

[Neutral Citation No. - 2024:AHC-LKO:39780]

Case :- MATTERS UNDER ARTICLE 227 No. - 2475 of 2024

Petitioner :- Chitra Misra And 13 Others

Respondent :- M/S Decathlon Sports India Private Ltd. Thru. Managing Director And Another

Counsel for Petitioner :- Pritish Kumar, Amal Rastogi

Counsel for Respondent :- Sanjeev Singh

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Pritish Kumar and Sri Amal Rastogi Advocates, the learned counsel for the petitioners and Sri S.C. Mishra, Senior Advocate assisted by Sri Sanjeev Singh, Advocate for the respondents.
2. By means of instant petition filed under Article 227 of the Constitution of India, the petitioners have challenged the validity of an order dated 15.07.2022 passed by Hon'ble Justice Shri Dilip B. Bhosale (retired), Sole Arbitrator in the arbitration proceedings instituted by the petitioners against the respondents, whereby an application under Section 16(2) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') has been allowed and the arbitration proceedings have been dropped for want of jurisdiction, leaving it open to the parties to take appropriate remedy for redressal of their grievances at proper stage before appropriate Forum. The petitioners have also challenged the validity of the judgment and order dated 30.01.2024 passed by the Presiding Officer, Commercial Court No. 1, Lucknow in Arbitration Case No. 124 of 2022, dismissing an application under Section 13(1A) of the Commercial Court Act, 2005 read with Section 37 of the Arbitration Act, filed by the petitioners, challenging the aforesaid order dated 15.07.2022 passed by the Sole Arbitrator.

3. Briefly stated, facts of the case are that M/s Rohtas Projects Limited had executed a lease deed dated 07.04.2017 in favour of M/s Decathlon Sports India Private Ltd (the respondent no. 1), letting out an area of 21,825 Square feet i.e. 2,028 square meters, bearing Unit Nos. GF-01, GF-02, GF-03, GF-04, GF-05, GF-06, GF-07, GF-08, GF-9, GF-9A, GF-9B, GF-10A, GF-10B, GF-10C at Plot No. TC-G 4/4 in Rohtas Presidential Arcade situated in Vibhuti Khand, Gomti Nagar, Lucknow, for a period of 20 years.
4. The petitioner no. 2, Hina Juneja had entered into an agreement to purchase the unit no. GF-03 on 21.05.2013 and an agreement to sell Unit No. GF-05 of the Complex was executed in favour of Vijay Path Traders Link Private Limited on 28.03.2012. Rest of the petitioners claim to have purchased various units forming part of the leased premises from M/s Rohtas Projects Ltd. subsequent to execution of the lease deed in favour of the respondent no.1
5. The petitioners filed an Arbitration application No. 48 of 2020 before this Court under Section 11 of the Arbitration Act stating that they had been allotted commercial units by M/s Rohtas Projects Limited. M/s Rohtas Projects Limited had executed a lease deed in favour of respondent no. 1 for an area measuring 21825 square feet on 07.04.2017 for a period of 20 years w.e.f. 16.01.2017. The petitioners had obtained transfers of various portions of the leased property between the years of 2017-2018 from M/s Rohtas Projects Limited. The petitioners requested the respondent no. 1 to clear the outstanding liability of payment of rent under the lease deed executed by M/s Rohtas Projects Limited in favour of respondent no. 1 and upon failure of the respondent no. 1 to clear the dues, they issued a joint notice dated 25.08.2020 terminating the tenancy of respondent no. 1 created by the lease deed dated 07.04.2017 executed by M/s Rohtas Projects Limited. They requested this Court to appoint an Arbitrator for adjudication of the dispute between the parties. Elaborate submissions were advanced on behalf of the parties in proceedings under Section 11 of the Arbitration Act.

6. The learned counsel for the petitioner had placed reliance on the decision of Hon'ble Supreme Court in the case of **Mayavati Trading (P) Ltd. versus Pradyut Deb Burman**, (2019) 8 SCC 714, wherein the Hon'ble Supreme Court held that the scope of judicial intervention, as per under Section 11(6-A) is confined to examination of the existence of Arbitral Agreement and is to be understood in the narrow sense as has been laid down in the judgment rendered in **Duro Felguera, S.A. versus Gangavaram Port Ltd.**, (2017) 9 SCC 729, wherein it was held that: -

“in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.”

