

Arb.A. No. 02 of 2021
The Secretary, Tourism & Civil Aviation Department & Anr. v. Brij Raj Oberoi
AND
Arb. P.No.02 of 2021
Brij Raj Oberoi v. State of Sikkim through the Secretary & Anr.

THE HIGH COURT OF SIKKIM: GANGTOK (Civil Appellate Jurisdiction)

DIVISION BENCH: HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

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AND
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1. The Secretary,
Tourism and Civil Aviation Department,
Government of Sikkim,
Gangtok, East Sikkim.

2. State of Sikkim,
Through the Secretary,
Tourism and Civil Aviation Department,
Government of Sikkim,
Gangtok, East Sikkim.

.... Appellants

versus

Brij Raj Oberoi,
Managing Director of Elgin Hotel Pvt. Ltd.,
18, H.D. Lama Road,
P.O. Darjeeling, West Bengal,
Resident at Hotel Norkhil Campus,
Paljor Stadium Road, Gangtok.
East Sikkim.

.... Respondent

Section 37 Arbitration and Conciliation Act, 1996 read
with section 13 of the Commercial Courts Act, 2015
& Article 227 of the Constitution of India.

Appearance:

Dr. (Ms.) Doma T. Bhutia, Additional Advocate General
and Mr. S.K. Chettri, Government Advocate for the
appellants.

Mr. A. Moulik, Senior Advocate with Ms. K.D. Bhutia and
Mr. Ranjit Prasad, Advocates for the respondent.

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Brij Raj Oberoi,
 Managing Director of Elgin Hotels Pvt. Ltd.,
 18, H.D. Lama Road,
 P.O. Darjeeling, West Bengal,
 Resident at Hotel Norkhil Campus,
 Paljor Stadium Road, Gangtok.
 East Sikkim.

.... Petitioner.

versus

1. State of Sikkim,
 Through the Secretary,
 Tourism and Civil Aviation Department,
 Government of Sikkim,
 Gangtok, East Sikkim.

2. The Secretary,
 Tourism and Civil Aviation Department,
 Government of Sikkim,
 Gangtok, East Sikkim.

.... Respondents

**Application for appointment of arbitrator under section
 11 of the Arbitration and Conciliation Act, 1996 read
 with section 10 of the Commercial Courts Act, 2015
 and under Article 227 of the Constitution of India.**

Appearance:

Mr. A. Moulik, Senior Advocate with Ms. K.D. Bhutia and
 Mr. Ranjit Prasad, Advocates for the Petitioner.

Dr. (Ms.) Doma T. Bhutia, Additional Advocate General
 and Mr. S.K. Chettri, Government Advocate for the State-
 respondents.

J U D G M E N T

1. Arbitration Appeal No. 02 of 2021 arises out of the
 impugned order dated 31.05.2021 passed by the learned
 Commercial Court on an application filed by the respondent

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(Brij Raj Oberoi) under section 9 (1) (ii) of the Arbitration and Conciliation Act, 1996 (the Arbitration Act). The learned Commercial Court examined, *inter-alia*, the relevant arbitration clause i.e. 4 (xiii) of the lease agreement dated 09.12.1997 entered between the appellant (the State) and the respondent (Brij Raj Oberoi) leasing out the premises known as “Norkhil Hotel”. It held that arbitrable dispute had arisen between the parties which were to be referred to arbitration and restrained the appellant from disturbing the possession and enjoyment of “Norkhil Hotel” until the commencement of arbitral proceedings.

2. Arbitration Petition No. 02 of 2021 is an application filed by Brij Raj Oberoi on 16.07.2021 for appointment of arbitrator under section 11 of the Arbitration Act read with section 10 of the Commercial Courts Act, 2015.

3. Both cases shall be disposed by this common judgment.

4. On 09.12.1997 the deed of lease was executed between the State and Brij Raj Oberoi by which “Norkhil Hotel” was leased to Brij Raj Oberoi for a period of 24 years. The lease was to expire on 31.05.2021. The lease deed, *inter-alia*, contained the following relevant clauses:-

“3. *That the initial terms of the lease under this deed shall be a period of twenty four years from 1.6.1997 to 31.5.2021 (First day of June one thousand nine hundred and ninety seven to the thirty first day of May two thousand and twenty one) and shall be renewable for such further period as the lessor deems fit subject to acceptance of the lessee’s offer in terms of clause 4 (xii) hereinafter.”*

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x x x x x x

“4. xiii. *The lessee shall in the last year of the lease tenure and not later than six months prior to the expiry of the present lease, communicate in writing to the lessor his terms and conditions for the renewal of the present lease and if the same is accepted by the lessor, then the present lease may be renewed for such further period and on such rent as may be mutually agreed upon between the parties thereto, failing which the matter shall be referred to arbitration by an arbitrator to be appointed by the Chief Justice of the Sikkim High Court.”*

5. On 12.11.2020 before the expiry of the period of lease on 31.05.2021 Brij Raj Oberoi sent an offer of renewal to the State to the following effect:-

“The rent for the period commencing from 01.06.2021 will be Rs.64,30,766.43/- per year i.e., 10% more than the annual rent that is being paid now. The escalation clause will remain the same i.e. 10% more every three years. The rent will be paid in equal quarterly installment every year. It is suggested that the period of the renewed lease will be 30 years commencing from 1.6.2021. All other terms and conditions of the lease will remain the same.”

