

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.485 of 2022

Bihar State Tourism Development Corporation Ltd through its Managing
Director, Birchand Patel Path, Patna- 800001.

... .. Appellant/s

Versus

Amit Kumar, S/o Shiv Pujan Swami, resident of Kapatiya, P.S.- Nalanda, P.O.
and District- Nalanda, at Present Nalanda Cafeteria, Nalanda, P.O. and
District- Nalanda.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. P.K. Shahi, Sr. Advocate Ms. Anukriti Jaipuriyar, Advocate
For the Respondent/s	:	Mr. Shashi Shekhar Dwivedi, Sr. Advocate Mr. Prasoon Kumar, Advocate Mr. Krishna Mohan Mishra, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
ORAL ORDER

17 18-06-2026 Heard Mr. P.K. Shahi, learned senior Advocate
assisted by Ms. Anukriti Jaipuriyar, learned counsel for the
appellant and Mr. Shashi Shekhar Dwivedi, learned senior
counsel assisted by Mr. Prasoon Kumar, learned counsel for the
respondent.

2. This appeal has been preferred against the order
dated 28.10.2013 passed in Title Suit No. 01 of 2013 by the
learned Additional District Judge-1st Nalanda, Bihar Sharif
whereby, the learned court below rejected the petition dated
03.06.2013 filed by the defendant- appellant under Section 8 of
the Arbitration and Conciliation Act, 1996 (in short 'the
Arbitration Act') for referring the matter to the Arbitrator as per



Clause 40 of the arbitration agreement and accordingly to appoint the Arbitrator from the list of persons provided/agreed by the parties as well as to decide the maintainability of the suit as preliminary issue and further sought relief for vacating the suit premises even after expiration of original term of contract without paying any amount and direction for payment of license fees amount due upon the plaintiff-respondent since 2013 till the date of its occupation along with 12% interest.

3. The appellant has earlier filed a civil miscellaneous application bearing Civil Miscellaneous No. 1328 of 2018 against the impugned order dated 28.10.2013 but the same was dismissed vide order dated 28.01.2022 as not maintainable in view of Section 37(1)(a) of the Arbitration Act, 1996. Consequently, the present appeal has been filed against the impugned judgment and order under Section 37(1)(a) of the Arbitration Act, 1996.

4. The respondent has filed the aforesaid Title Suit for restraining the appellant from disturbing the management of Nalanda Cafeteria, Nalanda and further for directing the appellant to take security amount after deducting Rs. 95,125/- as well as for directing the appellant to enter into an Arbitration agreement and for further direction to consider the investment



of the petitioner of Rs. 15,00,000/- in renovation.

5. The case of the plaintiff-respondent in short, is that, the Bihar State Tourism Development Corporation Limited (in short 'the Corporation') firstly invited a tender notice of Nalanda Cafeteria, Nalanda for settlement of lease for a period of 2/3/5 years for management of Nalanda Cafeteria along with other properties on 22.09.2007. The tender of the plaintiff-respondent was accepted being the highest bidder and accordingly a license deed in form of lease deed was executed for a period of 2/3/5 years and as per the terms, the plaintiff-respondent deposited the license fees including all service taxes yearly as mentioned in the allotment letter and plaintiffs continued paying the license fee from 28.10.2007 to 28.10.2013. It is further contended that before expiry of the license, the Corporation again invited auction notice for taking license for management of Nalanda Cafeteria, Nalanda for a period of 2/3/5 years as per the terms of NIT notification. The plaintiff deposited margin money and took part in the bid. The plaintiff enhanced the bid to Rs. 6,21,000/- and second bid was only for Rs. 3,85,000/- so, being the highest bidder, the tender of the plaintiff was accepted and he deposited Rs. 6,21,000/- plus 12.36% service tax i.e. total Rs. 6,97,756/- and accordingly,



allotment order was issued on 16.10.2012 and the possession of the plaintiff remained as before but the defendant-appellant did not execute the agreement for aforesaid license despite the payment of license fee of one year excluding service tax which commence from 28.10.2012 to 28.10.2013. For that period the entire amount was deposited so, there was no question of interference during the continuation of license period from 28.10.2007 to 28.10.2013. When the petitioner got allotment letter, then Managing Director had given order in form of letter to invest in renovation and accordingly, the plaintiff-respondent invested the entire amount of security, which he was willing to deposit for advance of second year in renovation work of the said premises despite that plaintiff was willing to deposit the same but, there was no specific date and month fixed in the said letter as to till what date the amount of security shall have to be deposited.

