
(2014) 09 DEL CK 0140
In the Delhi High Court
Case No : OMP No. 488/2013

Planet M. Retail Ltd.

APPELLANT

Vs

Select Infrastructure Pvt. Ltd.

RESPONDENT

Date of Decision : 19-09-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 9(ii)(e)
Civil Procedure Code, 1908 (CPC) — Order 18 Rule 5, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 39, 151
Easements Act, 1882 — Section 63
Specific Relief Act, 1963 — Section 14, 14(1), 14(i)(c), 37, 41

Citation : (2014) 4 ARBLR 348 : (2014) 145 DRJ 654

Hon'ble Judges : Deepa Sharma, J

Bench : Single Bench

Advocate : Meet Malhotra, Sr. Adv, Virendra Rawat and Devender Singh, Advocate for the Appellant; Ravi Gupta, Sr. Advocate and Ankit Jain, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Deepa Sharma, J.—The present petition has been filed u/s 9 with the prayer that respondent be restrained from terminating the Licence Agreement dated 12.12.2006 on the ground of violation of clause 2(a) of the said Licence Agreement and restrain the respondent, its servants, employees, agents, third party contractors or anybody claiming through respondent, from creating any obstruction, hindrance in possession, use of licensed premises by petitioner and also from disconnecting, discontinuing of any of amenities to the licensed premises or committing any act/omission directly or indirectly causing obstruction to business of petitioner from the licensed premises and attempting to illegally evict the petitioner from the licensed premises, without following due process of law.

2. It is contended by the petitioner that the petitioner is a company incorporated under the provisions of Companies Act, 1956 and is engaged in the business of

retail of sale of CDs, DVDs, CD ROMs etc. of music, movies, games, memorabilia, promotional merchandise and general merchandise. The respondent is also a company incorporated under the Companies Act and is owner of mixed use commercial complex, consisting of shopping centre, multiplex complex, offices and hotels, etc. named "Select City Walk" at District Centre, Saket (in short "Select City Walk").

3. Pursuant to the agreement dated 12.12.2006 between Bennett, Coleman & Co., predecessor-in-interest of the petitioner, and the respondent, in respect of Shop F-18, measuring 2,263 square feet (Licensed Premises) in Select City Walk, a licence for a term of nine (9) years from the year 2006 was granted to the petitioner, with effect from 01.11.2007. The petitioner had acquired the retail division of Bennett, Coleman & Co. Ltd. and all rights, liabilities and possession of licensed premises under the Licence Agreement was legally assigned to the petitioner and vide letter dated 08.04.2008, the respondent was informed of these facts and the respondent had acknowledged the said assignment of licence agreement to the petitioner. From time to time, the Licence Agreement was amended. First Addendum is dated 31.03.2007 and second Addendum is dated 01.04.2011. According to the petitioner, the Clause 2(a) of the Licence Agreement is relevant, which is reproduced as under:-

"The Licensee hereby undertakes to conduct only the following Permitted business in the Licensed Space, on a regular basis, and exclusively in the manner as specified hereinafter:

In view of the above clause, the petitioner submits that he was permitted to sell the permitted brand under the brand name "Planet M" and also permitted to sell, besides other articles, General Merchandise, including Promotional Merchandise. It is contended that under the term "General Merchandise", the petitioner is entitled to sell any variety of goods except the sale of those goods which are barred under the law. It is further contended that under the aforesaid addendums, the parties had agreed to various forms of payment on the same.

4. 8% was to be paid to the licensor on the net sales turnover of music CDs and 2% on the game instrument, equipment and other accessories and 1.50% on the net sales turnover of mobiles, from the licensed space. Monthly Minimum Guarantee (MMG), licence fee was calculated @ Rs. 145/- per square feet of the licences space per month which amounted to Rs. 3,40,895/- All these payments were subjected to the escalation as agreed between the parties. It is submitted that in order to promote the sale of kids music and gaming product and to draw more footfall, the petitioner had started selling toys, apparels and related accessories from the licensed premises with effect from April, 2012 and decided to add toys as a separate category in its current business plan for the Financial Year 2013-2014. It is further contended that the petitioner and its predecessor-in-interest had with the knowledge of respondent been permitted to sell certain other merchandise from the licensed premises which were specifically added to the business plan, for example, the petitioner had added "Telecom & Gaming"

merchandise and was also selling telecom and gaming items and the respondent had never objected to the same and the petitioner continued to make payment against the sale of those items as per the Licence Agreement. The decision of the petitioner for adding toys as a category had been duly conveyed to the respondent in a meeting and also vide e-mail dated 23.04.2013. It is also stated that in the Financial Year, 2012-13, the MMG licence fee (based on the sale, including of toys, apparels and related accessories) had been paid by the petitioner to the respondent which has been accepted by the respondent without objection. It is submitted that respondent had acquiesced to the sale of toys, apparels and related accessories from the licensed premises, but still issued a show-cause notice dated 16.04.2013. The show-cause notice pertains to the termination of the Licence Agreement. The respondent in the said show-cause notice had made a reference of a show-cause notice dated 11.03.2013, but the petitioner had never received it. There was also a meeting between the parties to discuss this issue. Despite that the respondent again sent a letter dated 25.04.2013 with reference to clause 25(a)(1) of the Licence Agreement, and asked the petitioner to cure the breach of agreement and stop selling toys, apparels and related accessories within seven (7) days, failing which to terminate the Licence Agreement. Subsequently, in the meeting held on 01.05.2013 between the parties, the respondent had agreed to hold talks with the petitioner in order to resolve the dispute. It is contended that in the said meeting, the petitioner had explained to the respondent that selling of toys, apparels and related accessories did not amount to violation of Licence Agreement. However, the petitioner again received a letter dated 01.05.2013, where, it has been wrongly stated that the respondent had deferred its decision for terminating the Licence Agreement by 30 days on petitioner's request. The said letter was duly replied by the petitioner vide its letter dated 02.05.2013. It is further submitted that in the meeting held on 01.05.2013, the petitioner had learnt that the respondent wanted petitioner to either vacate the premises or agree to a higher licence fee. It is submitted that although the parties had agreed to resolve their disputes amicably within 30 days, yet on 08 and 09th May, 2013, the employees of the respondent threatened the store manager of the petitioner of disconnecting the amenities and business facilities in the event of petitioner failing to relocate itself or agree to increase in the licence fee.

