

# Arbitrability Of Disputes Arising Out Of Lease Deed(S) In Real Estate Transactions

- *By Sameer Jain*

*Founder and Managing Partner, PSL, Advocates and Solicitors*

*&*

*Himesh Thakur*

*Associate, PSL, Advocates and Solicitors*

Real Estate is one of the biggest markets in the world and was also responsible for the global downfall of markets and the economy in the year 2008 which shook the entire world. Now, with the advancement of time, real estate transactions have also become complex and are no more like the vanilla transactions of sale, leasing, and licensing, that used to take place in the past. With respect to commercial properties, there are companies involved who incur huge costs on developing the properties as per the specifications and the needs of the individuals/companies before finally leasing them. Further, co-working spaces have really picked up the pace and have become the perfect thing for start-up individuals and companies.

The properties are sometimes leased out to the concerned companies after the investment of huge costs in the fit-outs and development of the property as per the needs and specifications of the lessee at no extra costs usually, but based on an understanding that the lessee would occupy the property and pay rent for a particular period of time. This is a hybrid leasing and asset financing model.

Usually, in a co-working space, a bigger area is divided into sub parts and is then licensed to the interested people/companies. The real estate sector is catering to the new generation of entrepreneurs and companies as per their needs and continuously evolving to match the market needs which, however, has made the transactions complex.

All the above-mentioned transactions include entering into separate agreements for specific works or entering into one consolidated agreement consisting of all of them. The complex transactions have also made the disputes complex. The adjudication of disputes in courts, arising out of immovable properties usually are a time-consuming process and always may not be an effective remedy for getting the disputes adjudicated. Arbitration is a boon for such transactions and almost all the agreements consist of an arbitration agreement. A lot of confusion was created when the

judgment in *Himangni Enterprises v Kamaljeet Singh Ahluwalia*<sup>1</sup> was delivered by the Hon'ble Supreme Court. The judgment came to be interpreted by many to mean that all and every dispute under lease deeds cannot be arbitrated upon and hence became inarbitrable.

On the other hand, the courts, over a period, have set the position with respect to minimal judicial intervention in cases where an arbitration agreement exists. It is a well settled position of law that only the disputes involving rights *in personam* are arbitrable and the rights *in rem* are beyond the scope of arbitration in India.

The Arbitration and Conciliation Act, 1996 (“**the Act**”) does not expressly exclude any category of disputes treating them as non-arbitrable, however, the Courts, over years, have clarified the position on what disputes are arbitrable and what are not. In *Booz-Allen & Hamilton Inc. v SBI Home Finance Ltd.*,<sup>2</sup> the Hon’ble Supreme Court, while deciding the arbitrability of dispute arising out of mortgage deed, held that mortgage is a transfer of a right in rem. Therefore, a mortgage suit for the sale of the mortgaged property was held to be an action in rem, for enforcement of a right in rem. The Court observed that such questions involving rights *in rem* will have to be decided by the courts of law and not by Arbitral Tribunals. Further, the court laid down an indicative list of the disputes which are not arbitrable as under:

*“The well-recognized examples of non-arbitrable disputes are:*

- (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offenses;*
- (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;*
- (iii) guardianship matters;*
- (iv) insolvency and winding-up matters;*
- (v) testamentary matters (grant of probate, letters of administration, and succession certificate); and*
- (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”*

The Hon’ble Supreme Court further in *A. Ayyasamy v A. Paramasivam & Ors.*<sup>3</sup> clarified that the following categories of disputes would be non-arbitrable:

- “(i) patent, trademarks, and copyright;*
- (ii) anti-trust/ competition laws;*
- (iii) insolvency/ winding up*
- (iv) bribery/ corruption*

---

<sup>1</sup> *Himangni Enterprises v Kamaljeet Singh Ahluwalia* [2017] 10 SCC 706 (SC).

<sup>2</sup> *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd.* [2011] 5 SCC 532 (SC).

<sup>3</sup> *A. Ayyasamy v A Paramasivam & Ors.* [2016] 10 SCC 386 (SC).

- (v) fraud;
- (vi) criminal matters.”

The Court while examining whether the disputes are capable of adjudication and settlement by arbitration, held that in cases where the subject matter falls exclusively within the domain of the public for a viz. the courts, such disputes would be non-arbitrable and cannot be decided by Arbitral Tribunals, but by the Courts alone.

