

[2022] 7 S.C.R. 78

A BRIJ RAJ OBEROI

V.

**THE SECRETARY, TOURISM AND CIVIL AVIATION
DEPARTMENT & ANR.**

B (Civil Appeal Nos. 5509-5510 of 2022)

AUGUST 18, 2022

[INDIRA BANERJEE AND C. T. RAVIKUMAR, JJ.]

Arbitration and Conciliation Act, 1996: s. 11(6) – Appointment of an arbitrator – On facts, issue as regards reference of dispute pertaining to lease deed between the parties, to the arbitrator – Held: Clauses in a lease deed cannot be read and construed in isolation – Lease deed is to be construed as a whole – All disputes between the parties to the lease with regard to renewal and/or non-renewal, the period of renewal and the quantum of rent would have been decided by the Arbitrator – Issue of arbitrability of the dispute over non-renewal of the lease is within the realm of the arbitral tribunal/arbitrator – Thus, the Division Bench erred in rejecting the application of the appellant u/s. 11(6) for appointment of an arbitrator – Arbitration clause cannot be rendered otiose by refusal of the respondent State to renew the lease – Thus, the impugned judgment and order is set aside – Appointment of an arbitrator to adjudicate the disputes between the parties.

Allowing the appeals, the Court

HELD: 1.1 The Division Bench erred in arriving at the

F finding that the arbitration clause could only be invoked if the proposal for renewal was accepted by the lessor, but there was dispute with regard to the period of renewal or there was dispute with regard to the quantum of rent proposed to be paid by the lessee to the lessor. [Para 14][87-D-E]

G 1.2 Clauses in a lease deed cannot be read and construed in isolation. The lease deed is to be construed as a whole. Clause 4(xiii) has to be read with Clause 3 which clearly provides that the initial term of the lease under the deed shall be a period of 24 years from 1st June 1997 to 31st May 2021 and shall be renewable for such acceptance of the lessee's offer in terms of Clause 4(xiii).

Prima facie, the parties to the lease deed have used the expression “shall” which connotes a command. If the lessee offered its terms for renewal or extension of the lease within the time stipulated in the lease, *prima facie* the same would have to be accepted. However, if the quantum of rent or the period of lease could not be mutually agreed upon, the same would necessarily have to be referred to arbitration by an Arbitrator to be appointed by the Chief Justice of the Sikkim High Court. [Paras 15, 16][87-C-F, G-H]

1.3 The Division Bench erred in rejecting the application of the appellant under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator. The dispute arising out of non-renewal of the lease is clearly arbitrable. The deed of lease provided “*that the initial terms of the lease under this deed shall be a period of twenty four years from 01.06.1997 to 31.05.2021 and shall be renewable for such acceptance of the lessee’s offer in terms of clause 4(xiii) hereinafter*”. Clause 4(xiii) provides that the appellant-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. The arbitration clause cannot be rendered otiose by refusal of the respondent State to renew the lease. The respondent State may have formulated a policy for encouraging self-employment of local youth who are duly qualified and competent to run the hotel. Such policy decision cannot impact an existing agreement with a renewal clause. All disputes between the parties to the lease with regard to renewal and/or non-renewal, the period of renewal and the quantum of rent would have been decided by the Arbitrator. The issue of arbitrability of the dispute over non-renewal of the lease is within the realm of the Arbitral Tribunal/Arbitrator. [Paras 18, 19][89-H; 90-A-E]

1.4 The impugned judgment and order is set aside. An arbitrator is appointed to adjudicate the disputes between the parties. The Arbitrator is requested to complete the proceedings

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- A as early as possible preferably within the stipulated period. [Para 20][90-F-G]

Vidya Drolia & Ors. v. Durga Trading Corporation
(2021) 2 SCC 1 - referred to.

B	<u>Case Law Reference</u>		
	(2021) 2 SCC 1	referred to	Para 17

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5509-5510 of 2022.

- C From the Judgment and Order dated 18.11.2021 of the High Court of Sikkim at Gangtok in Arb. A. No.02 of 2021 and Arb. P. No. 02 of 2021.

Mukul Rohatgi, Sr. Adv., Saurav Agrawal, Debarshi Dutta, Sahil Tagotra, Aayush Kevlani, Abhishek Pandey, Ms. Kavya Pahwa, Advs. for the Appellant.

- D Dr. M. S. Domat Bhutia, AAG, K. V. Vishwanathan, Sr Adv., Raghvendra Kumar, Shashank Singh, Varun Singh, Advs. for the Respondents.