6. Despite the deposit of license fees for the period from 28.10.2007 to 28.10.2013, the Managing Director did not execute agreement deed (license deed) as was done previously on 27.10.2007 and then the plaintiff approached the Managing Director to execute license deed but despite willingness to deposit the money and there was no prescribed time limit under



the allotment letter to deposit the security advance of second year and as it can be deposited at any time within one year, the Managing Director in connivance with interested persons has issued a letter on 10.01.2013 and deliberately posted on 15.01.2013 which was received by the plaintiff's staff on 20.01.2013. From the contents of the said letter, the plaintiff came to know about cancellation of allotment letter and it was also contended in the letter that the bid amount of Rs. 6,83,100/- will be forfeited and a clause of arbitration was made in the allotment order although, there was no application of arbitration and because the arbitration clause is also imposed ex-parte which is not applicable unless the lease/license agreement was executed by the parties. It is further contended that defendant is not ready to take any step of arbitration proceeding and without taking interim measure as prescribed in Section 9 of the said Act, the plaintiff has got no option but to take interim measure under Section 9 of the said Act to restrain the defendant by using temporary injunction under Section 9(d) of the Arbitration Act, 1996 therefore, the plaintiff has filed the suit for injunction restraining the defendant from disturbing the possession of the plaintiff from license property and other reliefs as stated above.

7. It appears from order dated 18.02.2013 that the



learned trial court directed the respondent to maintain status quo till further order. In the meantime, notice was issued to the respondent for filing the written statement.

8. The defendant appeared and filed their written statement on 10.05.2013 challenging the maintainability of suit. It is vehemently pleaded in paragraph 6 that as per the Clause 28 of the NIT, there is a mandate for arbitration as per the Arbitration Act, 1996, before the Secretary of the Corporation who will act as an Arbitrator for settlement of any dispute between the parties. Therefore, the learned Civil Court does not have the jurisdiction to entertain the petition of the plaintiff-respondent. The defendant-appellant also filed a separate objection petition under Section 8 of the Arbitration Act, 1996 on 03.06.2013 and raised objection with regard to maintainability of the title suit filed by the plaintiff-respondent in view of Clause 40 of the allotment letter no. 336/12 dated 16.10.2012 which specifically provides for arbitration for resolution of disputes between the parties.

9. The learned Additional District Judge, Nalanda (trial court) on 28.10.2013 rejected the objection petition dated 03.06.2013 filed by the defendant-appellant on erroneous and misconceived grounds that defendant-appellant has not raised



objection to the jurisdiction of the Civil Court at the first instance, hence, have waived its right to object without considering the fact that the defendant-appellant has in fact specifically raised an objection to the jurisdiction at the first instance, which will be evident from paragraph 6 of the written statement and has also filed a separate petition dated 03.06.2013 on ground of jurisdiction.

10. Mr. P.K. Shahi, learned senior counsel appearing on behalf of the appellant vehemently submitted that the impugned order passed by the Additional District Judge is without application of mind since the defendant-appellant has raised an objection to the jurisdiction of the lower court at the first instance, which will be evident from paragraph 6 of the written statement. Learned senior counsel for the appellant further submitted that plaintiff-respondent has filed the suit before the learned lower Court under Section 9(d) of the Arbitration Act, 1996, which provides only interim relief/temporary injunction till the party approach as the Arbitrator as per the terms of contract. The learned court below usurped the jurisdiction and refused to refer the matter to an Arbitrator as per clause 40 of the terms of allotment letter dated 16.10.2012. The learned trial court failed to consider the matter



as relief granted under Section 9(d) of the Arbitration Act, 1996, provides to grant/deny temporary injunction and the said suit cannot continue by treating it as a regular suit for deciding the suit between the parties as the same is outside the jurisdiction of the learned court. Learned senior counsel further submitted that signing of the lease agreement is not mandatory. Reliance has been placed in the case of **Govind Rubber Limited vs. Louis Dreyfus Commodities Asia Private Limited** reported in (2015) 13 SCC 477 wherein, the Apex court has held that “*an agreement even if not signed by the parties can be spelt out from correspondence exchanged between the parties. However, it is the duty of the Court to construe correspondence with a view to arrive at the conclusion whether there was any meeting of mind between the parties which could create a binding contract between them. It is necessary for the Court to find out from the correspondence as to whether the parties were ad idem to the terms of contract*”.

