 618 SBP & Co. vs. Patel Engineering Ltd. and Anr. and that the issue of arbitrability has been restricted to the adjudication under [Section 8](#) and not under [Section 11](#) of the Act. This distinction has also been brought out by the Supreme Court in the case of Emaar MGF Land Limited (supra) as noted above.

68. Learned Senior counsel for the defendant has objected to the reliance of the plaintiffs on the decision in Himangni Enterprises (supra) contending that the same is no more good law in view of the decision in Vidya Drolia (supra). In Vidya Drolia (Supra) dealing with the determination of a lease Supreme Court held that though a lease is a transfer of an interest in a property and therefore, a conveyance, in law, there is nothing in the Transfer of Property Act to show that a dispute as to determination of a lease arising under Section 111 of the Transfer of Property Act cannot be decided by arbitration. Even in Vidya Drolia Supreme Court was dealing with an application under Section 11 (6A) and not Section 8 of the Act.

69. In Vidya Drolia (supra) the Supreme Court noted para-35 of Booze Allen (supra) wherein it was held that every civil or commercial dispute, either contractual or non-contractual which can be decided by a Court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. The Supreme Court in Booze Allen (supra) not only recognized the adjudication of certain categories of proceedings which are reserved by the legislature exclusively for public fora as a matter of public policy but certain other categories of cases though not expressly reserved for adjudication by public fora but by necessary implication stand excluded from the purview of public fora. It was thus held that where the cause or a dispute is inarbitrable, the Court where the suit is pending will refuse to refer the parties to arbitration under Section 8 of the Act even if the parties might have agreed upon arbitration as the forum for settlement of such dispute. In Vidya Drolia Supreme Court further noted that in Himangni Enterprises (supra) the Supreme Court had relied upon the two decisions, that is, 1981(1) SCC 523 Natraj Studios (P) Ltd. vs. Navrang Studios & Another and Booze Allen (supra) and it was held that in case of Natraj Studios (supra) the case related to the Bombay Rent Act which could be decided by no other Court except Small Causes Court. Considering the facts of Booze Allen (supra) and Natraj Studios (supra) the Supreme Court held that in both the decisions, Transfer of Property Act situation between a landlord and tenant was very far removed and thus the question involving any Transfer of Property Act situation cannot possibly be said to have been answered in the two decisions. It is thus on these facts Himangni Enterprises (supra) was distinguished holding that a Transfer of Property

Act situation was not contemplated either in Booze Allen (supra) or in Natraj Studios (supra).

70. In the light of the decision of the Supreme Court in Emaar MGF Land Limited (supra) it can thus be concluded that though the issue whether a dispute is arbitrable or not cannot be gone into in an application under Section 11 of the Act however, in an application under Section 8 of the Act the Court is required to go into the issue whether the dispute between the parties is an arbitrable dispute or not and if the dispute falls in “excepted matters” or relates to specific or special remedies, than there can be no reference to the arbitration and the civil suit has to be proceeded. Further the amendment to Section 8 of the Act, cannot be given an expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. It can be further culled out that a distinction has been drawn between the scope of consideration in an application under Section 11 and Section 8 of the Act even after the amendment as an order on application under Section 8 being a judicial order, it has been held that not only the Court would consider the existence of the arbitration agreement between the parties but also whether the subject matter of the dispute is capable of adjudication by a public forum and not by a special court or tribunal or relates to any additional/specific relief falling in the category of excepted matter resulting in a judgment in rem.

71. Supreme Court in Emaar MGF, also held that even after the amendment to Section 8 of the Act, the law laid down by the Supreme Court in Booz Allen, A.Ayyaswamy, Vimal Kumar Shah, would continue to apply and the Court on an application under Section 8 of the Act can look into the fact whether the remedy provided under the Act for a dispute is barred

expressly or by implication. In Booz Allen, A.Ayyaswamy, Vimal Kishore Shah and Emaar MGF, Supreme Court noted certain categories of disputes which are non arbitrable. However, the said categories cannot be held to be exhaustive and thus it would depend on the facts of each case whether the remedy provided under the Act for deciding such dispute is barred by implication or otherwise

