

VIDYA DROLIA & ORS.

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v.

DURGA TRADING CORPORATION

(Civil Appeal No. 2402 of 2019)

FEBRUARY 28, 2019

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[R. F. NARIMAN AND VINEET SARAN, JJ.]

Arbitration and Conciliation Act, 1996 – s.11(6) – Dispute between landlord and tenant regarding determination of lease – Arbitrator appointed on petition filed by respondent-landlord – Appellant-tenant objected on arbitrability of the dispute by relying on Himangni Enterprises case wherein it was held that where the Transfer of Property Act applied between the landlord and tenant, disputes between them would not be arbitrable – Held: None of the provisions of the Transfer of Property Act were noticed by Himangni Enterprises case – In Himangni Enterprises case, it was held that the question involved was answered by decision in Natraj Studios case and Booz Allen case – However, perusal of decision in Natraj Studios and Booz Allen showed that no such question was answered by these two decisions – Therefore, Himangni Enterprises case requires a relook – In view of this, matter is referred to larger bench – Transfer of Property Act, 1882 – ss.111, 114 and 114A – Reference to larger bench – Landlord-tenant dispute.

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Words and Phrases: Expression ‘arbitrability’ – Meaning of, Discussed.

Referring the matter to larger bench, the Court

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HELD: 1. A close reading of Section 114 of Transfer of Property Act, 1882 would show that the rights of landlord and tenant are balanced by the said provision. This is because where a lease of immoveable property has determined by forfeiture for non-payment of rent, and at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrears, together with interest thereon and his full costs within 15 days, the Court in its discretion may relieve the lessee against the forfeiture. This shows two things – one that the landlord’s interest is secured not only by the deposit of rent in arrears but also interest thereon

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- A and full costs of the suit. The option given, of course, is that security may also be given but what is important is that the Court is given a discretion in making a decree for ejection if this is done. The discretion may be exercised in favour of the tenant or it may not. This itself shows that Section 114 cannot be said to be a provision conceived for relief of tenants as a class as a matter of public policy. The same goes for Section 114A. Here again, a lessee is given one opportunity to remedy breach of an express condition, provided such condition is capable of remedy. However, the exception contained in this section shows that it is a very limited right that is given to a tenant, as this would not apply to assigning, sub-letting, parting with the possession, or disposing of the property leased, or even to an express condition relating to forfeiture in case of non-payment of rent. Thus, it is clear that every one of the grounds stated in Section 111, whether read with Section 114 and/or 114A, are grounds which can be raised before an arbitrator to decide as to whether a lease has or has not determined. [Para 14] [476-B-F]

- 2. The decision in *Himangni Enterprises*, concerned itself with a landlord-tenant dispute in which the Delhi Rent Act, 1995 was admittedly inapplicable. However, in paragraph 18 of the said judgment, this Court said that the question involved in the appeal was no longer res integra and stood answered by two decisions of this Court in *Natraj Studios* and *Booz Allen* against the appellant and in favour of the respondent. The judgment in *Natraj Studios* is a judgment in which Section 28 of the Bombay Rent Act, in the context of arbitrability, arose for consideration.
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- F This section made it clear that disputes between landlords and statutory tenants would be referable only to the small causes court in Bombay and “no other court has jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question”. In *Booz Allen*, it was held that only those tenancy matters that are (i) governed by special statutes (ii) where the tenant enjoys statutory protection against eviction and (iii) where only specified courts are conferred jurisdiction to grant eviction or decide disputes, are cases where the dispute between landlord and tenant can be said to be non-arbitrable. A perusal of *Natraj Studios* and *Booz Allen* judgments shows that a Transfer of
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Property Act situation between a landlord and tenant is very far removed from the situation in either *Natraj Studios* or in *Booz Allen*. Therefore, the question involved in a Transfer of Property Act situation cannot possibly be said to have been answered by the two decisions of this Court. [Paras 15-19] [478-A-D; 479-B-D]