In *Natraj Studios (P) Ltd. v Navrang Studios*<sup>4</sup> while adjudicating the dispute arising out of leave and license agreement, it was held that wherein an agreement had an arbitration clause, the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 would have an overriding effect due to the non-obstante provision in the Act. The Court observed that:

*“Tenancy Acts are a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways and public policy requires that contracts to the contrary which nullifies the rights conferred on tenants by the Act cannot be permitted and it follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognized by a court of law.”*

To understand the arbitrability of disputes arising out of lease deeds better, it becomes imperative to bifurcate the disputes into the following two categories:

- 1) Disputes arising out of lease deeds, the subject matter of which is covered under the Tenancy Acts
- 2) Disputes arising out of lease deeds, the subject matter of which is not covered under the Tenancy Acts

In *Ranjit Kumar Bose v Anannya Chowdbury*,<sup>5</sup> the Hon’ble Supreme Court had clarified that the Tenancy Acts will have an overriding effect on the Act, and hence, only the Civil Judge having jurisdiction will be empowered to order or decree for recovery of possession in a suit filed by the landlord. The Hon’ble Court while relying on the non-obstante clause in the Tenancy Act had observed that it overrides the agreement between the parties and hence, such arbitration clauses will have no validity.

---

<sup>4</sup> *Natraj Studios (P) Ltd. v Navrang Studios* [1981] 1 SCC 523 (SC).

<sup>5</sup> *Ranjit Kumar Bose v Anannya Chowdbury* [2014] 11 SCC 446 (SC).

The Hon'ble Supreme Court in *Agri Gold Exims Ltd. v Sri Lakshmi Knits & Wovens*<sup>6</sup> had held that when there was an arbitration clause in the memorandum of understanding and there existed no statutory bar to arbitration, the disputes between the parties could be adjudicated through arbitration. In such cases where there exists an arbitration agreement, the Courts as per Section 8 are under an obligation to refer the parties to arbitration in terms of the arbitration agreement. A similar position was also taken by the Hon'ble Supreme Court in *Magma Leasing & Finance Ltd. v Potluri Madhavilata*,<sup>7</sup> reiterating that Section 8 is in the form of a legislative command, and where there is no statutory bar and prerequisite conditions are satisfied, the courts must refer the parties to the arbitration.

A lot of controversy was stirred up regarding the arbitrability of disputes arising out of lease deed due to the decision of the Hon'ble Supreme Court in the matter of *Himangni Enterprises v Kamaljeet Singh Ahluwalia*.<sup>8</sup> Brief facts of the cases are that a lease deed was executed between the appellant and respondent for the premises for a period of three years. However, the lease deed had expired by efflux of time, and as no fresh lease deed was executed between the parties, the tenancy became monthly. The appellant on being served with the notice of the civil suit had filed an application under Section 8 of the Act. The application under Section 8 was dismissed by the Additional District Judge and the High Court at New Delhi and hence, came for consideration before the Hon'ble Supreme Court. The appellant in the present case contended that the Tenancy Act (Delhi Rent Control Act, 1995) was not applicable by virtue of Section 3 of the Act and therefore, the dispute between the parties should be referred to arbitration. Section 3 of the Delhi Rent Control Act, 1995 provides the exclusions for the applicability of the said act, however the Supreme Court while deciding the said matter held as follows:

*“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 (Section 3) by virtue of it, the provisions of the Act do not apply to certain premises but that does 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. In such a situation, the rights of the parties and the demised premises would be governed by the Transfer of Property Act and the civil suit would be triable by the civil court and not by the arbitrator. In other words, though by virtue of Section 3 of the Act, the provisions of the Act are not applicable to certain premises but no sooner the exemption is withdrawn or ceased to have its application to a particular premises, the Act becomes applicable*

---

<sup>6</sup> *Agri Gold Exims Ltd v Sri Lakshmi Knits & Wovens* [2007] 3 SCC 686 (SC).

<sup>7</sup> *Magma Leasing & Finance Ltd v Potluri Madhavilata* [2009] 10 SCC 103 (SC).

<sup>8</sup> *Himangni Enterprises v Kamaljeet Singh Ahluwalia* [2017] 10 SCC 706 (SC).