Finding on Issue No.IV

72. The incidental question which is raised by learned counsel for the defendant in the present case while addressing arguments is that the relief of the plaintiffs seeking ownership rights in the shops/spaces is barred under Section 34 of the Specific Relief Act and in the absence of any registered document no such relief of declaration of ownership can be granted. However, it is relevant to consider whether at this stage the reliefs sought in the suit can be bifurcated to come to the conclusion that part reliefs are not maintainable hence for the remaining reliefs the disputes in the suit can be referred to arbitration. When this Court raised a specific query to learned counsel for the defendant, the answer was in the negative and that the case of the defendant was that all the reliefs as sought are arbitrable. As held by the Supreme Court in the decision reported as 2003 (5) SCC 531 Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya & Anr. there is no provision in the Arbitration and Conciliation Act for bifurcating the suit into two parts one to be referred to arbitration for adjudication, other to be decided by the civil Court and on this issue the decision in Sukanya Holdings (supra) has not been overruled by any Larger Bench.

73. This principle laid down in Sukanya Holdings (supra) has been followed in Booz Allen (supra) wherein the Court in para 51 held that if the

three issues referred by the appellant are the only disputes, it may be possible to refer them to arbitration, however mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due, it is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons, who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-a-vis the mortgagor and mortgagee. It was further held that even if some of the issues or question in a mortgage suit are arbitrable or could be decided by a private forum, the issues in a suit cannot be divided.

74. Consequently, even if one of the disputes raised or relief sought cannot be decided by the arbitrator either for the reason that the dispute falls in the excepted category or the rights of third parties in the suit property are affected, the dispute cannot be referred to arbitration by splitting the reliefs sought in the suit.

75. Learned counsels for the defendant have strenuously argued that the agreement between the parties was a licence agreement, the plaintiffs always referred to and understood the same as a licence agreement and thus no further rights beyond what can be granted in a licence i.e the right to use the property, can vest in the plaintiff and there is no merit in the claims of the plaintiffs that they have an interest in the suit property which is akin to ownership or in the alternative an interest more than that of a lessee or in any case at the least a right to an irrevocable license in perpetuity or in the alternative as argued in CS(COMM) 208/2020, the covenants run with the land and thus judgement on the disputes would be a judgement in rem. It is trite law that it is not the nomenclature of the document but what is intended

from the document as per its content and the conduct of the parties that has to be looked into.

76. Justice Subba Rao in Associated Hotels of India Ltd. (supra) in the concurring judgment held that even though the document used the phraseology appropriate to a license however, it is the substance of the agreement that matters and not the form, for otherwise clever drafting can camouflage the real intention of the parties. Following the earlier decisions, Supreme Court culled out the following propositions and held:

“28..... The following propositions may, therefore, be taken as well established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties — whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. Judged by the said tests, it is not possible to hold that the document is one of licence. Certainly it does not confer only a bare personal privilege on the respondent to make use of the rooms. It puts him in exclusive possession of them, untrammelled by the control and free from the directions of the appellants. The covenants are those that are usually found or expected to be included in a lease deed. The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence. The solitary circumstance that the rooms let out in the present case or situated in a building wherein a hotel is run cannot make any difference in the character of the holding. The intention of the parties is clearly manifest, and the clever phraseology used or the ingenuity of the document-writer hardly conceals the real intent. I, therefore, hold that under the

document there was transfer of a right to enjoy the two rooms, and, therefore, it created a tenancy in favour of the respondent.