5. It is further contended that by virtue of clause 2(a) of the Licence Agreement, the petitioner is entitled to sell toys, apparels and related accessories from the licensed premises as the same falls under the category of "General Merchandise. It is further submitted that the petitioner is ready to invoke the dispute resolution mechanism provided under the Licence Agreement of negotiation and failing negotiation of arbitration. It is also submitted that the petitioner has strong prime facie case in his favour and it has neither faulted in any payment due from the petitioner nor had violated any term of the Licence Agreement. It is also submitted that he shall suffer irreparable loss and injury which cannot be compensated in terms of money. In these circumstances, it is prayed that the

respondent be restrained from terminating the Licence Agreement.

6. The respondent has contested the present petition. It is submitted that the petitioner is selling toys, Barbie products, apparels, including T-shirts, jewellery, mobile accessories which he was not permitted to sell under the Licence Agreement. It further contended that the expression "General Merchandise" used in clause 2(a) of the agreement cannot be read in isolation. It is to be read along with the other expressions in the said clause and the General Merchandise only relates to the CDs, DVDs, CD ROMs etc. and no license has been given to the petitioner to sell these articles. It is further submitted that the Select City Walk has various shops which are selling products like kids toys. These products are sold by Crossword, Chicco, etc. and the Barbie products are sold by Mom & Me., Apparels, including T-shirts are sold by various outlets and the jewellery items are also sold by various outlets like Gilli, Pure Gold, Renee, etc. and the mobile accessories sold by stores like Nokia, Samsung, Digital house, etc, under separate contracts with other. It is further submitted that the petitioner has not come before this Court with clean hands. The petitioner has alleged that he had not received the show-cause notice dated 11.03.2013 while the copy of the said notice was duly received by the petitioner at the store itself. It is further submitted that the petitioner has not been making the payment of charges under Licence Agreement in time, but has been making delayed payment. This includes the payment of Common Area Maintenance & Mall Management Charges (Camm), payment towards electricity charges in terms of clause 9(c), payment of property tax amount in terms of clause 14(d) and submission of its sale report/account, certified by a qualified Chartered Accountant or Financial Officer for the purpose of calculation of the amount payable by the petitioner to the respondent in terms of clause 4(c) and the respondent had addressed various communications, including letters dated 11.01.2010 and 25.05.2012 in this regard. The petitioner has also not maintained the comprehensive insurance cover in respect of the premises occupied by him in terms of clause 13 and the respondent had to write the letters dated 24.05.2012 and 26.07.2012 in this regard. The petitioner in terms of clause 13(e) was under obligation to obtain necessary statutory approvals, licences and NOCs from concerned authority and submit the same to the respondent, but he has not submitted the said statutory approvals, licences and NOCs with the respondent. In terms of clause 15(a), the petitioner was to set up IT platform in the licensed premise which he completed only in the month of March, 2013. It is submitted that all this shows that the petitioner has not been complying with the terms and condition of the Licence Agreement and has been committing breach at every stage. It is further submitted that respondent had already terminated the said licence. It is also submitted that the petitioner was only permitted to carry out the business from the premises in question and the possession of licensed premises was never handed over to the petitioner and so the petitioner cannot claim the possession of the premises. It is not disputed that addendum dated 31.03.2007 and 01.04.2011 were executed between the parties. It is denied that respondent had

ever acquiesced or given permission to the petitioner to sell the items like toys, including Barbie, apparels and jewellery, etc. It is further submitted that the respondent had received an email from the petitioner dated 06.03.2013 intimating that the petitioner was celebrating the birthday of Barbie in the premises in question and it was found that apart from selling the toys, including Barbie, the petitioner was also selling the toys, apparels and related accessories for which he was not permitted to do and so it was violative of terms of the agreement and so the respondent had issued notice dated 11.03.2013 requiring him to remove the said items from the licensed premises. The petitioner did not remove those items, despite the said communication. Accordingly, vide communication dated 16.04.2013, the petitioner was called upon to show-cause as to why the agreement be not terminated. It was then that the respondent had received an e-mail dated 23.04.2013 seeking permission of the respondent to add toys in category of product permitted to be sold from the premises in question. It is contended that the fact that permission of the respondent was sought for selling the toys, etc, shows that the respondent had never permitted the petitioner to sell those items from the premises in question. It is further submitted that no MMG for Financial Year 2012-13 in respect of toys, apparels and related accessories was ever given to the respondent. It is denied that respondent had ever acquiesced to adding of toys, apparels and related accessories in the store. It is submitted that since the petitioner failed to remove those items vide communication dated 24.04.2013, the petitioner was again asked to cure the defect within seven (7) days failing which the Licence Agreement would stand automatically terminated. It is submitted that thereafter Mr. Sanjay Karwa, CEO of petitioner met the officials of respondent and in the said meeting, Mr. Karwa had agreed to remove the said items from the premises in question and on his request, 30 days time was given to him and accordingly, the communication dated 01.05.2013 was issued and the termination was kept on hold till 31.05.2013. It is submitted that the petitioner, however, took a complete different stand vide its letter dated 02.05.2013. It is submitted that the respondent had never threatened the petitioner for disconnection of the amenities of the business facilities nor wanted the petitioner to relocate and never coerced him to pay higher licence fee. It is submitted that 30 days time was given to the petitioner for removing the items from the premises in question. It is further submitted that no sale report was furnished to the respondent by the petitioner for the year 2012-2013. On these facts, it is submitted that the present petition is liable to be dismissed.

I have heard the arguments of the learned counsel for the parties.

7. It is not in dispute that there was an agreement between the petitioner and the respondent by which the petitioner was granted a licence to run his business in Shop F-18, Select City Walk in terms of Licence Deed dated 12.12.2006 which was valid up to December, 2015. There is no dispute to the fact that in terms of clause 2(a), as reproduced above, the petitioner was permitted only to sell the permitted brand "Planet M". He was also permitted in trade merchandise

category and was allowed to sell Music Cassettes, Audio Video CDs, CD ROMS, Memorabilia and Associated Merchandise, General Merchandise, including Promotional Merchandise. There is also no dispute to the fact that subsequently the parties had entered into the addendum dated 31.03.2007 and 01.04.2011, by which certain categories of items like telecom and gaming merchandise in the mobiles were permitted to be sold by the petitioner from the licensed premises. Dispute arose when it was found that besides all these articles, the petitioner was selling toys, apparels, Barbie products, jewellery, etc. There is no dispute to the fact that vide e-mail dated 23.04.2013, the petitioner had submitted their business plan for the year 2013-14, whereby they informed the respondent that they were introducing toys as category in all our major stores by the name of "Little Planet M" as there was huge potential and since it was also going to increase the revenue for the petitioner, it also offered 8% margin for this category on the basis of NSV.