6. As there was no response to the letter dated 12.11.2020, Brij Raj Oberoi sent a reminder on 09.04.2020. Thereafter, it was followed by a legal notice dated 05.05.2021. On 15.05.2021 Brij Raj Oberoi moved an application under section 9 (1) (ii) of the Arbitration Act (the application). The State thereafter, issued a letter dated 17.05.2021 to Brij Raj Oberoi conveying their inability to renew the lease on the ground that the State Government had approved a policy which envisages professional methods of managing tourism infrastructure,

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assets and facilities in the State. For that purpose the State had decided to adopt a process, in public interest, with stringent qualifications and bid participating criteria, and determine appropriate lease owner through a selection process. On 21.05.2021 Brij Raj Oberoi wrote to the State contending that disputes and differences had arisen between them in respect of the renewal of the lease and its terms; and keeping in mind clause 4(xiii) of the lease agreement to refrain from taking any steps as contemplated by them for tender to handover “Norkhil Hotel” to a third party until the disputes are decided through arbitration. On 24.05.2021 Brij Raj Oberoi filed an additional affidavit before the learned Commercial Court informing about the issuance of the letter dated 17.05.2021 by the State declining to renew the lease without considering the offer made by him. He also apprised the learned Commercial Court about his reply dated 21.05.2021 and the fact that he had come to learn that the State was taking steps for allotment of “Norkhil Hotel” to a party/person of their choice and the fact that the lease itself was going to expire on 31.05.2021.

7. On 28.05.2021 the State filed a response to the application contending that Brij Raj Oberoi had misconstrued clause 4(xiii) of the lease agreement. It was contended that as the State had not accepted the offer made by Brij Raj Oberoi there was no case for arbitration. Read properly, clause 4(xiii)

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would permit reference of the quantum of rent and the period of renewal for arbitration. Under clause 4(xiii), upon termination and/or expiry of the lease, Brij Raj Oberoi was required to quit and vacate “Norkhil Hotel”.

8. Section 9 of the Arbitration Act deals with interim measures for protection which a party may, before or during arbitral proceedings or at any time after the making of the arbitral award or before it is enforced in accordance with section 36, apply to a Court for. It is certain that a contemplation or the existence of an arbitral proceedings is a must before the Court can pass protective orders as contemplated in section 9 (1) (ii) (a) to (e). In ***Firm Ashok Traders vs. Gurmukh Das Saluja***¹ the Supreme Court observed that the party invoking section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that arbitral proceedings were actually contemplated or manifestly intended and were positively going to commence within a reasonable time.

9. As stated hereinbefore, the arbitration clause is set out under clause 4 (xiii). A plain reading of this clause reveals that it can be invoked only if the following two situations arise, once the proposal for renewal of the present lease - communicated in writing by the lessee to the lessor within the stipulated time frame – is accepted by the lessor:-

¹ (2004) 3 SCC 155

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- i. If there is a dispute with regard to the further period of renewal of the present lease, as proposed; and
- ii. If there is a dispute with regard to the quantum of rent proposed to be paid by the lessee to the lessor for the extended period of lease.

10. In the instant case, the State expressed its inability to renew the lease through its letter dated 17th May, 2021. It may have been written belatedly, however, it was before expiry of the lease period. As a consequence, the result of this letter dated 17th May, 2021, tantamount to a final decision on the part of the State not to renew the present lease in favour of Brij Raj Oberoi.

11. In such circumstances, none of the disputes - which can be termed as arbitrable dispute – as specified hereinbefore, are present in the facts of the instant case. In absence of any arbitrable dispute, an order could not have been passed by the Learned Commercial Court under section 9 of the Arbitration Act.

12. Consequently, Arbitration Appeal No. 02 of 2021, is allowed and the impugned judgment and order dated 31.05.2021, passed by the learned Commercial Court on the application filed by Brij Raj Oberoi under section 9 of the Arbitration and Conciliation Act, 1996 is set aside. The Arbitration Petition No. 02 of 2021 seeking appointment of

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Arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 read with section 10 of the Commercial Courts Act, 2015 is also dismissed. The parties to bear their own costs.

(Bhaskar Raj Pradhan)
Judge
18.11.2021

(Biswanath Somadder)
Chief Justice
18.11.2021

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Approved for reporting: yes.
Internet: yes.