3. None of the provisions of the Transfer of Property Act were noticed by *Himangni Enterprises* case. In fact, none of the said provisions would indicate that disputes under the said Act are triable only by the civil court and not by arbitration, as has been held in this paragraph. It is clear that the Transfer of Property Act is silent on arbitrability, and does not negate arbitrability. Equally, merely because a discretion had to be exercised by the court on whether or not to grant specific performance, would not militate against specific performance being granted, in particular, of *Booz Allen*. It is clear, therefore, that the judgment in *Himangni Enterprises* will require a relook by a Bench of three Hon'ble Judges of this Court. One more thing held in *Himangni Enterprises* is that the mere fact that an exemption from the Rent Act is available does not mean that the matter becomes non-arbitrable. The Court held that as soon as the exemption is withdrawn, the Rent Act will apply, and therefore, it cannot be contended that the Arbitration & Conciliation Act would apply. This reasoning is also not correct. [Paras 21, 23, 24] [480-B-F]

Himangni Enterprises v. Kamaljeet Singh Ahluwalia (2017) 10 SCC 706; [2017] 10 SCR 139; *Duro Felguera, S.A. v. Gangavaram Port Ltd.* (2017) 9 SCC 729 : [2017] 10 SCR 285 ; *Praduman Kumar v. Virendra Goyal (Dead) by LRs.* (1969) 3 SCR 950; *Namdeo Lokman Lodhi v. Narmadabai & Ors.* [1953] SCR 1109 ; *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others* (2011) 5 SCC 532 : [2011] 7 SCR 310 ; *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Others* (1999) 5 SCC 651 : [1999] 3 SCR 490; *Vimal Kishor Shah and Others v. Jayesh Dinesh Shah and Others* (2016) 8 SCC 788 : [2016] 7 SCR 102; *Dhulabhai v. State of M.P.* [1968] 3 SCR 662; *Emaar MGF Land Limited v. Aftab Singh* 2018 SCC OnLine SC 2771 – referred to.

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- A *Wolverhampton New Waterworks Co. v. Hawkesford*
141 ER 486 – referred to.

Case Law Reference

	[2017] 10 SCR 139	referred to	Para 2 (viii)
B	[2017] 10 SCR 285	referred to	Para 7
	[1969] 3 SCR 950	referred to	Para 13
	[1953] SCR 1109	referred to	Para 13
	[1999] 3 SCR 490	referred to	Para 22
C	[2016] 7 SCR 102	referred to	Para 25
	[1968] 3 SCR 662	referred to	Para 25
	[2011] 7 SCR 310	referred to	Para 15

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2402
D of 2019.

From the Judgment and Order dated 07.09.2016 of the High Court at Calcutta in A.P. No. 286 of 2016.

Debjyoti Basu, Hiren Dasan, Harish Dasan, Chand Qureshi, M. K. Tripathi, Advs. for the Appellants.

E Saurav Agarwal, P.C. Sharma, Anirudha Agarwalla, T. R. B. Sivakumar, Anshuman Chowdhury, Ms. Akanksha Sisodia, Advs. for the Respondent.

The Judgment of the Court was delivered by

F **R. F. NARIMAN, J.** 1. Leave granted.

2. The facts, in this appeal, are as follows:

G (i) A Tenancy Agreement was entered into between the landlord's predecessor-in-title (Shree Bajrang Land & Trading Company) and the appellants/tenant on 02.02.2006 in respect of certain godowns and other structures.

(ii) The maximum period of tenancy was for 10 years. The initial period was 5 years, with an option for renewal for another 5 years with a 10% enhancement in the rent.

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(iii) It was agreed that the tenant should pay the agreed rent of Rs.12,985/- per month. It was also agreed that upon expiry or earlier determination of the lease, the tenant shall deliver vacant and peaceful possession of the premises. Clause 23 of the aforesaid Agreement stated as follows:

“23. That in case of any disputes, differences and/or claims arising by and between the parties out of this agreement and/or in respect to the subject matter of this agreement, the same shall be referred to the Arbitral Tribunal consisting of three arbitrators, out of which one arbitrator shall be appointed by the party of the first part, one by the party of the other part collectively and the Presiding Arbitrator shall be appointed mutually by the two arbitrators so appointed by the parties. The decision of the Arbitral Tribunal shall be final and binding on the parties. The Arbitration proceedings shall be governed by the provisions of Arbitration & Conciliation Act, 1996 with all statutory modifications for the time being in force. The venue of arbitration shall always be within the Ordinary Original Civil Jurisdiction of the High Court at Kolkata.”

