

\* HONOURABLE SRI JUSTICE L. NARASIMHA REDDY

AND

HONOURABLE SRI JUSTICE S.V. BHATT

+ CIVIL REVISION PETITION No.4506 OF 2012

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% Date: 25-07-2013

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# Smt. Penumalli Sulochana .. Petitioner

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v.

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\$ Harish Rawtani .. Respondent

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! Counsel for the petitioner : Sri B. Venkat Rama Rao

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^ Counsel for the respondent : M. Sudhir Kumar

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< **GIST:**

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> **HEAD NOTE:**

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? **CASES REFERRED:**

- 1. AIR 1959 SC 1362(1)  
2. (2011) 5 SCC 532  
3. AIR 1990 PATNA 95

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**C/15**

**HONOURABLE SRI JUSTICE L. NARASIMHA REDDY**

**AND**

**HONOURABLE SRI JUSTICE S.V. BHATT**

**CIVIL REVISION PETITION No.4506 OF 2012**

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**ORDER:** (Per Hon'ble Sri Justice L. Narasimha Reddy)

The plaintiff in O.S. No.172 of 2012 on the file of II Additional Chief Judge, City Civil Court, Hyderabad, filed this revision feeling aggrieved by the order dated 03-08-2012 passed in I.A. No.1494 of 2012, filed by the respondent - defendant.

2. The petitioner is the owner of the premises bearing No.8-2-293/82/A/796-A in an area of 1,162 square yards of Road No.36, Jubilee Hills, Hyderabad. The same was leased out to the respondent for a period of five (05) years through a lease deed dated 06-12-2006.

After expiry of the period of lease, the petitioner got issued a notice dated 22-02-2012 under Section 106 of the Transfer of Property Act, 1882 (for short "the Act"). Alleging that the respondent did not vacate the premises even after receipt of notice, the petitioner filed the suit for eviction of the respondent, for recovery of arrears of rent, and damages for use and occupation.

3. On receipt of summons in the suit, the respondent filed I.A. No.1494 of 2012 under Section 8 of the Arbitration and

Conciliation Act, 1996 read with Section 151 of the Code of Civil Procedure, 1908 with a prayer to dismiss the suit and refer the matter to arbitration.

He pleaded that the lease deed dated 06-12-2006 contains a clause providing for arbitration of the dispute, if any, between the parties and in that view of the matter, the suit is not maintainable.

4. The petitioner filed a counter opposing the interlocutory application. She pleaded that the subject matter of the suit is not a dispute arising out of the lease deed and that the suit was filed only after expiry of the period stipulated in the lease deed. It was pleaded that the application was filed only with a view to defeat the rights of the petitioner to seek the remedy provided for, in law.

5. Through the order under revision, the trial Court allowed the interlocutory application, dismissed the suit and directed that the matter be referred to arbitration.

6. Sri B. Venkat Rama Rao, learned counsel for the petitioner, submits that the filing of interlocutory application by the respondent was nothing but misuse of process of law. He contends that the lease expired by efflux of time and thereby the arrangement under the lease deed came to an end. It is submitted that when the relief claimed in the suit is covered by the provisions of the Act, the matter cannot be subject matter of arbitration. Learned counsel further submits that, assuming that the arbitration clause operates despite the expiry of lease, the respondent has waived the rights under it, once he filed O.S. No.560 of 2012 in the same Court for the relief of specific performance in relation to the alleged extension of lease. He has placed reliance upon the precedents in support of his contentions.

7. Sri M. Sudhir Kumar, learned counsel for the respondent, on the other hand, submits that the clause contained in the lease deed is comprehensive in nature and even the disputes that arise subsequent to the expiry of lease, are required to be resolved through arbitration. He submits that once a matter is referred to arbitration, the dispute has to be resolved through an award that may be passed by the arbitrator and that the arbitrator is not bound by the principles of law. He contends that filing of O.S. No.560 of 2012 is for a relief, other than the one covered by the lease deed and such a step cannot be treated as a waiver on the part of the respondent.

8. The trial Court dismissed the suit by taking into account the above clause and after referring to certain decided cases.

9. The three questions arise for consideration before us viz.,

1. Whether the arbitration clause continues to operate despite the expiry of the lease?
2. Whether the dispute, which is covered by the suit, can be subject matter of an arbitration?
3. Whether the respondent has waived the right to invoke the arbitration clause?

