IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: October 05, 2020
Judgment delivered on: November 03, 2020

\+ OMP(I)(COMM) 247/2020

ROYAL ORCHID ASSOCIATED HOTELS PRIVATE LIMITED

..... Petitioner

Through: Mr. Suhail Dutt, Sr. Adv. with Mr. Sandeep Prabhakar, Mr. Sujoy Kumar, Raghav Kumar & Mr. Amit Kumar, Advs.

versus

KESHO LAL GOYAL

..... Respondent

Through: Mr. Gaurav Pachnanda, Sr. Adv. with Ms. Renu Gupta, Ms. Shruti Gupta, Ms. Akshaya Ganpath & Ms. Namrata Sinha, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act of 1996', for short) with the following prayers:-

> *"In view of the above facts and circumstances, it is most humbly prayed that this Hon'ble Court may kindly be pleased to grant the following interim measures of protection:*
>
> *a) Pass an order restraining the Respondents, his employees, agents, servants or anyone acting on his*

behalf and instructions from illegally and forcibly dispossessing the Petitioner from the Hotel Regenta LP Vilas situated at Nanda Ki Chowri, Chakrata, Dehradun and from interfering with the Petitioners' operation and management of the said hotel and from preventing or obstructing the Petitioners' operations thereof and further from entering into any agreement or arrangement etc. with any third party in regard to the possession, operations and management of the aforesaid Hotel before the commencement of or during the pendency of the Arbitration proceedings that may commence in due course.

b) Pass ad-interim ex-parte orders in terms of prayers a) hereinabove;

c) Pass such other relief as this Hon'ble Court may deem fit, in the interest of justice and equity;

d) Pass an order granting costs in favour of the Petitioner and against the Respondent in respect of the present proceedings."

2. It is the case of the petitioner and so contended by Mr. Suhail Dutt, learned Sr. Counsel, that petitioner is a company incorporated under the provisions of the Companies Act, 1956 in the year 1986 for carrying on the business, inter alia, of operating hotels and providing hospitality services in India. The petitioner has established itself as one of the most reputed companies in the said business. It has been operating more than fifty business and leisure hotels in India for more than two decades in the name and

style, *"Royal Orchid* and *Regenta"* and the quality of services which are associated with these brands are well reputed in the hospitality services sector.

3. The respondent is the proprietor of Motel Lalit Palace. The respondent was desirous of building, furnishing and equipping a modern star hotel of approximately 51 rooms situated at Nanda ki Chowri, Chakrata Road, Dehradun, under the name Regenta LP Vilas ('Hotel', for short) and had approached the petitioner, being aware that the petitioner has the requisite knowledge and market experience for operation of such a hotel. The respondent represented that it is the sole and absolute owner of the land on which it was desirous of building, furnishing and equipping the hotel. It is the submission of Mr. Dutt that the petitioner entered into a Hotel Operation Agreement ('Agreement', for short) dated May 15, 2015 with the respondent for the purpose of operating the Hotel, for a period of 15 years extendable by mutual consent of both parties commencing from the date of opening of the Hotel. According to him, under the said Agreement, the petitioner ('Operator', as per Agreement) has undertaken to operate and manage the Hotel under the petitioner's brand name *"Regenta"* on the payment of an agreed management fee by the respondent ('Owner', as per Agreement). He stated, the Agreement envisaged several obligations on the part of the respondent, which were required to be continued without any interruptions during the term of the Agreement. Owing to construction, furnishing and technical detailing, the respondent handed over the Hotel to the petitioner only in July

2017. He stated that therefore, the petitioner was able to commence operations at the Hotel in July, 2017, which is the commencement date for the purpose of the Agreement. He stated that the petitioner expended considerable time and resources in giving technical inputs, detailing and designing inputs, which the petitioner has acquired over a period of time, towards the construction and execution of works in the Hotel. In fact, the petitioner's technical know-how and experience in the field was one of the key factors in signing the Agreement. The petitioner, at its own cost and expense, has been deputing various teams to train the staff of the respondent and provide them with the technical expertise and know-how in order to operate and manage a hotel of this calibre. The Hotel took over two years from the date of signing of the Agreement for completion. In this period, the respondent tapped the unlimited resources of the petitioner in setting up the Hotel to the standards associated with the petitioner's brand. It is also his submission that the petitioner invested large sums of money in this exercise in order to ensure that the Hotel meets the standards of a modern, luxury hotel of international standards. He stated that the petitioner has also actively assisted in identifying, recruiting and training the staff who are employed in the Hotel, in the same standards as it would in any of its own several hotels all over India. The Agreement envisages several obligations on the respondent, which are required for functioning of the Hotel. However, the respondent has continuously breached the terms of the Agreement since its inception. Despite impassive approach and unwillingness of the

respondent to perform its duties in terms of the Agreement, the petitioner has continued to execute the Agreement in terms of its letter and spirit. According to him, the respondent had breached certain obligations under the Agreement like respondent had not provided swimming pool as was contemplated in Schedule 2 and 3 of the Agreement.

4. That apart, the liquor license, which the respondent was required to procure to operate the bar in the Hotel, could only be procured in the month of May, 2019. That apart, he stated that there is a failure on the part of the respondent to pay the management fee. He highlights the fact that as on July 31, 2020, the total outstanding amount towards the Basic Management Fee and the Incentive Management Fee is a sum of Rs. 1,02,05,187/-, which is required to be paid along with interest at 2% per month as per Article XII (4) of Agreement.

5. Mr. Dutt submitted that the petitioner was shocked to receive an e-mail dated March 19, 2020, purporting to terminate the Agreement owing to alleged poor performance of the Hotel in terms of generating revenues. The petitioner issued an immediate response to the e-mail dated March 19, 2020, *inter alia* bringing to the respondent's notice that the purported termination was unlawful owing to the lock-in-period of five years in the Agreement. The petitioner also highlighted how the failure of the respondent to provide essential facilities like swimming pool and liquor license has affected the revenues. Thereafter, the parties had discussions during which the petitioner asserted and explained that the lock-in period of five years would commence

from July, 2017 being the opening date and the lock-in period would expire only by July, 2022. The petitioner was shocked to receive a letter dated July 28, 2020 through e-mail purporting to be another termination notice from the respondent. The respondent repeated the false contents of their previous communication dated March 19, 2020 and completely overlooked the facts stated in the petitioner's reply. Unfortunately, overlooking all the pleas taken by the petitioner, the respondent issued letter dated July 28, 2020 whereby the petitioner terminated the Agreement executed between the parties. During his submissions, Mr. Dutt has drawn my attention to various provisions of the Agreement to contend that Article XXIV of the Agreement prescribes the *'Term of Agreement'* to be initially fifteen years starting from the *'Opening Date'* renewable for another ten years with the first five years of the said term to be the mandatory lock-in period of five years, which would thus be commensurate with the starting of term of fifteen years. Admittedly, the '*Opening Date'* being July, 2017, the mandatory five years lock-in period would start from July, 2017 being the commencement of the first fifteen years of the '*Term of Agreement'*.