8. It is also pertinent to note here that although the petitioner has admitted the receipt of the letter dated 16.04.2013 from the respondent which is a show-cause notice referring the change in Permitted Trade Category and asking the petitioner to rectify its default and though this show-cause notice was having a reference of their previous show-cause notice dated 11.03.2013, the petitioner has categorically denied the receipt of such letter dated 11.03.2013. This refusal on the part of the petitioner, in the petition, is duly supported by an affidavit. The respondent has categorically stated in their reply that the said notice dated 11.03.2013 was duly served upon the petitioner at the store, but the petitioner had still categorically denied the receipt of this notice, in the rejoinder. The respondent, however, has placed on record the copy of the said notice dated 11.03.2013 and the true copy of this notice clearly shows that the notice was duly received by the petitioner at the shop Planet M, Saket on 11.03.2013 itself. Besides that, the said notice was also sent through post. This prima facie show that the said notice was duly received by the petitioner personally by hand at the shop itself, and the petitioner had made a false denial of this fact in the petition, supported by affidavit and in rejoinder. Besides other things, it shows that the petitioner has not come to this Court with clean hands.

9. There is no dispute to the fact that the contract between the parties contains an arbitration clause and any arbitral dispute between the parties is subject to arbitration. It, therefore, is for the arbitrator to resolve the issue if there was a violation of clause 2(a) by the petitioner or not on account of petitioner's selling toys, Barbie, apparels and related accessories or whether the selling of Barbie toys, etc. falls within the permitted trade/merchandise category, and whether the termination of licence agreement or threat to it was in terms of the agreement or not.

10. At this stage, the petitioner has come up before this Court alleging that the respondent's threat to terminate the agreement and asking him to vacate the licensed premises is illegal and has prayed that the respondent be restrained

from terminating the Licence Agreement. In order to be entitled to this relief, the petitioner is required to show the existence of a prima facie case in his favour. The petitioner is thus required to show that the act of the respondent in terminating the licence is patently illegal, and, therefore his occupation of the licensed premises be protected. The case of the respondent is that the agreement already stands terminated and the petitioner has no right to come before this Court under the determined licence deed.

11. The question that has come up before this Court, therefore, is whether the petitioner can be allowed to continue to run the business in the shop under a determined licence deed and thereby indirectly imposing a contract upon the respondent against his own choice. The question whether termination is legal or illegal is a question which can only be arbitrated by the parties before the Arbitrator. What relief could be granted to the petitioner in case it is found that the termination of Licence Agreement was illegal is also a subject matter of an arbitration. It is argued on behalf of the respondent that the petitioner has no right to continue in the shop under a terminated Licence Agreement. On the other hand, it is argued by the petitioner that he shall suffer an irreparable loss and injury. Reliance is also placed by the respondent in *Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*, *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, *M/s. Exclusive Motors Pvt. Ltd. Vs. TDC*, OMP No. 183/2008, decided on 04.04.2008, *Provogue (India) Ltd. Vs. Naveen Kohli* (2008) 150 DLT 537, *Thomas Cook (India) Limited Vs. Hotel Imperial and Others*, *Hindustan Petroleum Corporation Ltd. Vs. Sri Sriman Narayan and Another*, *Chandu Lal Vs. Municipal Corporation of Delhi*, *MIC Electronics Ltd. and Another Vs. Municipal Corporation of Delhi and Another*, and *R.P.S. Educational Society (Regd) Vs. DDA*, OMP No. 538/2008, decided on 02.09.2009.

12. It is argued on behalf of the petitioners that provisions of Specific Relief Act, more particularly Section 41 is not applicable to the proceedings u/s 9 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

13. Learned counsel for the petitioner has argued that the powers of this Court u/s 9 of the Act are akin to the powers of Civil Court under Order 39 Rules 1 and 2 of CPC (hereinafter referred to as "CPC") for grant of interim injunction. It is further argued that grant of interim injunction is dealt with u/s 37 of the Specific Relief Act and sub-section (1) clearly stipulates that temporary injunctions are regulated by CPC. It is argued that the relevant aspect of CPC which deals with interim injunction is Order 39 Rule 1 and 2 CPC and in pari materia with Section 9 of the Act. The reliance has been placed on the findings of the Supreme Court in the case of *Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others*, which is reproduced as under:-

"15. ...The power u/s 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application u/s 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it

appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application u/s 9 of the Act."

14. Reliance is also placed on the findings of this Court in *Modi Rubber Ltd. Vs. Guardian International Corp.*, :

"209.

(i)

(ii) The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in pari materia with the provisions of Order 39 of the Code of Civil Procedure, 1908. The power vested in the court by virtue of Section 9 must be exercised in consonance with equity which tempers the grant of discretionary relief as the relief of interim injunction is wholly equitable in nature."

15. It is further argued that since the provisions of Order 39 Rule 1 and 2 CPC are applicable u/s 9 of the Act, the ratio of *Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others*, , squarely applicable to the facts and circumstances of the case and the Court is not required to see if the petitioner is ultimately going to succeed in the case or not, whether nature of contract is determinable and also the provisions of Sections 14 and 41 of Specific Relief Act are not relevant in the proceedings for grant of interim injunction. The relevant paras on which the reliance has been placed by the learned counsel is reproduced as under:-

"15. Learned counsel submitted that Section 14(1) of the Specific Relief Act, 1963 provides in Clause (c) further provides that a contract which is in its nature determinable cannot be specifically enforced. They argued that on completion of six years from the date of the agreement, Liberty Agencies could terminate the agreement and the six years period had expired in the year 2011 and hence the Court cannot specifically enforce the contract. They submitted that Section 41(e) of the Specific Relief Act, 1963 clearly provides that an injunction cannot be granted to prevent breach of a contract, the performance of which would not be enforced.

16. Learned Counsel for the appellants cited the decision in *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, in which this Court has held that a contract which is in its nature determinable cannot be enforced by the Court. They also cited the decision in *Percept D'Mark (India) Pvt. Ltd. Vs. Zaheer Khan and Another*, in which this Court has held relying on the judgment of the Chancery Division in *Page One Records Ltd. v. Britton* [(1968) 1 WLR 157 : (1967) 3 All ER 822], that where the totality of the obligations between the parties give rise to a fiduciary relationship injunction would not be granted because the performance of the duties imposed on the party in the fiduciary relationship could not be enforced at the instance of the other party.