7. Learned counsel for the petitioner had also referred to a decision of the Hon'ble Supreme Court in the case of **Vidya Drolia and Others Vs. Navrang Studios**: (1981) 1 SCC 523, wherein Hon'ble Supreme Court held as under: -

“Whether Arbitration Agreement was in writing? or whether Arbitration agreement was contained in exchange of letters, telecommunication, etc.? or whether the Core contractual ingredients qua the arbitration agreement were fulfilled?, or whether the subject matter of dispute is arbitrable.”

If the Court prima facie comes to a conclusion that there is no valid arbitration agreement then it would not refer the matter to an

Arbitrator but on the other hand, if the validity of the Arbitration agreement cannot be determined on a prima facie basis then it should refer the matter to Arbitration. “Therefore, the Rule for the Court is “when in doubt, do refer”.

8. After recording the submissions advanced by learned counsel for the parties, this Court passed an order dated 25.08.2021 in Arbitration Application No. 48 of 2020. The relevant portion of the order is as under: -

“(16) In view of the aforesaid, this Court proposes the name of Justice Anant Kumar (Retired) Resident of Flat No.703, Indraprastha Grand, Sector-4 A, Vrindavan Yojana, Near Kandhai Park, Lucknow, Mobile No.8004928592 as Sole Arbitrator.

(17) Let the notice in terms of Section 12 (6) of the Arbitration and Conciliation Act, 1996, be sent to the newly proposed Arbitrator for seeking his consent, list this matter on 16.09.2021.”

9. The Arbitrator proposed by the order dated 25.08.2021 did not give his consent and, therefore, Hon’ble Justice Shri Dilip B. Bhosale (retired) was appointed as the sole Arbitrator by means of an order dated 06.10.2021.
10. The petitioners filed a statement of claim before the sole Arbitrator on 26.11.2021.
11. The respondents filed an application under Section 16(2) of the Arbitration Act on 28.10.2021 praying for dismissal of the arbitration proceedings initiated by the petitioners, as the Arbitral Tribunal does not have the jurisdiction to decide the dispute. A further prayer was made for stay of the proceedings, as per the moratorium imposed on institution of any proceeding as per Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘the IBC’).
12. The respondents had *inter alia* stated in the application under Section 16(2) of the Arbitration Act that before execution of the lease deed dated 07.04.2017 in favour of the respondent no. 1, the owner of the premises, M/s Rohtas Projects Limited had executed two

agreements to sell - (i) dated 21.05.2013 in respect of unit GF-03 in favour of Hina Juneja (petitioner no. 2) and (ii) dated 28.03.2012 in respect of unit GF-05 in favour of M/s Vijay Path Traders Link Private Limited but no sale deed has been executed in respect of those units at that point of time. The respondent no. 1 had taken the property on lease under a *bona fide* belief that the same was free from all encumbrances and it had made substantial investments to further develop the property at its own expenses. The respondent no. 1 has stated that several of the petitioners did not have registered sale deeds in their favour. Three of the petitioners had not even an agreement to sell executed in their favour. The petitioners had invoked the arbitration agreement between the Respondent no. 1 and M/s Rohtas Projects Limited without impleading M/s Rohtas Projects Limited as a party and they had wrongly impleaded the respondent no. 1 whereas there was no arbitration agreement between the petitioners and the respondent no. 1.

13. The respondent no. 1 further contended that the proceedings under the IBC were already pending before the National Law Company Tribunal, New Delhi (hereinafter referred to as “the NCLT”), wherein a moratorium had been imposed under Section 14 of the IBC, according to which the proceedings cannot be initiated against M/s Rohtas Projects Ltd. in any other court of law. Section 238 of the IBC Code, 2016 gives an overriding effect to it or over other statute.
14. The respondent no. 1 also placed reliance upon the Clause 19 of the lease agreement, which prohibits creation of any third party interest in respect of any part of the leased premises, without consent of the lessee and without execution of a tri-partite agreement regarding attornment of leasehold rights.
15. The petitioners filed objections against the application under Section 16(2) of the Act refuting the contentions of the respondents. The petitioners stated that most of them had sale deeds in their favour

and the parties had acquired rights in respect of property prior to initiation of insolvency proceedings. The petitioners contended that this aspect had already been examined by this Court while passing the order dated 25.08.2021 under Section 11 of the Arbitration Act and, therefore, it could not be raised again.