6. He has also drawn my attention to the definitions, which are depicted in Schedule 1 to the Agreement to contend that the *'effective date'* has not been defined in the definitions. The words *'effective date'* mentioned in Article XXIV (3) have to necessarily be read with the earlier part of the same Article i.e. *"first 5 (five) years of the terms of Contract"*. Hence, the

effective date has to be read as the *'Opening Date'*, since the term starts only from the '*Opening Date'*. Otherwise, reading '*effective date'* in a manner urged by the respondent would render the first part of the clause i.e. *'first 5 (five) years of the terms of Contract'* as otiose and redundant. According to Mr. Dutt, even *'Fiscal Year'* is a defined term for Schedule I Clause 8 and commences from the '*Opening Date'*. Also the expression '*Term'* is defined in Schedule I Clause 17 as set out in Article XXIV. It is settled law that the Agreement has to be read harmoniously in keeping with the principles of business efficacy as applicable in commercial contracts and by looking at other clauses in the Agreement to give effect and meaning to the intent of the parties. Mr. Dutt stated that reading of Article IX (1) and (2) read with Article XII makes it very clear that the Management Fee and the Incentive Fee is also payable from the '*Opening Date'* only. Article IX is absolutely clear and only covers certain pre-operational activities prior to the opening of the hotel by the operator for which the respondent had to bear the said pre-operational expenses. Article II, sub-clause 2, detailing the various activities to be done by the Operator i.e. the petitioner herein, relied upon by the respondent on a plain reading clearly shows that except for the pre-operating expenses Clause 2.1 referred above, all other duties and responsibilities relate only to the operation and maintenance of the hotel. For the period May 15, 2015 till July 21, 2017 the Hotel was under construction and nonoperational and hence the *'Term'* commenced only from the *'Opening Date'* as defined under the Agreement. Thus, till July,

2022, the Agreement cannot be terminated for any reason whatsoever.

7. In support of his submission on interpretation of a contract, Mr. Dutt has relied upon the following judgments:-

(i) Adani Power (Mundra) Limited vs. Gujarat Electricity Regulatory Commission and Ors. MANU/SC/0869/2019;

(ii) Sandvik Asia Pvt. Ltd. vs. Vardhman Promoters Pvt. Ltd. MANU/DE/9261/2006;

(iii) Achintya Kumar Saha vs. Nanee Printers and Ors. (2004) 12 SCC 368;

(iv) Keshav Kumar Swarup vs. Flowmore Private Limited (1994) 2 SCC 10;

(v) Administrator of the Specified Undertaking of the Unit Trust of India and Ors. vs. Garware Polyester Ltd. (2005) 10 SCC 682.

8. According to Mr. Dutt, as the respondent is dis-entitled from terminating the contract during the lock-in period under any circumstance either with cause or without cause, the Agreement is not hit by Section 14 or 41 of the Specific Relief Act, 1963 ('Specific Relief Act', for short). Rather, the mandatory lock-in period is an express negative covenant within the meaning and scope of Section 42 thereof to enforce the negative covenant even assuming though not admitting the Agreement is allegedly not specifically enforceable. Further, in the present case the contract itself requires the parties to continue performing the Agreement during the pendency of the Arbitration [Article XXVIII (5)]. In

support of his submission, Mr. Dutt has relied upon ***Gujarat Bottling Co. Ltd. and Ors. Vs. Coca Cola Company and Ors. (1995) 5 SCC 545*** and ***Ascot Hotels and Resorts Pvt. Ltd. and Ors. Vs Connaught Plaza Restaurants Pvt. Ltd. MANU/DE/1142/2018.***

9. Mr. Dutt submitted that the judgments relied upon by the respondent in ***Amritsar Gas Agency***, ***Rajasthan Breweries Limited***, ***Royal Orchid*** etc. are not applicable to the facts and circumstances of the case. Alternatively, Mr. Dutt, without prejudice by not admitting that the lock-in period had expired, stated that to invoke Article XXV(2)(a) even after the expiry of the lock-in period of five years, on the ground of shortfall of financial performance for three consecutive years, the same must be for three consecutive years relating to the period after the expiry of the lock-in period and not prior to it. That apart, he stated that even the physical possession of the Hotel is with the petitioner. In this regard, he has referred to Article II (4) which gives Operator a right to lease, sub-lease or grant concession etc. Article V (9) and (10) provides that Operator would operate without any hindrance and Owner will not interfere in the day to day operations. He also referred to Article VI(f) which provides that even for inspections Owner has to give a prior three days written notice. He also refers to Article XIX (2)(b) to contend that the Owner gave an undertaking that the property was not mortgaged or charged to adversely affect the rights of the operator. He also states that Article XX (3) clearly provides that the operator has to be compensated before vacation of the

premises by the operator and Article XXV, sub-clause (2)(a), (3) and (5) provides the right to recover projected three years fees or interest before vacation of the premises. He states the Agreement creates an interest in favour of the petitioner in the Hotel and the petitioner has an indefeasible lien and charge over the Hotel and to preserve and protect his possession thereof as contemplated by Section 202 read with Section 221 of the Indian Contract Act, 1872 ('Contract Act', for short). The respondent can only seek possession of the hotel from the petitioner consistent with the settled jurisprudence which mandates by virtue of catena of decisions of Supreme Court, by taking recourse to due process of law and not illegally or forcibly. In this regard, he has relied upon the judgments in the cases of ***Kavita Trehan and Ors. Vs. Balsara Hygiene Products Limited MANU/DE/0313/1991*** and ***Southern Roadways Ltd., Madurai, Represented by its Secretary vs. S.M. Krishnan (1989) 4 SCC 603***.