11. Learned senior counsel further submitted that it is admitted fact that allotment letter dated 16.10.2012 was issued to the plaintiff-respondent after payment of license fee for the first year. Apart from the license fees of the first year, the respondent has not paid the license fees of other years. The



plaintiff-respondent was required to deposit second year license fees of Rs. 6,97,000/- as per the terms of allotment letter dated 16.10.2012 but due to poor financial condition, the Corporation-State provided grace time of 3-4 months for payment of security deposit vide letter dated 21.11.2012. After considering the request of the respondent, the Corporation granted grace time for demand of security deposit amount of Rs. 6,83,100/- latest by 31.01.2013 failing which, the allotment of the premises will be cancelled and any amount deposited by plaintiff-respondent will be forfeited vide letter No. 93/13 dated 11.01.2013.

12. It is further submitted that despite the grace period, the plaintiff-respondent failed to deposit any amount under the security amount head rather requested the Corporation to adjust the amount of Rs. 95,125/- of the plaintiff-respondent under some other contract as a part security amount under this contract and consider his case sympathetically as he is ready to abide by all terms and conditions and further grant six months time to pay the security amount vide letter dated 28.01.2013. This correspondence clearly shows that there can be an arbitration agreement in the exchange of statements of claims and defense in which the existence of the agreement is alleged by one party and not denied by other.



13. It is vehemently submitted that plaintiff-respondent has not paid the license fees of any year except 1st year and commercially running the property till date. After the expiry of the license on 27.10.2017, the dues of the license fees as calculated up to 31.03.2026 is Rs. 4,30,57,310/- only, which the plaintiff-respondent is bound to pay to the Corporation. The respondent is still commercially operating the property without paying a single penny causing huge loss to the Government exchequer. The plaintiff invoked the arbitration clause of allotment letter dated 16.10.2012 treating it as valid contract between the parties and filed a petition seeking interim relief under Section 9(d) of the Arbitration Act, 1996 for temporary injunction. Once the respondent has invoked the provision of Section 9 of the Arbitration Act, 1996 as per Clause 40 of the allotment letter dated 16.10.2012 before the Civil Court, later, it cannot deny the application of the Arbitration Act, 1996 in the subject matter of dispute. Reliance in this regard has been placed in the case of **Sundaram Finance Ltd. vs. NEPC India Ltd.** reported in (1999) 2 SCC 479.

14. Learned senior counsel further submitted that plaintiff-respondent is taking the benefit of the ex-parte interim stay order dated 18.02.2013 and in garb of that order is refusing



to pay any license fee of the suit premises that has accumulated to Rs. 4,30,57,310/-. In the garb of status quo order, the plaintiff is still commercially running the property even after expiry of maximum period of lease, which has expired on 27.10.2017. The learned court below failed to consider that after expiry of maximum period of lease, the plaintiff is continuing in possession of the suit premises without paying license fees. The title suit is pending since 2013 at the stage of framing of issue before the learned Additional District Judge-I, Nalanda. Both the parties filed their respective issues on 17.12.2013 and 15.04.2014 but the learned Additional District Judge-I, Nalanda has not framed common issues till 08.04.2026. The plaintiff-respondent is continuously commercially running the suit property for the last 14 years without paying a single penny as a license fee to the Corporation apart from 1st year, in the light of order of *Status quo* passed by the trial court on 18.02.2013.

15. In the aforesaid facts and circumstances, the Civil Court does not have the jurisdiction to entertain the application for adjudication of the dispute once the plea of an agreement clause has been taken by the parties.

16. On the other hand, Mr. S.S. Dwivedi, learned senior counsel for the respondent vehemently submitted that no



agreement in terms of Section 7 of the Arbitration Act has been made between the appellant and the respondent and as such the application filed by the defendant-appellant before the trial court for referring the dispute to Arbitrator was rightly rejected by the learned court below as the application filed under Section 8 of the Arbitration Act was without the original arbitration agreement or a duly certified copy of the same. The allotment letter dated 16.10.2012 is not an agreement as the plaintiff-respondent has not signed the copy of the agreement. Non-filing of the original agreement or duly certified copy thereof is a clear non-compliance with Sub-Section (2) of Section 8 of the Arbitration Act, 1996, which is a mandatory provision and the dispute could not have been referred to arbitration. It is admitted fact that after issuance of allotment letter dated 16.10.2012, the defendant-appellant has not executed agreement with the plaintiff-respondent.