(iv) On 16.10.2012, the tenancy was attorned in the name of the respondent, and the appellants paid rent to the respondent as the earlier landlord had surrendered his leasehold rights in favour of the respondent with effect from 01.11.2012.

(v) On 24.08.2015, a letter was sent by the respondent calling upon the appellants to deliver vacant and peaceful possession on the expiry of the 10 year period, i.e., on 01.02.2016. A reminder to this effect was also sent on 30.12.2015. As the tenant did not vacate the premises, arbitration was invoked by the respondent on 29.02.2016 by a notice sent to the appellants.

(vi) On 28.04.2016, the respondent filed the present Section 11 petition before the Calcutta High Court for appointment of an arbitrator.

(vii) On 07.09.2016, the High Court passed the impugned order appointing an arbitrator, after rejecting the appellants' objections on arbitrability of the dispute between the parties. After this, the arbitral proceedings began and we are informed that as many as 18 sittings have taken place.

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- A (viii) Meanwhile, however, on 12.10.2017, a judgment was delivered by this Court in **Himangni Enterprises v. Kamaljeet Singh Ahluwalia**, (2017) 10 SCC 706 [“*Himangni Enterprises*”], in which it was held that where the Transfer of Property Act, 1882 applied between landlord and tenant, disputes between the said parties would not be arbitrable.
- B (ix) Even though four arbitration sittings took place after this judgment, a review/recall application was filed by the appellants before the Calcutta High Court on 04.06.2018 in the light of this judgment. This review was dismissed by the Calcutta High Court on 08.06.2018.
- C 3. Mr. Debajyoti Basu, learned counsel appearing for the appellants has argued that the Transfer of Property Act is an Act which created rights in *rem* insofar as the landlord and tenant are concerned. He has further argued that the public policy contained in the statute in Sections 111(g), 114, and 114A, in particular, make it clear that by necessary implication the Arbitration & Conciliation Act, 1996 stands excluded.
- D For this purpose, he also relied upon Section 2(3) of the Arbitration & Conciliation Act read with Section 5 thereof. He referred us to the statement of claim made before the learned Arbitrator and said that, in any event, grant of mesne profits would be outside the arbitration agreement inasmuch as mesne profits are to be decided by way of
- E damages only after the agreement has come to an end. He also referred to and relied upon Order XX Rule 12 of the Code of Civil Procedure [“CPC”] to state that mesne profits could only be given in the manner provided in Order XX Rule 12, i.e., by a Civil Court and not by an arbitrator. He further went on to argue that even if it be held that certain sub-clauses of Section 111 would be arbitrable, yet it being clear that so far as at least arrears of rent and forfeiture are concerned, such disputes being non-arbitrable, it would be difficult to bifurcate the aforesaid grounds as often, one petition for eviction may contain several grounds, some of which are relatable to arrears of rent and forfeiture and some of which may relate to other grounds. Therefore, according to him, the entirety of
- F the subject-matter of landlord and tenant disputes arising under the Transfer of Property Act is excluded by necessary implication. He also stated that it is well settled that this case is one of inherent lack of jurisdiction and that therefore, participation in the arbitral proceedings would make no difference as consent cannot confer jurisdiction, nor can
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waiver be inferred so as to confer jurisdiction. He relied strongly upon a number of judgments to buttress these submissions. In any event, according to him, this Court's judgment in *Himangni Enterprises* (supra) would apply on all fours in the facts of his case and would therefore, govern this case, which would necessarily lead to an arbitrator in the present proceedings having no jurisdiction to decide disputes between landlord and tenant. He also argued that Section 11(6A) of the Arbitration & Conciliation Act should be read in a purposive manner, and that "existence" of an arbitration agreement that is spoken of would also refer to disputes which are non-arbitrable as such.