10. A reply to the petition has been filed by the respondent. Mr. Gaurav Pachnanda, leaned Sr. Counsel appearing for the respondent would submit that the petitioner carries on the business of operating hotels in India and the respondent is a hotelier in the city of Dehradun, Uttarakhand who owns the Hotel. On May 15, 2015, the petitioner and respondent entered into an Agreement, for the operation of the respondent's hotel at Nanda Ki Chowki, Chakrata Road, Dehradun, Uttarakhand, called Regenta LP Vilas. The Agreement is a commercial agreement, in the nature of an agency, which allowed the petitioner to operate and manage the Hotel of the respondent as

an agent of the respondent, in consideration of management fee. The commercial operation of the Hotel started in July 2017. However, the petitioner repeatedly non-performed and failed to meet its own targets causing losses to the respondent. The petitioner breached its obligations under the Agreement, including but not limited to its obligations under Article XXV (2)(a) of the Agreement. According to Article XXV (2)(a), in case of under-performance of the petitioner by more than fifteen percent (15%) from the projected Gross Operating Profit for consecutive three years, the respondent has a right to terminate the Agreement, without any penalty. It is the case of the respondent that the petitioner has underperformed by more than fifteen percent (15%) from the projected GOP for consecutive three years, i.e., 2017-2018, 2018-2019 and 2019-2020. Accordingly, the respondent exercised its rights under the Agreement and issued a notice on July 28, 2020 ('Notice', for short), to the petitioner, seeking to terminate the Agreement on expiry of 60 days. The petitioner did not respond to the Notice. It did not make any attempt to amicably resolve the matter between the parties. Instead, the petitioner filed the present petition seeking protection from this Court against termination of the Agreement.

11. Mr. Pachnanda submitted that the petitioner in its petition, has not disputed the under-performance on its part, as the reason for issuing the Notice. According to him, on September 08, 2020, the petitioner had issued two letters through email to the respondent, informing that its current General

Manager has resigned w.e.f. September 30, 2020, which has been accepted by the petitioner. The petitioner through another letter has informed the respondent that it has appointed a new General Manager for the hotel, who will reach the Hotel on September 25, 2020. Mr. Pachnanda submitted while the respondent does not accept the petitioner's position as set-forth in these letters, the respondent has not responded to these letters, at this stage, in view of the Court's order, dated August 24, 2020, as well as the fact that the Notice of termination comes into effect from September 26, 2020, and the petitioner's General Manager's resignation comes into effect on September 30, 2020.

12. Mr. Pachnanda would submit that the present petition is not maintainable as there is no valid and binding Agreement. In this regard, he has drawn my attention to Dispute Resolution Clause, more specifically Article XXVIII, which, according to him, stipulates that in case of any dispute, the parties can approach Courts at Delhi or alternatively, they may opt to go for arbitration. The use of words *'may opt'* to settle the disputes through arbitration manifests a clear intention of the parties that the arbitration clause is optional and the parties can either choose to resolve their disputes through courts in Delhi or they may opt for arbitration. The respondent has specifically declined to give consent to refer the disputes to arbitration. Therefore, the disputes cannot be referred to arbitration. He takes support of this contention by relying upon Section 7 of the Act of 1996. He states, before a Section 9 petition is entertained, the Court has to satisfy itself that there exists a valid and binding arbitration

agreement. He relies upon the judgment of the Supreme Court in the case of ***Sundaram Finance Ltd. v NEPC India Ltd. (1999) 2 SCC 479***. He also relied upon the judgment in the cases of ***(i) Wellington Associates Limited v. Kirit Mehta, (2000) 4 SCC 272; (ii) Panchsheel Constructions v. Davinder Pal Singh Chauhan, (2019) SCC Online Del 7176; and (iii) Quick Heal Technologies Limited v. NCS Computech Private Limited and another, (2020) SCC Online Bom 693*** in support of his contention.

13. Without prejudice to the above, Mr. Pachnanda stated that there is no negative covenant in the Agreement and hence after the expiry of lock-in period of five years on May 14, 2020, the respondent is within its right to terminate the Agreement. He stated, the termination notice was issued by the respondent on July 28, 2020, after the lock-in period of five years had come to end on May 14, 2020. He relied on Article XXIV (3) which according to him specifically provides that the five year lock-in period will start from the *'effective date'*, i.e., May 15, 2015. In contradistinction, Article XXIV (1) specifically provides that the fifteen year term of the Agreement will start from the *'Opening Date'*. These expressions have been consciously used in the Agreement. There is no ambiguity in the language and literal meaning of these provisions at all.

14. According to him, the submission of Mr. Dutt that '*effective date'* used in Article XXIV (3) to signify the start of the five year lock-in period must be replaced by *'Opening Date'* not only defies business common sense but also has the effect of

virtually rewriting Article XXIV (3) of the Agreement. He stated that under Recital 3, Recital 4, Recital 5 and Recital 6 read with Article II, several services to be provided by the petitioner, such as, providing professional advice regarding architecture, engineering, interior design, furnishing etc., were to commence from the *'effective date'* i.e., May 15, 2015. In this regard, he has drawn my attention to Article II (2) and Article IX. The respondent has paid an amount of Rs. 15,00,000 as *'Pre-opening Expenses'* to the petitioner in accordance with this scheme of the Agreement. Further, these pre-opening services were to be provided by the petitioner in consideration of the Management Fee promised to be paid by the owner, under Article XII, starting from the '*Opening Date'*. Therefore, the lock-in period of five years would commence from the '*Opening Date'*. If the plea of Mr. Dutt is accepted, then it implies that under Article XXIV (3) there is no lock-in for the period starting from the '*effective date'* i.e., May 15, 2015 until the '*Opening Date'*. This would mean that the respondent is free to terminate the Agreement any time after the '*effective date'* until the '*Opening Date'* is achieved. Such an interpretation disregards the fact that the respective rights and obligations of both parties under the Agreement commence on the '*effective date'* i.e., May 15, 2015. He denies the submission of Mr. Dutt that the respondent never contested the petitioner's interpretation, as set out in the petitioner's email dated April 04, 2020. According to him, it was the petitioner's own understanding that the lock-in period was ending on May 14, 2020 and had not yet expired by April 04, 2020. Otherwise, faced

with potential termination, the petitioner would have specifically asserted at this stage that the lock-in period ought to commence from the '*Opening Date'* and not from May 15, 2015. The petitioner did not do so at all.

