

De Jure

September 3, 2020

Arbitrability Of Tenancy Disputes



Transfer of Property Act, 1882 (“**TOPA**”), a central legislation, contains the general law governing the transfer of property by the acts of parties including the lease of immovable properties. It specifies the rights and liabilities of landlord and tenant, in absence of contract to the contrary.



However, several States have enacted rent or tenancy laws which regulate the rights and obligations of landlord and tenant. These laws provide certain provisions for effectively handling the situations in terms of contract between landlord and tenant and issues revolving around them. These special laws often exclude ordinary jurisdiction of civil courts. Instead, they confer exclusive jurisdiction to special courts to adjudicate specified disputes between landlord and tenant.

The Maharashtra Rent Control Act, 1999 (“**Act**”) provides that, in Mumbai, the Court of Small Causes Mumbai, and in any area for which a Small Causes Court is established under the Presidency Small Causes Courts Act, 1882, shall have exclusive jurisdiction to entertain any proceeding or application or to deal with such claim or question.

Many landlord and tenant disputes wind up in court. This often results in a lengthy, frustrating and costly process for landlords. Tenants may also feel the brunt of this process and may face consequences, more particularly the costs that they may not afford. However, arbitration to resolve such disputes between them offers an alternative to this process.

While deciding an application seeking appointment of an arbitrator under Section 11(6A) of the Indian Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”), the power of the court is confined only to the examination of the existence of an arbitration agreement, leaving it to the court to decide on the existence of a valid arbitration agreement, no more and no less.

The dispute

Tenancy-related disputes have seen a huge increase in India, specifically in Maharashtra, considering the practice of Pagadi system. The substantial increase in such disputes are also on account of the upcoming redevelopment of old dilapidated structures. Adjudication of these disputes by the special court take several years.

Given the commercial nature of leasing transactions and the huge financial implications involved, parties alternatively concurred to resolution by arbitration. But as the Act enshrines the Small Causes Court to have exclusive jurisdiction to entertain and try any suit or proceeding between a landlord or tenant relating to the recovery of rent or possession of any premises thereby excluding arbitration for resolving these issues/ disputes. The Supreme Court and various High Courts have had contradicting views on the same and the Supreme Court verdict in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*¹ is mentioned here:

A suit was filed by the shop owner to seek tenant's eviction from his shop and for recovery of unpaid arrears of rent and grant of permanent injunction. The tenant, on

being served with the notice of the civil suit, filed an application under Section 8 of the Arbitration Act urging the Court to refer the parties to arbitration. The Trial Court upheld the objections of the owner and dismissed tenant's application. The aggrieved tenant filed an appeal before the High Court. The High Court dismissed the appeal and upheld the order of the Trial Court giving rise to filing of the special leave to appeal by the tenant before Supreme Court.



The Supreme Court dismissed the appeal of the tenant and held that the Delhi Rent Act, which deals with the cases relating to rent and eviction of the premises, is a special Act. Though it contains a provision by virtue of which the provisions of the Delhi Rent Act did not apply to

¹(2017) 10 SCC 706

certain premises but that did not mean that the Arbitration Act, ipso facto, would be applicable to such premises conferring jurisdiction on the arbitrator to decide the eviction/rent disputes.

While rejecting the appeal, the Supreme Court placed reliance on *Natraj Studios (P) Limited v Navrang Studios*² and *Booz Allen & Hamilton Inc v SBI Home Finance Limited*³. In both the cases, the Supreme Court has held eviction and tenancy matters are governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred with jurisdiction to grant eviction or decide the disputes.

The aforesaid decisions by the Supreme Court show that a dispute is considered incapable of arbitration only if following three conditions are fulfilled:

- The matter is governed by a special statute;
- Under such special statute the tenant enjoys statutory protection against ejection; and
- Such special statute confers exclusive jurisdiction on specified Courts.

²1981(1) SCC 523

³(2011) 5 SCC 532

Interpretation of Himangni Enterprise by various High Courts

In *Efcalon Tie-Up Private Ltd. vs. Startrack Agency Pvt. Ltd.*⁴, the High Court of Calcutta distinguished the Supreme Court dictum of Himangni (supra) and held, while appointing an arbitrator, that it does not see Himangni (supra) as having declared eviction claims under TOPA which the Arbitration Act does not provide for specified Courts or forums to try such claims, as outside the scope of application of the Arbitration Act. Similar view was taken by the same court in *Pran Krishna Das vs. Kamala Rani Debnath*⁵.