The Judgment of the Court was delivered by

E **INDIRA BANERJEE, J.**

1. Leave granted.

2. These appeals are against a common judgment and final order dated 18th November 2021 passed by the High Court of Sikkim at Gangtok allowing Arbitration Appeal No.02 of 2021 filed by the Respondents,

- F setting aside the impugned order dated 31st May 2021 passed by the Commercial Court on an application of the Appellant under Section 9 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act", and also dismissing Arbitration Petition No. 02 of 2021 filed by the Appellant under Section 11 of the 1996 Act for appointment of an Arbitrator.

3. The State of Sikkim, impleaded as Respondent No.2 in this appeal, is the absolute owner of the property bearing Plot No.309, Paljor Stadium Road, Gangtok, East Sikkim, known as Norkhill Hotel, hereinafter referred to as the 'said property' along with its land, buildings, annexe, servants quarters and garages.

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4. By a registered deed of lease dated 9th December 1997, the Respondent State leased out the said property to the Appellant on terms and conditions stipulated in the said deed of lease. Some of the terms and conditions of the Deed of Lease are set out hereinbelow for convenience:- A

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2. *The consideration of the lease of the premises fully described in the schedule I below, the lessee undertakes to pay to the lessor the sum of Rs. 30.00 lakhs (Rupees Thirty lakhs) only per annum with a 10% (ten percent) increase compounded every three years in quarterly installments of Rs. 7,50,000/- (Rupees Seven Lakhs Fifty Thousand only) payable by the 7th April, 7th July, 7th October and 7th December of each year and the first installment shall be payable on the date of the execution of this deed.* C

3. *That the initial terms of the lease under this deed shall be a period of twenty four years from 01.06.1997 to 31.05.2021 (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 acceptance of the lessee's offer in terms of clause 4(xiii) hereinafter.* D

4. *The lessee covenants with the Lessor as follows:* E

i) *The lessee shall pay the lease amounts on the dates aforesaid in clause 2 hereinabove.*

ii) *The lessee shall pay the increased lease amounts at the rate of 10% (ten percentage) to be compounded every three years as follows:* F

a) *from 01.06.2000 to 31.05.2003 Rs. 33,30,000.00 per annum.*

b) *from 01.06.2003 to 31.05.2006 Rs. 36,30,000.00 per annum.* G

c) *from 01.06.2006 to 31.05.2009 Rs. 39,93,000.00 per annum.*

d) *from 01.06.2009 to 31.05.2012 Rs. 43,92,300.00 per annum.* H

- A *e) from 01.06.2012 to 31.05.2015 Rs. 48,31,530.00 per annum.*
- f) from 01.06.2015 to 31.05.2018 Rs. 53,14,683.00 per annum.*
- B *g) from 01.06.2018 to 31.05.2021 Rs. 58,46,151.30 per annum.*
- ...
- C *v) The lessee shall keep the leased premises in good order and condition and in the same condition in which it was handed over the lessee with a reasonable wear and tear for which he shall not be entitled to make any claim subsequently.*
- D *vi) The lessee shall comply with all the provisions of the relevant enactments and regulations thereunder and with any other obligations imposed by the local laws in regard to the lease premises.*
- ...
- E *x) The lessee shall upon termination and/or expiry of the lease quit and vacate the leased premises.*
- F *xi) The lessee shall give three months notice in writing of his intention to terminate this agreement if he wants to vacate the premises before the expiry of the lease period. If such notice is given the lessee shall be entitled to vacate the leased premises on expiry of the term of notice.*
- G *xii) The lessee if he fails and neglects to pay two consecutive quarterly lease amounts within the period situated in clause 2 the lessee shall become a defaulter in payment of the lease amount and on and from the eighth day of such second and consecutive defaulting month, the lessee shall be deemed to be a trespasser in the demised premises.*
- H *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. A

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xvii) *The lessee shall after the expiry of the tenure of this lease or sooner determination thereof, shall peacefully and quietly surrender to the lessor, the possession of the demised premises in the condition in which the same has been delivered to the lessee.* B

5. *The lessor covenants with the lessee as follows:* C

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ii) *The lessee upon paying the lease amount and observing and performing the other covenants and conditions and agreements to be observed and performed, shall peaceably hold and enjoy the leased premises during the tenure of this lease without any interruption or disturbance.* D

6. *In the event of any breach of the terms and conditions of the agreement by the lessee, the agreement/terminated by the lessor, at his option, after giving one months notice in writing of its intention to do so and the lessor shall be entitled to exercise its right of reentry, into the leased premises without prejudice to its right to recover all arrears of rent and other claims for damages caused by such breach of the terms and conditions hereinbefore covenanted.”* E