25. It is not necessary for us to deal with the contentions of learned counsel for

the parties based on the provisions of Sections 14, 41 and 42 of the Specific Relief Act, 1963 because Section 37 of the said Act makes it clear that temporary injunctions are to be regulated by the CPC and not by the provisions of the Specific Relief Act, 1963. In fact, the application for temporary injunction of Respondent No. 1 before the trial court is under the provisions of Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure.

26. It has been held by this Court in *Kishoresinh Ratansinh Jadeja v. Maruti Corporation and Ors.* (supra) that it is well established that while passing an interim order of injunction under Order 39 Rules 1 and 2 Code of Civil Procedure, the Court is required to consider.

(i) whether there is a prima facie case in favour of the Plaintiff;

(ii) whether the balance of convenience is in favour of passing the order of injunction; and

(iii) whether the Plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for. Hence, we only have to consider whether these well-settled principles relating to grant of temporary injunction have been kept in mind by the trial court and the High Court."

16. It is further submitted that whether the Specific Relief Act is applicable to Section 9 proceedings is the question which was kept open by the Supreme Court in the case of *Arvind Construction Co. Pvt.* (supra) and the relevant para relied upon by the petitioner, is reproduced as under:-

"15...No doubt, a view that exercise of power u/s 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power u/s 9 of the Act is not controlled by Order XVIII Rule 5 of the CPC is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power u/s 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver."

On the basis of these submissions, learned counsel for the petitioner has contended that this Court u/s 9 is only required to protect the petitioner and cannot refuse the relief merely on the ground that the contract was determinable or that the petitioner was not likely to succeed to get the final relief and that the remedy available is that of claim for damages.

17. On the other hand, while agreeing to the contention of petitioner that provisions of Order 39 Rule 1 and 2 are applicable to the proceedings u/s 9 of the Act, the learned counsel for the respondent has submitted that Sections 14 and 41 of the Specific Relief Act are relevant for grant of ad interim injunction and this consideration is not barred in view of Section 37 of the Specific Relief

Act. It is submitted that the findings of the Supreme Court in Best Sellers Retail (India) Pvt. Ltd. (supra) that the provision of Section 14 and 41 of the Specific Relief Act cannot be considered at ad interim stage would render the said judgment per incuriam because the same question was discussed by the Supreme Court in its earlier judgment in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, . It is submitted that the judgment in Best Sellers Retail (India) Pvt. Ltd. (supra) was given by Two-Judge Bench of the Supreme Court and the judgment of Cotton Corporation Limited (supra) was also given by Two-Judge Bench of the Supreme Court. It is further submitted that while delivering the judgment in the Best Sellers Retail (India) Pvt. Ltd. (supra), the Two-Judge Bench of the Supreme Court had not taken note of the earlier judgment of the same Bench in Cotton Corporation Limited (supra). Therefore, in view of the judgment in the case of Union of India (UOI) and Others Vs. S.K. Kapoor, , the earlier judgment has to be taken note of and the subsequent judgment in Best Sellers Retail (India) Pvt. Ltd. (supra) has become per incuriam.

18. I have considered the rival contentions and have given careful considerations to the case laws relied upon by the parties.

19. Let me first discuss whether Best Sellers, case is to be followed or Cotton Corporation case is to be followed. Both the judgments are rendered by Two-Judges Bench of Supreme Court.

20. In S.K. Kapoor (supra) case, the Supreme Court has held as under:-

"9. It may be noted that the decision in S.N. Narula's case was prior to the decision in T.V. Patel's case. It is well settled that if a subsequent co-ordinate Bench of equal strength wants to take a different view, it can only refer the matter to a larger Bench, otherwise the prior decision of a co-ordinate Bench is binding on the subsequent Bench of equal strength. Since, the decision in S.N. Narula's case was not noticed in T.V. Patel's case, the latter decision is a judgment per incuriam. The decision in S.N. Narula's case was binding on the subsequent Bench of equal strength and hence, it could not take a contrary view, as is settled by a series of judgments of this Court."

21. In view of the Supreme Court's direction in S.K. Kapoor (supra), it is apparent that the law laid down by the Supreme Court in the case of Cotton Corporation Limited (supra) has to be taken into consideration since the finding in Best Sellers Retail (India) Pvt. Ltd. (supra) becomes per incuriam. The Supreme Court in Cotton Corporation Limited (supra) has discussed the relevance of Section 41(b) and other provisions of Specific Relief Act with reference to grant of interim injunction and has observed as under:-

"9. Mr. Sen, learned counsel for the respondent-Bank, contended that sec. 41(b) is not at all attracted because it deals with perpetual injunction and the temporary or interim injunction is regulated by the CPC specially so provided in Sec. 37 of the Act. Expression "injunction" in sec. 41(b) is not qualified by an adjective and therefore, it would comprehend both interim and perpetual

injunction. It is, however, true that Sec. 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of the court are regulated by the Code of Civil Procedure. But if a dichotomy is introduced by confining Sec. 41 to perpetual injunction only and Sec. 37 read with O. 39 of the CPC being confined to temporary injunction, an unnecessary grey area will develop. It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted."

22. It, therefore, is settled law now that even at the time of grant of interim injunctions, the Court has to take into consideration the relevant provisions of Specific Relief Act. There is no dispute to the fact that in any case the petitioner is required to show the existence of three ingredients (i) the existence of the prima facie case; (ii) the balance of inconvenience and (iii) the irreparable loss and injury suffered by him if the interim injunction is refused. There is no dispute to the fact that the petitioner is a licensee of the respondent. He had the licence to run a shop in a mall. He was permitted to carry out the trade of permitted category of articles. Under the agreement of licence, the respondent retains the right to terminate the agreement in case of petitioner making any change in the permitted business. It is also the admitted fact that the respondent issued show-cause notice to the respondent dated 11.03.2013 followed by another show-cause notice dated 16.04.2013. In the absence of any satisfactory reply, the respondent terminated the licence vide termination letter dated 25.04.2013. The respondent on the request made by the petitioner vide its communication dated 01.05.2013 kept on hold the termination letter till 31.05.2013. Aggrieved by the said act of the respondent, the petitioner approached this Court with following prayers:-

"(i) restraining the respondent from terminating the Licence Agreement dated 12.12.2006 on the ground of violation of clause 2(a) of the said licence agreement by the petitioner as set out in the letters dated 11.03.2013, 16.04.2013, 25.04.2013 and 01.05.2013 sent by the respondent to the petitioner;"

(ii) restraining the respondent its servants, employees, agents, third party contractors or anybody claiming through Respondent from creating any obstruction, hindrance in possession, use of Licensed Premises by petitioner and for further restraining them from disconnecting, discontinuing of any of the amenities to Licensed Premises and committing any act/omission directly or indirectly causing obstruction to business of petitioner from the Licensed Premises and attempting to illegally evicting the Petitioner without following due

process of law."

