

Prajakta Vartak

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
ARBITRATION PETITION (L.) NO. 22526 OF 2022**

BXIN Office Parks India Pvt. Ltd.	...Petitioner
Vs.	
Kailasa Urja Pvt. Ltd.	...Respondent

AND

**ARBITRATION PETITION NO. 351 OF 2022**

One International Center Pvt. Ltd.	...Petitioner
Vs.	
Symphony Kitchen Pvt. Ltd.	...Respondent

AND

**ARBITRATION PETITION (L.) NO. 1692 OF 2022**

Indiabulls Properties Pvt. Ltd.	...Petitioner
Vs.	
Symphony Kitchen Pvt. Ltd. & Anr.	...Respondents

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Mr. Sharan Jagtiani, Senior Advocate with Mr. Karl Tamboly, Ms. Krushi Barfiwala i/b. Parinam Law Associates for Petitioners.

Mr. Surel Shah i/b. Mr. Saurabh Butala with Mr. Omkar Chitale and Ms. Manvi Sharma for Respondents.

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CORAM	:	G.S. KULKARNI, J.
Reserved on	:	JULY 28, 2022.
Pronounced on	:	AUGUST 20, 2022.

**JUDGEMENT:-**

1. These are three petitions filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “**the Act**”) whereby the petitioners are praying for interim measures pending the arbitral proceedings.

2. Arbitration Petition (L.) No. 22526 of 2022 (BXIN Office Parks

India Pvt. Ltd.) has been argued as the lead petition. The subject matter of the proceedings is quite common, namely, a dispute as raised by the petitioner in the capacity of licensors against the respondent in all these proceedings being the licensees under the respective leave and licence agreements as entered between the parties.

3. For convenience, the facts in the lead petition are required to be noted:

The petitioner is a company incorporated under the Companies Act, 1956 and is stated to have absolute right, title and authority in land admeasuring 39085.43 square meters bearing City Survey No. 841 lying, being and situated at Jupiter Mills, Lower Parel, Mumbai – 400 013 including the building constructed thereon called “One World Center” (formerly known as One Indiabulls Centre). The building consists of Tower-1 (Ground + 18 floors), Tower-2A and 2B (Ground + 20 floors) and Wing B1 & B2 (Ground + 8 floors) (for short, referred to as “the building”). The building was originally under the ownership of Indiabulls Properties Private Limited (for short, “IPPL”).

4. The respondent is also a company incorporated under the Companies Act, 1956. It is stated that the respondent requested the IPPL to allow it to use a cumulative area of 16,256.70 sq. ft. in Tower 1 of the One World Centre for the purposes of operating a food court.

5. On 06 January, 2017, a Leave and Licence Agreement was entered between the parties granting the respondent a license to use the premises admeasuring 16,256.70 sq. feet in Tower – 1 of the building which comprises of the seating, preparation and wash area situated on the 1<sup>st</sup> floor. The term of the licence was for sixty months which has expired on 31 July, 2021.

6. In accordance with Clause 4 of the Leave and Licence Agreement, a monthly fee of Rs.10,000/- was payable within a period of 10 days of the beginning of the successive month.

7. Clauses 2, 6, 9.6, 16 and 22 of the Leave and Licence Agreement are required to be noted which read thus:-

**“Clause 2 of the Agreement – Grant of License**

LICENCE TERM:- The Licensor hereby grants on a Leave and license to the Licensee and the Licensee hereby takes on leave and license from the Licensor, to use and occupy the Licensed Premises for the purpose of setting up a Food Court for a period of 60 (sixty) months (the License Period commencing from License Commencement Date of 1<sup>st</sup> August 2016 and expiring on the completion of 60 (Sixty) from the License Commencement Date i.e. 31 July 2021 unless terminated earlier in accordance with the terms of this Agreement. There shall be 60 (Sixty) months Lock in period for the Parties during which period neither Party shall be entitled to terminate the Leave and License Agreement save and except as set out herein.

**Clause 6 of the Agreement – Possession and Occupation of Premises**

6.1 The Licensee hereby acknowledges that on the commencement and during the continuation of the use and occupation of the Licensed Premises, the Licensor shall not assign its rights in relation to operation of the Food Courts. However, Licensee shall be free to sub-let, sub-license, grant the right to use the Licensed Premises to third parties for any activities it may consider fit in its sole discretion.

6.2 Except to the extent set out above, it is hereby agreed

between the Parties hereto that at all times the juridical possession of the Licensed Premises shall be of the Licensor.

#### **Clause 9 of the Agreement – Covenants of the parties**

9.6 Upon the expiry of this License Period or on earlier determination/ termination of this Agreement, the Licensee shall on its own remove all articles and things belonging to the Licensee, Sub-Licensee (being the Third Parties) or their employees and hand over and/or deliver the vacant, quiet and peaceful charge of the Licensed Premises and other movables without any claim or hindrance and the Licensor shall refund the Interest Free Security Deposit subject to such deduction/adjustment of outstanding dues, if any, payable by the Licensee under this Agreement against possession of the Licensed Premises. In the event the Licensee fails to hand over and/or deliver the vacant, quiet and peaceful charge of the License Premises on the expiry or sooner determination of the Agreement although the Licensor is ready and willing to refund the Interest Free Security Deposit to the Licensee, the Licensee shall be liable and shall pay to the Licensor liquidated damages, double the amount of the License fee per day, for each day of delay in vacating the Licensed Premises.

#### **Clause 14 of the Agreement – Termination**

Either party may be entitled to terminate the agreement by serving a notice of one (1) month to the other party anytime after the 54<sup>th</sup> month of the Lock-in Period.

#### **Clause 16 of the Agreement – Entirety**

16.1 This Agreement (including the schedules and the annexures attached to this Agreement) constitutes the entire agreement between the parties with respect to the subject matter of this Agreement.

16.2 It is hereby clarified and agreed that this Agreement supersedes all previous arrangements/ agreements/ understandings and representations, written and oral between the Parties hereto with respect of the transaction contemplated in this Agreement and that this Agreement shall alone govern the rights and obligations of the parties herein.

16.3 This Agreement shall not be amended, altered or modified in any manner except by an instrument in writing and signed by both the Parties.

#### **Clause 22 of the Agreement – Dispute Resolution**

The Parties will attempt in good faith to resolve any dispute, differences or claim arising out of or relating to this Agreement promptly through negotiations between them. In the event of the Parties failing to resolve the dispute amicably then the Parties shall refer such dispute or claim arising out of or in connection with this Agreement to arbitration by a mutually agreeable sole arbitrator. The Arbitration proceedings will be conducted according to the provisions of the Arbitration & Conciliation Act, 1996 or amendment or re-

enactment thereof and the decision of the said Arbitrator shall be final and binding on both the Parties. The venue of the arbitration proceedings will be Mumbai.”

8. The share holding of IPPL, which was managed by Indiabulls was transferred to a new management held by Blackstone Group.

