

**A.P. 318 of 2020
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
COMMERCIAL DIVISION**

Laxmi Pat Surana

v.

Future Enterprises Limited & Anr.

For the petitioner : Mr. Sakya Sen, Adv.
Mr. Sunil Kr. Gupta, Adv.
Ms. Arindam Paul, Adv.

For the Respondent Nos. : Mr. Mr. S. K. Kapur, Sr. Adv.
1 Mr. Ranjan Bachawat, Sr. Adv.
Mr. Arindam Guha, Adv.
Mr. Debnath Ghosh, Adv.
Mr. S. Sengupta, Adv.

For the Respondent Nos. : Mr. S. N. Mookherjee, Sr. Adv.
2 Mr. Rishad Medora, Sr. Adv.
Ms. Pooja Chakraborti, Adv.
Ms. Radhika Mishra, Adv.
Mr. D. Saha, Adv.

Hearing concluded on : March 22, 2021

Judgment on : April 07, 2021

DEBANGSU BASAK, J. :-

1. The petitioner has applied under section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator.

2. Learned Advocate appearing for the petitioner has submitted that, the petitioner is a licensee under South-Eastern Railways, in respect of an immovable property by virtue of an agreement dated April 16, 2004. The petitioner has constructed a shopping mall on a portion of such land and sub-licensed a portion of the constructed area to Pantaloon Retail (India) Limited. The petitioner and Pantaloon Retail India Limited had entered into the sub-licensee agreement dated January 30, 2007. Pantaloon Retail (India) Limited had then been put into possession on October 1, 2007. Pursuant to an order of the Hon'ble High Court of Bombay dated August 24, 2010, Pantaloon Retail (India) Limited had been demerged. By the letter dated September 15, 2010, Pantaloon Retail (India) Limited had informed the petitioner that by virtue of the order of the demerger, Future Merchandise Limited should be subrogated in its place. The various legal entities and undertakings of Pantaloon Retail (India) Limited underwent demergers and ultimately, the respondent Nos. 1 and 2 had emerged as the successor in interest of Pantaloon Retail (India) Limited.

3. Learned Advocate appearing for the petitioner has submitted that, Pantaloon Retail (India) Limited had defaulted in payment of

the license fees. Disputes and differences arose between the parties to the agreement for sub-licensee. An application under Section 9 of the Arbitration and Conciliation Act, 1996 had been filed being AP No. 1095 of 2011. In such application, an order dated March 21, 2012 had been passed requiring the respondents to deposit a sum of Rs. 6.50 crores with its advocate on record. The petitioner had invoked Section 21 of the Act of 1996 and referred the disputes to arbitration. By an order dated March 30, 2012, the disputes had been referred to arbitration. The learned Arbitrator had entered into reference. The petitioner had filed an application for interim award and an award for delivery of khas, vacant and peaceful possession. The learned arbitrator had passed an interim award on April 8, 2013 directing khas, peaceful and vacant possession of the premises to the petitioner. The interim award has not been challenged by the respondents. Despite such interim award the respondents has not made over possession of the premises to the petitioner. The respondents are in occupation and deducting tax as source in respect of the license fees payable under the Sub-licensee Agreement.

4. Learned Advocate appearing for the petitioner has submitted that, the Arbitral Tribunal had passed an award on May 19, 2016. The parties had challenged such award. In the award, the Learned Arbitrator had held that the respondents are obliged to pay rent for the lock in period of sixty months being August 2008 to July 2013.

5. Learned Advocate appearing for the petitioner has submitted that the respondents had unauthorisedly sub-licenced the demised premises and are not in actual physical occupation or possession of the demised premises. The respondents have been commercially exploiting the same. The respondents have not been paying the monthly occupation charges or license fees from 6 June, 2010.

6. Learned Advocate appearing for the petitioner has submitted that, by a letter dated September 24, 2016 the petitioner had claimed mense profits from the respondents on and from November 1, 2011. The petitioner had issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 on October 6, 2016. The respondents had replied thereto by letters dated October 28, 2016 and October 31, 2016 denying the liability to pay mense profits and have questioned the right to invoke the arbitration clause.