4. Mr. Saurav Agarwal, learned counsel appearing on behalf of the respondent countered these submissions. According to him, this is a case in which the appellants have participated in the arbitral proceedings. Arbitral proceedings are well on their way, and we ought, therefore, to exercise our discretionary jurisdiction under Article 136 of the Constitution of India against the appellants. He has further argued relying upon various judgments, including certain High Court judgments that were passed after *Himangni Enterprises* (supra) to state that, on facts, *Himangni Enterprises* (supra) was wholly distinguishable as it did not apply to a situation of a lease expiring by efflux of time. He also pointed out that certain High Court judgments had, after *Himangni Enterprises* (supra), distinguished the said judgment on this and other grounds. As an alternative submission, he said that, in any case, *Himangni Enterprises* (supra) would require reconsideration as it did not state the law correctly.

5. Having heard the learned counsel on both sides, we may first set out Section 11(6A) of the Arbitration & Conciliation Act, which reads as follows:

"11. Appointment of arbitrators.—

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(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.

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A The 246th Law Commission Report, which led to the enactment of Section 11(6A), stated as follows:-

- B “Section 11(6A) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. *The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void.* If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal.
- C However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.”

(emphasis supplied)

D 6. It will be seen that though the Law Commission Report speaks not only of “existence” but also of an arbitration clause being null and void, this has not translated itself into the language of Section 11(6A). On the contrary, Section 11(6A) is to be contrasted with Section 16(1) of the Act which reads as follows:

- E **“16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—**
- F *(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*
- G *(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”*

H 7. It will be noticed that “validity” of an arbitration agreement is, therefore, apart from its “existence”. One moot question that therefore, arises, and which needs to be authoritatively decided by a Bench of three learned Judges, is whether the word “existence” would include

weeding-out arbitration clauses in agreements which indicate that the subject-matter is incapable of arbitration. A Division Bench of this Court, through one of the learned Judges, Kurian Joseph, J., has stated, in **Duro Felguera, S.A. v. Gangavaram Port Ltd.**, (2017) 9 SCC 729, that the scope of Section 11(6A) is limited to the following:

“**59.** The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* and *Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]*. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court’s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

8. We now come to the meat of the matter.

9. It is important first to set out certain provisions of the Transfer of Property Act, 1882 and the Arbitration & Conciliation Act, 1996 in order to appreciate the controversy before us. Section 111 of the Transfer of Property Act, relating to determination of lease, reads as follows:

“**111. Determination of lease.**—A lease of immovable property, determines—

- (a) by efflux of the time limited thereby;
- (b) where such time is limited conditionally on the happening of some event—by the happening of such event;
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;
- (e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

- A (f) by implied surrender;
 - (g) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;
 - B (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.”
10. Section 114, which deals with relief against forfeiture for non-payment of rent, reads as follows:-
- D **“114. Relief against forfeiture for non-payment of rent.—** Where a lease of immovable property has been determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.”
 - F 11. Section 114A, which deals with relief against forfeiture in certain other cases, reads as follows:
- “114A. Relief against forfeiture in certain other cases.—** Where a lease of immovable property has been determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—
- G (a) specifying the particular breach complained of; and
 - (b) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.”

12. While appreciating that a lease is a transfer of an interest in property, and therefore, a conveyance, in law, there is nothing in the Transfer of Property Act to show that a dispute as to determination of a lease arising under Section 111 cannot be decided by arbitration. However, what was argued was that Sections 114 and 114A, which provide for statutory reliefs against forfeiture for non-payment of rent and for breach of an express condition, would indicate that the statute itself is based on a public policy in favour of tenants as a class, which can be decided by the courts only.

13. In **Praduman Kumar v. Virendra Goyal (Dead) by LRs.**, (1969) 3 SCR 950, this Court explained the *raison d'etre* for Section 114 as follows:

“The covenant of forfeiture of tenancy for non-payment of rent is regarded by the courts as merely a clause for securing payment of rent, and unless the tenant has by his conduct disentitled himself to equitable relief the courts grant relief against forfeiture of tenancy on the tenant paying the rent due, interest thereon and costs of the suit. Jurisdiction to relieve against forfeiture for non-payment of rent may be exercised by the Court if the tenant in a suit in ejectment at the hearing of the suit pays the arrears of rent together with interest thereon and full costs of the suit.”