9. By its letters dated 14 June, 2021 and 17 June, 2021, the petitioner informed the respondent that the leave and licence agreement would expire by efflux of time on 31 July, 2021. The respondent was informed to handover vacant and peaceful possession of the licensed premises and remove any furniture and fittings that may have been installed in the licensed premises on the expiry of the licence. It was also informed that on the respondent handing over possession, the petitioner would refund to the respondent the interest free security deposit of Rs.10 Lakhs, as per the terms and conditions as set out in Clause 4.4 of the agreement. It is stated that the respondent, however, refused to accept the service of the petitioner’s letter dated 14 June, 2021, which was thereafter forwarded by petitioner’s e-mail dated 17 June, 2021.

10. On 26 July, 2021, IPPL addressed another letter to the respondent being a reminder to hand over and vacate the licensed premises by 31 July, 2021. On 31 July, 2021 the leave and licence agreement expired by efflux of time. The petitioner has contended that despite receipt of

its letters and knowing fully well that the term of the licence had expired, the respondent continued to occupy the licensed premises. This compelled the petitioner to paste notices on the access points of the licenced premises intimating the respondent and its employees that the leave and licence agreement having expired, the respondent cannot utilize the licensed premises.

11. It is the petitioner's case that despite continued efforts of the petitioner, the respondent has refused to vacate and handover the licence premises to the petitioner. It is contended that on 27 August, 2021, the Health Department of the Municipal Corporation served on the respondent an inspection report whereby the respondent was called upon to close the licensed premises on account of not having the requisite licenses.

12. As similarly the respondent was acting in breach of the leave and licence agreements qua the other premises (being the subject matter of Arbitration Petition No.351 of 2022), the petitioner was required to approach this Court by filing a petition under Section 9 of the Act (Arbitration Petition Lodging No.20565 of 2021) praying for interim measures. On 20 December, 2021, this Court (B.P. Colabawalla, J.) passed an order granting reliefs in terms of prayer clauses (c) and (d) namely restraining the respondent from making any application to the

statutory authorities for renewal of the licenses for operating the licensed premises as also restraining the Municipal Corporation from granting any of the applicable licenses to the respondent. Prayer clauses (a) and (b) of the petition were not pressed. The petition was accordingly disposed of.

13. It is thus contended by the petitioner that the respondent has continued to occupy the licensed premises despite the licence having expired, as also the respondents are not conducting and cannot conduct any business which is causing a serious prejudice to the petitioner as also there are other issues inter alia in regard to the pest control of the premises etc. It is contended that the respondent is causing a serious obstruction to the other licensees of the petitioner, as the respondent has encroached over an area which was allowed to other licensees of the petitioner in respect of which police complaints are also made by the petitioner.

14. The petitioner being aggrieved by such conduct of the respondent, lastly addressed an e-mail dated 05 May, 2022 to the respondent pointing out the harassment being caused to the petitioner and called upon the respondent to remove the barricades as put up by the respondent within a period of 48 hours and cease from its illegal occupation. It is the petitioner's case that employees of the respondent have now started squatting on the licensed premises. It is on such

backdrop, the petitioner has approached this Court praying for the following reliefs:-

(Reliefs as prayed for in Arbitration Petition (L) No. 22526 of 2022)

**“a) That pending the hearing and disposal of arbitral proceedings, making of the arbitral award and until execution of the arbitral award, this Hon’ble Court be pleased to restrain and injunct Respondent from utilising the Licensed Premises as a Food Court or for any other purposes including but not limited to permitting the Respondent’s staff from staying at the Licensed Premises;**

b) that pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, this Hon’ble Court be pleased to direct the Respondent to deposit a sum of Rs. 68,60,000/- (Rupees Sixty Eight Lakhs and Sixty Thousand Only);

c) that pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, this Hon’ble Court may be pleased to direct the Respondent to forthwith disclose on oath the audited balance sheets of the Respondent for the last three years, its assets and properties (moveable and immovable) including shares, stock in trade, furnish list of all the bank accounts with copies of the statement of accounts of the same for the last 3 (three) accounting years, demat statements of the Respondent for the last three years, savings, financial investments, including but not limited to bonds, government securities, along with the details of the charges/mortgages/encumbrances (if any) subsisting as on the date of the disclosure;

d) that pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, this Hon’ble Court be pleased to order and attach assets and properties, both movable and immovable as disclosed in terms of prayers clause (d) above together with all the machinery, equipment, stores, plant, furniture, fixtures, articles, things, appurtenances, and other paraphernalia situated therein until the satisfaction of the Petitioner’s claim of in the sum of Rs. 68,60,000/- (Rupees Sixty Eight Lakhs and Sixty Thousand only);

e) that pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, an order of attachment be passed in respect of all the bank accounts in the name of the Respondent and other assets and properties of the Respondent to secure the dues of the Petitioner and/or in the alternative, be pleased to pass an order of injunction restraining the Respondent from in any manner transacting; transferring and withdrawing any amounts thereof and to “debit freeze” the banks accounts as may be disclosed by the Respondent;



f) that pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, the Respondent, by itself, jointly and/or severally, or through their employees; servants, agents, trustees or any person acting through it or on its behalf, or otherwise however, be ordered and directed to provide security in favour of the Petitioner a sum of Rs. 68,60,000/- (Rupees Sixty Eight Lakhs and Sixty Thousand only);

g) that pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, the Respondent, their servants and agents be restrained by an order of injunction by this Hon'ble Court from dealing with, disposing off, transferring, alienating, encumbering or in any manner creating third party rights in respect of the assets and properties (moveable and immoveable) disclosed in terms of prayers clause (d) above, including shares, stock in trade, bank accounts, bank statements, savings, financial investments, including but not limited to bonds, government securities;

h) that without prejudice to the aforesaid, pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, this Hon'ble Court be pleased to grant such reliefs in order to enable the Petitioner to effectively carry out the capex work to renovate and refurbish the Licensed Premises;

i) that without prejudice to the aforesaid, pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay, or some other fit and proper person for the Licensed Premises with all powers under Order XL Rule 1 of the Code of Civil Procedure 1908, with the power to appoint such agency to run a food court from the Licensed Premises in terms of the requirements and demands prevalent in the area and of the Building and/or recover and/or realise such amounts from the agency which will be paid as license fee for usage of the License Premises and such amounts be deposited with the Office of the Prothonotary and Senior Master of this Hon'ble Court;

j) that without prejudice to the aforesaid, pending the hearing and disposal of arbitration proceedings, making of arbitral award and until execution of the arbitral award, this Hon'ble Court be pleased to grant such other reliefs to in order to enable the Petitioner to provide the essential service of providing food to the other licensees and occupants of the Building.

k) ad-interim reliefs in terms of prayer clauses (a) to (h) above.”  
(emphasis supplied)

15. Although the first petition was argued as a lead petition, the

reliefs as prayed for in the companion petitions are also similar and, therefore, the prayers in those petitions need not be extracted.

16. Mr. Jagtiani has drawn the Court's attention to the various clauses of the leave and licence agreement. He has also referred to the correspondence between the parties. Mr. Jagtiani has made extensive submissions to contend that as the leave and licence agreements having expired by efflux of time on 31 July, 2021 which is almost a year back, the respondent cannot continue to occupy the licensed premises. It is his submission that the reliefs as prayed for are thus required to be granted and more particularly the relief that the Court Receiver, High Court be appointed as a receiver of the licensed premises, so that the another agency can be appointed to run the Food Court in the licensed premises. It is his submission that this would be beneficial to the occupants of the building who are in requirement of such facilities. Mr. Jagtiani referring to the decisions in **Brainvisa Technologies Pvt. Ltd. vs. Subhash Gaikwad (HUF)**<sup>1</sup> and **Bafna Motors Private Limited vs. Amanulla Khan**<sup>2</sup> would submit that even if a dispute between the parties arises under the leave and licence agreement, this Court has granted reliefs by exercising jurisdiction under section 9 of the Arbitration and Conciliation Act. The other submissions are on merits which need not be adverted in detail in view of the stand taken by the respondent.