16. The learned sole Arbitrator rejected the application under Section 16(2) of the Arbitration Act by means of impugned order dated 15.07.2022. It is s recorded in the order dated 15.07.2022 that the application under Section 16(2) of the Act questioning the jurisdiction of the Arbitral Tribunal has been filed on the following grounds: -

“(i) The Claimants have invoked the arbitration clause of the lease deed entered into between the Respondents and M/S Rohtas Projects Limited without making M/S Rohtas Projects Limited a party to the Arbitration Petition and the same is against the principles of natural justice.

(ii) Some of the parties do not hold a registered sale deed in their favour but they have also been made parties to the present arbitration proceedings and have been granted right to be part of the arbitration proceedings.

(iii) A moratorium has been imposed by the National Company Law Tribunal (NCLT) against initiation of any proceedings in any other court of law or tribunal and Section 238 of the IBC shall have overriding effect over all other laws and the present arbitration proceedings are barred by section 14(1)(a) of the said Code.

(iv) The Claimants did not exercise due diligence on the charges on the leased property despite the fact that they were aware of the lease deed that existed between the Respondents and M/S Rohtas Projects Limited.

(v) In view of the special provisions of the Uttar Pradesh Regulation of Urban Premises Tenancy Ordinance 2021, the arbitration proceeding initiated under the Act, which is a general law, is not maintainable in as much as the special law prevails over the general law of arbitration. The Claimants should have therefore filed their petition under the said Ordinance of 2021 and not under the provisions of the Arbitration and Conciliation Act, 1996.”

17. The claimants/petitioners had opposed the application filed under Section 16(2) of the Act stating that the NCLT had jurisdiction to adjudicate on the issues regarding corporate insolvency of the corporate debtor Rohtas Projects Ltd. Only and not on any issues involved between the claimants and the respondents. The arbitration proceedings between the parties were not barred by the provisions of IBC. The petitioners further submitted that this High Court has passed the order under Section 11 of the Arbitration Act after being satisfied about the existence of an arbitration agreement between the parties.
18. The Tribunal relied upon the decisions in the cases of **Food Corporation of India Versus Indian Council of Arbitration and Others**: AIR 2003 SC 3011; **Hindustan Petroleum Corporation Limited Versus Pink City Midway Petroleum**: AIR 2003 SC 2881 and **Shri Subh Laxmi Fabrics (P) Limited Versus Chandmal Barodia and others**: AIR 2005 SC 2261, wherein Hon'ble Supreme Court consistently held that if the question of jurisdiction of Arbitral Tribunal is raised by any party, the same has to be decided by the Arbitral Tribunal itself under Section 16 of the Act.
19. The Arbitrator held that in view of the moratorium imposed by the NCLT, the Arbitral Tribunal has no jurisdiction to proceed with the matter, therefore, although the learned counsel for the parties had made submissions touching rights and liabilities of the parties, the Arbitral Tribunal cannot embark upon to make any observation on the rights and liabilities of the parties as it has no jurisdiction to proceed with the matter.
20. The petitioners challenged the aforesaid order by filing an application under Section 13(1A) of the Commercial Court Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996, which has been rejected by means of an order dated 30.01.2024 passed by the Presiding Officer, Commercial Court no. 1, Lucknow.
21. The Commercial Court held that although the moratorium imposed by the NCLT, New Delhi came to an end on 13.12.2021,

proceedings were going on before the NCLT. The Arbitrator has dealt with the objections of the claimants/petitioners and has drawn detailed conclusion, which do not suffer from any legal error. The petitioners have already cancelled the lease deed granted by the lessor M/s Rohtas Projects Limited in favour of the respondents and the respondents have vacated the property in dispute and they have deposited the entire arrears of rent before the NCLT. In view of the aforesaid facts, the Commercial Court found that there was no ground to interfere in the impugned order dated 15.07.2022 passed by the Arbitral Tribunal and it dismissed the appeal.