77. In the decision reported as C.M.Beena and Another Vs. P.N.Ramachandra Rao (supra), Supreme Court held that the real intention of the parties is required to be deciphered from complete reading of the document, if any and surrounding circumstances including conduct of the parties before and after creation of relationship and the nomenclature relating to either lease or licence by itself, is not decisive. One of the features to determine the nature of relationship is the retention of control or possession over the property. The Supreme Court in this decision, on the facts noted as under:-

“12. On the facts found by the two Courts below which findings have not been reversed by the High Court it is clear that the nature of the premises is of a shop and not a garage meant and designed exclusively for parking a car. The premises are located in a busy commercial market. The appellant has exclusive possession over the premises and the owner neither can nor does interfere therein. A full fledged stationery shop and allied business activities have been carried on by the appellant in the premises ever since 1972. The appellant was in possession of the premises for about 20 years before the date of the deed of licence and in spite of the 'deed of licence' of 1981 having been executed continued to possess, use and enjoy the occupation of premises as before. Though the so-called licence expired in 1982 the respondent did not insist on the appellant putting back the respondent in possession of the premises but allowed him to remain in occupation and to continue to do so for a period of about seven years till the date of the institution of the suit. It is thus clear that the present one is not a case where the possession or control of the premises was retained by the respondent while the appellant was only permitted to make such use of the premises as would have been unlawful but for the permission given. Agreeing with the Courts below and

disagreeing with the High Court we hold the relationship between the parties to be of landlord and tenant and the possession of the appellant over the premises as that of a tenant”.

78. Supreme Court in the decision reported as (2009) 10 SCC 455 New Bus-Stand Shop Owners Association Vs. Corporation of Kozhikode and Another also reiterated that the true test is the nature and quality of occupation and that exclusive possession though not a decisive test but its absence signifies that the agreement is for the licence and not for lease. It was held as under:-

25. Reference in this connection can be made also to a later judgment of the Court of Appeal in Marchant Vs. Charters, where again Lord Denning reiterated these principles in a slightly different form by holding that the true test is the nature and quality of the occupation and not always whether the person has exclusive possession or not. The true test in the language of the learned Judge is as follows:

"...It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not? In which case he is a licensee."

79. It is thus settled that mere nomenclature of the agreement will not make the agreement a mere license with no further right to the plaintiffs

except user of the premises and to discern the true intention between the parties, terms of the agreements and conduct of the parties have to be looked into. As noted above the common case in all the suits is that even if the documents are treated as licenses they are irrevocable licenses in perpetuity thus giving interest in the property. Further in four suits, the plea is that the agreements creates an interest in the land in favour of the plaintiffs akin to owner or at least more than a lessee. The salient features of the license agreements canvassed by learned counsels for the plaintiffs are that the plaintiffs have the preemptory right to purchase the premises as and when the defendant was permitted to sell the same as per the law and that too not exceeding the security deposit, the renewal of the licenses was automatic and at the discretion of the plaintiffs with no say of the defendant, termination was impermissible except and limited to the engagement in unlawful activity by the plaintiffs, there was no increase in the license fee, the license fee was the actual maintenance cost, the plaintiffs had an unhindered right of possession of the shops/premises with them with access to defendant only on permission by the plaintiffs and on prior notice of time, acknowledgment of the defendant that the shops which had been let out on lease were on a much higher rent than the so called license fee taken from the plaintiffs and that when in the year 2008 and 2010 two or three similarly placed licensees surrendered their rights, payments for a sum of ₹70 lakhs to ₹1 crores was made by the defendant.

80. Countering these allegations case of the defendant is that the plaintiffs have no registered documents in their favor and hence cannot seek an interest in the land, though the initial agreement was for renewal after every five years however, thereafter all the supplementary agreements were on

mutually agreed terms, the provision of termination clause itself showed that the agreement was terminable though for specified reason, the defendant was bound by the terms of the lease deed with Delhi Development Authority which clearly stipulated that the defendant cannot create any right or interest in the land in favour of the third party, the defendant has not terminated the licence but has revoked the same w.e.f. 1st June, 2020 whereafter the plaintiffs have no right or claim in the property. The basis for revocation was that the fundamental requirement of the license agreement, that is, shops in the shopping arcade have been decided to be abandoned by the defendant in the best financial interest of the defendant company as the suit property is lying mortgaged and by removing the shopping arcade, the defendant has decided as a matter of policy to use the said area for a more financially viable purpose. Since the entire property lies mortgaged to financial institutions, no third party can claim any right in the land, the licensees had no unfettered right to use and occupy the premises and the licenses merely authorize the plaintiffs to enter upon and use the stipulated space for the specific purpose of carrying on business of jewellery and handicrafts etc., that is, “authorized purpose” on the days and during the hours determined by the defendant from time to time and the licensees could not make any alteration or additions in the space/shops. It is thus claimed that the agreement between the parties created no interest in the property and not even a right of easement.