1 Arbitration Application No. 195 of 2010, dated 14.09.2012

2 Arbitration Application No. 340 of 2019

17. Mr. Surel Shah and Mr. Kanade, learned counsel for the respondent have raised a preliminary objection to the maintainability of the petition on the ground that the disputes are not arbitrable as necessarily by statutory implication arbitration would be barred in view of the provisions of Section 41 of the Presidency Small Cause Courts Act, 1882 (for short, "**PSCC Act**"). Mr. Shah's contention is that primary intention of the petitioner is to dispossess the respondent from the licensed premises and in seeking such reliefs or any incidental thereto would disturb the respondent's possession of the premises.

18. Mr. Shah has submitted that Section 41 of the PSCC Act would bar arbitration as the Small Causes Court is conferred exclusive jurisdiction to entertain and try all suits and proceedings between a licensor and licensee relating to the recovery of possession of any immovable property situated in Greater Bombay, relating to the recovery of the licensed fees or charges or rent thereof, irrespective of value of the subject matter of such suit or the proceedings. It is his submission that in the facts of the present case, the only remedy available to the petitioner is to file a civil suit seeking all reliefs relating to the possession of the property. It is his submission that the principal prayers as made by the petitioners, are prayers which are necessarily in relation to the recovery of possession of licensed premises and hence, by virtue

of Section 41 of the PSCC Act, arbitration is clearly barred. In support of his contention, Mr. Shah has placed reliance on the decision of the Division Bench of this Court in **Carona Ltd. Vs. Sumangal Holdings**<sup>3</sup>, the decision of the Full Bench of this Court in **Central Warehousing Corporation, Mumbai vs. Fortpoint Automotive Pvt. Ltd., Mumbai**<sup>4</sup>, decision of the Supreme Court in **Prabhudas Damodar Kotecha & Ors. vs. Manhabala Jeram Damodar & Anr.**<sup>5</sup> and a decision of the three Judges Bench of the Supreme Court in **Vidya Drolia & Ors. vs. Durga Trading Corporation**<sup>6</sup>.

19. It is his submission that the petitioner had in fact approached the respondent to set up and operate Food Court in the premises in question admeasuring 16,256.70 sq. ft. located at Tower 1 at One World Center comprising of the seating preparation and wash area on the first floor of the said Tower, described as the 'licensed premises'. The premises were in bare shell condition whereby even the basic infrastructure for running a food court was required to be developed by the respondent by incurring substantial capital expenditure. It was thus proposed that the respondent shall develop the premises for setting up and operating a food court at the respondent's own cost and on such investment, the premises would be let out to the respondent at minimal license fee. It is

3 2007(4) MhLJ 551

4 2010(1) Mh. L.J. 658

5 2013(6) All MR 399(S.C.)

6 (2021) 2 SCC 1

submitted that accordingly, it was agreed between the parties that it is the respondent who would undertake the development of the food court. It is submitted that at the relevant time the occupancy of the main building was also low and the respondent operated the food court at a substantial loss for the initial period. The respondent has invested an amount of Rs.16.64 Crores and there was hardly any return of such capital investment for variety of reasons. It is submitted that it was understood between the parties that the agreement shall be executed for at least a period of 10 years, however, due to petitioner's internal policies, the petitioner had informed the respondent that initially the agreement would be for 5 years from 01 August, 2016 to 31 July, 2021 and which would be subsequently renewed for another 5 years. Mr. Shah would also submit that it is also the respondent's case that it was agreed between the parties that the respondent would be entitled to enter into business conducting agreements with third parties and sublet/sub-license the premises for operating the food court. He submits that it was also specifically agreed that no privity of contract shall exist between the petitioner and the third parties wherein the respondent shall solely deal with such third parties. The respondent accordingly had approached the brokers to sublet some of the stalls which were in possession of the respondent under the leave and licence agreement and accordingly, the respondent had executed business conducting

agreements with Mountains Trail Foods Private Limited, Poncho Hospitality Private Limited, Fresh Juices and Hospitality Pvt. Ltd. and Juno's Hospitality LLP. It is submitted that in contravention of this arrangement, the petitioner in April 2018, had tried to forcefully enter into business conducting agreements directly with the third parties whereby according to the respondent, the petitioner defrauded the respondent by illegally appropriating the operating fees under the said business conducting agreements which otherwise was to come to the benefit of the respondent by virtue of clause 9.10 of the leave and licence agreement. It is also the respondent's case that one Aditya Birla Group in collusion with the petitioner had encroached on the respondents area of about 2000 sq. ft. as licenced in favour of the respondent which was revealed to the respondent by the Aditya Birla Group by providing a copy of the agreement. Such encroachment and the collusive approach of the petitioner with Aditya Birla Group resulted in the respondent filing a criminal complaint against Aditya Birla Group and the petitioner with N.M. Joshi Marg Police Station.

20. It is submitted that the respondent was associated with the petitioner even prior to the leave and licence agreement. It is for such reasons and as set out in the reply affidavit which are almost similar in both the proceedings, the respondent has contended that the petitioner is not entitled to any relief much less for a drastic relief of appointment

of a receiver.

21. It is the respondent's case that in view of the specific provision of Section 41 of the PSCC Act, the petitioner does not have a right to seek remedy of possession or any remedy relating thereto either before the arbitral tribunal in any arbitral proceedings or before this Court in proceedings under Section 9 of the Act. It is the respondent's contention that as the main relief of recovery of possession itself is not maintainable before the arbitral tribunal, hence there is no question of Section 9 proceedings being maintainable, praying for any ancillary relief or any other interim reliefs. It is submitted that this Court would not have jurisdiction to grant any interim relief relating to possession including appointment of Court Receiver and thereby displacing the petitioner from the subject premises. Referring the decision of the Supreme Court in **Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd.**<sup>7</sup> and the decision of the Full Bench of this Court in **Central Warehousing Corporation, Mumbai vs. Fortpoint Automotive Pvt. Ltd.** (supra), it is submitted that the present dispute falls under the category of a non-arbitrable dispute and the exclusive jurisdiction to entertain such dispute would lie with the Small Causes Court under Section 41 of the PSCC Act. It is on such pleas, the reliefs as prayed for in the petition are opposed by the respondent.

7 2011(5) SCC 532

22. Mr. Shah although has advanced the above submissions on the maintainability, he would not dispute that in the event the disputes between the parties under the leave and licence agreements in question, if were to be purely monetary claims of the petitioner and nothing to do with possession and any other incidental reliefs thereto, in such case, as per the well-settled principles of law, arbitral proceedings in regard to pure monetary claims would have been maintainable, being a cause falling outside Section 41 of the PSCC Act. Mr. Shah has also fairly stated that his clients without prejudice to their rights and contentions are willing to deposit in this Court the amounts towards liquidated damages as agreed between the parties under the leave and licence agreement.