15. He also highlights the fact that the submission of Mr. Dutt that breach must occur after the lock-in period is over, as per Mr. Dutt, as flawed because by that analogy the lock-in period would stand extended till July 2025. That implies that the lock-in period is ten years from *'effective date'* and eight years from '*Opening Date'*. This is not and cannot be the intention of the parties when the lock-in period is of only five years. Without prejudice and in any event, Mr. Pachnanda submitted, an alleged negative covenant ought not to be enforced after the effective date of the termination notice. In this regard, he has relied upon the judgment in the case of ***Royal Orchid Hotels Ltd. v. Ferdous Hotels Private Ltd., 2013 SCC OnLine Mad 1334***. Mr. Pachnanda submitted that the petitioner was only managing and operating the hotel of the respondent as an agent and licensee under the Agreement. However, the petitioner does not have possession of the hotel at all. This according to him is clear from Recital 3, Recital 4, Recital 5 and Recital 6 read with Article II that the petitioner is merely an agent and licensee of the respondent. He also refers to Article II (1), Article II (2) and Article II (5) which provides that the petitioner is only an agent of the respondent and only a hotel management expert. That apart, Article V (2) clarifies that all the employees of the Hotel are the employees of the Owner, i.e. the respondent. It is only the

General Manager of the Hotel, who is the employee of the petitioner although all his costs, expenses and remuneration is reimbursed by the respondent. Under Article VII, the entire working capital of the Hotel is provided by the respondent. Similarly, under Article XX (1), the respondent has the absolute right to sell, mortgage, lease or create any other encumbrance on the hotel as long as the petitioner's ability to manage and operate the Hotel is not impaired in anyway. He relied upon the judgment in the cases of ***(i) Southern Roadways Ltd. (supra), (ii) Chandu Lal v Municipal Corporation of Delhi, AIR 1978 Delhi 174; (iii) Vidya Securities Ltd. v. Comfort Living Hotels Pvt. Ltd., ILR 2002 Delhi 633***.

16. That apart, it is his submission that the Agreement between the parties is determinable in nature. Therefore, no interim relief, as prayed for by the petitioner can be granted. In support of his submission, he has referred to Article XXV(2)(a) which provides for termination for cause/breach, which could be during the lock-in period or after the lock-in period and Article XXV (3) which provides for termination by the respondent, without cause, after the lock-in period. He also stated that the remedies sought by the petitioner are statutorily prohibited under Section 14 (b), Section 14 (d) read with Section 41 (e) of the Specific Relief Act. He relied upon the judgment in the cases of ***(i) Country Development and Management Services Pvt. Ltd. v. Brookside Resorts Pvt. Ltd., 2006 SCC OnLine Delhi 200; (ii) Royal Orchid Hotels Ltd. (supra) and; (iii) Marriott International Inc. and others v. Ansal Hotels Ltd. and another,***

ILR (2000) II Del 196.

17. Mr. Pachnanda also meets the argument of Mr. Dutt with regard to Section 202 of the Contract Act, to contend that there is no agency coupled with interest in favour of the petitioner. According to him, Section 202 of the Contract Act applies only to an agency created for the purpose of giving security for an existing interest and not where the alleged interest of the agent arises after (and incidental to) the creation of the agency itself. According to him, in the present case, the Agreement was not created to secure any existing interest of the petitioner. In this regard, he relied upon the judgment in the cases of ***M. John Kotaiah v. A Divakar, 1984(2) APLJ 140*** and ***Harbans Singh v. Shanti Devi, ILR (1977) 2 Delhi 649***. He stated, that the petitioner has no purported lien on the Hotel under Section 221 of the Contract Act. In this regard, he has relied upon Article XXV (5) which provides that the petitioner will become entitled to interest @ 24% in case the petitioner's accounts and dues are not settled upon the termination of the Agreement. Further, Section 221 is applicable only in respect of an amount due to the agent. There is a serious dispute amongst the parties as to whether any amount is due to the petitioner from the respondent or vice versa. He relied upon the judgment in the case of ***USA v. Master Builders, ILR (1991) II Del 590***. According to him, it is a settled law that an agent cannot exercise any lien under Section 221 of the Contract Act, if it interferes in the principal's business. Allowing the petitioner to exercise such a purported lien on the respondent's Hotel would virtually bring to an end the

respondent's business. In this regard, he relied on the judgment in the cases of ***Southern Roadways Ltd. (supra)*** and ***Ram Prasad v. State of MP, (1969) 3 SCC 24***.

18. In rejoinder arguments, Mr. Suhail Dutt would submit that the plea of Mr. Pachnanda that the present petition is not maintainable, is totally misplaced. According to him, the arbitration clause i.e Article XXVIII is a binding clause between the parties, inasmuch as the said Article clearly gives to both the parties choice and / or option to either invoke civil Courts' jurisdiction in which case the Article mandates exclusive jurisdiction of Delhi Courts or the parties may opt for arbitration and if the latter option is exercised, by either of the parties then the jurisdiction is vested in Delhi Courts. The clear wordings of the Article are that either party shall be entitled to choose either one or the other remedy and the one does not fetter the other with this intention in mind, the relevant Article uses the word *"or"*. Accordingly, the arbitration clause in terms of the Article XXVIII amounts to a binding arbitration agreement vesting in both the parties an option to either invoke the jurisdiction of the Civil Court or to invoke Arbitration. In support of his submission, he refers to the judgment in the cases of; ***(i) Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. Vs. Jade Elevator Components (2018) 9 SCC 774 (ii) INDTEL Technical Services Pvt. Ltd. vs. W.S. Atkins PLC (2008 10 SCC 308*** and; ***(iii) Sundarban Marine Products Pvt. Ltd. and Ors. Vs. Waterbase Ltd. and Ors. (2017) 14 SCC 182***.

19. Having heard the learned counsel for the parties and

perused the record, the first issue, which is required to be decided is, whether there is a binding arbitration clause in the Agreement, for this petition to be maintainable under Section 9 of the Act of 1996. The submission of Mr. Dutt is, the Agreement clearly gives a choice to the parties either to invoke Civil Court's jurisdiction or to opt for arbitration. Whereas, the submission of Mr. Pachnanda is otherwise. To answer this issue, it is necessary to first reproduce the relevant clause regarding dispute resolution i.e. Article XXVIII.

