

# Dispute Resolution Hotline

January 28, 2010

## BOMBAY HIGH COURT OUSTS ARBITRATION IN DISPUTES BETWEEN LANDLORD AND TENANT IN MUMBAI

In a landmark judgment passed by a Full Bench of the Bombay High Court ("**Court**"), the Court has laid down the law regarding operation of an arbitration clause in agreements giving a license to use property executed in Greater Mumbai. The Court has thereby confirmed its earlier judgments which held that arbitration clauses in Leave and License Agreements pertaining to properties situated in Greater Mumbai are void and the jurisdiction to try all disputes in such arrangements vests with the Small Causes Court in Mumbai as per the provisions of the Presidency Small Causes Court Act, 1882 ("**Presidency Act**").

While the earlier judgments were based on the provisions of the Arbitration Act of 1940, the present judgment has validated the same position in reference to the Arbitration and Conciliation Act of 1996. Resolving disputes through alternate dispute mechanisms, such as arbitration, are preferred options over litigation in India, especially property related disputes which have a reputation to continue for years, even decades. Although arbitration agreements are held to be binding over the parties to such agreements, they are held to be void when a statute gives exclusive jurisdiction to a particular forum to try certain disputes. The polemic regarding the binding effect of arbitration clauses was examined in the present case when the Learned Single Judge of the Court referred the issue to a Larger Bench in a Writ Petition filed by Central Warehousing Corporation against M/s Fortpoint Automotive Pvt. Ltd.<sup>1</sup>. The Court held that arbitration clauses would not oust the jurisdiction of the Small Causes Court in resolving disputes arising out of Leave and License Agreements pertaining to properties situated in Greater Mumbai.

### FACTS OF THE CASE

Central Ware Housing Corporation ("**Petitioners**") had entered into a Lease Deed in respect of the premises owned by the Mumbai Port Trust. Fortpoint Automotive Pvt. Ltd. ("**Respondents**") later had entered into a Memorandum of Agreement ("**Agreement**") with the Petitioners by virtue of which, storage facility space in the premises was provided to the Respondents. It was the case of the Petitioners that the Respondents encroached upon an area outside the godown premises and started using the same for washing their vehicles. Consequently, the lessors/owners Mumbai Port Trust issued a show cause notice to the Petitioners asking them why the Lease Deed executed between them and the Petitioners should not be terminated and threatened to initiate eviction proceedings. Later, the owners also enhanced the rent and also made a demand of Rs. 70,94,21,581.51 for increase in the rate with retrospective effect on the basis of unauthorized encroachment of the premises.

The Petitioners, in turn, sought to have the Respondents pay for damages for their unauthorized occupation and the revision of rent by Mumbai Port Trust. The Petitioners also terminated the storage warehousing facilities of the Respondents and asked them to vacate the premises.

The Respondents invoked the arbitration agreement as per Clause 14 of the Agreement and called upon the Petitioners to refer the disputes to arbitration. Simultaneously, the Respondents also proceed to file a suit before the Small Causes Court at Mumbai by invoking section 41<sup>2</sup> of the Presidency Act for declaration that that the Agreement between the Petitioners and Respondents was valid and subsisting and the termination notices issued by the Petitioners were illegal and bad in law.

The Petitioners contended that they had already appointed a sole arbitrator to adjudicate the dispute and the Respondents failed to appear before the arbitrator. Accordingly, the Petitioners raised a preliminary objection regarding jurisdiction of the Small Causes Court to try the suit under section 41 of Presidency Act on the ground that the same was barred in view of the provisions of section 8 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). Section 8 of the Arbitration Act provides that a court is obliged to refer to arbitration a matter brought before it if there exists an arbitration agreement between the parties and the defendant applies for reference of the dispute to arbitration.

The Small Causes Court framed a preliminary issue regarding jurisdiction and granted ad interim relief to the Respondents<sup>3</sup>. The preliminary issue was eventually decided against the Petitioners and aggrieved by the decision, the Petitioners appealed in the Bombay High Court.

The Petitioners contended before the learned Single Judge that the earlier decisions of the Bombay High Court which had taken the view that the provisions of section 41 of the Presidency Act would prevail over Arbitration Act did not have occasion to consider the efficacy of section 5 of the Arbitration Act. Section 5 of the Arbitration Act provides as under:

*"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in Part-I of the Act of 1996".*

According to the Petitioners, this was a non-obstante clause that would prevail over section 41 of the Presidency Act.

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The Single Judge also noted that section 2(3) of the Arbitration Act, which is also contained in Part- I stipulates that this part did not affect any other law for the time being in force, by virtue of which, certain disputes may not be submitted for arbitration. The Single Judge thus found it appropriate to refer the following question to Larger Bench for an authoritative pronouncement:

*“Whether in view of the provision of section 5 of the Arbitration and Conciliation Act, 1996, If any Agreement between the Licensor and Licensee contains a clause for arbitration, the jurisdiction of the Small Causes Court under the Presidency Small Cause Courts Act, 1882 would be ousted?”*

**DECISION OF THE LARGER BENCH**

The Court observed that the State Legislature had amended Section 41 of the Presidency Act to its present form to address the issue of multiplicity of proceedings. The Larger Bench examined the Statement of Objects and Reasons<sup>4</sup> while introducing the amendment and took the view that section 41 (1) is a special law containing a non-obstante clause, by virtue of which, exclusive jurisdiction is vested on Small Causes Court for adjudication of disputes specified therein between the licensor or licensee or a landlord and tenant. The Larger Bench also noted that the Arbitration Act is not within the excepted enactments referred to in section 41 (2) of the Arbitration Act.