5. The lease was due to expire by efflux of time on 31st May 2021. By a letter dated 12th November 2020 addressed to the Respondent State, through the Secretary, Tourism Department, the Appellant offered its terms and conditions for renewal of the lease of the said property, for a further period of 30 years, at an annual rent of Rs.64,30,766.43 per year, that is, 10% more than annual rent being paid then, with escalation of 10% every three years. F

6. By a letter dated 17th May 2021 written in response to the Appellant's letter dated 12th November 2020, Dr. K. Jayakumar, IAS, Additional Chief Secretary, Department of Tourism and Civil Aviation, Gangtok rejected the offer of the Appellant for renewal of lease of the G

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A property in question. The said letter is extracted hereinbelow for convenience:-

“...This has reference to your request for renewal of lease ownership of Norkhill hotel period for a further period of 30 years vide your letter dated 12 Nov. 2020.

- B *2. In the context of the above, this is to inform you that the State Government has approved a policy as part of executing the vision for bringing about transformative changes in the tourism sector, which interalia envisages professional methods of managing tourism infrastructure, assets and facilities in the State.*
- C *3. Efforts are being made for mobilization of revenues for the government with effective mechanisms, with effective mechanisms, with associated enforcement of policies for their professional regulation, processes for deciding on lease ownership, and for monitoring and enforcement of regulations. Assessment and revenue collections are to be realistic, with focus on quality assurance and standards, in keeping with the image and branding efforts, to make Sikkim a preferred destination for tourism.*
- D *4. The State Government has considered the fact that Norkhill property being a heritage hotel located at a most commanding place near the Palzor Stadium has considerable significance and would need to be treated as a premium property with a potential to generate better revenues for the State exchequer, in order that much needed funds to operate and manage the state machinery< especially in the context of the current pandemic is ensured.*
- E *5. Furthermore, in the present context, energetic enthusiastic qualified younger generation hoteliers having the experience of having served in the hotel industry in Sikkim and outside the State are available. It would only be fair for the State to provide an opportunity for them to also make their offers for lease ownership, in terms of providing augmented quality of value added services and spelling out their capability to generate and offer more revenues for the state.*
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6. Hence, the State has decided that it would be in public interest to adopt a process with stringent qualifications and bid participating criteria, and determine appropriate lease owner through a selection process. This approach would ensure that capacities of emerging, capable, professional hoteliers who provide more value added services and revenues can be given the opportunity to participate for lease ownership selection. A

7. Hence, the Government has after careful consideration and application of mind, has decided in public interest that, your request for consideration of renewal of lease ownership and extension of tenure of lease in respect of Nikhill hotel would not be accepted. The decision is also in keeping with the principles laid down by the Hon'ble Supreme Court for letting out Government properties, in a number of cases, which lays down that Public property partakes the character of a trust and that, public purpose would be served only by getting the best price for government property, so that larger revenue coming into the coffers of the State administration can be utilized for beneficent activities to subserve public purpose namely, the welfare State..." C

7. By a letter dated 21st May 2021, the Appellant requested the Respondents to refrain from taking steps to hand over the hotel to a third party until the disputes and differences were decided through arbitration. E

8. The Appellant filed an application under Section 9 of the 1996 Act, being Arbitration Suit No.05 of 2021 in the Commercial Court, being the Court of the District Judge, East Sikkim at Gangtok. F

9. On or about 28th May 2021, the Respondent State filed its Response to the application under Section 9 of the 1996 Act, contending that the Appellant had misconstrued Clause 4(xiii) of the Lease Agreement. It was contended that as the Respondent State had not accepted the offer made by the Appellant, there was no case for arbitration. Read properly, clause 4(xiii) would permit reference of disputes with regard to the quantum of rent and the period of renewal, to arbitration. Furthermore, under clause 4(xvii), upon termination and/or expiry of the lease, the Appellant was required to quit and vacate the said property. G

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- A 10. By an order dated 31st May 2021, the learned Judge, Commercial Court restrained the Respondent State from disturbing the Appellant's possession of the property in question, until the commencement of the arbitral proceedings.
- B 11. The Respondent State filed an appeal from the said order dated 31st May 2021 under Section 37 of the 1996 Act read with Section 13 of the Commercial Courts Act, 2015 and Article 227 of the Constitution of India being Arbitration Appeal No. 02 of 2021. The Appellant, on the other hand, filed an application under Section 11 of the 1996 Act, read with Section 10 of the Commercial Courts Act, 2015 being Arbitration Petition No.02 of 2021 for appointment of an Arbitrator.
- C 12. By the impugned judgment and order, the Division Bench of the High Court allowed Arbitration Appeal No. 02 of 2021, set aside the order dated 31st May 2021 passed by the Commercial Court and also dismissed Arbitration Petition No.02 of 2021 filed by the Appellant under Section 11 of the 1996 Act, for appointment of an Arbitrator.
- D 13. The Division Bench, *inter alia*, held:-
- E *"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:-*
- F *i. If there is a dispute with regard to the further period of renewal of the present lease, as proposed; and*
- F *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.*
- G *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.*
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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.