### **Analysis and Conclusion**

23. I have heard learned counsel for the parties. I have also perused the record with their assistance. At the outset, the preliminary objection as raised on behalf of the respondent as to whether in view of the provisions of Section 41 of the PSCC Act in the present facts, this Court would lack jurisdiction to entertain proceedings under section 9 of the Act, would be required to be decided.

24. To consider such objection, it would be necessary to first advert to Section 41 of the PSCC Act, which is found in Chapter VII of the PSCC Act. Section 41 reads thus:-



**“41. Suits or Proceedings between licensors and licensees or landlords, land 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 but subject to the provisions of sub-sections of (2), the Court of Small Causes 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 the licence fees 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 <sup>8</sup>[the Maharashtra housing and Area Development Act, 1976 or any other law for the time being in force, apply].”

25. It may be stated that the PSCC Act was enacted to amend the law relating to the Small Causes Courts established in the Presidency Towns of Calcutta, Madras and Bombay. Chapter II of the Act provides for ‘Constitution and Officers of the Court’, under which section 5 is the provision which provides for establishment of the Small Causes Court. Section 6 provides that the Small Cause Court shall be deemed to be a Court subject to the superintendence of the High Court. Chapter IV of the Act provides for ‘Jurisdiction in respect of Suits’. Chapter V provides for ‘Procedure in Suits’. Chapter VI providing for ‘New Trials and Appeals’, is not relevant in the present context. Chapter VII provides for ‘Recovery of Possession of Certain Immovable Property and Certain Licence Fees and Rent’ under which the provision of Section 41 pertaining to ‘Suits or proceedings between licensors and licensees or

<sup>8</sup> These words and figures were substituted for the word and signed “the Bombay Housing Board Act, 1948 or any other law for the time being in force, apply”were submitted

landlords, land tenants for recovery of possession of immovable property and licence fees or rent, except those to which other Acts apply to lie in Small Cause Court is incorporated.

26. On a plain reading of Section 41 of the PSCC Act, it is clear that it is the Small Causes Court, which has been conferred 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 the licence fee or charges or rent therefor, irrespective of the value of the subject matter of such suits or proceedings. Sub-section (2) of Section 41 of the PSCC Act provides that 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 Maharashtra housing and Area Development Act, 1976 or any other law for the time being in force, apply].

27. Thus, the question which would arise for consideration in the present proceedings is whether Section 41 of the PSCC Act would create

a implied bar for this Court to grant any reliefs under section 9 of the Arbitration and Conciliation Act.

28. To answer such preliminary issue which is in regard to the maintainability of the present proceedings, it would be necessary to consider as to what is the legal position in such context as seen from the different pronouncements.

29. In **Natraj Studios (P) Ltd. Vs. Navrang Studios and Another**<sup>9</sup>, which is a decision of three Judges Bench of the Supreme Court, the dispute between the parties had arisen under an agreement dated 28 March, 1970 by which Navrang Studios granted to Natraj Studios, on leave and licence, two studios situated at Andheri, Bombay along with machineries, equipments etc. Although the agreement was initially for a period of 11 months, it was extended from time to time. By a further agreement dated 5 November, 1972, the original agreement was extended for 11 months from 01 January, 1973. The leave and license agreement was thus in force on 01 February, 1973, with effect from which date Section 15-A was inserted in the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, by an amendment (Maharashtra Act 17 of 1973), which provided that any person who was in occupation of any premises on 01 February, 1973 as a licensee, had deemed to have become a tenant of the landlord on that day for the

9 (1981) 1 Supreme Court Cases 523

purposes of the Act. Much later i.e. on 28 April, 1979 Navrang Studios terminated the leave and licence agreement and called upon Natraj Studios to vacate and hand over possession of the studios to Navrang Studios. This caused Natraj Studios to file a declaratory suit in the Small Causes Court at Bombay which was instituted on 08 May, 1979 praying for a declaration that it was a monthly tenant of the two Studios. Natraj Studios also filed an application under Section 33 of the Arbitration Act, 1940 before the Bombay High Court for a declaration that the arbitration clause was invalid, inoperative, etc. Such application was dismissed by the learned Single Judge of the Bombay High Court on the ground that the High Court had no jurisdiction to determine the alleged rights if any of Natraj Studios as a tenant. Consequently, Navrang Studios filed an application under Section 8 of the 1940 Act praying that a sole arbitrator be appointed to decide the disputes and differences between the parties under the leave and licence agreement. Such application was allowed by the High Court and the sole arbitrator came to be appointed. It is against such orders passed by the High Court, the proceedings came to be filed before the Supreme Court, being the subject matter of the said decision. Natraj Studios contended that the essence of the dispute between the parties was the right to the possession of the two studios being sought by Navrang and hence the dispute between the parties could only be resolved by the Small Causes

Court and that every other court having jurisdiction including that of an arbitrator was excluded. It is in such context, examining the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act as also the provisions of the PSCC Act and advertent to the prior decisions as rendered by the Court in such context, the Supreme Court observed that as a matter of public policy, any arbitration agreement between the parties, whose rights would be regulated by such acts cannot be recognised by a Court of law. It was held that exclusive jurisdiction is given to the Court of Small Causes and jurisdiction is denied to other Courts to entertain and try any suit or proceeding between a licensor and a licensee relating to recovery of licence fees and charge or to deal with any claim or question arising out of the Act or any of its provisions. The observations of the Supreme Court as contained in paragraphs 2, 16, 17, 18 and 24 which are relevant in the context of the present proceedings are required to be noted which read thus:-

“2. Shri Soli Sorabji and Shri Talat Ansari learned counsel for the appellant submitted that the essence of the dispute between the parties was the right to the possession of the two Studios, that after the 1973 Amendment to the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the status of the appellant was at least that of a 'deemed tenant', that under the scheme of the Bombay Rent, Hotel & Lodging House Rates Control Act, 1947, the dispute between the parties could only be resolved by the Court of Small Causes and that every other Court's jurisdiction including that of an arbitrator was excluded. Shri Mridul, learned counsel for the first respondent, argued that the subject matter of the 'leave and licence' agreement was not 'premises' within the meaning of that expression as defined in the Bombay Act but the business as such and, therefore, the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act were not attracted at all.

.....

16. We may now proceed to consider the submission that the Court of Small Causes alone has exclusive jurisdiction to resolve the dispute between the parties. Section 28(1) of the Bombay Rent Act, positively confers jurisdiction on the Court of Small Causes to entertain and try any suit or proceeding between a landlord and tenant relating to the recovery of rent or possession of any premises or between a licensor and a licensee relating to the recovery of licence fee or charge and to decide any application made under the Act and to deal with any claim or question arising out of the Act or any of its provisions, and negatively it excludes the jurisdiction of any other Court from entertaining any such suit, proceeding or application or dealing with such claim or question.

17. The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts is pursuant to the social objective at which the legislation aims. Public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognised by a Court of law.

