

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

% **Date of order : 20th March, 2023**

+ **ARB.P. 1220/2022**

ALSORG INTERIORS INDIA PVT. LTD. Petitioner

Through: **Mr. Govind Rishi and Mr. Rohit
Taneja, Advocates**

versus

KUNAL SURI & ANR. Respondents

Through: **Mr. Sandeep Phogat, Advocate**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the petitioner seeking the following reliefs:

*“(i) Appoint an impartial arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 to decide the disputes between the parties; and
(ii) pass any other further orders/directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”*

FACTUAL MATRIX

2. The facts relevant for the adjudication of the instant petition is that *vide* Lease Agreement dated 14th September 2018, the petitioner company

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entered into a lease for the suit property bearing no. GS-I 05, First Floor, DLF Grand Mall, MG Road, Gurgaon, admeasuring 1151 square meter (hereinafter referred as 'Suit Property') with the erstwhile owner namely, Mrs. Geeta Devi. The period of the lease under the terms and conditions of the Agreement was 5 years commencing from 1st July 2018 with 24 months lock-in period on a monthly rent of INR 75,000 excluding electricity, water, and maintenance charges to be paid to the maintenance agency of the DLF Grand Mall.

3. The terms and conditions provided that the petitioner had to pay rent every month and the lessor had the right to terminate the lease if the lessee defaulted in making the payment of rent or maintenance charges for a continuous period of two months after serving 15 days' notice to the lessee in writing.

4. Between March 2020 to June 2020, the government imposed a country-wide lockdown due to COVID-19 due to which the petitioner was also affected, and, thus, *vide* email dated 6th August 2020 requested a complete waiver of rent for the months of April-May-June 2020, for the months July-August-September 2020 a 60% waiver, and for the month October-November-December 2020 a 50% waiver in the monthly rent, which was agreed by the owner *vide* email dated 8th August 2020.

5. Accordingly, a revised proposal for the monthly rent for the month of January 2021 was then shared with the previous owner and the same was agreed upon in a physical meeting at the revised rate of INR 55 per sq. ft. and the petitioner started paying rent in terms of INR 55 per sq. ft.

till June 2022.

6. Respondents no. 1 and 2 *vide* Sale Deed dated 8th June 2022 purchased the suit property from Mrs. Geeta Devi. Pursuant to the sale of the property, respondents no. 1 and 2 adorned the attornment of the suit property *qua* the rights and responsibility arising out of the Lease Deed dated 14th September 2018.

7. The respondent demanded rent from the petitioner as per the terms and conditions of the Lease Deed dated 14th September 2018 for which communications *vide* emails took place between the parties.

8. On 16th September 2022, after the alleged threats and influence from the respondents, the petitioner *vide* its notice invoked Arbitration Clause 16.7 of the Lease Deed dated 14th September 2018.

9. A petition under Section 9 of the Arbitration and Conciliation Act, 1996 was also filed before the Patiala House Courts, New Delhi against the respondents and maintenance agency restraining them from disconnecting, discontinuing, and disallowing the amenities of the suit property. In the said matter a stay *vide* Order dated 20th September 2022 was granted to the petitioner, restraining the respondents from doing the same till the next date of hearing i.e., 31st October 2022.

10. The petitioner has now filed the present petition for the appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 to adjudicate upon the disputes between the parties pursuant to Clause 16.7 of the Lease Deed dated 14th September

2018.

SUBMISSIONS

(On behalf of the petitioner)

11. Learned counsel for the petitioner submitted that a proposal for payment of rent for the months of April-May-June 2020, July-August-September 2020 at 60% waiver, and October-November-December 2020 at 50% waiver was mutually decided between the petitioner and the erstwhile owner Mrs. Geeta Devi.

12. Learned counsel for the petitioner submitted that the petitioner approached the then owner for the execution of an addendum to the Lease Deed dated 14th September 2018 to record the revised terms of the rent and also the change of ownership as Mrs. Geeta Devi had expired on 28th June 2020 and her son had stepped into her shoes *vide* letter dated 9th August 2020 along with NOC of even date from the other legal heirs in his favour but the latter kept on delaying matter on pretext partition of all the properties.