> *"Article XXVIII*
>
> *(1) In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. The pai1ies agree to meet to pursue resolution through negotiation before resorting to litigation. If they do not reach such solution within a period of 30 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be referred to exclusive jurisdiction of Court of Delhi or parties may opt to settle the dispute by arbitration in accordance with the provisions of Arbitration and Conciliation Act, 1996. The venue of arbitration shall be Delhi. The proceedings of*

arbitration shall be conducted in English by a sole arbitrator jointly appointed by the parties. If the parties fail to mutually agree on an arbitrator, the arbitrator shall be appointed in terms of the Arbitration and Conciliation Act, 1996.

2. If any controversy or dispute involves Accounting matters, either Party, may serve upon the other a written notice stating that such party desires to have the controversy or dispute resolved by any arbitrator, who shall be a person qualified to act as auditor, under the provisions of the Companies Act, 1956. If the parties cannot agree within fifteen (15) days from the serving of such notice by either party on the selection of such arbitrator, he shall be designated by the President of the Institute of Chartered Accountants of India, upon the request of either party.

3. The decision and award of arbitrator shall be final and binding upon both Owner and Operator and shall not be subject to any appeal.

4. All information exchanged during this meeting or any subsequent dispute resolution process, shall be regarded as "without prejudice" communications for the purpose of settlement negotiations and shall be treated as confidential by the parties and their representatives, unless otherwise required by law. However, evidence that is independently admissible or discoverable shall not be rendered inadmissible or non-discoverable by virtue of

its use during the dispute resolution process.

5. Except the matter in controversy or dispute, all other terms and conditions of this Agreement shall remain in full force and effect, pending the award of the arbitration proceedings.

6. Subject to clauses above, all disputes are subject to jurisdiction of Delhi courts. This Agreement shall be governed by and construed in accordance with the laws of India."

20. Having noted the Article, it is also necessary to refer to the judgments referred to by the parties. Mr. Pachnanda has relied upon the judgment of the Supreme Court in the case of ***Wellington Associates Limited vs. Kirit Mehta, (2000) 4 SCC 272.*** In the said judgment, the Supreme Court was concerned with Clauses 4 and 5 of the agreement therein, which read as under:-

"4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration

shall be at Bombay."

21. The Supreme Court while considering the aforesaid clauses, was concerned with the issue as to whether there is any binding arbitration clause. The Supreme Court, referring to a judgment of Rajasthan High Court in the case of ***B. Gopal Das vs. Kota Straw Board, AIR 1971 Rajasthan 258,*** held that the words *"may be referred"* used in clause 5, read with clause 4, concludes that clause 5 is not a firm or mandatory arbitration clause as it postulates a fresh agreement between the parties that they will execute to go to arbitration. The Judgment is distinguishable on facts.

22. Insofar as the judgment of the Coordinate Bench of this Court in ***Panchsheel Constructions (supra)*** as referred to by Mr. Pachnanda is concerned, the Court was concerned with the following stipulations in the agreement therein:-

> *"That in case of any difference of opinion between the first party/owner and second party/builder in regard to the interpretation or scope of his agreement of any part thereof they should try to solve the problem to any Arbitrator."*

23. The other clause in a Collaboration Agreement therein reads as under:-

> *"That this transaction has taken place at New Delhi and as such Delhi courts shall have exclusive jurisdiction to entertain any dispute arising out or in any way touching or concerning this Deed."*

24. This Court in ***Panchsheel Constructions (supra)*** by

referring to the judgment of the Supreme Court in the case of ***Wellington Associates Limited (supra),*** has held that the said judgment squarely applies to the facts inasmuch as the usage of the words '*try to solve'* does not give a binding effect to the purported arbitration agreement between the parties. The Court also distinguished the judgment of the Supreme Court in the case of ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. (supra),*** on which reliance was placed by the petitioner therein**.**

25. Insofar as the judgment in the case of ***Quick Heal Technologies Limited (supra)*** as relied upon by Mr. Pachnanda is concerned, the Bombay High Court was concerned with a dispute resolution clause, which reads as under:-

> *"17. Dispute Resolution:*
>
> *a. All disputes under this Agreement shall be amicably discussed for resolution by the designated personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same may be referred to arbitration as stated below.*
>
> *b. Disputes under this Agreement shall be referred to arbitration as per the Arbitration and Conciliation Act, 1996 as amended from time to time. The place of arbitration shall be at Pune and language shall be English. The arbitral tribunal shall comprise one arbitrator mutually appointed, failing which, three (3) arbitrators, one appointed by each of the Parties and the third appointed by the 2 so appointed arbitrators and designated as the presiding arbitrator and shall have a*

decisive vote.

c. Subject to the provisions of this Clause, the Courts in Pune, India, shall have exclusive jurisdiction and the parties may pursue any remedy available to them at law or equity."

26. The Court in ***Quick Heal Technologies Limited (supra)*** was of the view that Clause 17 of the agreement therein, *inter-alia* shows that there is no pre-existing Agreement between the parties that they should or they will refer their disputes to arbitration or to the Court. In other words, the parties have at no stage agreed to an option of referring their disputes under the said agreement to arbitration or to the Court. It held, it is clear beyond any doubt that Clause 17 of the agreement is a clause which is drafted with proper application of mind, inasmuch as, the parties have first agreed that all disputes under the agreement shall be amicably discussed for resolution by the designated personnel of each party, thereby making it mandatory to refer all disputes to designated personnel for resolution / settlement by amicable discussion. It is thereafter if such dispute/s cannot be resolved by the designated personnel within 30 days, the same may be referred to Arbitration, thereby clearly making it optional to refer the disputes to Arbitration, in contrast to the earlier mandatory agreement to refer the disputes for amicable settlement to the designated personnel of each party. The Judgment has no applicability.

27. Insofar as the judgments relied upon by Mr. Suhail Dutt are concerned, in ***Zhejiang Bonly Elevator Guide Rail***

Manufacture Co. Ltd. (supra), the Supreme Court was concerned with a dispute resolution clause 15 therein, which reads as under:-

> *"**15. Dispute Handling:***
>
> *Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the Court."*

28. The Supreme Court by referring to its earlier judgment in the case of ***INDTEL Technical Services Pvt. Ltd. (supra)*** wherein the Supreme Court was dealing with Clauses 13.2 and 13.3, which reads as under, held that Clause 15 refers to *"Arbitration or Court"* depicts, there is an option and the petitioner has invoked the arbitration clause and therefore there is no impediment in the appointment of an Arbitrator. The Supreme Court accordingly, appointed the Arbitrator for adjudicating the disputes and differences between the parties.