81. Dealing with the irrevocability of a license, Supreme Court in Ram Sarup Gupta (supra) held that the party by agreement can make license irrevocable even if it is not covered by clauses (a) and (b) of Section 60 of the Easement Act. In Mumbai International Airport Pvt. Ltd. (MIAL)

(supra) relied upon by learned counsel for the defendant, Supreme Court held that though the very idea of a license being irrevocable is a contradiction but whether the same is irrevocable or not will depend on the terms of the agreement between the parties.

82. In Sumikin Bussan (Hong Kong) International Limited (supra) the Division Bench of Bombay High Court referring to the earlier decision of the Bombay High Court in M. F. DeSouza vs. Childrens Education Uplift Society, (supra) which was affirmed by the Supreme Court held that Section 60 of the Easement Act mentions only two clauses of cases in which license could be regarded as irrevocable however, these categories of licenses are irrevocable by operation of the law, that is, Easement Act, but apart from the Easement Act by virtue of law of Contract if the parties entered into a contract and arrived at a solemn agreement to the effect that the license shall be irrevocable or shall be limited for a particular duration, licensor would be bound by his engagement and will not be entitled to terminate the license or revoke the same at his sweet will and pleasure. Referring to Corpus Juris Secundum , Vol. LIII , pages 815-16 it was noted:

“As a general rule a mere licence, that is, one which is merely a personal privilege not coupled with an interest in the land, may be revoked by the licensor at any time, at his pleasure. This rule generally applies regardless of how long the use has been permitted, and although the intention was to confer a continuing right, and even though the licence was created by a deed or other written instrument. The general rule, however, is not without its modifications and exceptions, and does not apply where the licence is coupled with or partakes of the character of an easement and the rights under it are affirmatively and definitely fixed and settled, or where it constitutes part of a contract between the parties”

x x x

Therefore, I am of the opinion that, quite apart from S. 60 of the Easements Act, the Court will have to bear in mind in a suit of this nature whether the licensor is precluded from revoking the licence because of any contractual engagement into which he has entered. There being an engagement of this kind here, I am of the opinion that the plaintiff cannot claim to itself the right of revocation at its free will and pleasure. To hold otherwise and to decree possession in such circumstances would be nothing else than putting the Seal of approval of the Court to a breach of contract.” (emphasis supplied)

83. In Sumikin Bussan (Hong Kong) International Limited (supra) the Bombay High Court also referred to the earlier decision in Dominion of India vs. Sohan Lal, (supra) which was also affirmed by the Supreme Court wherein the Division Bench Held:

“[12] Be that as it may, the two tests of irrevocability established by the cases and referred to above, or by the Indian Easements Act will, however, give way to the special agreement, if any, of the parties. Thus a license which is prima facie irrevocable either because it is coupled with a grant or interest or because the licensee has erected works of a permanent nature there is nothing to prevent the parties from agreeing expressly or by necessary implication that the license nevertheless shall be revocable. See Liggins v. Inge, (1831) 7 Bing, 682 at pp. 688, 694 which was applied by the Judicial Committee in Plimmer v. Wellington Corporation, (1884) 9 A. C. 699 at p. 714: (53 J.P.C. 104), Gujarat Ginning and Manufacturing Co. Ltd., Ahmedabad v. Moti Lal Hirabhai Spinning & Manufacturing Co. Ltd., Ahmedabad, A.I.R. (23) 1936 P.C. 77 at p. 82: (160 I. C. 837) and Ganga Sahai v. Badrul Islam, A.I.R. (29) 1942 ALL. 930: (202 I.C. 676). On the same reasoning, I should think, there will be nothing to prevent the parties from agreeing expressly or impliedly that a license, which is prima facie revocable being not within either of the two categories of irrevocable license should nonetheless be irrevocable.”

