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

+ **ARB.P. 246/2020**

ASIAN HOTELS (NORTH) LIMITED Petitioner
Through: Dr. Lalit Bhasin, Ms.Nina
Gupta and Ms.Radhika Gupta, Advs.

versus

POONAM SOOD MENON & ANR. Respondents
Through: Mr. Amardeep Singh and
Mr.Prasahnt Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (O R A L)

% **03.11.2020**
(Video-Conferencing)

1. By a perpetual lease deed dated 22nd July, 1982, a plot of land, admeasuring 20,000 sq.mtrs., was taken on lease, by the petitioner, from the Delhi Development Authority (DDA). On the said plot of land, the petitioner proceeded to construct and establish the well known Hyatt Regency Hotel, which was completed and came into operation in 1983.

2. The statutory architectural control conditions, applicable in this regard in respect of five star hotels, allowed the petitioner to allot area, in its premises, equal to or less than 2000 sq. mtrs., for commercial purposes. On the basis of the said covenant, the petition avers that 41 shops were constructed, in the aforesaid hotel.

3. Permission to operate the shops was granted, by the petitioner, to various licensees, under individual license agreements. One such license agreement was executed between the petitioner and the respondents on 18th July, 1983, whereby and whereunder the respondents were granted the license to carry out commercial activities in shop no. L-75A. Under the license agreement, the respondents were further required to furnish an interest free refundable deposit of ₹ 2 lakhs, as well as pay license fee @ of ₹1650/- per month. The license was renewable on a five yearly basis.

4. Clause 12 in the aforesaid License Agreement dated 18th July, 1983 provided for resolution of the disputes between the parties, if any, by arbitration, and read thus:

"12. That in case of any dispute, difference, between the Licensor 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 Licensor 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 questioned in any court of law ".

5. The License Agreement, whereby the respondents were granted the license to operate Shop L-75A was last renewed up till 31st July, 2018. The petition avers that, after the said date, the respondents were using the shop as a permissive licensee, on payment of monthly license fee of ₹ 4950/-.

6. The hotel, as well as the shopping arcade, had, from its inception, been mortgaged with various financial institutions, against

moneys advanced by such institutions to the petitioner. The petition avers that, as the shopping arcade was more than 40 years old, and was in need of demolition, replacement and repairs, it had become necessary to discontinue commercial operations in the shopping arcade. As a result, on 29th May, 2020, communications were issued by the petitioner to all the licensees, including the respondents, revoking the licenses granted for operation of the premises on a commercial basis, with effect from 1st June, 2020. The licensees were granted time, to vacate the premises, till 30th June, 2020.

7. The respondents joined issue with the petitioner, on this proposed course of action and, *vide* a letter dated 19th June, 2020, invoked the afore-extracted arbitration clause 12, in the License Agreement dated 18th July, 1983. The communication stated that the respondents were appointing Mr. Dinesh Dayal, a learned Retired District Judge, as its arbitrator.

8. It was also stated, in the letter, that, rather than appointing its own arbitrator, it would be more appropriate for the petitioner to move this Court, for appointment of its arbitrator.

9. It is in these circumstances that the petitioner has moved this Court by means of the present petition, in which the petitioner has chosen to rely on Section 10 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “1996 Arbitration Act”) which reads thus:

“10. Number of arbitrators.—

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.”

10. The contention of the petitioner, in the petition, is that Clause 12 in the License Agreement dated 18th July, 1983 is incapable of enforcement, as it violates Section 10(i) of the 1996 Arbitration Act, the number of arbitrators being required to be appointed under the said clause being an even number, i.e. two. In these circumstances, the petitioner has submitted, in the present petition, that, Clause 12 in the License Agreement being incapable of being operative, in view of Section 10(i) of the 1996 Arbitration Act, this Court would have to appoint a sole arbitrator. Accordingly, it has been prayed that a sole arbitrator be appointed by this Court, to arbitrate on the disputes between the parties.

11. A reply, to the petition, has been filed by the respondents. Giving voice to the contentions contained in the said reply, Mr. Amardeep Singh, learned Counsel for the respondents, has sought to dispute the contention, in the petition, that Clause 12 of the License Agreement dated 18th July, 1983 was hit by Section 10(i) of the 1996 Arbitration Act. Pointing out that, at the time of execution of the license agreement on 18th July, 1983, the Arbitration Act, 1940 (hereinafter referred to as the “1940 Arbitration Act”) was in force, Mr. Singh invites my attention to Section 3 of the said Act, which reads thus:

“3. Provisions implied in arbitration agreement. - An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.”

12. In conjunction with Section 3 of the 1940 Arbitration Act, Mr. Singh invites my attention to Clause 2 of the First Schedule to the 1940 Arbitration Act, which reads thus:

“2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.”

13. Mr. Singh submits that, by a combined operation of Section 3, read with the First Schedule of the 1940 Arbitration Act, the requirement of the two arbitrators, nominated by the petitioner and the respondent, having to appoint a third umpire, was to be read into Clause 12 of the License Agreement dated 18th July, 1983. This, he submits, impliedly amended the said clause by statutory fiat, resulting in the arbitral tribunal consisting, not of two, but of three members. As a result, he submits, there is no infraction of Section 10(1) of the 1996 Arbitration Act, under the aegis of which the arbitration can continue, with three members, the third member being the umpire to be appointed by the arbitrators appointed by the petitioner and the respondents respectively.

14. On a careful consideration, the submission of Mr. Singh is found to have merit. Section 3 of the 1940 Arbitration Act, read with Clause 2 of the First Schedule thereto, results in an implied

modification of clause 12 of the License Agreement dated 18th July, 1983, and the arbitrators appointed by the petitioner and the respondents would, by virtue of such modification, mandatorily have to appoint a third arbitrator as umpire. This modification, which came into effect immediately on execution of the agreement between the parties, would continue to remain in operation despite the repeal of the 1940 Arbitration Act by the 1996 Act.

15. Dr. Lalit Bhasin, fairly, expresses no objection, to the arbitration being conducted by a three member arbitral tribunal, as suggested by Mr. Amardeep Singh.

16. He, however, requests that some time may be granted to his client to appoint its arbitrator, whereafter the two arbitrators could appoint the third arbitrator as umpire.

17. In view thereof, the present petition is disposed of, granting liberty to the petitioner to appoint its arbitrator within a period of one month from today, and communicate the name of the arbitrator to the respondents. The two arbitrators would, thereafter, proceed to appoint a third arbitrator, as umpire, within a period of one month from the said date.

18. The Arbitral Tribunal thus constituted would proceed to enter on the reference and decide the disputes between the parties, in accordance with the provisions of the 1996 Arbitration Act which would entirely govern the arbitration proceedings and all aspects thereof including the fees to be paid to the arbitrator.

19. With the aforesaid directions, the petition stands disposed of.

C. HARI SHANKAR, J.

NOVEMBER 3, 2020/kr