> *"13.2 Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this Agreement which cannot be settled amicably by the Parties shall be referred to adjudication;*
>
> *13.3 If any dispute or difference under this Agreement touches or concerns any dispute or difference under either of the Sub Contract Agreements, then the Parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the*

relevant Sub Contract Agreement and the Parties hereto agree to abide by such decision as if it were a decision under this Agreement."

29. The relevant paras being paras 8 and 9 are reproduced as under:-

"8. This Court had the occasion to deal with such a clause in the agreement in INDTEL Technical Services Private Limited vs. W.S. Atkins Rail Limited1. In the said agreement, clause No.13 dealt with the settlement of disputes. Clauses 13.2 and 13.3 that throw light on the present case were couched in the following language:-

"13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication;

13.3. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a decision under this agreement."

9. Interpreting the aforesaid clauses, the Judge designated by the learned Chief Justice of India held thus:-

"Furthermore, from the wording of Clause 13.2 and

Clause 13.3, I am convinced, for the purpose of this application, that the parties to the memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed."

30. In so far as the reliance placed by Mr. Dutt on the Judgment of Supreme Court in ***Sundarban Marine Products Pvt. Ltd. and Ors. (supra)*** is concerned**,** the Supreme Court was concerned with Clauses 14 and 15 of the Distributorship Agreement therein, dated February 01, 1994, which I reproduce as under.

"14. All disputes arising out of or in any way connected with this Agreement shall be deemed to have arisen in MADRAS and only courts in MADRAS SHALL HAVE jurisdiction to determine the same.

15. Arbitration

15.1 In the event of any dispute or difference between the parties hereto as to the operation of this agreement, the Distributor may refer the matter to arbitration, such demand for arbitration shall specify the matters which are in question, dispute or difference and only such dispute or difference, other than excepted matters, for which the demand has been made and no other dispute or difference shall be referred for the arbitration by an officer of TWL/employee to be nominated by TWL and the provisions of the Indian Arbitration Act, 1940 for the time being in force or of any other Act of the Legislature passed in substitution thereof or modifications thereof

and for the time being in force, apply to such arbitration.

15.2 The act of Distribution and the responsibilities of the Distributor shall not be suspended or delayed because of the existence of any such dispute. TWL's decision on such dispute or difference shall be conclusive until reversed by the Arbitrator."

3. Since the Appellant did not refer the dispute, raised by the Respondent, for adjudication to an arbitrator, the Respondent approached the High Court of Judicature at Madras (hereinafter referred to as 'the High Court'), for appointment of an arbitrator, Under Section 11 of the Arbitration and Conciliation Act, 1996. The High Court accepted, that Clause 15.1 of the Distributorship Agreement, dated 01.02.1994, was indeed an arbitration clause, for settlement of disputes between the parties, and accordingly, appointed Justice (Retd.) A Abdul Hadi, a former Judge of the Madras High Court, as the sole arbitrator, vide an order dated 07.01.2005.

31. The Supreme Court in paras 9 and 10 has stated as under:-

"9. The interpretation placed by us on Clauses 14 and 15.1 hereinabove, can be logically understood if Clauses 15.1 and 15.2 are read together. We say so because, Clause 15.2 allows the distributor to make a choice to refer a dispute to an arbitrator, and in case he exercises the above choice, the distributor is obliged under Clause 15.2, not to suspend or delay the responsibilities which

the distributor has to shoulder under the Distributorship Agreement, dated 01.02.1994. It is in the above view of the matter, that it is also apparent from a close examination of Clause 14, that the same is truly not a jurisdiction clause, for purposes of arbitration. Had it been so, the same would have been part of Clause 15, which, in our view, is the exclusive arbitration clause.

10. For the reasons recorded hereinabove, since we have arrived at the conclusion, that a reference of a dispute at the behest of the Respondent, could not be made for adjudication to an arbitrator, the impugned order passed by the High Court dated 07.01.2005, appointing an arbitrator, is liable to set aside. The same is accordingly hereby set aside."

32. In the above judgment, it is seen that, the Supreme Court held, it is the Distributor who can refer the matter to Arbitration and not the respondent and as such set aside the judgment of the High Court appointing the Arbitrator. The issue before the Supreme Court was not with regard to whether there is any arbitration clause but who can invoke the arbitration clause. This judgment is not applicable to the facts of this case.

33. Having considered the judgments referred to by the learned counsel for the parties, this Court is of the view that, the issue in the case in hand is squarely covered by the judgment of the Supreme Court in the case of ***INDTEL Technical Services Pvt. Ltd. (supra)*** as followed in ***Zhejiang Bonly Elevator Guide***

Rail Manufacture Co. Ltd. (supra) inasmuch as from the perusal of Article XXVIII of the agreement, it is clear that the petitioner has an option either to get the disputes / claims / differences adjudicated through the jurisdiction of the Court or by way of arbitration in accordance with the provisions of the Act of 1996. The fact that the petitioner has filed this petition, it must be held that it intends to get the disputes settled through the process of arbitration. It is also not the case of the respondent either him or the petitioner had earlier invoked the jurisdiction of a Civil Court. I also find from sub-clause 2 of Article XXVIII, the intention of the parties is to refer the disputes to the Arbitrator with regard to any dispute concerning accounting matters and one of the claims of the petitioner is of non-payment of Management Fees, which is an accounting issue. The objection raised by Mr. Pachnanda on the maintainability of the petition is liable to be rejected.

34. The next issue which arises for consideration is whether the respondent has terminated the Agreement during the lock-in period. To answer this issue, it is necessary to determine from which date the lock-in period has started or kicked in. According to Mr. Suhail Dutt, Article XXIV of the Agreement prescribes the *'Term of agreement'* to be initially for 15 years starting from the *'Opening Date'*, renewable for another 10 years with the first five years of the said term to be mandatory lock-in period of 5 years, which would thus commensurate with the starting of the term of 15 years. So according to him, the 'O*pening Date'* being of July, 2017, the mandatory 5 years lock-in period had started from July, 2017. In effect, he argued that the *'effective date'* has not been

defined in the definition Clauses under Schedule-I. According to him, the word *'effective date'* mentioned in sub-clause 3 of Article XXIV has to be necessarily read with earlier part of the same Article, i.e., first five years of the terms of the contract. Hence, the *'effective date'* has to be read as the *'Opening Date'* since the term starts from the *'Opening Date'*.