In *Renuka P. Gandhi vs. Oriental Gems Pvt. Ltd.*⁶ the Calcutta High Court interpreted Himangni (supra) and observed that if a dispute is in *personam* then the arbitrator has the jurisdiction to determine it because it only binds the parties, but if the award is likely to affect third parties or would be in nature of a judgment *in rem* as in insolvency matters, testamentary matters, tenancy governed by the Rent Act etc., then the award of the arbitrator would not be binding on the third parties. Therefore, the claimant has a remedy only before the Civil

⁴MANU/WB/0365/2019

⁵MANU/WB/0271/2019

⁶MANU/WB/0060/2018

Court. But the Calcutta High Court took the view that it does appear from the decision of Himangni (supra) that whether the disputes are strictly in *personam* or not is a question of fact which has to be investigated by the arbitrator before he assumes complete jurisdiction over the matter.

Recent developments

In February 2019, the division bench of the Supreme Court, in the case of *Vidya Drolia and Ors. vs. Durga Trading Corporation*, considered an appeal pertaining to a tenancy agreement that had an arbitration clause and was thus referred to arbitration by Calcutta High Court. The Supreme Court appreciated the fact that a lease is a transfer of interest in property but there is nothing in the act to show that a dispute concerning determination of the lease cannot be decided by arbitration. It observed that act is silent on arbitrability and does not negate arbitrability since it does not by necessary implication exclude arbitration.

The Supreme Court, in this case, has given a lot of conceptual clarity with regard to the scenario when Statutes exclude arbitration by necessary implication and when they do not. A comparison was made between the

Indian Trusts Act, 1882 and Specific Relief Act, 1963 to show that it is imperative to examine the statute as a whole before determining whether the statute excludes arbitration. On the other hand, the Court noted how there was no provision in the Specific Relief Act that suggested that arbitration be excluded. Similarly, it reasoned that TOPA was analogous to the Specific Relief Act in this regard and it thus, could not be said that disputes governed by TOPA cannot be arbitrated.

The Supreme Court did not agree with the reasoning supplied in the case of Himangi (supra) and opined that the judgment will require a relook. Therefore, the case and the issue of arbitrability of tenancy disputes has been referred to a three-judge bench of the Supreme Court.

Story so far

India has, so far, followed a calculative approach towards arbitrability of disputes. Regarding tenancy disputes, Booze Allen (supra) had ruled that eviction and tenancy matters governed by special statutes can only be adjudicated by courts and not arbitration. The ruling in Booze Allen ran in line with an earlier Supreme Court judgment of Natraj Studios (supra) which had ruled out arbitration of lease disputes as they were to be

adjudicated under special legislation and undermined public policy.

Later, in 2017, Supreme Court was again faced with arbitrability of lease dispute in Himangni (supra). This time the Court relied on the judgments in Booze Allen and Natraj Studios and ruled that lease disputes cannot be arbitrated irrespective of whether such disputes arose from special legislation. The judgment effectively left no scope for arbitrating lease disputes in India.

In 2019, Justice RF Nariman, in, Vidya Drolia (supra), raised questions on the interpretation adopted by Himangi (supra). The judgment in case of Vidya Drolia opens new pathways for arbitration of tenancy disputes which are governed by TOPA.

Way forward

Arbitration, being a powerful tool of dispute resolution, can certainly ease the situation and improve the outcome. Unless the position as regards the validity /enforceability of arbitration clause in tenancies governed by general law, is clarified to restore the previously prevailing view, the parties despite opting for arbitration mechanism in such contracts/ agreements, will be compelled to take recourse

to civil proceedings before the specific courts, which may be time consuming.

The decision in case of Divya Drolia, may not be binding as the case has been referred to a larger bench but it nonetheless echoes a pro-arbitration stance of the Supreme Court by effectively deconstructing the reasoning given in the case of Himangni (supra).

Contributed By:

Aradhana Bhansali, Partner: aradhana@rajaniassociates.net

Manasi Padwalkar, Associate: mpadwalkar@rajaniassociates.net

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CONTACT US



Rajani Associates

simple solutions

Address: Krishna Chambers
59 New Marine Lines
Churchgate
Mumbai 400020
Maharashtra, India
Telephone: (+91-22) 40961000
Facsimile: (+91-22) 40961010
Email: dejure@rajaniassociates.net
Website: www.rajaniassociates.net