13. Learned counsel for the petitioner submitted that on 14th September 2022, the facility manager representative approached the petitioner and threatened to disconnect all the facilities on 16th September 2022, which would make the suit property inhabitable to live, if NOC received from the respondents is not submitted to their office. It is also submitted that the petitioner had on each and every occasion expressed its desire to deposit the rent as per the agreed terms with the erstwhile owner as the respondents had attorned the lease deed and had stepped into the shoes of

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the erstwhile owner. But despite the efforts of petitioner in sharing all the documentary proof of the revised rent and willingness to pay the same the respondents are determined to extort an exorbitant rent from the Petitioner.

14. Learned counsel for the petitioner submitted that after perusing Clause 16.7 of the Lease Deed dated 14th September 2018, it is clear that the dispute has to be brought before the Arbitral Tribunal and that the respondents are resorting to arm-twisting methods to extort unreasonable claim of rent from the petitioner. It is also submitted that the terms and conditions of the Lease Deed clearly state that in the event of any disputes arising between the parties, the same would be settled through Arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.

15. Learned counsel for the petitioner submitted that despite serving a Legal Notice dated 16th September 2022, the respondent has not replied to the said Notice and that the respondent is acting contrary to the revised terms and conditions of the Lease Deed.

16. Therefore, it is prayed that an arbitrator may be appointed to adjudicate and resolve the disputes between the parties.

(On behalf of the respondent)

17. *Per contra*, learned counsel for the respondents submitted that the dispute between the parties falls under 'excepted matters' excluded from the purview of the Arbitration and Conciliation Act, 1996 thereby

vitiating any Arbitral Proceedings in the instant matter, as the dispute between the parties is governed and covered by the Haryana Urban (Control of Rent and Eviction) Act, 1973 and can only be adjudicated by the 'Controller' appointed by the State Government under 1973 Act.

18. Learned counsel for the respondents submitted that the petitioner is a defaulter and has not paid the rent since 1st July 2022. It is also submitted that the petitioner has failed to show any revised written arrangement with the previous owner consenting for the lessor amount payable every month as in absence of same, the terms of the lease are binding and the petitioner company is under obligation to pay the rent as per the Lease Deed.

19. It is alleged by the petitioner that Mr. Prem Pal is duly authorized by the Board of Directors of the petitioner company, however learned counsel for the respondents submitted that Mr. Prem Pal is neither authorized nor competent to sign the present petition.

20. Learned counsel for the respondents submitted that the respondents served a legal notice dated 21st September 2022 to the petitioner seeking rectification of default and gave 15 days' time to rectify the default, failing which, the Lease Deed shall be terminated. It is submitted that the defects were not cured nor the rent was paid after which the respondent vide letter dated 13th October 2022 terminated the Lease Deed and asked the petitioner to vacate the premises which the petitioner hasn't done so yet. Furthermore, the respondent-initiated Eviction Proceedings under Special Statute before the Court of Ld. Sh. Anil Kumar Yadav, Rent

Controller, Gurugram wherein the notice was served to the petitioner.

21. Learned counsel for the respondents submitted that the petitioner did not place on record a single proof regarding any arrangement with the previous owner or her son. It is submitted that the arrangement between the petitioner and previous owner wasn't denied as the same was in written acceptance by the previous owner and that Mrs. Geeta Devi had expired and her son stepped in by virtue of a letter dated 9th August 2020. Furthermore, it has been submitted that no proof of correspondence and letter is placed on record by the petitioner.

22. Learned counsel for the respondents submitted that the allegations of the petitioner that the respondents had malicious plans against the petitioner to illegally terminate the Lease Deed dated 14th September 2018 since they stepped in as the owner of the leased premises and wanted to disrupt the running business of the petitioner. It is submitted that respondents have been asking the petitioner to pay rent as per the original terms of clauses of the Lease Deed.

23. Learned counsel for the respondents submitted that they have denied that the petitioner simply accepted the change of ownership in favour of the respondents and desired to pay the rent in terms of the Lease Deed and the latter arrangement dated 1st January 2018 with the erstwhile owner as alleged. It is also submitted that there was no arrangement with the erstwhile owner on 1st January 2018 as no Lease Deed was executed on that day and the previous owner's son refused to accept the proposed payment by the petitioner and the petitioner has lied to this Court and

played fraud upon it to believe upon such arrangement.

24. Learned counsel for the respondents submitted that terms of the lease can be revised only after mutual consent in writing. It is also submitted that the respondents in their repeated correspondences asked the petitioner to produce the acceptance or consent form from the previous owner for the revised Agreement which was not produced by the petitioner.