17. Learned senior counsel for the plaintiff-respondent submitted that plaintiff-respondent filed Title Suit No. 01 of 2013 in the Court of District Judge for *ad interim* injunction against the defendant-appellant not to disturb the possession in the management of Nalanda Cafeteria, Nalanda and further prayed to take the security amount after deducting



Rs. 95,125/- as well as for a direction to the respondent to enter into an arbitration agreement and consider the investment of petitioner in renovation of Nalanda Cafeteria, Nalanda amounting to Rs. 15 lakhs. It is admitted fact that earlier agreement between the parties had expired and a fresh tender was issued by defendant-appellant in which the plaintiff-respondent succeeded and an allotment letter was issued on 16.10.2012. The application under Section 8 of the Arbitration Act was filed by defendant-appellant before the learned court below much after filing of the written statement which was also contrary to the provision of law. There is no agreement between the parties till date. On plain reading of the allotment letter, it shows that an allotment was being made to the plaintiff-respondent with effect from 28.10.2012 on the basis of acceptance of offer of license fees of Rs. 6,21,000/- as per terms and conditions mentioned in the allotment letter.

18. After deposit of the required amount as mentioned in the allotment letter, they should take steps to get an agreement executed, failing which the allotment letter would be cancelled. It is apparent from the allotment letter, the agreement would be executed only after depositing of prescribed amount and Clause No. 40 of such agreement would start taking effect



only after execution of such an agreement. Earlier, the plaintiff-respondent had taken the license from the defendant-appellant in the year 2007 and after deposit of license fees etc. an agreement was executed between the parties which was duly signed by both the parties on each page of the agreement and witnessed by two witnesses. It is further submitted that after issuance of allotment letter, no agreement was executed between the parties therefore, the application filed under Section 8 of the Arbitration Act, 1996 is not entertainable in absence of original arbitration agreement or a duly certified copy of the same. Reliance has been placed in the case of **Atul Singh and others vs. Sunil Kumar Singh and others** reported in **(2008) 2 SCC 602** wherein the Hon'ble Supreme Court has held that non-compliance with Sub Section (2) of Section 8 of the Arbitration Act, 1996, which is a mandatory provision, the dispute would not have been referred to arbitration.

19. Learned senior counsel further submitted that the present appeal has been filed against the order dated 28.10.2013. Any letter, communication, notification or whatever which has taken place subsequent to 28.10.2013 is absolutely irrelevant and cannot be looked into. The claim of arrears of Rs. 4,30,57,310/- is upto 01.03.2026 whereas the petition was filed



in the learned court below on 10.03.2023, the appellant has made a claim of dues of Rs. 4,82,94,086/- which shows that all these datas and charts are forged and fabricated. It is further submitted that the demand of money is irrelevant and foreign to the scope of the suit as well as this appeal. If the appellant has really got any money claim against the plaintiff-respondent, the plaintiffs are at liberty to file a money suit for realization of the same for the period within limitation and not beyond that. This Court has no jurisdiction to pass an order for payment of money by the plaintiff-respondent to the appellant in the instant appeal in as much as this is beyond the scope of the instant appeal. In such view of the matter, the application under Section 8 of the Arbitration Act, 1996 is not maintainable. The impugned order is just and proper.

20. Having considered the rival submissions of the parties and materials on record, this Court finds that it is an admitted fact that pursuant to Notification Inviting Tender (NIT) dated 18.09.2012 the property of Nalanda Cafeteria, Nalanda was allotted to the plaintiff-respondent being highest bidder for maximum period of five years from 28.10.2012. The plaintiff-respondent deposited license fees amount of Rs. 6,97,756/- including the service tax for the first year and did not deposite



the security money as advance license fees for the second year. The said period of five years expired on 27.10.2017. The plaintiff filed title suit on 02.02.2013 for *ad interim* temporary injunction not to disturb the possession of the plaintiff-respondent from licensed property which was admitted for hearing on 12.02.2013. It is also apparent from order sheet of Title Suit No. 01 of 2013 (Annexure A/18) that the plaintiff filed an injunction petition for restraining the respondents by issuing interim injunction on 04.02.2023 under Section 9 of the Arbitration Act, 1996, this fact has been mentioned in paragraph 11 of order dated 28.04.2023. The learned court below also clarified that the injunction petition was filed under Section 9 of the Arbitration Act, 1996 and not under Order 39 Rule 3 A of the Civil Procedure Code. On the said application, the ex-parte injunction order was passed on 18.02.2013 by the learned Additional District Judge-I, Biharsharif, Nalanda, thus, the plaintiff-respondent has invoked the provision of Section 9 of the Arbitration Act, 1996. The learned trial court by the impugned order rejected the petition under Section 8 of the Arbitration Act filed by the defendant-appellant and held that plaintiff has filed suit under the provision of Arbitration Act, 1996 and on the ground that defendant-appellant has not raised



objection to the jurisdiction of lower court at the first instance, hence has waived its right to object without considering the fact that the defendant-appellant elaborately raised objection in paragraph 6 of the written statement and also filed a separate petition dated 03.06.2013 on the ground of jurisdiction. The finding of the learned lower Court is apparently an error of record.