*to such premises. In this view of the matter, it cannot be contended that the provisions of the Arbitration Act would, therefore, apply to such premises.”*

The Court further held that where the Transfer of Property Act, 1882 applied between landlord and tenant, disputes between the said parties would not be arbitrable, though, the Court did not refer to any provision of the Transfer of Property Act, 1882 which ousted such jurisdiction of arbitral tribunals. The Court while relying on the decisions of the Supreme Court in *Natraj Studios (P) Ltd. v Navrang Studios*<sup>9</sup> and *Booz Allen & Hamilton Inc.*<sup>10</sup> dismissed the petition. The Court also overruled the following decisions passed by various High Courts which were relied upon by the petitioner and further held that any decision of the High Court, which has taken a view contrary to the view of the Court in the present case, i.e. *Himangni Enterprises v Kamaljeet Singh Ablumalia*<sup>11</sup> would stand overruled:

(i) *Anjuman Taraqqi Urdu (Hind) v Vardhman Yarns & Threads Ltd.*<sup>12</sup>

The defendant had moved an application under Section 8 of the Act while relying on the arbitration clause in the lease deed in a suit for recovery of possession. The lease had expired by efflux of time and the tenancy had become on a month-to-month basis. The Delhi High Court held that since the lease deed was duly stamped and registered, the arbitration clause therein must be given full play and the Court had no option but to refer the case to arbitration and the suit was thus not maintainable.

(ii) *Lovely Obsessions (P) Ltd. v Sahara India Commercial Corp. Ltd.*<sup>13</sup>

The petitioner, in this case, had filed a revision petition against the decision of the Additional Civil Judge which allowed the application under Section 8 of the Act and referred the disputes arising out of the lease deed to arbitration even though the lease deed had expired due to efflux of time. It was contended that the matter shall be decided by the Civil Court as per the Haryana Urban (Control of Rent and Eviction) Act, 1973 however, the Court held that application under Section 8 of the Act had been rightly allowed by the trial court. It was observed that the arbitration clause does not become defunct or inoperative merely because the lease period under the lease deed had expired. Further, regarding the applicability of the Rent Act, it was held that the said issue could

---

<sup>9</sup> *Natraj Studios (P) Ltd v Navrang Studios* [1981] 1 SCC 523 (SC).

<sup>10</sup> *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd.* [2011] 5 SCC 532 (SC).

<sup>11</sup> *Himangni Enterprises v Kamaljeet Singh Ablumalia* [2017] 10 SCC 706 (SC).

<sup>12</sup> *Anjuman Taraqqi Urdu (Hind) v Vardhman Yarns & Threads Ltd.* [2012] 2 ILR 655 (Del HC).

<sup>13</sup> *Lovely Obsessions (P) Ltd. v Sahara India Commercial Corp. Ltd.* [2012] SCC Online P&H 11449.

also be decided by the arbitrator because all disputes as per the arbitration agreement need to be decided by the arbitrator.

The effect of the judgment passed by the Hon'ble Supreme Court in the *Himangni Enterprises case*<sup>14</sup> was that even the cases which were out of the scope of the Tenancy Act became a subject matter of trial by the Civil Court. The interpretation given by the Supreme Court in this matter had the effect of ousting the applicability of the Arbitration Act and thereby creating confusion in the minds of the litigants.

Finally, the Hon'ble Supreme Court had the opportunity to revisit the law laid down in the Himangni case while deciding *Vidya Drolia & Ors. v Durga Trading Corp.*<sup>15</sup> The Court while referring the decision to the larger bench held that the view taken in the *Himangni case* was not correct. The judgment to be passed by the three-judge bench of the Supreme Court has been reserved on 04 February 2020 and it would finally put to rest the controversy created by the *Himangni* judgment.

The relationship of the lessor and lessee when dealing in commercial properties is usually not governed by the tenancy acts, as, the primary condition for the applicability of the tenancy acts, i.e., a particular limit of rent, is much higher in the commercial properties. Therefore, the disputes between the lessor and the lessee can be arbitrated upon without any hindrance or bar under the tenancy acts if there exists a registered lease deed and an arbitration agreement under it. Further, as explained in the preliminary paragraphs, the lease between the lessor and lessee has become complex and doesn't include just the transfer of property(ies) but also has a service element to it. Therefore, all such disputes can also be arbitrated upon. It is expressly when a tenancy law or any other law ousts the jurisdiction of an arbitral tribunal and only with respect to disputes provided therein that such disputes cannot be arbitrated upon.

---

<sup>14</sup> *Himangni Enterprises v Kamaljeet Singh Abluwalia* [2017] 10 SCC 706 (SC).

<sup>15</sup> *Vidya Drolia & Ors. v Durga Trading Corp.* [2019] SCC Online SC 358.