18. Thus exclusive jurisdiction is given to the Court of Small Causes and jurisdiction is denied to other Courts (1) to entertain and try any suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises, (2) to try any suit or proceeding between a licensor and a licensee relating to the recovery of licence fee or charge, (3) to decide any application made under the Act and, (4) to deal with any claim or question arising out of the Act or any of its provisions. Exclusive jurisdiction to entertain and try certain suits, to decide certain applications or to deal with certain claims or questions does not necessarily mean exclusive jurisdiction to decide jurisdictional facts also. Jurisdictional facts have necessarily to be decided by the Court where the jurisdictional question falls to be decided, and the question may fall for decision before the Court of exclusive jurisdiction or before the Court of ordinary jurisdiction. A person claiming to be a landlord may sue his alleged tenant for possession of a building on grounds specified in the Rent Act. Such a suit will have to be brought in the Court of Small Causes, which has been made the Court of exclusive jurisdiction. In such a suit, the defendant may deny the tenancy but the denial by the defendant will not oust the jurisdiction of Court of Small Causes. If ultimately the Court finds that the defendant is not a tenant the suit will fail for that reason. If the suit is instituted in the ordinary Civil Court instead of the Court of Small Causes the plaint will have to be returned irrespective of the plea of the defendant. Conversely a person claiming to be the owner of a

building and alleging the defendant to be a trespasser will have to institute the suit, on the plaint allegations, in the ordinary Civil Court only. In such a suit the defendant may raise the plea that he is a tenant and not a trespasser. The defendant's plea will not straightaway oust the jurisdiction of the ordinary Civil Court but if ultimately the plea of the defendant is accepted the suit must fail on that ground. So the question whether there is relationship of landlord and tenant between the parties or such other jurisdictional questions may have to be determined by the Court where it falls for determination-be it the Court of Small Causes or the ordinary Civil Court. If the jurisdictional question is decided in favour of the Court of exclusive jurisdiction the suit or proceeding before the ordinary Civil Court must cease to the extent its jurisdiction is ousted.

.....

24. In the light of the foregoing discussion and the authority of the precedents, we hold that both by reason of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and by reason of the broader considerations of public policy mentioned by us earlier and also in *Deccan Merchants Cooperative Bank Ltd. v. M/s. Dalichand Jugraj Jain & Ors.* (supra), the Court of Small Causes has and the Arbitrator has not the jurisdiction to decide the question whether the respondent-licensee-landlord is entitled to seek possession of the two studios and other premises together with machinery and equipment from the appellant-licensee-tenant. That this is the real dispute between the parties is abundantly clear from the petition filed by the respondents in the High Court of Bombay, under S. 8 of the Arbitration Act seeking a reference to Arbitration. The petition refers to the notices exchanged by the parties, the respondent calling upon the appellant to hand over possession of the studios to him and the appellant claiming to be a tenant or protected licensee in respect of the studios. The relationship between the parties being that of licensor-landlord and licensee-tenant and the dispute between them relating to the possession of the licensed- demised premises, there is no help from the conclusion that the Court of Small Causes alone has the jurisdiction and the Arbitrator has none to adjudicate upon the dispute between the parties.”

30. In **Carona Ltd. Vs. Sumangal Holdings** (supra), the question before the Division Bench of this Court was as to whether the Court would have jurisdiction under Section 9 of the Act to pass orders in the nature of interim measures in a dispute between licensor and licensee, in the context as to what Section 41 of the PSCC Act would provide. In

such case, the proceedings before the Division Bench had arisen from the order passed by the learned Single Judge dismissing the section 9 petition filed by the appellant-Carona Ltd. on the ground that the dispute between the parties had arisen under a leave and licence agreement in respect of which the PSCC Act would provide for exclusive jurisdiction over the subject matter under Section 41 of the PSCC Act. The prayer before the learned Single Judge was for a direction to hand over possession of the premises or in the alternative, direction for appointment of a Receiver in respect of the premises, as also a prayer for direction to the respondent to deposit an amount as security towards the claim of the appellant in arbitration which are also some of the reliefs in the present proceedings. The Division Bench referring to the decision of the Supreme Court in **Natraj Studios (P) Ltd. Vs. Navrang Studios and Another** (supra), as also referring to the decision of the learned Single Judge of this Court in **Siemens Ltd. vs. Captech Online Pvt. Ltd.**<sup>10</sup> held that the legislature having created a special forum for adjudication of disputes of a particular nature by necessary implication, the jurisdiction of the other Civil Courts as also of the arbitrator under any arbitration agreement between the parties stood excluded. The relevant observations of the Division Bench need to be noted which read thus:-

“10. On the contrary, the Court would have due regard to the fact that the Legislature had a stated object - conceived in the public interest -in conferring exclusive jurisdiction to deal with matters between licensors and licensees or between landlords and tenants on



the Small Causes Court. Rent Control Legislation constitutes a statutory regulation of the relationship between landlords and tenants and between Licensors and licensees in the public interest and as a matter of protecting public welfare. The question whether the Small Causes Court has exclusive jurisdiction must be understood in the backdrop of the object which the legislature intended to subscribe. A comprehensive remedy has been provided. Sub-section (1) of Section 42 provides an appeal from a decree or order made by the Court of Small Causes exercising jurisdiction under Section 41 to a Bench of two Judges of the Court. In *Natraj Studio Pvt. Ltd. v. Navrang Studio*, (supra), the Supreme Court had occasion to consider the question as to whether an arbitration agreement could operate in respect of a dispute as to the possession of premises where the Court of Small Causes had jurisdiction under Section 28(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Sub-section (1) of Section 28 of the Rent Act provided that notwithstanding anything contained in any law, in Greater Bombay, the Court of Small Causes, Bombay, and in any area for which a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and elsewhere the Court of Civil Judge, Senior Division, shall have jurisdiction to entertain and try suits or proceedings between landlords and tenants relating to the recovery of rent or possession or between licensors and licensees relating to the recovery of licence fee or charges. The Supreme Court held that both on the basis of the non-obstante provision as well as the object of the legislation the exclusive jurisdiction would vest in the Courts stipulated by the Legislature and an arbitration agreement cannot be recognised in the field:

“The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts is pursuant to the social objective at which the legislation aims. Public Page 1108 policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognised by a Court of law.”

11. These observations would apply in construing the provisions of Section 41 of the Presidency Small Cause Courts Act, 1882. The object of the legislation deals with a matter of public interest and the ground which weighed with the Supreme Court in *Natraj Studio* in excluding the applicability of an arbitration agreement in the field would apply here as well. In his judgment in *Siemens* (supra) Mr. Justice D.K. Deshmukh held that the mere deletion of the non-obstante clause in Section 41 would not make any difference. The Learned Single Judge held that the Legislature having created a special forum for adjudication of disputes of a particular nature by

necessary implication, the jurisdiction of the other Civil Courts would also stand excluded. The Learned Judge observed thus:

“In my opinion, however, mere deletion of non obstante clause from Section 41 will not make much difference. Because of the non-obstante clause contained in Section 41, the jurisdiction of the civil court to entertain the suit between the licensee and licensor for recovery of possession and for recovery of licence fee was expressly barred. But perusal of the provisions of Section 9 of the Civil Procedure Code shows that the jurisdiction of the civil court to entertain the suit can be expressed barred and it also can be barred by necessary implication. It can now be taken as a settled law that when the legislature creates special forum for adjudication of disputes of a particular nature then by necessary implication, jurisdiction of the Court of original civil jurisdiction to entertain those disputes is barred by necessary implication. The legislature by enacting Section 41 created a special forum for adjudication of disputes between the licensor and licensee in relation to recovery of licence fee and recovery of possession. Section 41 also created forum for filing an appeal against the decision of Small Causes Court. Thus, as the legislature has created a special forum for adjudication of disputes between the licensee and licensor in relation to recovery of possession and licence fee, the jurisdiction of the court of original civil jurisdiction will be ousted by necessary implication and, therefore, applying the law laid down by the Supreme Court in *Natraj Studios*, the reference to arbitration of the question which falls for decision before the Small Causes Court suit under Section 41, cannot be possible.”

