

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
(Original Side)**

Reserved on: 29.09.2021

Pronounced on: 01.10.2021

A.P. No. 512 of 2019
(Through Video Conferencing)

SWAROOP SEN

... .Applicant(s)

Through : Mr. Sanjib Dawn, Advocate

v/s

AJAY KUMAR BORAL AND ANOTHER

....Respondent(s)

Through : Mr. Swatarup Banerjee (VC), Mr.
Manik Lal De, Mr. Ratul Biswas,
Advocates

**Coram : HON'BLE MR. JUSTICE RAJESH BINDAL,
CHIEF JUSTICE (ACTING)**

ORDER

1. The present application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') for appointment of an arbitrator.

2. The learned Counsel for the applicant submitted that there is an arbitration Clause in the lease and license agreement dated August 10, 1987 signed between the parties. In terms thereof both the parties had appointed one arbitrator each. However, they failed to appointed an umpire. As a result the arbitral proceeding could not commence. The applicant has filed the present petition seeking direction for appointment of arbitrator.

3. The judgment of Hon'ble the Supreme Court in **Vidya Drolia and Others vs. Durga Trading Corporation, (2021) 2 SCC 1** was referred to in support of the argument that landlord/tenants disputes are arbitrable. The case in hand does not fall in the exception clause. Section 105 of the Transfer of Property Act defines 'lease'. Whereas in terms of Section 3(c) of the West Bengal Premises Tenancy Act, 1997 (for short, 'the 1997 Act') the dispute in the present case is not governed by the aforesaid Act. Hence, the present application may be accepted and an arbitrator be appointed for resolution of the dispute.

4. On the other hand, learned Counsel for the respondent submitted that the argument raised by the learned Counsel for the applicant that the 1997 Act is not applicable in the case in hand is misconceived as the agreement in the case in hand was signed before coming into force of the aforesaid Act. He further submitted that it is not a lease agreement rather it is merely a Leave and Licence agreement.

5. In response, the learned Counsel for the applicant submitted that in terms of findings recorded in para 154.4 in **Vidya Drolia and Others's** case (supra) the issue regarding arbitrability of a dispute is also to be decided by an arbitrator.

6. Heard the learned Counsel for the parties and perused the paperbook.

7. The clause of the agreement on which reliance was placed by the learned Counsel for the applicant is extracted below:

“14. In the event of any dispute between the parties to these presents in connection with the observance of the terms and conditions of this Agreement the matter shall be referred to

the Arbitration of two Arbitrators one to be appointed by each of the parties to these presents with the power to such Arbitrators to appoint an Umpire and the decision of the majority of the Arbitrators shall be binding on both the parties to these presents and all the provisions of Indian Arbitration Act shall apply.”

8. The aforesaid agreement which is termed to be a Leave and Licence agreement was signed on August 10, 1987. The aforesaid facts are not in dispute. Hon’ble the Supreme Court in **Vidya Drolia and Others’s** case (supra), while dealing with the issue regarding arbitrability of a landlord/tenant dispute, while overruling the earlier judgment in **Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706** held that landlord/tenant’s dispute which are covered and governed by the rent control legislation would not be arbitrable. Para 80 thereof is extracted below:

“80. In view of the aforesaid, we overrule the ratio laid down in *Himangni Enterprises* and hold that landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.”

9. Argument raised by the learned Counsel for the applicant that the provision of the 1997 Act are not applicable is with reference to the Leave and Licence agreement in question is merely to be noticed and

rejected. Section 3(c) thereof on which reliance was placed upon is reproduced, hereunder:

“3. Exemption.—Nothing contained in this Act shall apply to—

(a) x x x x

(b) x x x x

(c) any tenancy where the lease with due consent of the tenant has been registered under the Registration Act, 1908 (16 of 1908), after the commencement of this Act, and the fact of such consent has been recorded in the instrument so registered;”

10. A perusal of the aforesaid clause shows that for exemption from application the provisions of the 1997 Act, the lease deed has to be registered after the commencement of the 1997 Act, which came into force w.e.f. July 10, 2001. In the case in hand, neither the agreement in question is lease agreement nor the same was signed after the coming into force of the 1997 Act as the agreement is dated August 10, 1987.

11. Para 154.4 in the **Vidya Drolia and Others’** case (supra) also does not come to the rescue of the applicant for the reason that long drawn complicated arguments are not required to be addressed and considered in dealing with the arguments raised regarding non-arbitrability of the dispute in question. Once it is found that the dispute is non-arbitrable, it will be waste of time to refer the same for arbitration. Para 154.4 is extracted below:

“154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and

nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

12. For the reasons mentioned above, I do not find any merit in the present application. The same is accordingly dismissed.

RAJESH BINDAL
Chief Justice (Acting)

KOLKATA
01.10.2021

PA(SS)