

**(2008) 11 DEL CK 0056**

**In the Delhi High Court**

**Case No : Arbitration Application 431 of 2007**

Shri Raj Baboo Nischal

APPELLANT

Vs

Shri Ajay Kumar Verma

RESPONDENT

**Date of Decision : 04-11-2008**

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 5  
Delhi Rent Control Act, 1958 — Section 50

**Citation :** (2008) 4 ARBLR 333 : (2008) 154 DLT 568 : (2008) 9 ILR Delhi 188

**Hon'ble Judges :** Rajiv Sahai Endlaw, J

**Bench :** Single Bench

**Advocate :** Siddhartha Yadav, for the Appellant; Atul Bandhu and Varun Kumar, for the Respondent

## **Judgement**

Rajiv Sahai Endlaw, J.—The Petitioner has applied u/s 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of a sole Arbitrator, the parties having failed to arrive at a consensus thereon.

2. The Petitioner claims an Agreement dated 1st February, 1991 with the Respondent. Under the said Agreement, the Respondent, stated to be desirous of developing his business of sale and purchase of artificial jewellery and silver ornaments under the name and style of M/s Shivam Jewellers, appointed the Petitioner as his agent. Under the Agreement, the Respondent was to provide supply and make available all the said goods for sale of the same to be conducted by the Petitioner and for which the Petitioner was to be entitled to commission at the rate of 5% or at any other rate mutually settled between the parties from time to time. The Agreement further provides that the Petitioner shall conduct the business in shop bearing private No. 6 (Back side), forming part of premises No. 83/1A, Punjabi Bagh, New Delhi-110026, owned/rented by the Petitioner. It is further contained in the Agreement that the Respondent shall have no right and interest in the ownership/tenancy rights of the shop in question and the Respondent shall not in any manner interfere or claim any right

or interest in the said shop in any manner or capacity whatsoever. The Agreement further provides that if either party desires not to continue the business under the said deed for any reason whatsoever, he may give one month's notice to the other party of his intention to discontinue the business. The other terms and conditions of the said Agreement are not relevant for the present purposes save that the Agreement in Clause 12 thereof provides as under.

12. That in case of any dispute or difference concerning the business or in relation to any of the clauses of this agreement or otherwise connected both the business conducted under this agreement in any manner whatsoever. The same shall be referred to the sole arbitrator to be appointed by the parties and whose decision shall be final. The provisions of arbitration act shall apply to such proceedings.

3. The Petitioner approached the court with a case that the Respondent had paid commission to the Petitioner till 1st April, 2000 and has not paid any commission thereafter; that the Petitioner vide notice dated 16th March, 2001 by a one month's notice terminated the Agreement and also asked the Respondent to ask his representatives, who in terms of the Agreement were reporting at the shop aforesaid to assist in sales, not to so report; that the Respondent however vide reply dated 27th March, 2001 claimed the Agreement dated 1st February, 1991 to be a sham document and having no legal validity and the Respondent further claimed to be a tenant of the Petitioner in the shop in question and at a rent of Rs. 750/- per month; that the said contention of the Respondent was controverted by the Petitioner vide rejoinder notice dated 20th April, 2001 and in which the Respondent was also asked to hand over vacant and peaceful possession of the shop to the Petitioner; that upon the failure of the Respondent to so deliver possession, the Petitioner vide letter dated 10th May, 2001 invoked the Arbitration clause and asked the Respondent to concur in the appointment of the sole Arbitrator; that the Respondent however, vide reply dated 21st May, 2001 took a stand that the Arbitrator had no jurisdiction to decide such dispute and further took a stand that in any case, the Agreement was a sham. The Petitioner described his claims against the Respondent for adjudication by arbitrators as relating to the validity of the agreement, possession of the shop, for recovery of arrears of commission and for mesne profits with interest etc.

4. The petition was filed before the District Judge, Delhi. After completion of pleadings, the following issues were struck on 9th October, 2001 by the learned Additional District Judge before whom the petition was then pending.

1. Whether the Agreement dated 1/2/91 was a sham document
2. Whether the disputes enumerated in para 17 of the petition are liable to be referred to Arbitrator
3. Relief.