31. In **ING Vysya Bank Ltd. vs. Modern India Ltd.**<sup>11</sup>, the learned Single Judge of this Court while considering the issue whether the petitioner-licensee who had filed the petition under Section 9 of the Act claiming a relief in the nature of specific performance of an agreement of renewal in terms of agreement of licence executed between him and the respondent licensor, as also, who had sought an order of injunction restraining the licensor from terminating the agreement of licence and from initiating proceedings for the recovery of possession of the licensed premises, held that the recourse to arbitration under the terms of the arbitration clause contained in the agreement of leave and licence would

<sup>11</sup> 2008(2) Mh. L.J. 653

be barred by virtue of the exclusive jurisdiction conferred upon the Court of Small Causes by Section 41(1) of the PSCC Act and accordingly, dismissed the petition.

32. In a decision of the Full Bench of this Court in **Central Warehousing Corporation, Mumbai vs. Fortpoint Automotive Pvt. Ltd., Mumbai** (supra), the Court considered a question “Whether in view of the provision of Section 5 of the Arbitration and Conciliation Act 1996, if any Agreement between licensor and licensee which contains a clause for arbitration, the jurisdiction of the Small Causes Court under the Presidency Small Cause Courts Act, 1882 would be ousted?” The Full Bench taking a review of the legal position and examining the purport of Section 41 of the PSCC Act, answered the said question in the negative, thereby holding that even if an arbitration agreement exists between the parties and despite the non-obstante clause in Section 5 of the Arbitration and Conciliation Act, the exclusive jurisdiction of the Small Causes Court to try and decide the dispute specified in Section 41 of the PSCC Act would not be ousted. The relevant observations in that regard needs to be noted, which reads thus:

“40. In summation, we would hold that section 41(1) of the Act of 1882 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. The effect of section 41(2) of the Act of 1882 is only the suits or proceedings for recovery of possession of immovable property or of licence fee thereof, to which, the provisions of specified Acts or any other law for the time being in force apply, have been excepted from the application of non-obstante clause contained in section 41(1) of the Act. The expression “or any other law for the time

being in force” appearing in section 41(2) will have to be construed to mean that such law should provide for resolution of disputes between licensor and licensee or a landlord and tenant in relation to immovable property or licence fee thereof, to which immovable property, the provisions of that Act are applicable. The Act of 1996 is not covered within the ambit of section 41(2) in particular the expression “or any other law for the time being in force” contained therein. **The question whether the exclusive jurisdiction of the Small Causes Court vested in terms of section 41 of the Act of 1882 is ousted, if an agreement between the licensor and licensee contains a clause for arbitration, the same will have to be answered in the negative.** For, section 5 of the Act of 1996 in that sense is not an absolute non-obstante clause. Section 5 of the Act of 1996 cannot affect the laws for the time being in force by virtue of which certain disputes may not be submitted to arbitration, as stipulated in section 2(3) of the Act of 1996. We hold that section 41 of the Act of 1882 falls within the ambit of section 2(3) of the Act of 1996. **As a result of which, even if the Licence Agreement contains Arbitration Agreement, the exclusive jurisdiction of the Courts of Small Causes under section 41 of the Act of 1882 is not affected in any manner. Whereas, 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 to oust the exclusive jurisdiction of the Small Causes Courts by virtue of section 41 of the Act of 1882.**

41. Accordingly, we answer the question referred to us in the negative. We, therefore, hold that in spite of Arbitration Agreement between the parties and non-obstante clause in section 5 of the Act of 1996, the exclusive jurisdiction of the Small Causes Court to try and decide the dispute specified in section 41 of the Act of 1882 is not ousted.”

(emphasis supplied)

33. In **Prabhudas Damodar Kotecha & Ors. vs. Manhabala Jeram Damodar & Anr.** (supra), the Supreme Court while examining the provisions of Section 41 of the PSCC Act as also the provisions of the Bombay Rent Act held that the provisions of Section 41 ought to be given a liberal construction and the attempt should be to achieve the purpose and object of the legislature and not to frustrate it. In the facts of the case, the Court held that the expression “Licensee” used in section 41(1) of the PSCC Act would take within its ambit even a “gratuitous licensee” which was held to be a term of wider import. The relevant

observations of the Court are required to be noted which read thus:-

“49. The interpretation of the expressions licensor and licensee which we find in Section 41(1), in our view, is in tune with the objects and reasons reflected in the amendment of the PSCC Act by the Maharashtra Act (XIX) of 1976 which we have already extracted in the earlier part of the judgment. The objects and reasons as such may not be admissible as an aid of construction to the statute but it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time of introduction of the bill and the extent and urgency of the evil which was sought to be remedied. The legal position has been well settled by the judgment of this Court in M.K. Ranganathan and Anr. v. Government of Madras and Ors. AIR 1955 SC 604. It is trite law that the statement of objects and reasons is a key to unlock the mind of legislature in relation to substantive provisions of statutes and it is also well settled that a statute is best interpreted when we know why it was enacted. This Court in Bhaiji v. Sub Divisional Officer, Thandla and Ors. (2003) 1 SCC 692 stated that the weight of the judicial authority leans in favour of the view that the statement of objects and reasons cannot be utilized for the purpose of restricting and controlling statute and excluding from its operation such transactions which it plainly covers. Applying the above-mentioned principle, we cannot restrict the meaning and expression licensee occurring in Section 41(1) of the PSCC Act to mean the licensee with monetary consideration as defined under Section 5(4A) of the Rent Act.

#### ONE UMBRELLA POLICY

50. We are of the considered view that the High Court has correctly noticed that the clubbing of the expression “licensor and licensee” with “landlord and tenant” in Section 41(1) of the PSCC Act and clubbing of causes relating to recovery of licence fee is only with a view to bring all suits between the “landlord and tenant” and the “licensor and licensee” under one umbrella to avoid unnecessary delay, expenses and hardship. The act of the legislature was to bring all suits between “landlord and tenant” and “licensor and licensee” whether under the Rent Act or under the PSCC Act under one roof. We find it difficult to accept the proposition that the legislature after having conferred exclusive jurisdiction in one Court in all the suits between licensee and licensor should have carved out any exception to keep gratuitous licensee alone outside its jurisdiction. The various amendments made to Rent Act as well the Objects and Reasons of the Maharashtra Act XIX of 1976 would clearly indicate that the intention of the legislature was to avoid unnecessary delay, expense and hardship to the suitor or else they have to move from the one court to the other not only on the question of jurisdiction but also getting reliefs.