This Court passed the following orders on 15.05.2013:

"1. Issue notice to the respondent by ordinary mode, Regd. AD Post as well as dasti, returnable on 28th May, 2013.

2. Learned counsel for the petitioner submits that the petitioner is in occupation of Shop No. F-18, Select City Walk ad measuring 2263 sq. fts. on licence for a period of nine years in terms of the licence deed dated 12th December, 2006. It is submitted that the licence is valid upto December 2015. It is submitted that the respondent is threatening the petitioner to either increase the rent or shift to some other premises in violation of the licence deed on the ground that the petitioner has added the profile of toys and apparels in the store. It is further submitted that the petitioner has paid upto date licence fee and the petitioner shall continue to pay the same during the period of the licence. The petitioner is seeking ex-parte injunction for restraining the respondent from interfering with the peaceful occupation of the petitioner in the suit property. The petitioner has made out a case for grant of ex-parte ad interim injunction.

3. In the facts and circumstances of this case, the respondent is directed not to interfere with the petitioner's occupation of the suit property or create any obstruction or disconnect/discontinue any of the amenities till the next date of hearing subject to the petitioner continuing to pay the licence fee in terms of the licence deed.

4. The competent officers of both the parties are directed to remain present in Court on the next date of hearing along with all original documents relating to this case within their power and possession.

5. Dasti."

23. It, therefore, is clear that vide its order dated 15.05.2013, while this Court restrained the respondent from interfering with the petitioner's occupation of the suit property, no stay was granted from giving effect to the letters of the respondent dated 11.03.2013, 16.04.2013, 25.04.2013 and 01.05.2013. It is argued on behalf of the respondent that the respondent vide letter dated 24.04.2013, had terminated the contract of licence of the petitioner. However, pursuant to a meeting held on 01.05.2013, the respondent had kept the termination on hold till 31.05.2013. It is argued, since there was no stay to these letters, the licence agreement between the parties stood terminated with effect from 31.05.2013. It is argued that since the licence stood terminated, the petitioner cannot continue to be in premises after the termination of the licence. It is further argued by the learned counsel for the respondent that the question whether the termination of the licence by them was right or wrong is a subject matter which can be determined during the arbitral proceedings. It is submitted that only remedy available to the petitioner on account of termination of the licence is by way of damages and by grant of interim injunction and thereby

allowing the petitioner to continue doing his trade, the Court cannot revalidate the agreement.

24. Reliance is also placed on Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, , Ratna Commercial Enterprises Ltd. and Another Vs. Vasutech Ltd., and Samay Singh Vs. Hindustan Petroleum Corporation Ltd. and Another, .

25. It is argued on behalf of the petitioner that the agreement was not determinable and could not have been revoked. Reliance is also placed on A.I.A. Enterprise and Another Vs. Guwahati Metropolitan Development Authority and Others, and Ma Durga Service Station and Others Vs. Hindustan Petroleum Corporation Ltd. Cal. Regional Office (Retail) and Others, of Calcutta High Court.

26. As held by this Court earlier, the question whether the licence was by its nature determinable or not is a question which is a subject matter of arbitration proceedings. However, it is an undisputed fact that with effect from 31.05.2013, the licence agreement between the parties to run a trade in the said shop stands determined. Whether such determination is contrary to the terms of the agreement and thus illegal is again the subject matter of arbitral proceedings. This Court, at this stage, cannot enter into this question. The consequences of such determination are relevant factors to judge if the relief claimed by petitioner can be granted to him. Grant of relief to petitioner would mean allowing him to run his trade in the licensed premises without a licence. It is the admitted fact that the petitioner was permitted the trade of limited nature from this shop. It is also the admitted fact that the petitioner had started selling toys, apparels and related accessories. This fact is apparent from letter dated 23.04.2013 of petitioner where he wrote to the respondent that "(2) we are introducing Toy as category in all our major stores by the name of "Little Planet M", as there is huge potential exist and for that we are going with the big plan of advertisement (will share accordingly) in media also; (3) this will help us in increasing our revenue and yours as well. (in terms of revenue upside); (4) we would like to offer 8% margin for this category on NSV."

This letter prima facie shows that the petitioner wanted to introduce toys, apparels and other related accessories in the name of "Little Plant M" and also offered profit margin of 8% to the respondent in the category of NSV. This letter was apparently written by petitioner on receipt of show-cause notice dated 11.03.2013 of respondent, whereby the respondent objected to petitioner's selling apparels and other related accessories, and called upon them to show-cause against proposed cancellation of licence. As discussed above, the petitioner had falsely denied the receipt of this letter. The respondent had subsequently issued another show-cause notice dated 16.04.2013 and in reply to that the petitioner vide its letter dated 23.04.2013 offered to pay 8% profit margin in the category of NSV to respondent and also sought permission to sell the toys in the category of "Little Planet M" from the store. This prima facie show that the petitioner had recently introduced the sale of the toys, etc. that is why it sought

permission to continue to sell under the category of "Little Planet M" and this sale was certainly not falling within the permitted category of trade, otherwise there was no occasion for the petitioner to offer the profit margin of 8% in the category of NSV from the sale of these toys. Apparently and prima facie there was a violation that is why there was an occasion for the issue of show-cause notice by the respondent. Even otherwise, the licence agreement stands terminated. Learned counsel for the respondent has argued that where the agreement of licence is terminable in nature, no interim protection can be granted. Reliance has been placed on *Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*, *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, *M/s. Exclusive Motors Pvt. Ltd. vs. ITDC*, OMP No. 183/2008 dated 04.04.2008 and *Provogue (India) Ltd. vs. Naveen Kohli* (2008) 150 DLT 537. I have carefully gone through these judgments. The Supreme Court in the case of *Rajasthan Breweries Ltd.* (supra) in para 19 has held as under:-

"19. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii) (e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same."