25. Learned counsel for the respondents submitted that the respondent requested the facility manager to stop/disconnect the infrastructure facilities and amenities of the petitioner on account of non-payment of monthly rent and maintenance charges as per the Lease Deed on time. It is submitted that such actions have been done out of the powers assigned under the Lease Deed and the same were justified.

26. Learned counsel for the respondents submitted that ex-parte Stay Order dated 20th September 2022 has been falsely procured by the petitioner by the way of concealment of facts.

27. Learned counsel for the respondents submitted that it is denied that the respondents did not reply to the Notice of the petitioner. It is submitted that the respondents have sent their detailed reply dated 4th November 2022 to the said Notice dated 16th September 2022. Furthermore, it is submitted that revised terms and conditions of the Lease Deed, if any, are not binding upon the respondents at all as mentioned above.

28. In view of the aforementioned submissions, the learned counsel for the respondents submits that this Court does not have the jurisdiction to decide the present dispute and the petition may thus be dismissed.

ANALYSIS

29. Heard learned counsel for the parties and perused the record. I have also given thoughtful considerations to the submissions advanced by the parties.

30. The petitioner requests for the appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, by invoking the Clause 16.7 of the lease deed dated 14th September 2018. The clause is reproduced below:

“16.7 Any dispute or difference arising between the parties shall be resolved amicably at the first instance. Unresolved disputes, controversies, contests, disputes, if any shall be submitted to arbitration to a sole arbitrator appointed by the Lessor. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 along with the Rules there under and any amendments thereto. The arbitration shall be conducted in English. The decision/award of the arbitrator shall be final/conclusive and binding on the Parties. The seat of the arbitration shall be at New Delhi.”

31. The arbitration clause makes it candid that the parties had mutually signed an agreement that lawfully subjected any dispute arising from the said agreement to be sent to arbitration to be resolved amicably.

32. In order to clearly understand the validity of such a clause in the aforementioned matter, it is important to examine the law on excepted matters and the principles surrounding it.

33. The law on excepted matters in arbitration has developed exponentially in the last decade as more and more contracts are now incorporating two different categories of excepted matters in the Arbitration clause¹.

34. The first category of excepted Matters clauses is those wherein as per the clause, the concerned authority's decision on the issue/dispute raised by either of the parties is final and binding upon them. The second category is the more common containing a proviso that the claims are not capable of being raised or adjudged by employing the language "shall not be payable", "no claim whatsoever will be entertained by the Authority", or "no claim will/shall be entertained".

35. The Hon'ble Supreme Court has held in ***BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 337*** as under;

"11. Clause 20.1 which is the arbitration clause and provides for excepted matters i.e. those matters the decision to which is specifically provided in the agreement itself reads as under:

"20.1. In the event of any question, dispute or difference arising under this agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CGM, Kerala Telecom Circle, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CGM, Kerala Telecom Circle, BSNL or by whatever designation such an officer may be

called (hereinafter referred to as 'the said officer'), and if the CGM, Kerala Telecom Circle or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CGM, Kerala Telecom Circle or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996.

There will be no objection to any such appointment on the ground that the arbitrator is a government servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a government servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CGM, Kerala Telecom Circle, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with the terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors....”

12. Clause 15.2 of Section III of the tender document which deals with the “delays in the supplier's performance” reads as under:

“Delay by the supplier in the performance of its delivery obligations shall render the supplier liable to any or all of the following sanctions, forfeiture of its performance security, imposition of liquidated damages, and/or termination of the contract for default.”

13. Clause 62 of Section IV of the tender document which

deals with liquidated damages and incentive reads as under:

“The bidder shall be charged liquidated damages at the rates as defined in the general conditions of contract as contained in Section III for any delay in the turnkey job entrusted to the bidder. However, he shall be provided an incentive @ 0.5% of the cost of the network of each service area (Telecom Circle), for each week of early commissioning of the entire network in that service area, subject to a maximum of 3% of the value of the contract of the Circle.”

14. Since this appeal arises out of an order which appointed an arbitrator to decide the dispute referred to by the respondent, we, in this appeal, need to decide that whether in view of the arbitration clause in the tender document provided under Clause 20 of the said document, the breach specified in Clause 16.2 is an “excepted matter”

15. Mr. Gopal Subramaniam, Additional Solicitor General of India appearing on behalf of the appellants contended that in view of the decision of this Court in Vishwanath Sood v. Union of India [(1989) 1 SCC 657] a conjoint reading of Clause 16.2 and Clause 20.1 would clearly show that Clause 16.2 is covered under the excepted matters as provided in Clause 20.1 of the tender document.