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**QUESTION No.1:**

10. The term of lease under the lease deed was for five (05) years commencing from 01-02-2007. Apart from stipulating the period of lease, Clause - 1 of the lease deed required the respondent to put the petitioner in vacant possession of the premises on or before 31-01-2012 without any claim or objection. The clause reads:

“1. That the lease is for a period of 5 (Five) years only, commencing from 1<sup>st</sup> February 2007 as

the Lessor will hand over the vacant possession to the Lessee on the said day. The lessee should hand over vacant and peaceful possession of the demised premises to the Lessor at the end of the lease period, i.e. on 31.01.2012 without any claim or objection of whatsoever nature.”

Clauses - 22 and 25 also have bearing upon this aspect, and they read:

“22. The Lessee should hand over the demised premises in the similar condition as was handed over to the Lessee, subject to normal wear and tear arising from daily use, at the expiry of the Lease Term i.e., on 31-1-2012 without any claim or request for renewal of the lease or without raising any objection of whatsoever nature. The renewal of the lease for any further period shall be at the sole discretion of the Lessor alone.

25. The Lessee shall vacate the demised premises immediately upon the expiry of Lease and handover the vacant and peaceful possession to the Lessor on 31-01-2012. In the event of Lessee continuing in the said property, even after such date, then the Lessee is liable to pay liquidated damages at the rate of thrice the monthly rental that is being paid to the Lessor as on that date, besides reimbursing the Lessor all the costs incurred by the Lessor in evicting the Lessee.”

11. After expiry of the lease, the petitioner got issued notice dated 22-02-2012 under Section 106 of the Act requiring the respondent to deliver vacant possession of the property. Since that was not done, the suit was filed for eviction and recovery of arrears of rent and damages for use and occupation of the premises.

12. The respondent filed the interlocutory application for dismissal of the suit on the ground that there exists a clause for

referring the dispute to arbitration. The relevant clause reads:

“32. Any dispute between the parties hereto during the currency of the lease or after its expiry or early determination thereof, with regard to this lease deed or the subject matter hereof, or any aspects relating to or touching upon the terms of this lease deed will be settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 by the arbitrator to be appointed/nominated by the Lessor. The arbitration will be conducted in the City of Hyderabad. The proceedings of the arbitration shall be recorded in English.”

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13. A perusal of the clause, at the first blush, would give an impression that it covers not only the disputes that arise during the subsistence of lease, but also on expiry thereof. However, if one takes into account, the principles of law that govern a lease, a different view point emerges. The only purpose that a lease deed would serve is that it governs the relationship between a lessor and a lessee as long as the lease subsists. The subsistence of lease under the deed can be up to the specific period mentioned in it. If there exists any provision for extension of lease subject to certain conditions, there is a possibility to construe that the term of the lease, covered by the document, can be extended. Where, however, the term is for fixed time and the parties also understood that the lease does not spillover beyond a date mentioned therein, the relationship between the parties ceases to be governed by the lease deed. Once the lease deed became redundant, any clause contained in it also ceases to be of any relevance to the parties.

14. The expression “after its expiry or early determination thereof” employed in Clause - 32 has a clear and definite purpose to serve. The intention of the parties can be gathered from the language

employed therein. This has to be understood in the context of the circumstances mentioned in the same clause. An early determination of the lease can certainly become the subject matter of arbitration since the document remains in force till 31-01-2012. The words “after expiry” have to be understood as covering the disputes that arise during the subsistence of the lease, under the document. For instance, if there existed any dispute between the parties as to violation of terms and conditions during the subsistence of the lease, the mere fact that the lease expired by the time the claim was raised or resolved does not take away them from the purview of arbitration.

15. The observation of Hon’ble Sri Justice Subba Rao, as his Lordships then was, in **Union of India v. Kishorilal Gupta and Brothers**<sup>[1]</sup>, is relevant and apt in this regard reads:

“Uninfluenced by authorities or case law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was none the less an integral part of the contract, which had no existence de hors the contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract not only did not provide for the survival of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including the arbitration clause.”

Support to this, was derived from the observation of Lord Macmillan of the House of Lords in **Heyman v. Darwine Ltd.** (1942-I All ER 337).

16. Therefore, the arbitration clause contained in the lease deed ceases to be of any relevance unless the dispute between the parties is the one that has arisen during the subsistence of the lease.

In other words, if the claim of one of the parties is in relation to state of affairs that arose after the expiry of the lease period, the clause would not bar adjudication of the dispute through Courts.

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**QUESTION No.2:**

17. Assuming that the clause operates, it needs to be seen as to whether the dispute which is the subject matter of the suit, can be dealt with in an arbitration. For the most part of it, arbitration is a mechanism chosen by the parties for resolution of disputes with reference to the terms of a contract entered into between them.