35. I am not in agreement with this submission made by Mr. Dutt. The date of the execution of the Agreement, i.e., May 15, 2015 has been defined as the '*effective date'* and sub-clause 3 of Article XXIV stipulated the lock-in period to be 5 years from the *'effective date'*, i.e., May 15, 2015. No doubt, Schedule-I of the Agreement which defines words mentioned in the agreement includes *'Opening Date'* to *mean the date of commencement of the operation of the hotel for the purpose of receiving guests to be determined in accordance with Article (IV) of this contract*, but the submission of Mr. Pachnanda that the Agreement prescribes 2 dates, i.e., '*effective date'* (May 15, 2015) and *'Opening Date'* (July 2020) for the reason that since the Hotel had to be constructed before being operational and the petitioner, having the necessary expertise and in terms of Recitals 3, 4, 5 and 6 read with Article 2, is required to provide professional advice regarding architecture engineering, interior designing, furnishing etc. from the *'effective date'* for which the petitioner was paid Rs. 15 lacs by the respondent for pre-opening services in consideration of the management fee promised to be paid by the owner, is appealing.

36. In substance, the plea of Mr. Pachnanda is, as certain

obligations have been imposed on the petitioner to be performed during the construction of the Hotel which started immediately, and continued till the hotel became operational (July, 2017), the lock-in period was stipulated from the *'effective date'*. In fact, I find it is the case of the petitioner itself in Para 19 of the petition that it had expended considerable time and resources in giving technical inputs, detailing and designing inputs, which the petitioner has acquired over a period of time, towards the construction and execution of works in the Hotel. It is also stated by the petitioner that the petitioner's technical interest and experience in the field was one of the key factors in signing the Agreement.

37. On the other hand, if the plea as advanced by Mr. Dutt has to be agreed to, then it shall mean that between May 15, 2015 and July, 2017, the respondent, after taking / seeking the benefit of the petitioner's experience / expertise in building the hotel, just before the start of operation of the hotel, could have terminated the agreement, leaving the petitioner in lurch / high and dry to its prejudice. In fact, the stipulation was in the interest of the petitioner against such termination. Further, the plea of Mr. Dutt is on a misreading of the stipulations in the Agreement inasmuch as Article XXIV (1) states the Agreement shall commence upon execution of the Agreement by the parties, and shall continue in force for a period of 15 years commencing from the '*Opening date'* of Hotel. Similarly, Article XXIV (3) clearly state the first 5 (five) years of the terms of contract starting from the '*effective date'* shall be considered as a lock-in period. On a reading of

both clauses, the following position emerges:

1. The agreement shall commence upon its execution by the parties.
2. The first five years of the terms of contract starting from the effective date (the date of commencement upon its execution, i.e., 1 above) shall be considered as a lock-in period.
3. The fifteen years shall commence from the opening date, i.e., commencement of operation of Hotel, July 2017.
4. The first renewal of 10 years shall be after the term of fifteen years from opening date.

38. Mr. Pachnanda is right in stating that the interpretation sought to be given by Mr. Dutt is contrary to the express terms of the Agreement. It is *prima facie* clear that the lock-in period of 5 years had commenced on May 15, 2015 and the notice being of July 28, 2020, which is after the lock-in period of 5 years, the same is proper. In view of the above conclusion, the reliance placed by Mr. Dutt on the Judgments in the cases of ***Gujarat Bottling Co. Ltd. and Ors. (supra)*** and ***Ascot Hotels and Resorts Pvt. Ltd. and Ors. (supra)*** shall not be applicable in the facts of this case inasmuch this Court, in the ***Country Development and Management (Supra)*** by relying upon the Apex Court judgment in ***Gujarat Bottling Ltd. (supra),*** on which reliance has been placed by Mr. Pachnanda, has held that *the relief by way of interlocutory injunction is to protect the plaintiff against the injury of violation of his right for which he could not be*

adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour in trial. The need for such protection has however to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights, for which he could not be adequately compensated. Whereas in the case in hand, there is no stipulation that the Agreement cannot be terminated even after lock-in period. In other words, it is determinable contract. That apart, the justification of the respondent is by relying on the stipulation of under performance of the petitioner for three years. Whether there was under performance; who was responsible for the same, cannot be decided in these proceedings, but to be decided by the Arbitrator and the petitioner can be adequately compensated in damages if it succeed before the Arbitrator. It is not the case of the petitioner that damages shall not adequately compensate it. Prima facie the action of the respondent cannot be faulted. Mr. Pachnanda has rightly relied on the judgments in ***Royal Orchid Hotels Ltd. (supra) and Marriott International Inc. and others (supra)*** wherein the Court has held that in view of Section 14 (1) (c) (pre-amended) (14 (d) of the amended Act) of the Specific Relief Act, the contract under the following category cannot be specifically enforced.

"a contract which is in its nature determinable"

39. The reliance placed by Mr. Dutt on the Judgment of this Court in ***Ascot Hotels and Resorts Pvt. Ltd. and Ors. (supra)*** is misplaced as it is not applicable to the facts of this case inasmuch

as in the said case, the appeal filed before this Court was against an interim order passed by the learned Arbitrator directing the parties to maintain status quo with respect to licenced area. This was primarily on the basis of Clause 22.4 of the License Agreement therein, which stated that Ascot can terminate the agreement except in the event of any three consecutive defaults by respondent CPRL to pay license fee and failure on the part of CPRL to make good the default. It was the case of CPRL that there was no default in the manner prescribed in Clause 22.4. This plea was accepted and the status quo order was not interfered with.

40. Similarly, the Judgments relied upon by Mr. Dutt in the case of ***Adani Power (Mundra) Limited (supra); Sandvik Asia Pvt. Ltd.; Achintya Kumar Saha (supra)*** in support of his submissions that nomenclature in an agreement is not important and agreement has to be interpreted harmoniously giving effect to intent of the parties, have no applicability as the said Judgments are distinguishable on facts and in view of my conclusion above.