21. Learned senior counsel vehemently submitted that non-compliance of second mandatory proviso as contained in Sub-Section (2) of Section 8 of the Arbitration Act, 1996, the application under Section 8 is not maintainable. It is apparent from record that after issuance of allotment letter pursuant to NIT contained in memo no. 1906/12 dated 18.09.2012, the plaintiff-respondent deposited license fees amount at the rate of Rs. 6,97,756/- through RTGS which was credited in the account of defendant-appellant on 01.11.2012 and accordingly payment receipts dated 05.11.2012 was issued by the appellants. It is also relevant to mention that the allotment letter was issued by the defendant-appellant with certain terms and conditions. Clause 40 of the allotment letter dated 16.10.2012 specifically mentions an arbitration clause in the allotment letter as well as in the tender document. After acceptance of terms and conditions of



allotment letter, the plaintiff deposited the first year license fees of at the rate of Rs. 6,97,756/-. Moreover, the correspondence of the plaintiff-respondent dated 21.11.2012 reveals that the plaintiff requested time of 3-4 months for payment of security deposit (advance of license fees) on the ground of poor financial condition. Considering the request of the plaintiff-respondent, the Corporation granted grace period to the plaintiff-respondent for payment of security deposit amount of Rs. 6,83,100/- by 31.01.2013 failing which the allotment of the license property shall stand cancelled and amount deposited by the plaintiff-respondent shall be forfeited vide letter dated 11.01.2013. Despite the grace period, the plaintiff-respondent failed to deposit security deposit rather he requested the Corporation to adjust the amount of Rs. 95,125/- of plaintiff-respondent under some other contract as part of security amount under this contract vide letter dated 28.01.2013. Soon thereafter, the plaintiff-respondent filed the present suit for interim protection.

22. It is admitted fact that the NIT and allotment was issued for the maximum period of five years which has expired on 27.10.2017 and after expiry of the license period till date, plaintiff-respondent is continuing in possession of the licensed property without paying the license fees. The plaintiff can



sought relief, at best, for the period of five years only. The interim protection was passed on 18.12.2013 in terms of Section 9 (d) of the Arbitration Act, 1996, since then the suit was pending. Moreover, the plaintiff has acted upon the allotment letter and continued the commercial business for running Nalanda Cafeteria, Nalanda and accepted to pay the payment of license fees for succeeding year. The clause contained in the allotment letter clearly stipulate a reference to arbitration deserve to be construed as an arbitration clause. In view of decision of the Supreme Court in **Govind Rubber (Supra)**, *an agreement even if not signed by the parties can be split out from correspondence exchange between the parties*. It is apparent from the request letter of the plaintiff-respondent that he sought grace time for payment of deposit of license fees for the next year. The terms and conditions mentioned in the allotment letter was never objected by the plaintiff-respondent and he accepted the same by depositing the license fees for the first year and requested some time for depositing the security money. It can be prima facie shown that parties are *ad idem*. Mere non signing the agreement cannot absolve the plaintiff from liability under the agreement.

23. However, the learned lower court refused to refer



the matter to the Arbitrator on the ground that defendant-appellant has not raised objection to the jurisdiction of lower court at the first instance, which is apparently error of record as stated in the preceding paragraphs. The learned Additional District Judge has failed to exercise its jurisdiction so vested in it.

24. Having regard to the discussions made hereinabove, the impugned order dated 28.10.2013 passed by the learned Additional District Judge-1st, Nalanda, Bihar Sharif, in Title Suit No. 01 of 2013 is set aside and petition dated 03.06.2013 filed under Section 8 of the Arbitration Act, 1996 is hereby allowed. The learned trial court is directed to refer the matter before the Arbitrator as laid down in Clause 40 of the allotment letter dated 16.10.2012.

25. Accordingly, this appeal is allowed.

26. Pending interlocutory application(s), if any, shall stand disposed of.

(Khatim Reza, J)

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