(at page 953)

The Court went on to quote from **Namdeo Lokman Lodhi v. Narmadabai & Ors.**, [1953] SCR 1109 as follows:

“... in exercising the discretion (under Section 114 of the Transfer of Property Act), each case must be judged by itself, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant. ... It is a maxim of equity that a person who comes in equity must do equity

- A and must come with clean hands and if the conduct of the tenant is such that it disentitles him to relief in equity, then the court's hands are not tied to exercise it in his favour."

(at page 1025)

- B 14. In fact, a close reading of Section 114 would show that the rights of landlord and tenant are balanced by the aforesaid provision. This is because where a lease of immoveable property has determined by forfeiture for non-payment of rent, and at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrears, together with interest thereon and his full costs within 15 days, the Court in its discretion
- C may relieve the lessee against the forfeiture. This shows two things – one that the landlord's interest is secured not only by the deposit of rent in arrears but also interest thereon and full costs of the suit. The option given, of course, is that security may also be given but what is important is that the Court is given a discretion in making a decree for ejection if this is done. The discretion may be exercised in favour of the tenant or it may not. This itself shows that Section 114 cannot be said to be a provision conceived for relief of tenants as a class as a matter of public policy. The same goes for Section 114A. Here again, a lessee is given one opportunity to remedy breach of an express condition, provided such condition is capable of remedy. However, the exception contained in this
- E section shows that it is a very limited right that is given to a tenant, as this would not apply to assigning, sub-letting, parting with the possession, or disposing of the property leased, or even to an express condition relating to forfeiture in case of non-payment of rent. Thus, it is clear that every one of the grounds stated in Section 111, whether read with Section 114 and/or 114A, are grounds which can be raised before an arbitrator to decide as to whether a lease has or has not determined.
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- G 15. So far so good on principle. However, we have now to refer to certain decisions of this Court. The basic decision in cases of this kind is the judgment contained in **Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others**, (2011) 5 SCC 532. This judgment has laid down in great detail what is the meaning of the expression "arbitrability" [see paragraph 34]. Paragraph 35 is important and reads as follows:

- H "35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of

courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.”

Paragraph 36 then goes on to give certain well recognized examples of non-arbitrable disputes as follows:

“**36.** The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (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.”

Paragraphs 37 and 38 then go on to state that a right in *rem* is a right exercisable against the world at large, and is not amenable to arbitration, whereas a right in *personam*, in which an interest is protected against specific individuals, is. It was also stated that disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

16. We now come to the sheet anchor of the appellants' case before us, namely, the decision in *Himangni Enterprises* (*supra*). This judgment concerned itself with a landlord-tenant dispute in which the

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A Delhi Rent Act, 1995 was admittedly inapplicable. However, in paragraph 18 of the said judgment, this Court said:

“**18.** In our considered opinion, the question involved in the appeal remains no longer res integra and stands answered by two decisions of this Court in *Natraj Studios (P) Ltd. vs. Navrang Studios*, (1981) 1 SCC 523 and *Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd.* against the appellant and in favour of the respondent.”

B 17. We may point out that the judgment in *Natraj Studios* (supra) is a judgment in which Section 28 of the Bombay Rent Act, in the context C of arbitrability, arose for consideration. This section made it clear that disputes between landlords and statutory tenants would be referable only to the small causes court in Bombay and “no other court has jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question”. Given this provision, and the fact that the Bombay Rent Act is a welfare legislation, this Court held:

D “**17.** The Bombay Rent Act is a welfare legislation aimed at the E 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 F by the Bombay Rent Act cannot be recognized by a Court of law.”

It then concluded in paragraph 24 as follows:

G “**24.** In the light of the foregoing discussion and the authority of H the precedents, we hold that both by reason of S. 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 Co-operative Bank Ltd. v. M/s Dalichand Jugraj Jain* (AIR 1969 SC 1320), the Court

of Small Causes has and the Arbitrator has not the jurisdiction to decide the question whether the respondent-licensor-landlord is entitled to seek possession of the two studios and other premises together with machinery and equipment from the appellant-licensee-tenant.”