16. Mr. Subramaniam further contended that the High Court had erred in holding that the quantification of the liquidated damages was subsequent to the decision of liability of liquidated damages to be payable to the appellants. Therefore, he contended that the respondent had specifically subscribed to each and every clause of the agreement without any objection at the tender stage and accordingly, it was not open to them to claim immunity from the contractual obligations. Thus, the matter in respect of which the respondent sought reference to arbitration was “excepted matter” in terms of Clause 16.2 of the tender agreement.”

36. The respondents in the instant petition claims that the present dispute between the parties fall under “excepted matters” which are excluded from the purview of the Arbitration and Conciliation Act, 1996 for adjudication as the present proceedings are governed by the Rent Control Legislation of Haryana, i.e. The Haryana Urban (Control of Rent and Eviction) Act, 1973.

37. Section 2(b) of the Haryana Urban (Control of Rent and Eviction) Act, 1973, is reproduced hereinbelow;

“2. In this Act, unless there is anything repugnant in the subject or context,-

(b) "Controller" means any person who is appointed by the State Government to perform the functions of a controller under this Act;”

38. As per the aforementioned section, the subject matter of the instant dispute including the suit property, non-payment of rent, termination of the lease by respondents no. 1 and 2 due to non-payment of rent, and subsequent filing of eviction petition by respondents no. 1 and 2 against the petitioner under The Haryana Urban (Control of Rent and Eviction) Act, 1973 falls under excepted matters and can be adjudicated by "Controller" appointed by the State Government to perform the functions of a Controller under this Act as defined under Section 2(b) of the Act 1973 which are neither covered by the arbitration agreement nor capable of adjudication and settlement by arbitration.

39. Respondents no. 1 and 2 have already filed an eviction petition under section 13 of the Haryana Urban (Control of Rent and Eviction)

Act, 1973 against the Petitioner bearing **RP No. 84 of 2022** titled as ***Kunal Suri & Anr vs Alsorg Interiors India Pvt. Ltd.*** which is pending adjudication for 13th April 2023.

40. In ***Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1***, the Hon'ble Supreme Court made the following observations;

“4.HimangniEnterprises [HimangniEnterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706 : (2018) 1 SCC (Civ) 82] upheld the decision [Himangni Enterprises v. Kamaljeet Singh Ahluwalia, 2016 SCC OnLine Del 6577] of the High Court and the District Court rejecting the application filed by the defendant tenant under Section 8 of the Arbitration Act in a civil suit seeking its eviction from a shop in a commercial complex in New Delhi. The suit was also for the recovery of arrears of rent and permanent injunction. The tenancy in question was not protected under the rent control legislation and the rights and obligations were governed by the Transfer of Property Act. Two Judges of this Court held that the issue of non-arbitrability is no longer res integra as it stood answered by decisions in Natraj Studios (P) Ltd. v. Navrang Studios [Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523] and 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]

5. In Natraj Studios (P) Ltd. [Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523] , wherein an application under Section 8 of the Arbitration Act, 1940 was dismissed as the tenancy was protected under the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947, it was observed that on broader consideration of public policy, the arbitrator lacked jurisdiction to decide the question whether the licensee-landlord was entitled to seek possession. The dispute could be exclusively decided by the

Court of Small Causes, which alone had jurisdiction. In Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , it was held that in eviction or tenancy matters governed by special statutes and where the tenant enjoys statutory protection, only the specified court has been conferred jurisdiction.

6.Himangni Enterprises [Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706 : (2018) 1 SCC (Civ) 82] relying on the said ratios holds that though the Delhi Rent Act is not applicable, it does not follow that the Arbitration Act would be applicable so as to confer jurisdiction on the arbitrator. Even in cases of tenancies governed by the Transfer of Property Act, the dispute would be triable by the civil court and not by the arbitrator. The exemption from the applicability of the Rent Act could be withdrawn and thereupon the rights would be governed by the rent control legislation.