22. While assailing the validity of both the aforesaid orders passed by the Arbitral Tribunal as well as the order passed by the Commercial Court no. 1, Lucknow, Sri Prithish Kumar, the learned counsel for the petitioners has submitted that the learned Arbitrator has wrongly recorded in the impugned order dated 15.07.2022 that *“it is not in dispute that during pendency of the arbitration proceedings before this Arbitral Tribunal, the NCLT has imposed moratorium against the proceedings any other Forum in respect of the subject matter of the present arbitration proceedings”*, whereas the correct position is that the moratorium had been imposed by means of an order dated 30.09.2019 passed by the NCLT in C.P. No. IB-1022/(ND)/2018, whereas the arbitration proceedings commenced in the year, 2021. Learned counsel submitted that moratorium seized to have affect w.e.f. 13.12.2021, as per an order passed by the NCLT on the aforesaid date.

23. Sri Prithish Kumar has further submitted that the respondents had merely prayed in the application under Section 16(2) for stay of the proceedings, as per moratorium imposed on the institution of any proceedings as per Section 14 of the IBC, and the learned Arbitral Tribunal has committed an error in dropping the proceedings, instead of staying the same till lifting of the moratorium. Moreover, as the moratorium has already seized to be in force with effect from 13.12.2021 i.e. prior to passing of the order dated 15.07.2022, the

learned Arbitrator was not justified in dropping the proceedings on the ground of the moratorium.

24. The learned counsel for the petitioners has also submitted that the petitioners being transferees of the lessor, possess the rights of lessor, as per the provision contained under Section 109 of the Transfer of Property Act. In support of his contention, he has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Ambica Prasad Vs. Alam and others**: (2015) 13 SCC 13, wherein it was held that it is well settled "*that a transferee of the landlord's rights steps into the shoes of the landlord with all the rights and liabilities of the transferrer landlord in respect of the subsisting tenancy*". As per Sri. Prithish Kumar, this Section does not require that the transfer of the right of the landlord can take effect only if the tenant attorns to him and attornment is not necessary to confer validity to the transfer of the landlord's rights.
25. Per contra, Sri S. C. Mishra Senior Advocate appearing for the respondents has submitted that the lease deed dated 07.04.2017 executed by M/s Rohtas Projects Limited in favour of the respondent no. 1 mentions that the "Lessor" which expression shall, unless it be repugnant to the context or the meaning thereof, means and includes its successors and **permitted assigns**. Upon transfer of its rights by the lessor without permission of the lessee, the lessee was entitled to hold the monthly rentals of the lessor till execution of proper legal documentation/deed of attornment amongst the lessor, the lessee and the buyer, which was never done. The lease deed further categorically stated that the lessor had executed an agreement to sell Unit nos. GF-03 and GF-05 forming a part of the lease premises but neither the sale deeds had been executed nor had physical possession been handed over to the prospective buyer. The lessor undertook the responsibility of execution of attornment deed/supplementary deed with the buyers of the units before execution and registration of sale deeds in that regard.

26. Sri Mishra further submitted that the Resolution Professional, had submitted an application to NCLT, a copy whereof has been annexed by the petitioners themselves (at page no. 213 to 233 of the petition) stating that the members of the suspended Board of Directors of M/s Rohtas Projects Limited had executed sale deeds of various units to respondent nos. 5 to 15 in that application (including several of the petitioners), without obtaining 'No Objection Certificates' from the IDFC Limited and Allahabad Bank (now Indian Bank), with whom the units were mortgaged. The Resolution Professional requested for a declaration that the transactions of sale in respect of mortgaged property without seeking 'No Objection Certificates' from the secured creditors, is null and void and the effect of the said transfers be reversed.
27. The learned counsel for the petitioners has drawn attention of the Court to the statement of the Claim filed by the petitioners before the sole Arbitrator, wherein they have claimed arrears of rent, interest on arrears of rent, damages for use and occupation of property at the rate of rent, interest on damages, eviction of the respondent no. 1 from the demise premises and cost of the proceedings. He submitted that the respondents have already deposited the entire amount, payable in the NCLT and they have already vacated the premises, which contentions are not disputed by the learned Counsel for the petitioners. The respondents having already performed their part for redressal of the grievances raised by the petitioners through the Claim Petition, they are not liable to do anything else for satisfying the claims of the petitioners and, in these circumstances, it would not be in the interest of justice that the respondents are made to face the arbitration proceedings.
28. Sri Mishra has further submitted that it is not that the respondents had only prayed for stay of proceedings through their application under Section 16(2) of the Arbitration Act. The prayers made in the application under Section 16 are as follows: -

"Prayer:-

In the premises, it is most respectfully prayed that the learned sole Arbitrator may graciously be pleased to: -

(a) dismiss the arbitration initiated by the petitioners as the Hon'ble Arbitral Tribunal does not have jurisdiction to try the matter, and/or;

(b) stay the proceedings as per the moratorium imposed on the institution of any proceedings as per Section 14 of IBC; and/or;

(c) pass any other order as learned Sole Arbitrator may deem fit.