5. The counsel for the Respondent pressed for an issue to be framed as to whether the Respondent is a tenant under the Petitioner and as to whether the Petitioner is entitled to the benefit of the Delhi Rent Control Act, 1958; however the learned Additional District Judge ordered that no separate issue needs to be framed on this aspect, as the question to be decided was whether there is legal Arbitration Agreement between the parties and whether there are referable disputes.

6. The parties were directed to lead their evidence on the issues framed. Evidence was led by the parties. However, for the present purposes, it is not necessary to discuss the same in detail and the relevance thereof to the present application shall be discussed at the appropriate place. Pursuant to the dicta of the Apex court in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, the petition was transferred to and received in this court on 1st October, 2007 alongwith the entire record. The counsel for the parties have been heard.

7. It is inter alia the case of the Respondent that one Shri Vishal Verma was a tenant in the shop aforesaid under the Petitioner; that the Respondent paid "pugree" of Rs. 75,000/- shared by the Petitioner and the said Shri Vishal Verma and thereby became a tenant in the shop under the Petitioner w.e.f. October, 1990; that the Respondent was initially paying rent at the rate of Rs. 500/- per month to the Petitioner; that the Petitioner after the Respondent had occupied the premises as a tenant, asked the Respondent to sign the Agreement dated 1st February, 1991 supra for the reason of showing to the income tax authorities; that the said Agreement is a sham document and is a camouflage for a rent agreement and the real nature of the Agreement is that of a rent deed creating relationship of landlord and tenant between the parties; that the Petitioner has illegally and mala fide issued the receipts etc., to the Respondent ostensibly on account of commission but in fact the same are rent receipts; that the Respondent is an illiterate person and the Petitioner has been procuring the signatures of the Respondent on whatever documents the Petitioner required and even on blank papers; that the Agreement dated 1st February, 1991 does not bind the Respondent as the real intention of the parties was to create tenancy of the shop in favour of the Respondent; that the Petitioner had in fact grabbed the land belonging to Bankey Behari Mandir and constructed 23 shops and a godown thereon and all of which shops were given on rent to different parties under similar agreements, and it was not possible for the Petitioner to carry on business in each shops on commission basis. It was contended that there being no Arbitration Agreement, the petition was misconceived and in any case, the Respondent being a tenant in the shop, cannot be evicted save in accordance with the provisions of the Rent Act.

8. The question which arises for consideration is that if with respect to an Agreement containing an arbitration clause, one party claims the same to be a sham, who is to adjudicate the said issue. In exercise of powers u/s 11(6) of the Act, the nominee of the Chief Justice cannot certainly adjudicate the same. The

powers u/s 11(6) of the Act earlier held to be purely administrative, even after SBP and Co. Ltd. *supra* are limited to finding whether the Arbitration Agreement exists or not; whether the person applying is a party to the agreement and as to whether the claims are dead claims or not or not referable to Arbitration in terms of the Agreement. In the present case the respondent admits his signature on the agreement containing arbitration clause, though calls the agreement sham and thus denies any arbitration agreement.

9. So, who is to decide whether the agreement is a sham or the nature of transaction between the parties i.e., whether the Respondent is a tenant or came into use/occupation of the premises in terms of the Agreement dated 1st February, 1991 *supra*. The Arbitration clause contained in the Agreement aforesaid is couched in the widest possible terms. It covers disputes and differences between the parties concerning any of the clauses of the Agreement or otherwise connected with the business or the Agreement between the parties.

10. The Petitioner's case is that the Respondent is not a tenant. Even though the Respondent prior to petition only claimed tenancy, the petitioner could not approach the Rent Controller for determination of such question in as much as the Rent Controller can be approached only when the petitioner pleads the dispute to be falling within the jurisdiction of Rent Controller. Undoubtedly, the Rent Controller has jurisdiction to determine the relationship of landlord " tenant, if disputed by the Respondent.

11. So the Petitioner could have approached the Civil Court for the adjudication of disputes raised. But the agreement contained all pervasive arbitration clause as aforesaid. Merely because a party to the document claims the document to be sham, cannot put to naught the Arbitration clause contained therein. The Respondent admits signing the said Agreement. The Respondent further admits obtaining receipts of payment from the Petitioner in terms of the said Agreement. In the circumstances, even though issue was framed and evidence ordered to be led, in my view erroneously, it is not for determination in exercise of jurisdiction u/s 11(6) as to whether the Agreement is a sham or not and it is best to leave all the said disputes, claims and counter claims between the parties to be adjudicated by the Arbitrator.