7. Learned Advocate appearing for the petitioner has submitted that, the petitioner had filed an application under Section 9 of the Act of 1996 being AP No. 380 of 2017 which is pending. The petitioner had filed an application under Section 11 of the Act of 1996 being AP No. 993 of 2017 which was dismissed as withdrawn with a liberty to file afresh on January 16, 2019.

8. Learned Advocate appearing for the petitioner has relied upon **2008 Volume 7 Supreme Court Cases 169 (Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department & Ors.)** and **2020 Volume 2 Supreme Court Cases 455 (Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.)**, in support of his contentions that, the petitioner is entitled to the benefits of Section 14 of the Limitation Act, 1963.

9. Learned Senior Advocate appearing for the respondent No. 2 has submitted that, the claim made by the petitioner is hopelessly barred by limitation. He has submitted that, the notice under Section 21 of the Act of 1996 had been issued on October 6, 2016. The thirty day period had expired on November 6, 2016. The petitioner had applied under Section 11 of the Act of 1996 on November 11, 2017. The petitioner had withdrawn the application

under Section 11 of the Act of 1996 on January 16, 2019 with the liberty to file afresh on the self-same cause of action. According to him, the petitioner had time till November 6, 2019 to file the application under Section 11 of the Act of 1996. However, the petitioner had filed the same on October 15, 2020. Therefore, a period in excess of three years had elapsed from the date of the notice under Section 21 of the Act of 1996 being October 6, 2016 till date the date of filing of the application under Section 11 of the Act of 1996, afresh, on October 15, 2020. The claim for arbitration is barred by law. He has relied upon **2021 SCC Online SC 207 (Bharat Sanchar Nigam Ltd. & Anr. V. Nortel Networks India Pvt. Ltd.)**. In support of his contention.

10. Learned Senior Advocate appearing for the respondent No. 2 has submitted that, the leave that was obtained by the petitioner on January 16, 2019 is governed by the provisions of Order XXIII Rule 2 of the Code of Civil Procedure, 1908 and not Section 14 of the Limitation Act, 1963.

11. Learned Senior Advocate appearing for the respondent No. 2 has referred to the award and claimed that the possession of the demised premises was handed over on April 14, 2012. According to

him all occupants of the demised premises are paying occupation charges to the petitioner who is accepting the same without demur. He has referred to the award of the arbitrator and submitted that, the new arrangement between the petitioner and the occupants have been noted by the arbitrator. Therefore, according to him the claim of the petitioner does not survive.

12. Learned Senior Advocate appearing for the respondent No. 1 has adopted the contentions of the respondent No. 2. He has submitted that, the petition under Section 11 of the Act of 1996 does not contain any pleading under Section 14 of the Limitation Act, 1963. It is only in the supplementary affidavit that, grounds under Section 14 of the Act of 1963 have been sought to be made out. He has relied upon **2003 Volume 4 Company Law Journal 333 (Cal) (Bharat Bhari Udyog Nigam Ltd. & Ors. v. Jessop and Co. Ltd. Staff Association & Ors.)** and submitted that, the supplementary affidavit cannot be treated as a substitute of an averment made in the petition.

13. The petitioner and Pantaloon Retail (India) Limited had entered into a sub-license agreement on January 30, 2007. The petitioner had put Pantaloon Retail (India) Limited in physical

possession on October 1, 2007. The respondent Nos. 1 and 2 are the demerged entities and have succeeded Pantaloon Retail (India) Limited in respect of the demised premises. Initially, disputes and differences had arisen between the parties which had been referred to arbitration. In such arbitration proceedings, an interim award dated April 8, 2013 had been passed, awarding eviction of the respondents from the demised premises and delivery of vacant and physical possession to the petitioner. The parties have rival contentions with regard to the making over of possession by the respondents to the petitioner. According to the respondents, the petitioner had entered into arrangement with the persons in occupation and therefore, it has to be construed that, the respondents had made over possession of the demised premises to the petitioner. The petitioner has contended that the respondents are yet to make over possession of the demised premises.