29. The existence of an arbitration agreement between the parties is the prerequisite for initiating arbitration proceedings. Arbitration agreement is defined in Section 7 of the Arbitration and Conciliation Act, 1996 as follows: -

*“ **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 including communication through electronic means 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.”

30. There is no arbitration agreement between the parties, i.e the petitioners and the respondents. An arbitration Clause is contained in Clause 23 of the lease deed dated 07.04.2017 executed by the M/s

Rohtas Projects Limited in favour of M/s Decathlon Sports India Private Ltd. (respondent no. 1), which provides as follows: -

“The parties agree that they shall attempt to resolve to good faith and consultation any dispute or difference between any of the parties in respect of or concerning or connected with the interpretation or implementation of this lease deed or arising out of this lease deed. In the event of dispute or difference between the parties not getting resolved, such dispute or difference shall be referred to the Arbitration under the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or amendment thereof, by an arbitration Panel comprising of three Arbitrators. The Arbitration Panel shall comprise one Arbitrator each appointed by the lessor and the lessee and such Arbitrators shall appoint the third Arbitrator.”

31. The expression ‘parties’ used in the above quoted Clause 23 refers to the parties to the lease deed, which was executed between: -

“ROHTAS PROJECTS LIMITED, a company incorporated and validly existing under the provisions of Indian Companies Act, 1956 with its corporate office at 27/18, Raja Ram Mohan Roy Marg (one way Road) Lucknow - 226001) acting through its authorized signatory, Mr. Pankaj Rastogi duly authorized vide board resolution dated 6th march 2017 (hereinafter referred to as the “Lessor” which expression shall, unless it be repugnant to the context or the meaning thereof, mean and include its Successors and permitted assigns), being Party of the FIRST PART.

AND

DECATHLON SPORTS INDIA PRIVATE LIMITED, a company incorporated and validly existing under the provisions of the Indian Companies Act, 1956 (a wholly owned subsidiary of Decathlon S. A., France) with its registered office at Survey number 78/10, A2 0 – Chikkajala Village, Bellary road, Bangalore – 562 157, (“hereinafter referred to as “the Lessee” which expression shall, unless it be repugnant to the context or the meaning thereof, mean and include its Successors and permitted assigns), acting through _ _ _ , being Party of the SECOND PART”

The lease deed further states that: -

“The Lessor is the absolute legal owner of all that piece of immovable property bearing No. TC-G 4/4, admeasuring 5000 square meters situated at Vibhuti Khand, Gomti Nagar, Lucknow, Uttar Pradesh which is currently categorized as

commercial use. The said property is hereinafter referred to as the Total Property and is more fully described in the Schedule written hereunder and is depicted in ANNEXURE A.

AND WHEREAS, the Lessor is into the business of developing commercial and residential projects and has constructed and developed a commercial complex under the name and style of 'Rohtas Presidential Arcade', which has been operational since 2015 and is spread over 5000 square meters (Hereinafter referred to as the Complex/Total Property) consisting of retail shops, stores, banks, offices etc. and basements for parking (plans of the Complex annexed herewith as ANNEXURE A) after obtaining all required approvals and sanctions in accordance with the building plans approved by the competent authority (ies). The Lessor has sold few units in the said Complex to various parties/individuals by virtue of Agreement to sale. Out of the Total property, **the Ground Floor measuring 21825 square feet (i.e. 2028 square meters) of covered area bearing Unit Nos. GF-01, GF-02, GF-03, GF-04, GF-05, GF-06, GF-07, GF-08, GF-09, GF-09A, GF-09B, GF-10A, GF-10B and GF-10C at Plot No. TC-G 4/4, admeasuring 2028 square meters situated at Vibhuti Khand, Gomti Nagar, Lucknow, Uttar Pradesh for retail space is available for lease and is owned/possessed by the Lessor, Though the Lessor has further presented to the Lessee that they have executed an Agreement to Sell dated 21.05.2013 for the Unit bearing Nos. GF-03 in the name of Mrs. Heena Juneja & Agreement to Sell dated 28.03.2012 for the Unit No. GF-05 of the Complex in favour of Vijay Path Traders Link Private Limited, but no conclusive sale has taken place for these two units.** The Lessor have further represented that as on date all the legal rights, interests and possession of the said two units stands in the name of the Lessor for all the purposes and the Lessor have obtained two separate registered Power of Attorneys from Mrs. Heena Juneja & Vijay Path Traders Link Private Limited respectively authorizing the Lessor to enter/deal/lease/execute on their behalf such business transactions as the Lessor may deem fit, after amalgamating their Units with the other Units of the Complex on the terms and conditions as the Lessor may deem fit. The Copies of the said registered Power of Attorneys for Unit No. GF-03 and GF-05 are annexed hereto as ANNEXURE B1 & B2."