7. In Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2019) 20 SCC 406] , another Division Bench referring to Section 11(6-A) has observed that the referral stage requirement is to only examine “existence of an arbitration agreement” and not validity of the arbitration agreement. The 246th Report of the Law Commission of India had suggested twin examination whether the agreement “exists” or is “null and void”, albeit Section 11(6-A), as enacted, requires “existence of an arbitration agreement”, and the prerequisite that the arbitration agreement should not be “null and void” was deliberately omitted. The wording of Section 11(6-A) was contrasted with Section 16(1) to draw distinction between “validity of an arbitration agreement” and “existence of an arbitration agreement”.

8. Reference was made to observations of Kurian Joseph, J. in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , to the effect that the scope of

Section 11(6-A) is limited, only to see whether an arbitration agreement exists — nothing more, nothing less. The legislative policy and purpose are to essentially minimise judicial intervention at the appointment stage.

9. Referring to Sections 111, 114 and 114-A of the Transfer of Property Act, it is observed that there is nothing in this Act and law to show that a dispute relating to the determination of lease, arrears of rent, etc. cannot be decided by an arbitrator. The grounds predicated on public policy could be raised before the arbitrator as they could be raised before the court. The arbitrator could well abide by the provisions of Sections 114 and 114-A, and apply the public policy considerations for the protection of tenants as a class.

10. Referring to Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , it was observed that the right in rem is a right exercisable against the world at large and is not amenable to arbitration, whereas in case of rights in personam an interest is protected against a specific individual, and is referable to arbitration. Further, subordinate rights in personam arising from rights in rem have always been considered to be arbitrable. Decision in Natraj Studios (P) Ltd. [Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523] was distinguishable, as the rent control legislation being applicable, the tenancy disputes were to be exclusively decided by the Small Cause Court in Bombay. The legislation had provided that no other court would have jurisdiction to entertain any suit, proceedings or deal with such claim or questions. The exception in the form of non-arbitrable landlord-tenant disputes, as per Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , was confined only to those cases/matters governed by : (i) special statutes, (ii) where the tenant enjoys statutory protection and (iii) where only specific courts are conferred

jurisdiction to decide disputes. The Transfer of Property Act does not negate arbitrability.

11. In Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan [Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651] , it was held that there is no prohibition in the Specific Relief Act, 1963 for referring disputes relating to specific performance of contracts to arbitration. Equally, the discretion to refuse or grant specific performance would not militate against arbitrability. Reference was made to Vimal Kishor Shah v. Jayesh Dinesh Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] , which had referred to Dhulabhai v. State of M.P. [Dhulabhai v. State of M.P., (1968) 3 SCR 662 : AIR 1969 SC 78] , in the context of whether the disputes under the Trusts Act, 1882 were arbitrable. The disputes under the Trusts Act were held to be non-arbitrable by necessary implication, as the Trusts Act had conferred specific powers on the Principal Judge of the Civil Court, which powers an arbitrator could not exercise.

12. The judgment in Vimal Kishor Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] was followed by another Division Bench in Emaar MGF Land Ltd. v. Aftab Singh [Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751 : (2018) 5 SCC (Civ) 652] , a case relating to the Consumer Protection Act, 1986. Reasoning that the exemption from rent control legislation can be withdrawn and thereupon Arbitration Act would not apply, it was observed, was not a valid justification and ground to hold that the subject-matter was not arbitrable.

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Non-arbitrability

15. Non-arbitrability is basic for arbitration as it relates to the very jurisdiction of the Arbitral Tribunal. An Arbitral Tribunal may lack jurisdiction for several reasons. Non-arbitrability has multiple

meanings. Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] refers to three facets of non-arbitrability, namely : (SCC p. 546, para 34)

“(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That 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.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of an arbitration agreement, will not be “arbitrable” if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.”

16. John J. Barcelo III, in his paper titled “Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective” [Vanderbilt Journal of Transnational Law, Vol. 36, No. 4, October 2003, pp. 1115-1136.] , in the context of transnational commercial transactions, has divided facets relating to non-arbitrability into seven categories:

“Stage 1 [Stage 1 is the referral stage.] is crucial concerning whether arbitration is allowed to go forward efficaciously or is obstructed by court intervention. At Stage

1, a party opposing arbitration may raise any of a series of legal issues requiring court, rather than arbitrator, decision. These may include any or all of the following claims : (1) the container contract is invalid (for a reason that would not directly invalidate the arbitration clause); (2) no arbitration agreement came into existence between the parties; (3) an existing arbitration agreement is either formally invalid (for example, not in writing) or materially invalid (for example, violative of mandatory law); (4) a disputed issue is not within the scope of the arbitration agreement; (5) mandatory law prohibits a disputed issue, though within the scope of the parties' arbitration agreement, to be arbitrated (a special type of material invalidity respecting a specific issue fraught with public policy concerns, such as (formerly) antitrust or securities fraud); (6) some precondition for permissible arbitration has not been met (for example, a time-limit on initiating arbitration); (7) the party seeking arbitration has waived its right to arbitrate or is estopped from claiming that right.”