12. The plea of the Respondent that the Respondent being a tenant protected by the Rent Act, the Arbitrator is not entitled / empowered to grant the relief of ejectment, in my view does not call for dismissal of the petition. The plea of the Respondent cannot be treated as a gospel truth. It is not to be forgotten that the Petitioner disputes the said position and relies upon a written document which also belies / negatives the stand of the Respondent. In the event of it being held that the Respondent is not a tenant and came into use/occupation of the shop in terms of the Agreement dated 1st February, 1991 *supra*, the jurisdiction of the Arbitrator to award the removal of the Respondent therefrom, cannot be denied. However, if it is ultimately found by the Arbitrator that the Respondent in fact is a tenant in the premises and covered by the provisions of the Delhi Rent Control

Act, 1958, the claim of the Petitioner for possession would be dismissed and the occasion would not arise for the Arbitrator to award the ejectment / vacation of the Respondent and in any case, the same would also be barred by Section 50 of the Rent Act.

13. The Apex Court in SBP and Co Ltd also held in relation to determination whether a claim made is live or not, that where it is not possible to determine without intricate enquiry, it will be appropriate to leave that question to be decided by Arbitral Tribunal on taking evidence, alongwith the merits of the claims in the application. That being the position, it would be the Arbitrator and not the Civil court which would be empowered to adjudicate the nature of the relationship between the parties. I am supported in this view by judgment of this court in Vijay Kumar Jain Vs. Baby Care Mktg. Co.,

14. I must record that another single Judge of this court (as his Lordship then was) in Krishan Gopal Arora Vs. Roshan Lal Arora and another relying upon Natraj Studio (P) Ltd. v. Narang Studio AIR 1981 SC 537, has held that the question whether there is relationship of landlord and tenant between the parties or merely a commission agency agreement or such other jurisdictional questions if fall for determination may have to be determined by the court and not by the Arbitrator. It was held that Public policy requires that contracts which nullify the rights conferred on tenants by the Rent Act cannot be permitted and the public policy further requires that parties cannot be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special courts constituted by the Rent Act. This court held that a serious dispute as to the real nature of transaction between the parties is a subtle question of law requiring interpretation of the documents which would enable an inference being drawn whether it was merely a commission agency agreement or a tenancy created between the parties and will be best adjudicated by court.

15. I am however, not inclined to follow the view taken in Krishan Gopal Arora (supra) for four reasons. Firstly, the same is based entirely on judgment of Apex Court in Natraj Studio Pvt. Ltd. in which case the Apex Court before it had not only an arbitration proceeding but proceeding arising from a declaration suit as to the status/relationship between the parties. The Apex Court on construction of agreement between the parties found a relationship of landlord tenant between the parties therein and thus held the authority/court under the Bombay Rent Act had the exclusive jurisdiction to resolve the dispute of recovery of possession. It was on finding the existence of relationship of landlord and tenant that the observations quoted in judgment in Krishan Gopal Arora, were made by the Apex Court. Otherwise, I do not find the Apex Court laying down that where the applicant disputes such relationship, the arbitrator has no jurisdiction to adjudicate the same. On the contrary the Apex court in Vasudev Gopalkrishna Tamwekar Vs. The Board of Liquidators Happy Home Co-operative Housing Society, held

10. Alternatively, it was contended that even if the Society claimed to obtain an

order for possession on some footing other than the relationship of landlord and tenant, when the appellant raised the contention that he was a tenant and the relationship of landlord and tenant was put into issue, the Court of Small Causes, Bombay, alone was competent to decide that question. Section 28 of Bombay Act 57 of 1947 excludes the jurisdiction of all courts other than the Court of Small Causes to try any suit, proceeding or application between a landlord and tenant and to deal with any claims or questions as are referred to in the section. Even if it be granted that an arbitrator appointed under the Bombay Co-operative Societies Act is a Court, - on this question we do not deem it necessary to express any opinion - in order that his jurisdiction be excluded the proceeding before him must be between landlord and tenant, and relating to the recovery of rent or possession of any premises to which the provisions of Part II of the Act apply. The exclusive jurisdiction of the Court of Small Causes arises only if the person invoking the jurisdiction of the Court alleges that the other party is a tenant or a landlord and the question is one which is referred to in Section 28. Where the person so invoking does not set up the claim that the other party is a tenant or a landlord the defendant is not entitled to displace the jurisdiction of the ordinary court by an allegation that he stands in that relation qua the other and on that ground the Court has no jurisdiction to try the suit or proceeding or an application. There is nothing in the judgment of this Court in Babulal Bhuramal and Another Vs. Nandram Shivram and Others, which supports the view that by merely setting up a plea that he is a tenant in respect of the premises in dispute, the jurisdiction of the ordinary Courts to decide a suit, proceeding or application would be displaced.