18. So far as *Booz Allen* (supra) is concerned, we have already extracted paragraph 36. Sub-paragraph (vi) of this paragraph makes it clear that only those tenancy matters that are (i) governed by special statutes (ii) where the tenant enjoys statutory protection against eviction and (iii) where only specified courts are conferred jurisdiction to grant eviction or decide disputes, are cases where the dispute between landlord and tenant can be said to be non-arbitrable.

19. A perusal of both the aforesaid judgments, therefore, shows that a Transfer of Property Act situation between a landlord and tenant is very far removed from the situation in either *Natraj Studios* (supra) or in sub-paragraph (vi) of paragraph 36 of *Booz Allen* (supra). We are, therefore, of the respectful view that the question involved in a Transfer of Property Act situation cannot possibly be said to have been answered by the two decisions of this Court, as has been stated in paragraph 18 of the said judgment.

20. The said judgment then goes on to state:

“**23.** The learned counsel for the appellant, however, argued that the provisions of the Delhi Rent Act, 1995 are not applicable to the premises by virtue of Section 3(1)(c) of the Act and hence, the law laid down in the aforementioned two cases would not apply. We do not agree.

24. 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 arbitration. In other words, though by virtue of Section 3 of the Act, the provisions of the Act are not applicable

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- A to certain premises but no sooner the exemption is withdrawn or ceased to have its application to a particular premises, the Act becomes applicable 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.”
- B 21. It may be noticed that none of the provisions of the Transfer of Property Act have been noticed by this judgment. In fact, none of the aforesaid provisions would indicate that disputes under the said Act are triable only by the civil court and not by arbitration, as has been held in this paragraph. It is clear that the Transfer of Property Act is silent on arbitrability, and does not negate arbitrability.
- C 22. In a similar situation, this Court, in **Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Others**, (1999) 5 SCC 651, held that when it came to the grant of specific performance, there is no prohibition in the Specific Relief Act that issues relating to specific performance cannot be referred to arbitration, unlike the English statute [see paragraph 34].
- D 23. Equally, merely because a discretion had to be exercised by the court on whether or not to grant specific performance, would not militate against specific performance being granted [see paragraph 44, in particular, of *Booz Allen* (supra)]. It is clear, therefore, that the judgment in *Himangni Enterprises* (supra) will require a relook by a Bench of three Hon’ble Judges of this Court.
- E 24. One more thing held in *Himangni Enterprises* (supra) is that the mere fact that an exemption from the Rent Act is available does not mean that the matter becomes non-arbitrable. The Court held that as soon as the exemption is withdrawn, the Rent Act will apply, and therefore, it cannot be contended that the Arbitration & Conciliation Act would apply. This reasoning is also, in our respectful view, not correct. Persons may be exempt from a Rent Act not merely for a certain period but also because the rent contained in the agreement between the landlord and tenant is above a certain amount. When the rent is fixed above the amount stated by a statute, in the normal course of human conduct, such rent can only be increased and not decreased so as to fall back within the provisions of the Rent Act. Further, the exemption based on a certain rent payable need not be withdrawn or cease to have application to a particular premises for many years to come. For all these reasons, we are of the view that this reason also does not hold good.

25. In **Vimal Kishor Shah and Others v. Jayesh Dinesh Shah and Others**, (2016) 8 SCC 788, this Court, after referring to **Dhulabhai v. State of M.P.**, (1968) 3 SCR 662, came to the conclusion that disputes which arose under the Indian Trusts Act, 1882, which applies only to private trusts, were also not arbitrable as this was excluded by necessary implication. This was so stated as follows:

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“**49.** So far as the question involved in the case at hand is concerned, it is governed by Condition 2 of *Dhulabhai case* [*Dhulabhai v. State of M.P.*, AIR 1969 SC 78] which reads as under: (AIR p. 89, para 32)

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“**32. (2)** Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

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Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.”