* * *

"4. RENT, ESCALATION & RENT COMMENCEMENT DATE

4.1 The Parties agree that in consideration of the grant of Lease and the continued right to enjoy and possess and use the Leased Premises during the Lease Term, the Lessee shall pay to the

Lessor, the monthly rent as detailed in ANNEXURE-1 (“Monthly Rent”) from the Rent Commencement Date. It is understood between the parties that the monthly rent is all inclusive of any/all kind of CAM charges during the tenure of this Lease.

4.2 The Lessee shall deposit the amount of monthly rentals, during the tenure of this lease and the security deposit in the bank account numbers to be provided by the Lessor to the Lessee, subject to Tax Deduction at Source.

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8. OBLIGATIONS ON PART OF THE LESSOR

** * **

8.3 In case the Lessor creates any lien after the execution hereof, that should be done with prior intimation to the Lessee. However, any charge or transfer of the Leased Premises to any third party during the subsistence of the lease can be created only in terms of Clause 19”.

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19.SALE, RIGHT OF FIRST REFUSAL & ATTORNMENT CLAUSE

19.1 In the event of proposed sale or transfer of its rights in any of the unit of the Leased Premises (either partially or whole), the Lessor shall first intimate the Lessee in writing to ascertain the interest of the Lessee to purchase the aforesaid premises and the Lessee shall revert on their interest in the aforesaid premises within 15 days of receiving such intimation. If the Lessee does not reply within 15 days, then the Lessor shall assume that the Lessee is not interested in the aforesaid space and the Lessor will be free to offer to any third party and the Right of First Refusal shall expire for the Lessee.

19.2 In case the Lessor doesn't comply with the above-said condition pertaining to the proposed sale or transfer of its rights of the Leased Premises, and does not intimate the Lessee then in such event the Lessee shall be entitled to hold the monthly rentals of the Lessor till proper legal documentation/Deed of Attornment is being executed between the Lessor, Lessee and such prospective buyer on the same terms and conditions of this Deed.

19.3 The Lessor hereby, Irrevocably agrees and undertakes to ensure the business continuity of the Lessee in the Leased Premises for the entire tenure of the Lease (on the same terms and conditions) in case of sale or transfer of ownership rights by

any manner whatsoever. In case of sale of the Leased Premises (either in part or full), the Lessor agrees to ensure the business continuity of the Lessee by executing Deed of Attornment between the Lessor, Lessee and such prospective buyer on the same terms and conditions of this Lease Deed before concluding the sale deed with such prospective buyer.

19.4 The Lessor agreed that in case of sale of any unit of the Leased Premises, the Lessor shall immediately inform the Lessee before making an endorsement on such sale or transfer and all such sale/transfer shall be subject to execution of Attornment Deed between the Lessor, Lessee and such prospective buyer.

19.5 The Lessee shall have the first right of refusal at the end of Lease Term for further renewal of Lease Term as per the mutually agreed terms and conditions.

19.6 It is well understood between the parties that the Lessor have already executed Agreement to Sell for the Unit No. GF-03 and GF-0S forming part of the Leased Premises, but neither the conclusive sale have been executed nor any physical possession of the same have been delivered. The Lessor have represented that such sale shall not at all any circumstance whatsoever shall disturb the peaceful possession and business operations of the Lessee in the Leased Premises. The Lessor shall ensure and takes responsibility to execute an Attornment Deed/Supplementary deed with the buyers of such units before concluding and registering a conclusive Sale Deed in that regard.