51. We are of the view that in such a situation the court also should give a liberal construction and attempt should be to achieve the purpose and object of the legislature and not to frustrate it. In such circumstances, we are of the considered opinion that the expression

licensee employed in Section 41 is used in general sense of term as defined in Section 52 of the Indian Easement Act.

52. We have elaborately discussed the various legal principles and indicated that the expression 'licensee' in Section 41(1) of the PSCC Act would take a gratuitous licensee as well. The reason for such an interpretation has been elaborately discussed in the earlier part of the judgment. Looking from all angles in our view the expression 'licensee' used in the PSCC Act does not derive its meaning from the expression 'licensee' as used in Sub-section (4A) of Section 5 of the Rent Act and that the expression "licensee" used in Section 41(1) is a term of wider import intended to bring in a gratuitous licensee as well."

34. Another facet of Section 41 of the PSCC Act as interpreted by the Division Bench of this Court in **Nagin Mansukhlal Dogli vs. Haribhai Manibhai Patel**<sup>12</sup> also needs to be noted. Mr. Justice D.P. Madon speaking for the Bench observed that Section 41 would take within its ambit even a claim for damages for trespass in a suit between the licensor and licensee. It was held that the words "relating to" as used in Section 41 are intentionally and designedly used in the provision not to confine the section only to a suit for the recovery of possession of immovable property but also to permit to be included within the ambit of such a suit all other reliefs which the plaintiff can claim in a suit for the recovery of possession of immovable property on the termination of a licence or a tenancy. The observations in this regard are required to be noted, which reads thus:

"21. Mr. Sanghavi also submitted that in the plaint the plaintiff has claimed a sum of Rs. 35,625 by way of damages for trespass for the period from June 1, 1970, till the date of the suit, that is, till April 1978, at the rate of Rs. 375 per month and for a sum of Rs. 375 per month from the date of the suit till possession of the said flat is handed over to the plaintiff either by way of future mesne profits or damages or compensation for wrongful use and occupation of the said flat Mr.

Sanghavi argued that section 41 of the Presidency Small Cause Courts Act did not in terms include a suit for damages for trespass or for compensation for wrongful use and occupation or for mesne profits. In his submission, the section only related to recovery of licence tea or charges and that the license having been determined, all that the plaintiff could recover from the defendant was either damages for trespass or compensation for wrongful use and occupation of the property or mesne profits. This argument of Mr. Sanghvi overlooks the language used in the said section 41. The said section 41 speaks of “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”. It is significant that the words used in the said section 41 are “suits ... relating to the recovery of possession” and not “suits, for possession”. Rule 12, of Order XX of the Code of Civil Procedure, 1908, provides as to how a Court is to proceed “Where a suit is for the recovery of possession of immovable property and for rent or mesne profits.” The contrast between the language used in Order XX, Rule 12 and the said section 41 immediately strikes one. The phrase “relating to the possession of any immovable property” is wider than the phrase “for the recovery of possession of any immovable property.” The words “relating to” are intentionally and designedly used in the said section 41 not to confine the section only to a suit for the recovery of possession of immovable property situate in Greater Bombay but also to permit to be included within the ambit of such a suit all other reliefs which the plaintiff can claim in a suit for the recovery of possession of immovable property on the termination of a licence or a tenancy.”

(emphasis in original)

35. In **Mansukhlal Dhanraj Jain & Ors. vs. Eknath Vithal Ogale**<sup>13</sup> the Supreme Court considered the purport of the provisions of Section 41 of the Act to hold that a suit under section 41 would take within its ambit even a relief in relation to the recovery of the licence fees or charges or rent thereof. Paragraph 12 reads thus:

“12. A mere look at the aforesaid provision makes it clear that because of the non-obstante clause contained in the section, even if a suit may otherwise lie before any other court, if such a suit falls within the sweep of Section 41(1) it can be entertained only by the Court of Small Causes. In the present proceedings we are not concerned with the provisions of sub-section (2) of Section 41(1) and hence we do not refer to them. For applicability of Section 41(1) of the Small Causes Courts Act, the following conditions must be satisfied before taking view that jurisdiction of regular competent civil court like City Civil Court is ousted:

(i) it must be a suit or proceeding between the licensee and licensor; or

(ii) between a landlord and a tenant;

- (iii) such suit or proceeding must relate to the recovery of possession of any property situated in Greater Bombay; or
- (iv) relating to the recovery of the licence fee or charges or rent thereof.”

36. In **Vidya Drolia & Ors. vs. Durga Trading Corporation** (supra), the Court considered the concept of non-arbitrability and laid down a fourfold test for determining when claim(s) or subject matter of a dispute is not arbitrable. Propounding a fourfold test, the three Judge Bench of the Supreme Court held that the subject-matter of a dispute in an arbitration agreement is not arbitrable when (i) the cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem (ii) cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable; (iii) cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and (iv) the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s) as in the present case. The Court considered the principle of implicit non- arbitrability, being a well established principle. The Court also considered the decision of the Supreme Court in **Natraj Studios (P) Ltd. vs. Navrang Studios** (supra) The relevant observations in that regard are required to be noted which read thus:-



“52. The order of reference notes that Dhulabhai refers to three categories mentioned in *Wolverhampton New Waterworks Co. v. Hawkesford*,<sup>27</sup> to the following effect:

“There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.”

53. Dhulabhai’s case is not directly applicable as it relates to exclusion of jurisdiction of civil courts, albeit we respectfully agree with the Order of Reference that the condition No. 2 is apposite while examining the question of non-arbitrability. Implied legislative intention to exclude arbitration can be seen if it appears that the statute creates a special right or a liability and provides for determination of the right and liability to be dealt with by the specified courts or the tribunals specially constituted in that behalf and further lays down that all questions about the said right and liability shall be determined by the court or tribunals so empowered and vested with exclusive jurisdiction. Therefore, mere creation of a specific forum as a substitute for civil court or specifying the civil court, may not be enough to accept the inference of implicit non- arbitrability. Conferment of jurisdiction on a specific court or creation of a public forum though eminently significant, may not be the decisive test to answer and decide whether arbitrability is impliedly barred.

**54. Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum. In *Transcore v. Union of India and Another*, this Court had examined the doctrine of election in the context whether an order under proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the ‘DRT Act’) is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the ‘NPA Act’). For analysing the scope and remedies under the two Acts, it was held that NPA Act is an additional remedy which is not inconsistent with the DRT Act, and reference was made to the doctrine of election in the following terms:**

“64. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If anyone of the three elements is not there, the doctrine will not apply. According to

American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.”

55. Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. There should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative. Conversely and in a given case when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied. This requires examining the “text of the statute, the legislative history, and ‘inherent conflict’ between arbitration and the statute’s underlying purpose” with reference to the nature and type of special rights conferred and power and authority given to the courts or public forum to effectuate and enforce these rights and the orders passed. When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or public forum is either completely denied or could be curtailed. **In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed. When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non- arbitrable.**

58. Consistent with the above, observations in Transcore on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi, which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in HDFC Bank Ltd. has been referred to in M.D. Frozen Foods Exports Private Limited, but not examined in light of the legal principles relating to non-arbitrability. Decision in HDFC Bank Ltd. holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The

legislation has overwritten the contractual right to arbitration.”