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50. When we examine the scheme of the Trusts Act, 1882 in the light of the principle laid down in Condition 2, we find no difficulty in concluding that though the Trusts Act, 1882 does not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the Trusts Act, 1882 yet, in our considered view, there exists an implied exclusion of applicability of the Arbitration Act for deciding the disputes relating to trust, trustees and beneficiaries through private arbitration. In other words, when the Trusts Act, 1882 exhaustively deals with the trust, trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Principal Civil Court of Original Jurisdiction for

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- A redressal of their disputes arising out of trust deed and the Trusts Act, 1882 then, in our opinion, any such dispute pertaining to affairs of the trust including the dispute inter se trustee and beneficiary in relation to their right, duties, obligations, removal, etc. cannot be decided by the arbitrator by taking recourse to the provisions of the Act. Such disputes have to be decided by the civil court as specified under the Trusts Act, 1882.
- B **51.** The principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law, was adopted by this Court in *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke* [*Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke*, (1976) 1 SCC 496 : 1976 SCC (L&S) 70 : AIR 1975 SC 2238] while examining the question of bar in filing civil suit in the context of remedies provided under the Industrial Disputes Act (*see* G.P. Singh, *Principles of Statutory Interpretation*, 12th Edn., pp. 763-64). We apply this principle here because, as held above, the Trusts Act, 1882 creates an obligation and further specifies the rights and duties of the settlor, trustees and the beneficiaries apart from several conditions specified in the trust deed and further provides a specific remedy for its enforcement by filing applications in civil court. It is for this reason, we are of the view that since sufficient and adequate remedy is provided under the Trusts Act, 1882 for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication.”
- C *Dhulabhai* (supra) refers to and relies upon the three famous categories that are contained in **Wolverhampton New Waterworks Co. v. Hawkesford**, 141 ER 486. Willes, J. had set out these three categories as follows:
- D “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
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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.”

(at page 495)

26. The Indian Trusts Act, 1882, in fact, provides an excellent instance of how arbitration is excluded by necessary implication. It is important to bear in mind the fact that the statute, considered as a whole, must lead necessarily to a conclusion that the disputes which arise under it cannot be the subject matter of arbitration.

27. A few sections of the Indian Trusts Act will suffice to demonstrate how disputes under this Act cannot possibly be the subject matter of arbitration. Under Section 34 of the Indian Trusts Act, a trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice, or direction on any present questions respecting management or administration of trust property, subject to other conditions laid down in the Section. Obviously, an arbitrator cannot possibly give such opinion, advice, or direction. Under Section 46, a trustee who has accepted the trust, cannot afterwards renounce it, except, *inter alia*, with the permission of a principal Civil Court of original jurisdiction. This again cannot be the subject matter of arbitration. Equally, under Section 49 of the Indian Trusts Act, where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, only a principal Civil Court of original jurisdiction can control such power, again making it clear that a private consensual adjudicator has no part in the scheme of this Act. Under Section 53, no trustee may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust property or any part thereof. Here again, such permission can only be given by an arm of the State, namely, the principal Civil Court of original jurisdiction. Under Section 74 of the Indian Trusts Act, under certain circumstances, a beneficiary may apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint such trustee accordingly. Here again, such appointment

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A cannot possibly be by a consensual adjudicator. It can only be done by a petition to a principal Civil Court of original jurisdiction. Also, it is important to note that it is not any civil court that has jurisdiction, but only one designated court, namely, a principal Civil Court of original jurisdiction. All this goes to show that by necessary implication, disputes arising under the Indian Trusts Act cannot possibly be referred to arbitration.

B 28. Insofar as the Transfer of Property Act or the Specific Relief Act, no such thing exists, as has been held by *Olympus Superstructures* (supra) and by *Booz Allen* (supra).

C 29. We may only indicate that *Vimal Kishor Shah* (supra) has, in a Consumer Protection Act situation, been recently followed by a Division Bench of this Court in **Emaar MGF Land Limited v. Aftab Singh**, 2018 SCC OnLine SC 2771.

D 30. In this view of the matter, this case is referred to a Bench of three Hon'ble Judges.

E 31. Given the facts of this case and the fact that 18 hearings have been held, the stay that has been granted to the arbitral proceedings by our order dated 13.08.2018 is lifted, and the proceedings may go on and culminate in an award. The award cannot be executed without applying to this Court. The appeal is disposed of accordingly.

Devika Gujral

Matter referred to larger Bench.