“[13] As regards the remedy, even where the license is revocable the licensee is entitled to a reasonable notice before the license is revoked. If, however, the license is revoked without reasonable notice the remedy of the licensee is by way of damages and not by way of an injunction. Aldin v. Lehimier Clark Muirhead & Co. (1894) 2 Ch. 437: (63 L.J. Ch. 601) and Wilson v. Tavener, (1901) 1 Ch. 598: (70 L.J. Ch. 263), where an interlocutory injunction had been refused. Even if the license is obtained for consideration, yet if it is otherwise revocable and is revoked the remedy of the licensee is damages: Smart v. Jones, (1864) 83 L. J. C. P. 154: (10 L.T. 271), Kerrison v. Smith, (1897) 2 Q.B. 445: (66 L.J.Q.B. 762), Prosonna Coomar Singha v. Ram Coomar Ghose, 16 Cal. 640. The reason is obvious, for to restrain the revocation of a revocable license is to make it (ir)revocable. If, however, the license is irrevocable and its enjoyment is obstructed by the licensor there is authority that the remedy of the licensee is either by way of injunction or in damages (see Peacock on Easement, 3 Edn., p. 680). As already stated the Court of Equity will give relief by way of specific performance or injunction. An irrevocable license for a term implies an undertaking on the part of the licensor not to revoke it during its term and even if the license be not specifically enforceable for any reason, a threatened breach of the license may be prevented by enforcing this implied negative covenant by means of an injunction-a remedy which really gives effect to the irrevocability of the license.” (emphasis supplied)

84. It is thus evident that the revocability of the license though true generally and in terms of the Easement Act applies only to two sets of situation as provided in clause (a) and (b) of Section 60 of the Easement Act however, by agreement the parties can make the agreement irrevocable. Further an irrevocable license cannot be revoked at the sweet will of the licensor unless there are breach of the terms therein and in case of revocation the licensee will be entitled to file an action. Though in all the

cases except in the case of Satish Khosla where clause (b) of Section 60 of the Easement Act is stated to be applicable, the terms as included in Section 60 are not there however, it has to be inferred from the terms of the agreement and the intention of the parties coupled with their conduct whether the licenses were irrevocable.

85. As noted above, in the agreements between the parties, the only reason for termination is unlawful activity for which also the licensor is required to give a notice and if breach is removed in 30 days there can be no termination of the license. The defendant has clarified that in this case the defendant has not terminated the license either for the breach of any condition or for the plaintiff's having performed any unlawful activity, but that they have revoked the license for their own bona fide requirement of raising the mobility of funds.

86. Dr. Lalit Bhasin, learned counsel for the defendant submits that the defendant has revoked the license and not terminated and seeks to distinguish between the termination and revocation. In terms of the definition given in Stroud's Judicial Dictionary relied by the defendant 'revocation is the calling back of a thing granted' whereas 'determination in the context of lease and other interest and settlement of a term or estate is the same thing as its termination, meaning not only premature extinction but any kind of coming to an end'. In the present case the defendant has resorted to revocation under the notice dated 29th May, 2020 for which there was no provision in license agreement.

87. At this stage, it will also be appropriate to note the objection of the defendant that since there exists mortgages on the suit land no right of ownership, lease or license in perpetuity can be created in favour of the third

parties/licensees unless the mortgagees are not impleaded as parties. Therefore, the suit is bad for non-joinder of the necessary parties. This is exactly the case of the plaintiffs that since they have interest in the suit land either in terms of a right which is of ownership or more than a lessee or atleast a right of irrevocable license in perpetuity and in the least a right which is the burden of covenants running with the land and hence the determination of these rights would be a judgment in rem as the same would not only affect the plaintiffs and the defendant but also the third parties, that is, those banks and intuitions where the land of the defendant is lying mortgaged.