27. In *M/s. Exclusive Motors Pvt. Ltd.* (supra), the Supreme Court has dealt with the issue of refusal by the respondent to renew the licence agreement and the petitioner praying for an injunction restraining respondent from taking forcible possession of the premises. The Court rejected the contention of the petitioner and refused to grant any injunction. The Court has held that in an application under Order 39 Rule 1 and 2 CPC, the Court is not expected to conduct a detailed examination on merit. It has to form a prima facie view as to whether the plaintiff's request for interim relief has some merit and held that prima facie the plaintiff at no point of time has exclusive interest in the property.

28. In *Indian Oil Corporation Ltd.* (supra), the distributorship agreement which was entered into between the parties for sale of LPG cylinders for household and

commercial consumers was determined by the India Oil Corporation Limited. The Arbitrator recorded the findings that determination of distributorship was not validly made under clause 27 and granted the relief to possession flowing from the breach of the contract till the breach was remedied by restoration of distributorship and continuation of distributorship till it was terminated in accordance with the agreed terms. The Supreme Court has held as under:-

"The finding in the award being that the Distributorship Agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is "a contract which is in its nature determinable". In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to "the law governing such cases". The grant of this relief in the award cannot, therefore, be sustained."

This clearly shows that even if the termination of an agreement is illegal, the agreement cannot be restored. It is further argued on behalf of the respondent that the petitioner cannot claim specific performance of the agreement which stands terminated, by way of interim relief as it amounts to revalidating the contract between the parties which is not permissible. Reliance has been placed on MIC Electronics Ltd. and Another Vs. Municipal Corporation of Delhi and Another, and in the said case, the Supreme Court has held as under:-

"12. The next question that needs to be considered is the contention of the Respondent that the contract between the parties was in its very nature determinable and consequently could not be specifically enforced by way of the present proceedings. In this behalf, it is observed that the Appellant did not pay the agreed licence fee in terms of the licence agreement. Consequently, after issuance of the show cause notice and calling for a reply from the Appellant the Respondent cancelled the licence under the terms of the agreement between the parties. Therefore, the licence stood terminated, as correctly observed by the learned Single Judge, in the impugned order, and the legality or illegality of termination would be a matter to be determined in arbitration. Further, the justification given by the Appellant for not paying the licence fee will be examined in the arbitral proceedings. The case of the Appellant that, owing to the failure of the Respondent to perform obligations under the agreement, and the latter's refusal to decrease the number of 20 of LED screens in terms of clause 6 of the agreement, would also be considered by the Arbitral Tribunal. In

this behalf, we, therefore, find considerable merit in the submission made on behalf of the Respondent that if the cancellation of the contract by the Respondent constitutes a breach of contract on their part, the Appellant would be entitled to damages. In other words, the questions whether the termination is wrongful or not or whether the Respondent was not justified in terminating the agreement, are yet to be decided. However, from the facts of the case there is no manner of doubt that the contract was by its very nature terminable, in terms of the contract between the parties themselves.

13. In Rajasthan Breweries Ltd. (supra), a Division Bench of this Court observed that, at the most, in case ultimately it is found that termination is bad in law or contrary to the terms of agreement or of any understanding between the parties or for any other reason, the remedy of the Appellant was to seek compensation for wrongful termination and not a claim for specific performance of the agreement. Further, in this view of the matter, there was every reason to come to the conclusion that the relief sought by the Appellant in terms of an injunction seeking to specifically enforce the agreement, by permitting the Appellant to continue to operate the 9 LED screens installed them, was statutorily prohibited with respect to a contract which is determinable in nature."

29. While discussing the principles to be followed by the Courts, while dealing with the matter of Section 9 of the Act, the Court has observed in the case of R.P.S. Educational Society (Regd.) vs. DDA OMP No. 538/2008, decided on 02.09.2009:

"5. It is apparent that in terms of license deed, the respondent had authority to cancel the license. u/s 9 of the Arbitration and Conciliation Act, the Court can pass an interim order to preserve such subject matter of dispute which it considered was necessary to be preserved for adjudication of the dispute. However, an order u/s 9 of the Arbitration and Conciliation act cannot be passed by the Court directing specific performance of the contract, the breach of which is alleged by the petitioner. This Court in Excel Generators Pvt. Ltd. Vs. IJM Corporation Berhad OMP No. 241/09 (decided on 13th May, 2009) had observed that where a contract is terminable contract and it can be foreclosed, the interim relief u/s 9 of the Arbitration and Conciliation Act cannot be granted for specific performance of the contract. In all those cases where monetary damages can compensate the breach of contract, the Court cannot insist upon the parties that the contract should be specifically performed."

It, therefore, is clear that even by way of grant of interim injunction, this Court cannot restore an agreement which already stands terminated/determined.

30. It is further argued on behalf of the respondent that the petitioner being the licensee, has no interest whatsoever in the licensed property. Reliance has been placed on Thomas Cook (India) Limited Vs. Hotel Imperial and Others, , Hindustan Petroleum Corporation Ltd. Vs. Sri Sriman Narayan and Another, and Chandu Lal Vs. Municipal Corporation of Delhi, .

31. In the case of Thomas Cook (India) Ltd. (supra), the plaintiff was occupying two rooms with premises of defendant No. 1 since 1975. But, in 1996, when plaintiff was in occupation of four rooms, the defendant No. 1 threatened plaintiff to vacate the same. Plaintiff then filed a suit praying for injunction against being dispossessed and during its pendency came a settlement and as per compromise decree, the plaintiff occupied two rooms. The defendant threatened the plaintiff to vacate those two rooms and the petitioner filed a suit for permanent injunction for restraining the defendant from dispossessing the plaintiff. While discussing the findings in several judgments, relied upon by the parties and refusing to grant the stay, the Apex Court made the following observations:

"17. The thread of reasoning, running through these decisions seems to be that although a person may be in unlawful possession of a property he cannot be dispossessed without recourse to law and, if he is dispossessed by use of force then, even though his occupation/possession was hitherto unlawful, he would still be entitled to be put back in possession in view of Section 6 of the Specific Relief Act. However, in the present case a different question emerges and that is whether a person who is in unlawful occupation can approach the Court for an injunction order restraining the lawful owner from "dispossessing" him. There is a distinction between this situation and the situation which arises post dispossession. In one situation the unlawful occupant has not yet been dispossessed, in the other he has already been dispossessed. Insofar as the latter case is concerned, the aforesaid decisions make it clear that such person is entitled to be put back in possession in terms of the provisions of Section 6 of the Specific Relief Act. However, these decisions do not specifically deal with the situation where the unlawful occupant has not yet been "dispossessed" but, he, in apprehension of such "dispossession", knowing his occupation to be unlawful, rushes to court for an injunction restraining the rightful owner from taking any steps towards physically ejecting him. Now, the grant of injunction is based on equitable principles. Injunction itself being an equitable remedy, one of the principles which is well settled is that a person who seeks equity must come to court with clean hands and must himself do equity. In the light of these well settled principles, can the plaintiff who is an unlawful occupant come to court and say, "please injunct the defendants from dispossessing me, although I am in unlawful occupation and am occupying the property without authority of law"? It is in the context of this very question that a Division Bench of this Court gave its decision in the case D.T.T.D.C. (supra). The observations of the Division Bench are extremely relevant and, therefore, I shall set them out in some detail as under:

"9. The point that arises in this appeal is whether a person who himself asks the owner to enter into a "license" and enters into such an agreement can, after expiry thereof and express request of the owners to vacate, seek the helping hand of the Court for a temporary injunction against the owner and whether the appellant can contend that till he is dispossessed by due process of law, he is entitled for an injunction?

10. In our opinion, there are two different sets of principles which have to be borne in mind. Taking up the first aspect, it is true that where a person Page 314 is in settled possession of property, even on the assumption that he has no right to remain in property, he cannot be dispossessed by the owner except by recourse to law. This principle is laid down in Section 6 of the Specific Relief Act, 1963. That Section says that if any person is dispossessed without his consent from immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit. That a person without title but in "settled" possession-as against mere fugitive possession-can get back possession if forcibly dispossessed or rather, if dispossessed otherwise than by due process of law, has been laid down in several cases. It was so held by the Supreme Court in *Yashwant Singh v. Jagdish Singh*, AIR 1968 SC 620; *Krishna Ram Mahale (Dead), by his Lrs. Vs. Mrs. Shobha Venkat Rao*, ; *Ram Rattan and Others Vs. State of Uttar Pradesh*, and *State of Uttar Pradesh and Others Vs. Maharaja Dharmender Prasad Singh and Others*, . The leading decision quoted in these rulings is the decision of the Bombay High Court in *K.K. Verma and Another Vs. Union of India and Another*, .

13. We shall now refer to the other aspect of the matter. Assuming a trespasser ousted can seek restoration of possession u/s 6 of the Specific Relief Act, can the trespasser seek injunction against the true owner? In our view this question does not entirely depend upon Section 6 of the Specific Relief Act but mainly depends upon certain general principles applicable to the law of injunctions and as to the scope of the exercise of discretion while granting injunctions? Recently, the law in this behalf has been clarified by the Supreme Court in clear terms in *Mahadeo Savlaram Shelke and Others Vs. Puna Municipal Corporation and Another*, . It was there held by Ramaswamy. J., after referring to Woodroffe on "Law relating to injunction; L.C. Goyle" Law of injunctions; David Bean "Injunction" Joyce on Injunctions and other leading Articles on the subject that the appellant who was a trespasser in possession could not seek injunction against the true owner. In that context the Supreme Court quoted *Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others*, , wherein it was observed that injunction is discretionary and that:

"Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court."

His Lordship Ramaswamy, J. also referred to *Dalpat Kumar and Another Vs. Prahlad Singh and Others*, , in regard to the meaning of the words "prima facie case" Page 315 and "balance of convenience" and observed in *Mahadeo Savlaram Shelke* (supra) at p. 39:

"It is settled law that no injunction could be granted against the owner at the instance of a person in unlawful possession."

Therefore as pointed by the above decision of the Supreme Court it is settled law

that a trespasser cannot seek injunction against the true owner. It has been so held also by several High Courts stating that an injunction cannot be granted in favor of a person who is a trespasser against the true owner [Hoshiar Singh etc. Vs. Gaon Sabha, Daryapur Kalan and Others,]. In K.V. Narayan Vs. S. Sharana Gowda and Another, ; Alagi Alamelu Achi Vs. Ponniah Mudaliar, ; Biswabani Private Ltd. Vs. Santosh Kumar Dutta and Others, ; Smt. Bishni Devi Vs. Bahadur Singh and Others, ; Padmanabhan Vs. Thomas and Another, . The above decisions accord with the view taken by the Supreme Court in Shiv Kumar Chadha's case and in Mahadeo Savlaram Shelke's case.

14. It is true that in some other cases Bhawani Investments Pvt. Ltd. Vs. Shree Properties and Another, ; Mogilipuvvu Annapurnaiah Vs. Malampati Narasimha Rao and Another, ; Patil Exhibitors (Pvt.) Ltd. Vs. The Corporation of the City of Bangalore, ; Bhola Nath and Others Vs. Maharao Raja Saheb Bundi State, ; Smt. Geeta and another Vs. Ashok Kumar and in Sai Balaji Trading Co. v. Veeraswamy 1980 (1) AIR 28, a contrary view has been taken that till evicted by due process of law, a trespasser is entitled to injunction against the true owner. These judgments in our opinion run quite contrary to the judgments of the Supreme Court in Mahadeva Savalram's case and to the two earlier rulings of the Supreme Court quoted therein namely Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, ; Dalpat Kumar and Another Vs. Prahlad Singh and Others, , and in our view, must be deemed to be wrongly decided. The approach in the latter group of cases to the question of grant of injunction was from the angle of Section 6 of Specific Relief Act and Lala Yeshwant Singh case (AIR 1968 SC 620) and K.K. Verma's case and not from the angle of the Court's discretionary power to grant injunction.

15. In our view injunction is an equitable relief and the Court must see whether a person who is a trespasser can seek the helping hand of the Court for protecting his unlawful possession as against the owner. A person who seeks equity must do equity. He must also come to Court with clean hands. When he does these things there will be no occasion for him to seek an injunction inasmuch as the trespass would have automatically stood vacated. If he does not do these things, he cannot at the same time ask for the helping hand of the Court to protect his illegal possession.

16. It is argued for the appellant that this may be anomalous. It is said that the trespasser has a "right" to an injunction against the true owner, and this is complementary to the duty of the owner not to evict the trespasser outside the judicial process. In our view, there is no anomaly. Each of these is based on a different legal principle. If the plaintiff wants the defendant to act in accordance with law he must first abide by the law himself and vacate the property as one would expect a law abiding citizen to behave."