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18. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an Arbitral Tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties.

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20. Section 7 of the Arbitration Act reads:

“7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or

which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

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79. Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem. Such actions normally [Ed. : Certainly in those cases where the dispute only affects the parties to the arbitration clause, third-party rights would not be affected, as in the facts of the present case. It is in such cases that “such actions under the TPA normally would not affect third-party rights or have erga omnes effect”. However, one may consider cases for instance, where a sub-tenancy exists or where the head lessee has taken a mortgage on the lease, and the landlord invokes the arbitration clause against the head lessee seeking to terminate the head lease, can the sub-tenant or mortgagee of the head lessee seek to be impleaded in the arbitration proceedings? For termination of the head

lease would also extinguish the rights of the sub-tenant and the mortgagee of the head lessee. The situations posited are relatively simple ones. Often there are numerous prior and subsequent transferees who might be affected by the result of a dispute between a landlord and tenant, or even between other transferees. In such complex situations involving prior and subsequent transfers, it would appear that the matter would be non-arbitrable as it would appear to satisfy the first two tests of non-arbitrability laid down herein—see Shortnotes B and C. In a case where the mortgagee is covered by the RDB Act and the SARFAESI Act, it might be rendered non-arbitrable by virtue of the fourth test as well—see Shortnotes E and G.] would not affect third-party rights or have erga omnes effect or require centralised adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the Transfer of Property Act do not expressly or by necessary implication bar arbitration. The Transfer of Property Act, like all other Acts, has a public purpose, that is, to regulate landlord-tenant relationships and the arbitrator would be bound by the provisions, including provisions which enure and protect the tenants.

*80. In view of the aforesaid, we overrule the ratio laid down in Himangni Enterprises [Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706 : (2018) 1 SCC (Civ) 82] 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.***

(Emphasis Supplied)

41. It is thus candid from the abovementioned precedent that where exclusive jurisdiction is given to adjudicate upon specific issues, the said matters may not be subjected to arbitration, even if there exists a clause favoring the same in the Agreement entered upon by the parties.

42. In the instant case a specific forum/court i.e, Controller has been appointed by the State Govt. under the Act of 1973 to adjudicate the present dispute and therefore the present matter falls under excepted matter and hence it is non-arbitrable in nature.

CONCLUSION

43. In light of the facts, submissions, and contentions in the pleadings, this Court finds that the petitioner has failed to make out the applicability of Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitrator for the aforementioned dispute.

44. The court is of the view that the instant matter comes under “excepted matters” under the Arbitration and Conciliation Act, 1996.

45. When a pre-existing special mechanism is present for the adjudication of a specific type of dispute, it is not desirable to resort to other common methods. The special mechanism has been specifically set in place for the adjudication of such disputes effectively. When such an option exists, it is to be understood that such mechanism is set up in the interest of the general public and to ease their dilemma.

46. Special tribunals and courts set up for specific claims are brought up for speedy and effective redressal of grievances. Arbitration is just one such mechanism, that parties may enter into to resolve disputes amicably.

47. But, as is in the instant petition, when a more effective mechanism

is already adjudicating upon the aforesaid matter, this court loses its jurisdiction to appoint an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.

48. Both, the Haryana Urban (Control of Rent and Eviction) Act, 1973 and the Arbitration and Conciliation Act, 1996 are special legislations. But the Arbitration and Conciliation Act, 1996 is an act with vast applicability, and a scope to bring a variety of matters under it. *Au contraire*, the Haryana Urban (Control of Rent and Eviction) Act, 1973 is more specific to landlord-tenant disputes. In the interest of justice, it is only appropriate to subject the dispute to a Court that has been set up for its specific adjudication, through a special law of the same.

49. In the view of the above discussion, the Court finds no reason to allow the instant petition.

50. Accordingly, the instant petition stands dismissed.

51. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 20, 2023
gs/AS

Click here to check corrigendum, if any