Under a contract or agreement, the parties thereto define their mutual rights and obligations, which, of course, are required to be within the framework of law. Where, however, the relationship is governed by any specific provision of law, the dispute in relation thereto cannot constitute the subject matter of arbitration. The reason is that once a situation, which attracts a specific provision of law exists, it has to be dealt with in accordance with that provision and even a Court of law has no discretion except to apply the provision. If such matters are entrusted to arbitration, there is every likelihood of the arbitrator taking his own view, which, in a given case, may be contrary to the provisions of law. The legal system, which requires a Court of law to apply the provision of law without leaving any discretion, cannot permit an arbitrator to flout such provisions. Once such matters are referred to arbitration, the mechanism to control his discretion is virtually non-existent, if one takes into account, the grounds on which, the award of an arbitrator can be set aside.

18. In its recent judgment in **Booz Allen and Hamilton Inc. v.**

**SBI Home Finance Limited and others** <sup>[2]</sup>, the Supreme Court held:

“Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

19. In item - (vi) mentioned in the above paragraph, eviction or tenancy matters are governed by special State rules. The list furnished is only illustrative in nature and not exhaustive. The ratio

that can discerned is that if a situation is governed by a specific provision of law, it cannot constitute subject matter of arbitration. If eviction of a tenant, governed by special statutes, cannot be the subject matter of arbitration, equally so, is a case, which squarely falls within the scope of Section 106 of the Act. The relationship between a lessor and a lessee is governed by the provisions of the Act. The arbitrator cannot be conferred with the power to decide the questions, such as, whether a lessee is a tenant holding over, or the one at sufferance. Such matters are in the purview of a civil Court in a properly instituted suit.

20. In **Padam Singh Jain v. M/s. Chandra brothers and others** <sup>[3]</sup>, the following view was expressed:

“The right of a landlord to determine a tenancy arises under a statute namely, Transfer of Property Act. In a case covered by the building control legislation such as the said Act, in view of the decisions of the Supreme Court even such tenancies need not be terminated by serving a notice under S.106 of the Transfer of property Act. It, therefore, follows that a right to file suit by a landlord against a tenant arises as soon as one or the other factors enumerated in various clauses of sub-section(1) of S.11 of the said Act are attracted.”

21. The trial Court made an attempt to distinguish the facts of the case, which, in our view, is incorrect.

22. In the instant case, there is no subsequent contract between the petitioner and the respondent. The contract covered by the lease deed came to an end with effect from 31-12-2012. The suit was preceded by a notice under Section 106 of the Act. An arbitrator cannot deal with matters of this nature.

23. Hence, we hold that the dispute covered by the suit cannot be subject matter of arbitration.

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**QUESTION No.3:**

24. In view of the answers to questions 1 and 2, hardly any scope is left to examine any other third contingency. However, for the sake of argument, if it is to be assumed that answers to questions 1 and 2 are in favour of the respondent, he has created, for himself, a very big hurdle to invoke the arbitration clause. He filed O.S. No.560 of 2012 for the relief of specific performance of an agreement. According to him, the petitioner promised to extend the lease beyond 31-01-2012 and for enforcement of such promise, he filed the suit. By this act, he made everyone, including the petitioner, to believe that any dispute between them which has arisen after 31-01-2012 cannot constitute subject matter of arbitration. If that was his understanding, which, in fact, is correct, the respondent cannot expect a different legal regime for the petitioner.

25. Viewed from any angle, the order passed by the trial Court cannot be sustained.

26. The Civil Revision Petition is, accordingly, allowed and the order under revision is set aside. The respondent is granted four (04) weeks time from today to file written statement in the suit. The trial Court shall club O.S. No.172 of 2012 and O.S. No.560 of 2012 and conduct a common trial. The respondent shall be under the obligation to pay the undisputed rents and the ancillary amounts from month to month during the pendency of the suit. If there exist any arrears on this account, the same shall be cleared within a period of four (04) weeks from the determination of the dispute thereof by the trial Court. The trial Court shall dispose of the suits within a period of six (06)

months from the date of filing of the written statement by the respondent. There shall be no order as to costs. The Miscellaneous Petitions filed in this revision shall stand disposed of.

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**L. NARASIMHA REDDY, J**

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**S.V. BHATT, J**

**July 25, 2013.**

**Note:** L.R. Copy to be marked. **(B/O)**PV

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[\[1\]](#) AIR 1959 SC 1362(1)

[\[2\]](#) (2011) 5 SCC 532

[\[3\]](#) AIR 1990 PATNA 95