(emphasis supplied)

37. Mr. Jagtiani, learned senior counsel for the petitioners relying on the decisions of the Division Bench of this Court in **Deccan Chronicle Holdings Limited Vs. L & T Finance Limited**<sup>14</sup>, **T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty & Ors.**<sup>15</sup> and a decision of the learned Single Judge of this Court in **The Royal Bank of Scotland vs. Earnest Business Services Private Limited**<sup>16</sup> would submit that this petition be held maintainable. These are the decisions, wherein in my opinion, in the facts of the respective cases, the Court has entertained proceeding filed under section 9 of the Act. The decisions can be discussed.

38. **Deccan Chronicle Holdings Limited Vs. L & T Finance Limited** (supra) was a case wherein the respondent-L & T Finance Limited being a creditor was asserting its money claims in arbitration. The Court in the facts of the case observed that the principle which has been laid down by the Supreme Court in **Booz Allen and Hamilton Inc.** (supra) was not breached because the claim in the arbitration was not an assertion of a right in rem but a claim for recovery of monies due and outstanding, simplicitor. It was also observed that a secured creditor can invoke the provisions of Section 9 of the Act which is a provision incidental to or ancillary to the arbitration proceedings for seeking an

14 2013 SCC OnLine Bom 1005

15 1954 SCC OnLine Mad 374

16 2017 SCC OnLine Bom 9363

interim measure for protection that would ensure that the fruits of the arbitral award are not destroyed or lost by dealings of the debtor with the properties in the meantime. It was observed that this is exactly what was done by the secured creditors and correctly accepted by the learned Single Judge. Thus this decision would not assist the petitioners in the context as to a dispute between a licensor and licensee on possession of the licenced premises and the reliefs incidental thereto. Also there cannot be any dispute on the proposition of law as to what has been held by the Court in **T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty & Ors.** (supra) namely as to in which circumstances a receiver would be required to be appointed which is to protect the property for the benefit of the person or persons to whom the Court on materials thinks that it properly belongs. In so far as the decision of the learned Single Judge in **The Royal Bank of Scotland vs. Earnest Business Services Private Limited** (supra) is concerned, the dispute between the parties was a case where a claim of the petitioner was a money claim as arising under the Agreement to Provide Business Centre Facilities under which the petitioner had agreed to pay to the respondent a consolidated sum per month. Such agreement was terminated by the petitioner and handed over possession of such facilities to the respondent. However, under such agreement, the petitioner made claims for refund of the security deposit, interest as also damages. A petition under section 9 of the Act

came to be filed by the petitioner before this Court in which this Court passed an order appointing a sole arbitrator who was a Former Judge of this Court. In the arbitral proceedings, the respondent had filed an application under Section 16 of the Act contending that the arbitral tribunal had no jurisdiction as the jurisdiction to decide the petitioner's claim would vest with the Small Causes Court under the provisions of Section 41(1) of the PSCC Act. The arbitral tribunal upheld the objection and held that the disputes would not be arbitrable and the exclusive jurisdiction to entertain/adjudicate such dispute would lie with the Small Causes Court. The Court, in these circumstances, considering the nature of the claims and the decisions as referred to in paragraph 13 held that considering the nature of the claim, it was clearly seen that it was only a monetary claim, hence such claim would not fall within the exclusive jurisdiction of the Small Causes Court. It was accordingly held that the arbitrator was in an error to come to a conclusion that the claims would fall within the jurisdiction of the Small Causes Court. Hence, even this decision would not forward the case of the petitioners.

39. Thus, Mr. Jagtiani would not be correct in his contention referring to these decisions that the present proceedings are of a nature which would fall on the principles as to what was decided by the Court in such decisions. No doubt in a given case even in regard to a dispute under the leave and licence agreement when the claim is purely a monetary

claim and not in relation to the possession of the licenced premises or reliefs incidental thereto, the Court has consistently held that the arbitral proceedings would be maintainable. Hence, such disputes being arbitrable, it is available to the aggrieved party to invoke the jurisdiction of this Court under Section 9 of the Act praying for interim measures (see **RMC Readymix (I) Pvt. Ltd. vs. Kanayo Khubchand Motwani**<sup>17</sup>, **A.S. Patel Trust and Others vs. Wall Street Finance Limited**<sup>18</sup>, **Brainvisa Technologies Pvt. Ltd.** (supra) and **Bafna Motors Private Limited** (supra). Applying the principles of law as laid down in these decisions, it would be open to the petitioner to seek any reliefs in arbitral proceedings which are purely in the realm of monetary claims as arising under the leave and licence agreement in question.

40. In the light of the foregoing discussion, the real dispute between the parties is in relation to the possession of the licensed premises being claimed by the petitioner. The petitioner has referred to the repeated notices issued to the respondent to hand over the licensed premises to the petitioner. Admittedly, the relation between the parties is that of a licensor and licensee. In these circumstances, there can be no other conclusion that the Court of Small Causes alone has the exclusive jurisdiction and not an arbitral tribunal to adjudicate the dispute between the parties, being a special forum created by the legislature for

17 Summons for Judgment No. 602 of 2005, dated 21.03.2006

18 Com. Arbitration Petition No. 452 of 2019, dated 23.07.2019

adjudication of disputes between the licensor and licensee inter alia in relation to the recovery of possession as Section 41(1) of the PSCC Act would provide. The reason being that the exclusive jurisdiction of the Court of Small Causes under Section 41 of the PSCC Act would remain sacrosanct and stand unaffected even if the parties agree to an arbitration agreement in the leave and licence agreement. As held by the Full Bench in Central Warehousing Corporation, Mumbai (supra) in the arbitration agreement in such cases is held to be invalid and inoperative on the principle that it would be against public policy to allow the parties, by a contract to oust the exclusive jurisdiction of the Small Causes Court by virtue of Section 41 of the PSCC Act.

41. Thus, in my opinion, the respondents are correct in their contention that this Court would not have jurisdiction to entertain the Section 9 petition considering the nature of the reliefs, which in fact pertain to or are incidental to the possession of the licenced premises as asserted by the petitioners, subject matter of the leave and licence agreements. Hence, as held by the Court in the decisions as discussed above, jurisdiction to entertain any such proceedings would lie with the Small Causes Court under the provisions of Section 41 of the PSCC Act. In view of such conclusion, it may not be possible for the Court to pass any orders on the present petition permitting the respondent to deposit in this Court liquidated damages which Mr. Shah had agreed to deposit

even in the present proceedings. In view of the fact that the present proceedings are held as not maintainable and having reached such conclusion, it may not be permissible for the Court to bifurcate causes of action, the principles of law in that regard being well settled. Needless to observe that it would be open to the petitioner to seek prayers in that regard in appropriate proceedings in the event the claims are pure monetary disputes falling within the realm of arbitrability of such disputes. All contentions of the parties in that regard are expressly kept open.

42. Resultantly, these petitions filed under Section 9 of the Arbitration and Conciliation Act, 1996, cannot be entertained. The petitions are accordingly dismissed. The petitioners are at liberty to take recourse to other appropriate proceedings as may be available to the petitioners in law including to assert pure monetary claims in arbitral proceedings as discussed in paragraph 37 of this judgment. All contentions of the parties in that regard are expressly kept open.

43. No costs.

**[G.S. KULKARNI, J.]**