The Larger Bench also looked into the question of whether section 41 of the Presidency Act was a law by virtue of which certain disputes may not be submitted to arbitration as stipulated in section 2 (3) of the Arbitration Act . The Court noted that though Section 41 of the Presidency Act did not expressly provide for exclusion of arbitration, since it has a non – obstante provision providing for exclusive jurisdiction to Small Causes Court, by necessary implication, it is a provision by virtue of which, disputes referred to therein, cannot be submitted to arbitration. In doing so, the Larger Bench relied on the decision of the Supreme Court in *Natraj Studio Pvt. Ltd. vs. Navrang Studio*<sup>5</sup>, wherein in context of the section 28 of the Bombay Rent Act, 1947, it was held that the provision was a law by virtue of which disputes contemplated therein could not be submitted to arbitration. The Larger Bench also relied on the decision of the Supreme Court in *Mansukhlal Dhanraj Jain v. Eknath Vitthal Ogale*<sup>6</sup> case wherein it was held that the provisions of Section 28 of the Bombay Rent Act are *pari materia* (relating to the same subject matter) to section 41 (1) of the Presidency Act.

The Court observed that Section 41 (2) of the Presidency Act is a special law which in turn has constituted special courts for adjudication of disputes specified therein between the licensor and licensee or a landlord and tenant. Thus the Court held that Section 5 of the Arbitration Act in a sense was not an absolute *non-obstante* clause and cannot affect the laws that have been in force and thus Section 41 of the Presidency Act falls within the ambit of Section 2 (3) of the Arbitration Act. As a result, even if the License Agreement contains an Arbitration clause, the exclusive jurisdiction of the Courts of Small Causes under Section 41 of the Presidency Act, is not affected in any manner.

Accordingly, the Larger Bench held that an arbitration agreement in such cases would be invalid and inoperative on the principle that it would be against public policy to allow the parties to contract out of the exclusive jurisdiction of the Small Causes Courts by virtue of Section 41 of the Presidency Act.

**CONCLUSION**

The judgment upholds earlier judgments and clearly lays down that an arbitration clause in a Leave and License Agreement or Lease Deed pertaining to property situated in Greater Mumbai would not be enforceable. Though in the instant case it was the licensee that benefited, the judgment is likely to prove advantageous for licensors and landlords, since the recent trend of judgments indicates a pro- landlord approach in settling disputes between landlords and tenants. However, resolving disputes in courts still continues to be a prolonged process and parties in dispute will have to wait for many years for the final outcome. Thus, while the judgment puts to rest the much debated issue of the validity of arbitration clauses in Leave and License or Lease Agreements executed in Greater Mumbai, it also exposes these ubiquitous arrangements to litigation. The already burdened litigation system will now see a surge in cases being filed under Leave and License and Lease Agreements, giving rise to a danger of abuse of the legal system, where often cases are filed to take benefit of systemic delay.

- **Gautam Dembla & Shafaq Uraizee-Sapre**

1 Writ Petition No. 4614 of 2009

2 “S. 41. **Suits or proceedings between licensors and licensees or landlords and tenants for recovery of possession of immovable property and licence fees or rent, except to those to which other Acts apply to lie in Small cause Court.**- (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, but subject to the provisions of sub-section (2), the Court of Small Cause shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of any licence fee or charges or rent therefore, irrespective of the value of the subject-matter of such suits or proceedings.

(2) Nothing contained in sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act, the Bombay Housing Board Act, 1948 or any other law for the time being in force applies.”

3 An Issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. As per section 9 – A of the Civil Procedure Code as applicable in Maharashtra, where at the hearing of an application relating to interim relief in a suit, objection to jurisdiction is taken, such issue is to be decided by the court as a preliminary issue before proceeding to determine such application. However the court has the discretion to grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to jurisdiction.

4 Under the existing law, the licensor has to go to different Courts for recovery of possession of premises and licence fees and if the plea of tenancy is raised by the defendant and succeeds, the matter has again to go to the Small

Cause Court. Similarly, where proceedings on the basis of tenancy are started in the Small Cause Court and subsequently the plea of licence is taken and succeeds, the plaint is returned and has to be re-presented to the City Civil Court or the High Court, as the case may be, depending on the valuation. Thus there is unnecessary delay, expense and hardship caused to the suitors by going from one Court to another to have the issue of jurisdiction decided. Moreover, Chapter VII of the Presidency Small Cause Courts Act envisages applications which culminate in orders and are always susceptible of being challenged by separate suits on title where the relationship is admittedly not between a landlord and tenant. In order to avoid multiplicity of proceedings in different Courts and consequent waste of public time and money and unnecessary delay, hardship and expense to the suitors, and to have uniformity of procedure, it is considered expedient to make the required supplementary provisions in the Presidency Small Cause Courts Act, so that all suits and proceedings between a landlord and tenant or a licensor and licensee for recovery of possession of premises or for recovery of rent or licence fee, irrespective of the value of the subject-matter, should go to and be disposed of by the Small Cause Court, either under that Act or the Rent Control Act.

5 (1981) 1 SCC 523

6 (1995) 2 SCC 665

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