88. Learned counsels for the defendant during the course of arguments contended that the licenses in three suits i.e. CS(COMM) 189/2020, 185/2020 and 191/2020 were last renewed in the year 2016. Therefore, without any renewal the plaintiffs have continued in the premises and the defendant took no action to resume the premises from these plaintiffs in the last four years. Further the defendant has issued the plaintiffs in these three suits as well revocation notice dated 29th May, 2020 clearly indicating from the conduct of the defendant, that the agreement between the parties continued despite there being no formal agreement entered into in terms of Clause II of the Supplementary Agreement which provided that the option by the lessee under this clause shall be deemed to have been exercise if the licensees continued in possession after the expiry of the original or extended period of license. Thus the formal extension or a fresh license agreement was a mere formality and the right of the plaintiffs to continue in the shops, stipulated space was at their will. This clause itself is indicative of at least an irrevocable license having been issued in favour of the plaintiffs.

89. From the terms of the agreement and the conduct of the parties, this Court is of the prima facie view that the plaintiffs are not mere licensees. One of the major factors which dispels that the plaintiffs had only a right to use or occupy the property by the license agreement was the right of preemption created by the license agreement which not only gave the first right to the plaintiffs to purchase the shops/places in the shopping arcade as and when permissible in law but also fixed the sale consideration and the same was also received as security deposit. This term of the agreement and the conduct of the defendant in receiving the proposed sale consideration itself negates the plea of the defendant that the plaintiffs are mere licensees. The right of preemption along with the sale consideration fixed and the sale consideration having been received and continuation in the premises at the will of the plaintiffs are not the only covenants which show that rights more than that of licensees were created in favour of the plaintiffs and an interest was created in the land in favour of the plaintiffs, the others being the right of exclusive possession of the shops/places with defendant required to give notice in case he wanted to inspect the same, the high threshold for termination being the indulging by the licensees in unlawful activity and that too rectifiable by removing the breach by notice of 30 days; the right of assignment and the conduct of the defendant that the shops let out on lease were on higher rent than the license fee which was mere maintenance charges and that when certain licensees surrendered their licenses, heavy amount of price was paid by the defendant. Therefore, the covenants in the license agreement and supplementary agreement created a right in favour of the plaintiffs and an interest in land beyond the terms of Section 60 of the

Easements Act as envisaged for an irrevocable licensees and better than a lessee.

90. Though learned counsel for the parties have addressed arguments at length on the rights of the parties and the nature of interest created in the land in favour of the plaintiffs by the license agreement and the supplementary agreement, however the scope of consideration at this stage before this Court is only whether the plaintiffs are mere licensees or they have a right in their favour or interest in the land in the nature that the said rights are not determinable by arbitration. It is only if the parties cannot be referred to arbitration in view of the interest created in their favour that this Court is required to go into this issue further for the purpose of interim injunction.

91. In view of the discussion above, prima facie the plaintiffs have a right in their favour and interest in land which is more than that of a lessee or at least that of an irrevocable licensee. In (1999) 5 SCC 651 Olympus Superstructures vs. Meena Vijay, Supreme Court held that the relief of specific performance of an agreement can be awarded by an arbitrator. Thus if the arbitrator can direct creation of an interest in a property, the arbitrator can also award declaration of the interest of the parties in the property. Further, as held in Booz Allen in paragraph 46, an agreement to sell or an agreement to mortgage does not involved any transfer of right in rem but creates a personal obligation and, therefore, the claim for specific performance will be arbitrable contrary to a mortgage which is a transfer of a right in rem. Moreover, as noted in Vidya Drolia, there is nothing in the Transfer of Property Act or the Specific Relief Act which forbids the rights of the parties being decided by arbitration. The rights of the plaintiffs herein

at best governed by the Transfer of Property Act or the Specific Relief Act, or that of an irrevocable licensee under the Easements Act can still be decided in arbitration. Consequently the present suits are not maintainable and the parties may avail the remedy of arbitration.

Conclusion

92. This Court having held that prima facie the rights created in favour of the plaintiffs and the interest created in the land is in the nature of an arbitrable dispute in terms of the decision of the Supreme Court in Olympus Superstructures, Booz Allen and Vidya Drolia (supra), the suits and the applications are dismissed with liberty to the parties to avail remedy of arbitration.

93. Judgment be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

July 21, 2020
'ga/vn/akb'

न्यायमेव जयते