14. On May 19, 2016 the sole arbitrator had passed an award. Both the parties have assailed such award. The award has awarded many claims in favour of the petitioner. According to the petitioner, the award dated May 19, 2016 has allowed the petitioner to make claims on the basis of mense profit. The respondents have

contended that the claim for mense profit are barred by the law of limitation, since the claim is from November 1, 2011.

15. ***Consolidated Engineering Enterprises & Ors. (supra)*** has held that, Sections 12 and 14 of the Limitation Act, 1963 are applicable to proceedings under the Arbitration and Conciliation Act, 1996. It has held that the policy of Section 14 of the Act of 1963 is to offer protection to a litigant against bar of limitation when he has instituted a proceeding by reason some technical defect which has not been decided on merit and has been dismissed.

16. ***Uttarakhand Purv Sainik Kalyan Nigam Limited (supra)*** has held that, the legislative intent underlining the Act of 1996 is party autonomy and minimal judicial intervention in the arbitral process. It has observed that, the provisions of Section 16 of the Act of 1996 exhibits the legislative policy to restrict judicial intervention at the pre-reference stage and that the issue of limitation should be decided by the arbitrator. In the facts of that case, it had appointed a arbitrator keeping the point of limitation open to be decided by the arbitrator.

17. In ***Bharat Sanchar Nigam Ltd. & Anr. (supra)*** the Supreme Court has held that the period for limitation of filing an application under Section 11 of the Act of 1996 would be governed by Article 137 of the First Schedule of the Limitation Act, 1993. It has also observed that, in rare and exceptional cases, where the claims are ex facie time barred and it is manifest that there is no subsisting dispute that the Court may refuse to make the reference.

18. In the facts of the present case, the parties have raised an issue of limitation. The predecessor in interest of the respondents had entered into the sub-licence agreement with the petitioner on January 30, 2007. There has been a previous arbitration proceeding between the parties and an interim award passed therein on April 8, 2013 awarding eviction of the respondents from the demised premises. The parties have issues with regard to implementation of the award for eviction. According to the petitioner, the respondents have not made over possession of the demised premises to the petitioner while the respondents contend otherwise. The petitioner has claimed for mense prifit as against the respondent from November 1, 2011

19. The entirety claim for mense profit at this stage cannot be said with certainty to be barred by the laws of limitation. The petitioner may not be entitled to the entirety of the claim on account of mense profit, particularly from the date of claim but at the same time, it cannot be said with finality that the petitioner is not entitled to claim any mense profit at all. Whether or not the petitioner is entitled to benefit of Section 14 of the Act of 1963 and whether circumstances exist for the petitioner to have such benefit, are issues which ought to be decided by the arbitrator. The issue of limitation as has been raised by the parties cannot be decided finally. As has been held in ***Bharat Sanchar Nigam Ltd. & Anr. (supra)***, if there is doubt the rule is to refer the disputes to arbitration. In the facts of the present case, it would be appropriate to refer the disputes between the parties to arbitration.

20. Since the issue of limitation cannot be decided finally the ratio of ***Jessop and Company Limited (supra)*** need not be applied in the facts of the present case.

21. In such circumstances, Mr. Justice Pratap Kumar Ray (retired) is appointed as the arbitrator in terms of the arbitration agreement

between the parties. The issue of limitation as has been raised by the parties are kept open to be decided by the learned arbitrator.

22. The learned arbitrator is at liberty to fix his remuneration which will be shared equally by the parties with the petitioner bearing one part and the other part being paid by the respondents. The costs and expenses of the arbitration shall be borne by the parties in the same proportions.

23. The parties are at liberty to communicate this order to the learned arbitrator.

24. AP No. 318 of 2020 is disposed of accordingly.

[DEBANGSU BASAK, J.]