19.7 The Lessor has unconditionally agrees that they will not sell the Leased Premises (either partially or fully) to any third party for the initial 06 months of Lease commencing from the handover of the Leased Premises to the Lessee.

32. Section 109 of the Transfer of the Property Act, 1982 relied upon by the petitioners reads as follows: -

“109. Rights of lessor’s transferee.-If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee. The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.”

33. Section 109 provides that **if the lessor transfers the property leased, in the absence of a contract to the contrary**, the transferee shall possess all the **rights of the lessor** and, **if the lessee so elects**, the transferee shall be subject to the liabilities of the lessor as to the property or part transferred. In the present case, there was a contract to the contrary contained in the lease deed itself prohibiting transfer of any part of the leased property without prior permission of the lessee. In these circumstances, the rights of the lessor shall not stand transferred to the petitioners by virtue of Section 109 of the Transfer of Property Act. Further, Section 109 makes the transferees subject to all the liabilities of the lessor as to the property transferred, at the option of the lessee. Here the lessee has not exercised this option. Rather the lessee has objected to the transfer made in favour of the petitioners in violation of the conditions contained in the lease deed.

34. In **Ambica Prasad v. Mohd. Alam**, (2015) 13 SCC 13 relied upon by the learned Counsel for the petitioners, the question involved was whether the a person having purchased a property which had been let out and was subject to the provisions of the Assam Urban Areas Rent Control Act, 1972, would become a landlord. The expression “landlord” has been defined in Section 2(c) of the Assam Urban Areas Rent Control Act, 1972 which reads as under:

“2. (c) ‘Landlord’ means any person who is, for the time being receiving or entitled to receive rent in respect of any house

whether on his own account, or on account, or on behalf, or for the benefit of any other person, or as a trustee, guardian or receiver for any other person and includes in respect of his sub-tenant, a tenant who has sub-let any house and includes every person not being a tenant who from time to time derives title under a landlord.”

The Hon’ble Supreme Court held that the definition of “landlord” is couched in a very wide language, according to which not only the owner but also any person receiving rent, whether on his own account or on behalf of or for the benefit of any other person or as a trustee, guardian, or receiver for any other person, is also the landlord. However, for the purpose of eviction of a tenant on the ground of personal need or reasonable requirement, one must show that he is the owner of the building.

35. While considering the effect of transfer of property governed by of the Assam Urban Areas Rent Control Act, 1972 by a Landlord, the transferee gets all rights and liabilities of the lessor in respect of subsisting tenancy, the Hon’ble Supreme Court observed that: -

“The section does not insist that transfer will take effect only when the tenant attorns. It is well settled that a transferee of the landlord's rights steps into the shoes of the landlord with all the rights and liabilities of the transferor landlord in respect of the subsisting tenancy. The section does not require that the transfer of the right of the landlord can take effect only if the tenant attorns to him. Attornment by the tenant is not necessary to confer validity of the transfer of the landlord's rights.”

36. The effect of the words “***in the absence of a contract to the contrary***” and “***if the lessee so elects***”, occurring in Section 109 of the Transfer of Property Act was neither considered nor decided in this judgment. It is settled law that while interpreting a provision of any Statute, any word used by the Legislature cannot be ignored. It is also a settled law that a judgment is an authority for what it actually decides. Therefore, the decision in **Ambica Prasad (supra)** will not apply to the facts of the present case where there is contract prohibiting transfer by the lessor without prior permission of the lessee and lessee has not opted to accept the transferees as its lessor.

37. So far as the submission of the learned Counsel for the petitioner that this Court having appointed the Arbitrator under Section 11 of the Arbitration and Conciliation Act, it was not open for the arbitrator to go into his question, in **Vidya Drolia and Others Vs. Navrang Studios**: (1981) 1 SCC 523, Hon'ble Supreme Court held that the Court has to appoint an arbitrator even if there is a doubt regarding existence of an arbitration agreement. Thus the appointment of an arbitrator does not require a conclusive finding by the Court that there is an arbitration agreement between the parties.