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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 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."

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14. In our considered opinion, the Division Bench fell in error in arriving at the finding that the arbitration clause could only be invoked if the proposal for renewal was accepted by the lessor, but there was dispute with regard to the period of renewal or there was dispute with regard to the quantum of rent proposed to be paid by the lessee to the lessor.

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15. It is well settled that clauses in a lease deed cannot be read and construed in isolation. The lease deed is to be construed as a whole. Clause 4(xiii) has to be read with Clause 3 which clearly provides that the initial term of the lease under the deed shall be a period of 24 years from 1st June 1997 to 31st May 2021 and shall be renewable for such acceptance of the lessee's offer in terms of Clause 4(xiii). Clause 4(xiii) has wrongly been printed as Clause 4(xii). It is not in dispute that it is to be read as Clause 4(xiii) and all concerned have proceeded on the basis that the offer is to be in terms of Clause 4(xiii).

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16. *Prima facie*, the parties to the lease deed have used the expression "shall" which connotes a command. If the lessee offered its terms for renewal or extension of the lease within the time stipulated in the lease, *prima facie* the same would have to be accepted. However, if the quantum of rent or the period of lease could not be mutually agreed upon, the same would necessarily have to be referred to arbitration by an Arbitrator to be appointed by the Chief Justice of the Sikkim High Court.

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A 17. In *Vidya Drolia & Ors. v. Durga Trading Corporation*¹, a three-Judge Bench of this Court held :-

- B “**151.**Broad or narrow interpretations of an arbitration agreement can, to a great extent, effect coverage of a retroactive arbitration agreement. Pro-arbitration broad interpretation, normally applied to international instruments, and commercial transactions is based upon the approach that the arbitration clause should be considered as per the true contractual language and what it says, but in case of doubt as to whether related or close disputes in the course of parties’ business relationship is covered by the clause, the assumption is that such disputes are encompassed by the agreement. The restrictive interpretation approach on the other hand states that in case of doubt the disputes shall not be treated as covered by the clause. Narrow approach is based on the reason that the arbitration should be viewed as an exception to the court or judicial system. The third approach is to avoid either broad or restrictive interpretation and instead the intention of the parties as to scope of the clause is understood by considering the strict language and circumstance of the case in hand. Terms like “all”, “any”, “in respect of”, “arising out of”, etc. can expand the scope and ambit of the arbitration clause. Connected and incidental matters, unless the arbitration clause suggests to the contrary, would normally be covered.
- C **152.** Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.
- D **153.** Accordingly, we hold that the expression “existence of an arbitration agreement” in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply

the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

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154.3. *The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

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154.4. *Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”*

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18. In the considered opinion of this Court, the Division Bench fell in error in rejecting the application of the Appellant under Section 11(6)

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- A of the 1996 Act for appointment of an Arbitrator. The dispute arising out of non-renewal of the lease is clearly arbitrable. As observed above, the deed of lease provided "*That the initial terms of the lease under this deed shall be a period of twenty four years from 01.06.1997 to 31.05.2021 (First day of June one thousand nine hundred and ninety seven to thirty first day of May two thousand and twenty one) and shall be renewable for such acceptance of the lessee's offer in terms of clause 4(xiii) hereinafter*".
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19. Clause 4(xiii) provides that the Appellant-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. The arbitration clause cannot be rendered *otiose* by refusal of the Respondent State to renew the lease. The Respondent State may have formulated a policy for encouraging self-employment of local youth who are duly qualified and competent to run the hotel. Such policy decision cannot impact an existing agreement with a renewal clause. All disputes between the parties to the lease with regard to renewal and/or non-renewal, the period of renewal and the quantum of rent would have been decided by the Arbitrator, as observed above. The issue of arbitrability of the dispute over non-renewal of the lease is within the realm of the Arbitral Tribunal/Arbitrator.

20. The appeals are allowed. The impugned judgment and order is set aside. Justice Bhaskar Bhattacharya, Former Chief Justice of Gujarat High Court and Former Chairman of the Sikkim Law Commission is appointed Arbitrator to adjudicate the disputes between the parties. The Arbitrator is requested to complete the proceedings as early as possible preferably within three months from the date of communication of this order. Needless to mention that the learned Arbitrator will not be influenced by any observations made in this order on the merits and/or arbitrability of the disputes.

21. The order of status quo passed by this Court shall continue for a period of three months from today or until further orders of the Arbitral Tribunal, whichever is earlier.