I find the above law apposite and applicable to the present controversy.

16. The Petitioner who claims that there is no relationship of landlord and tenant protected by the Rent Act, cannot be compelled to go before the Rent Controller for determination of the said issue. The only alternative to Arbitration would be to relegate the Petitioner to Civil court and which in view of the Arbitration Agreement, is not permissible.

17. Secondly, the judgment in Krishan Gopal Arora (supra) was under the 1940 Act. The 1996 Act has drastically altered the law of Arbitration or at least attempted to do so. By Section 5 thereof, the judicial interference has been prohibited except as provided under the Act. Thus upon finding that the dispute of determination of the nature of the Agreement/relationship between the parties is covered by the Arbitration Agreement, I find myself unable to refuse appointment of Arbitrator in as much as the same is not permitted under the 1996 Act. Moreover, I do not find any public policy involved for such determination. The said determination is a pure determination of fact. Only in the event of it being found on such determination that the Agreement between the parties in fact was of tenancy protected by the Rent Act, does the question of public policy come in. I have already held that in the event of it being found so, the Arbitrator would in any case be debarred from awarding the eviction/

ejection of the Respondent by virtue of provision of Section 50 of the Rent Act. However, such determination is not barred by the Rent Act or by reason of any public policy.

18. Thirdly, because the Apex court relying upon and reiterating the law laid down in *Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission*, and *D.D. Sharma Vs. Union of India (UOI)*, recently in *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, has held that the construction of the contract agreement is within the jurisdiction of the Arbitrators if the language thereof so permits and that interpretation of a contract is a matter for the Arbitrator to determine even if it gives rise to determination of a question of law. The same view is to be also found in the *State of Rajasthan Vs. Nav Bharat Construction Company*, . The question whether the Agreement between the parties is of tenancy or of commission agency thus is capable of being adjudicated by the Arbitrator.

19. Fourthly, the Agreement in *Krishan Gopal Arora supra* was of the year 1973. The Rent Act was amended w.e.f. 01/12/1988 whereby protection from eviction inter alia to premises, the rent whereof was in excess of Rs. 3,500/- per month, was taken away. The admitted position of the Respondent also in the present case is that he came into the premises in the year 1990 i.e. after the amendment of the Rent Act. After the amendment, in my view, there were no compulsions on the landlord to adopt the devices earlier adopted to evade applicability of the Rent Act, as in the present case. There is thus a shift in public policy also as prevailing at the time of adjudication in *Natraj Studio Pvt Ltd* and *Krishan Gopal Arora supra*. Today, public policy does not require arbitration to be ousted/excluded for such reasons.

20. The counsel for Respondent also argued that the Petitioner is not the owner of the property and is thus not entitled to maintain the petition. However, the said question is again alien to a petition u/s 11, especially since the contractual relationship with the Petitioner is admitted. Moreover, even if the stand of the Respondent has to be of the relationship of landlord and tenant between the parties, the Petitioner even as a landlord, without being the owner, is entitled to maintain a proceeding for ejection/eviction.

21. It was contended by the counsel for the Respondent that the Petitioner would save on the court fees payable in a suit to be filed in the Civil court. This is again no ground to defeat a petition u/s 11.

22. I, therefore, find that there is an Arbitration Agreement between the parties and the claims of the Petitioner, if upheld, are arbitrable.

23. The parties having been unable to concur upon the sole Arbitrator, I appoint Mr Rohit Kumar, Advocate (Ch. 411, Lawyers' Chamber, Delhi High Court, Tel 23385161) as the sole Arbitrator to adjudicate the claims and counter claims of the parties. The consolidated fee is fixed at Rs 60,000/- to be borne equally by the parties subject to the final award as to costs and besides out of pocket

expenses. Since the matter has remained pending at the stage of Section 11 for long, the arbitrator is further requested to dispose of the matter expeditiously preferably within one year.