38. Moreover, Section 16 of the Act provides as follows: -

“16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

39. Sri. S. C. Mishra, the learned Counsel for the petitioner has relied upon a decision of the Delhi High Court in **Surender Kumar Singhal v. Arun Kumar Bhalotia**, 2021 SCC OnLine Del 3708, in which it was held that: -

“25. ...the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be ‘exceptional circumstances’;

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction under Article 226/227;

(ix) The power should be exercised in ‘exceptional rarity’ or if there is ‘bad faith’ which is shown;

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided.

Section 16 of the Act and consideration by Arbitral Tribunals

*26. Coming to the second aspect, i.e., the law governing applications under Section 16 of the Arbitration & Conciliation Act, 1996 and the manner of consideration by arbitral tribunals. Section 16 of the Arbitration and Conciliation Act, 1996 deals with the competence of a Tribunal. Following the principle of kompetenze-kompetenze, an Arbitral Tribunal has the power to rule on its own jurisdiction. However, Section 16(5) requires that the Tribunal ought to **decide the plea.**”*

40. In **ONGC Ltd. v. Discovery Enterprises (P) Ltd.**, (2022) 8 SCC 42, it was held that: -

55. ... Section 16 stipulates that where the Tribunal rejects a plea of a lack of jurisdiction, it must continue with the arbitral proceedings and make an award and the remedy of a challenge to the award would lie under Section 34. However, if the Arbitral Tribunal accepts a plea that it lacks jurisdiction, the order of the Tribunal is amenable to a challenge in appeal under Section 37(2)(a). In the exercise of the appellate jurisdiction, the court must have due deference to the grounds which have weighed with the Tribunal in holding that it lacks jurisdiction having regard to the object and spirit underlying the statute which entrusts the Arbitral Tribunal with the power to rule on its own jurisdiction. The decision of the Tribunal that it lacks jurisdiction is not conclusive because it is subject to an appellate remedy under Section 37(2)(a). However, in the exercise of this appellate power, the court must be mindful of the fact that the statute has entrusted the Arbitral Tribunal with the power to rule on its own jurisdiction with the purpose of facilitating the efficacy of arbitration as an institutional mechanism for the resolution of disputes.”

41. When we examine the facts of the present case in light of the law referred to above, it appears that there is no arbitration agreement between the petitioners and the respondent no. 1. The transfer of property made by M/s Rohtas Projects Ltd. in favour of the petitioners, has been made in violation of the terms and conditions of lease deed executed by M/s Rohtas Projects Limited in favour of the respondent no. 1 and, therefore, none of the obligations contained in the lease deed dated 07.04.2017 by M/s Rohtas Projects Limited stood transferred to the petitioners, including the right to initiate the arbitration proceeding under Clause 23 of the lease deed. Therefore, there is no arbitration agreement between the petitioners and the respondent no. 1.

42. In view of the foregoing discussion, will not be in the interest of justice to interfere in the order dated 15.07.2022 passed by the sole Arbitrator dropping the arbitration proceedings for want of jurisdiction, although for different reasons.

43. In the present case, the claimants have purchased various portions of a property that had been taken on lease by the respondent no. 1 from M/s Rohtas Projects Limited, in violation of the conditions of the registered lease deed. Although there is no arbitration agreement between the petitioners and the respondent no. 1, the petitioners initiated arbitration proceedings claiming payment of arrears of rent and damages etc. The proceedings under the IBC have been initiated against the lessor M/s Rohtas Projects Limited. A Resolution Professional has already been appointed by the NCLT, New Delhi. The respondents have deposited the entire arrears of rent and damages etc. in the National Company Law Tribunal and they have already vacated the premises in dispute.
44. Jurisdiction of this Court under Article 227 of the Constitution of India is supervisory jurisdiction which should be exercised to prevent injustice being caused to a party but where the order under challenge in the petition under Article 227 of the Constitution of India does not cause any injustice to any of the parties, this Court will not exercise its discretion in such a case. Keeping in view the circumstances stated in the preceding paragraph, interfering in the order dated 15.07.2022 passed by the Sole Arbitrator and the order dated 30.01.2024 passed by the Commercial Court No. 1, Lucknow will not serve the interest of justice in any manner.
45. In view of the aforesaid discussions, no interference is warranted in the present petition filed under Article 227 of the Constitution of India.
46. Accordingly, the petition is **dismissed**. Costs made easy.

(Subhash Vidyarthi J)

Order Date: 21.05.2024

kkv/