26. The nature of occupancy is clearly permissive. In fact it does not amount to possession at all. The relationship between the plaintiff and the defendant in terms of the compromise decree was that of Licensor and licensee and not Lessor

and Lessee. The plaintiff had use of the two rooms under a license. A license does not create any interest in the property. It merely permits another person to make use of the property. There is no parting with possession as the legal possession continues with the owner (licensor). In C.M. Beena and Another Vs. P.N. Ramachandra Rao, , the Supreme Court held:-

"Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a license being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful (see Associated Hotels of India Ltd. Vs. R.N. Kapoor,)."

What is meant by parting with legal possession has been explained by the Supreme Court in the context of sub-letting in the case of M/s. Delhi Stationers and Printers Vs. Rajendra Kumar, in the following words:-

"Parting of the legal possession means possession with the right to include and also a right to exclude others. Mere occupation is not sufficient to infer either sub-tenancy or parting with possession."

Keeping these legal principles in mind, there is no doubt that the plaintiff merely had a right to use the two rooms. It cannot be said that the plaintiff was in possession thereof. This is clear from the facts, as aforesaid, that under the compromise decree the plaintiff was obligated to leave the keys of the rooms at the reception at the close of each day; the plaintiff was charged a daily tariff; the control and possession of the rooms was explicitly retained by the defendants; the rights of admission were reserved with the defendants. Under these circumstances it cannot be said by any stretch of imagination that the defendants had parted with possession or that the plaintiff was in "possession" of the said two rooms even during the period prior to the revocation of the license. Therefore, Mr. Kaul's reliance on all those decisions with deal with the question of dispossession without due process is misplaced. For, the plaintiff had a mere right to use, it never was in possession of the said two rooms, much less, in settled possession in which the defendants had acquiesced.

27. This brings me to the second aspect of "due process of law". It was urged by Mr. Kaul that even if the plaintiff was in unlawful possession it could only be evicted by due process of law and therefore the plaintiff was entitled to an order of injunction preventing the defendants from removing the plaintiff from the said two rooms except through due process of law. It must be made clear that this argument fails in the context of this case because the plaintiff was never in possession and therefore there is no question of dispossession in the sense usually understood. The plaintiff had a mere right to use, such right was revocable, it has been revoked and the plaintiff is entitled u/s 63 of the Indian Easements Act, 1882 to a reasonable time to leave the premises and take away

its goods. The argument also fails because by rushing to court the plaintiff has indeed invited a judicial determination of its status. If it got an order of injunction it would ensure to its benefit. But, if it did not, then it can't be heard to say that this court has to grant an injunction all the same because otherwise it would give a license to the defendants to forcibly throw out the plaintiff without filing a suit for possession.

28. The expressions "due process of law", "due course of law" and "recourse to law" have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed "forcibly" by the true owner taking law in his own hands. All these expressions, however, mean the same thing--ejectment from settled possession can only be had by recourse to a court of law. Clearly, "due process of law" or "due course of law", here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this "due process process" or "due course" condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the "bare minimum" requirement of "due process" or "due course" of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the "recourse to law" stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

32. In Chandu Lal (supra), the Supreme Court has held that if a document gives only a right to use the property in a particular way, but its possession and control remain with the owner thereof, it will be a licence and in such cases, the legal possession remains with the owner of the property, the licensee being permitted to make use of the property for a particular purpose. In this regard, the Supreme Court has observed as under:-

"The petitioners being licensees legal possession all along remained with the

Corporation. That being so, as held by the Supreme Court in *Munshi Ram and Others Vs. Delhi Administration*, , the Corporation had a right to reenter the premises and reinstate itself provided it does not use more force than necessary. Such an entry would be received only as a resistance to an intrusion upon possession which had never been lost. Further, the law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection authorities, there being degrading to the human the face being of the nothing more spirit than to run away in peril."

33. From the above case laws, it, therefore, is apparent that under the licence, the licensee is only given the permission to use the property in a particular way and that after the termination of the licence, the licensee has no right to continue in the said premises and that the possession of the said premises all along remain with the licensor.

34. The petitioner in order to be entitled for the grant of relief u/s 9 is required to show the existence of a prima facie case and the balance of convenience and also that he shall suffer irreparable loss and injury, if the relief is not granted.

35. In the case of *Roshan Lal Vs. Ratto*, , the Himachal Pradesh High Court has held as under:-

"It seems to me that when the court is called upon to examine whether the plaintiff has a prima facie case in a suit for the purpose of determining whether a temporary injunction should be granted, the court must perforce examine the merits of the case and it will be compelled to consider whether there is a likelihood of the suit being decreed. The depth of investigation which the court must necessarily pursue for that purpose will vary with each case. Where, as in the two cases cited above, the determination must be made with reference to factual material, the scope of examination must be confined to the evidence on the record, including affidavit evidence, available at that stage."

36. Also in the case titled as *Vellakutty Vs. Karthyayani and Another*, , the Kerala High Court has held as under:-

"The granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the court does not issue the injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the applicant". (*Abdul Qadeer Vs. Municipal Board, Moradabad and Others*,) It is also clear that a prima facie case implies the probability of the plaintiff obtaining a relief on the materials placed before the Court at that stage. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a prima facie case to justify issuance of a temporary injunction."

37. From the above discussion, it follows that the petitioner has no prima facie case in his favour for the reason that he was a licensee under the licence agreement and the licence stands terminated. It is also apparent that possession

of the shop in question all along remained with the respondents who are the owners of the said shop and the petitioner only had the permission to run a particular trade from the said shop. Since the petitioner no longer has the licence to run the said shop in the said premises due to termination of the licence agreement, he is in unlawful possession of premises which certainly cannot be protected against the owner of the said property and thus it is apparent that petitioner has no prima facie case in his favour. The balance of convenience also does not lie in his favour. In case on final adjudication, the Arbitrator reaches to the conclusion that termination of the licence agreement was illegal, the petitioner can always be compensated in terms of the money and, therefore, it cannot be said that he shall suffer an irreparable loss and injury. Even in the case of Best Seller Retail (India) Pvt. Ltd. (supra) on which the petitioner has relied upon, the Court has refused the relief on the ground that the petitioner would not suffer any irreparable loss and injury.

38. In view of this, the present petition u/s 9 stands dismissed and the stay granted by this Court vide order dated 15.05.2013 stands vacated.