41. Even the plea of Mr. Dutt that the respondent could not have terminated the agreement immediately after lock-in period for under performance, as such performance has to be seen three years post lock-in period and not before it, is also not appealing. Firstly, the '*Opening Date'* of the Hotel is the starting of the operation of the Hotel, which is of July, 2017. The operation of the Hotel reflects the performance. The stipulation in the Agreement does not say that the performance has to be seen post expiry of lock-in period. Even otherwise, if the plea of Mr. Dutt

is agreed to, it shall mean that lock-in period shall be of 8 years instead of 5 years that is from 2015 till 2023 (2015 to 2020 and three years thereafter). The plea of Mr. Dutt that the reasons for under-performance are in fact attributable to the respondent, as he had not provided the license for operating a Bar and the swimming pool in July 2017 itself, cannot be gone into in these proceedings being a factual dispute. The petitioner is at liberty to raise the issues before the learned Arbitrator.

42. Even the submission of Mr. Dutt, that certain stipulations in the agreement, *viz.* (i) operator's right to lease, sub-lease, grant concession; (ii) operator would operate the hotel without any hindrance and owner will not interfere in the day to day operations; (iii) the inspection to be carried out by the owner after giving a prior 3 days written notice; (iv) owner giving an undertaking that the property was not mortgaged or charged to adversely affect all the rights of the operator; (v) petitioner has to be compensated before vacation of the premises by it; and (vi) the right of the petitioner to recover the projected three years fee or interest before vacation of the premises; creates an interest in favour of the petitioner in the hotel and the petitioner has an indefeasible lien and charge over the hotel and has a right to preserve and protect the possession thereof; as contemplated by Section 202 read with Section 221 of the Contract Act, and the respondent cannot seek possession of the hotel from the petitioner without resorting to due process of law, is also without merit. The submission of Mr. Dutt is primarily by relying upon Sections 202 and 221 of the Contract Act. The said Sections are reproduced as

under:

> "*202.* ***Termination of agency where agent has an interest in subject-matter****.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.*
>
> *Illustrations*
>
> *(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.*
>
> *(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.*
>
> *221.* ***Agent's lien on principal's property.****— In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him."*

43. There is no dispute that the petitioner was required to operate the Hotel. The Agreement termed the petitioner as *'Operator'* and the respondent as *'Owner'*. For operating the Hotel, there were clear do's and don'ts. In substance, the petitioner was required to operate the hotel unhindered. For operating the Hotel, the petitioner was being paid the Management Fee. The receipt of the Management Fee is the interest of the petitioner as an *'Operator'*. But the interest to have Management Fee is after the exercise of right as an

'Operator'. In such a scenario, the agency is revocable. But if a right already exist to collect a / debt / interest / fee, for which the right to operate the hotel has been created, then the agency is irrevocable, which is clearly not the case here. Mr. Pachnanda is justified in relying upon the Judgment in the case of ***M. John Kotaiah (supra),*** wherein in Para 16 the Andhra Pradesh High Court has held as under:

> *"Thus it will be seen that if the interest created in the agent is in the result or the proceeds arising after the exercise of the power then the agency is revocable and cannot be said to be an irrevocable agency. However, if the interest in the subject matter, say a debt payable to the principal, is assigned to the agent as security simultaneously with the creation of the power and thereafter the agent exercises the power to collect the debt for discharge of an obligation owed by the principal in favour of the agent or owed by the principal in favour of a third party, then the agency becomes irrevocable." (emphasis supplied)*

44. Similarly, in ***Harbans Singh (supra)***, a Division Bench of this Court has in Paras 8 and 9 held as under:

> *(8) In Loonkaran Sethiya v. State Bank of Jaipur, (1969) I S.C.R. 122 (1), the respondent bank was given an irrevocable power of attorney by the appellant. For, the appellant had borrowed money from the bank. He had empowered the bank to recover money due to him from his debtor by executing a decree in which he was the decree- holder. The word "interest" under section 202 of the Contract Act was construed as follows at page 126 of the report:-*
>
> > *"There is hardly any doubt that the power given by the appellant in favor of the Bank is a power coupled with interest. That is clear both from the tenor of the document as well as from its terms..... .It is settled law that*

where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked."

(emphasis supplied)

This statement of law reproduces the English Common Law as would be evident from a reference to Article 135 in Bowstead on Agency, Fourteenth Edition, the relevant part of which is as follows :-

"Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. But it is not irrevocable merely because the agent has an interest in the exercise of it, or has a special property in, or lien for advances upon, the subject-matter of it, the authority not being given expressly for the purpose of securing such interest or advances.

(emphasis supplied)

(2) Where a power of attorney, whenever created is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power, or the performance of an obligation owed to the donee, then, so long as the donee has that interest, or the obligation remains undischarged, the power is irrevocable."

(emphasis supplied)

All the conditions of irrevocability are satisfied in the present case. The authority to the agent was given for valuable consideration which proceeded from the respondent. It was given for the purpose of effectuating security or protecting or securing the interest of the agent. For, the only purpose of the agency was to ensure and secure the performance of the contract by

the appellant in favor of the respondent for whom Shri Gulati was acting as the husband and the nominee and, therefore, a representative or an agent. Where the performance of the agency is not to secure the interest or the benefit of the agent then the agency is not irrevocable merely because the agent has an interest in the exercise of it or has a special property in or lien for advances upon the subject-matter of it.

(9) In Palani Vannan v. Krishnaswami Konar, Air 1946 Madras 9 (2), the primary object of the power of attorney was to recover the money on behalf of the principal by the execution of a decree. The, incidental provision for the employment of an agent and enabling the agent to recover his out-of-pocket expenses from the decretal amount did not make the object of the power of attorney to be the benefit of the agent. Section 202 of the Contract Act, therefore, did not apply.

(emphasis supplied)

For the same reason, section 202 was not attracted to the facts in Dalchand v. Seth Hazarimal Air 1932 Nagpur 34 (3) because the agent was merely entitled to retain a part of the price of the cloth sold by him as his remuneration but he had no interest in the cloth itself - within the meaning of section 202.

(emphasis supplied)

The same distinction is maintained in Mutharasu Thevar v. Mayandi Thevar. But the facts of the case before us are different. They are analogous to the facts of the Supreme Court decision referred to above and, therefore, the agent in our case had an interest in the property which was the subject-matter of the agency within the meaning of section 202.

45. Mr. Pachnanda is also right in contending that there is no agency coupled with the interest in favour of the petitioner. Section 202 of Contract Act applies only to an agency created for the purpose of giving security for an existing interest and not

where the alleged interest of the agent arises after the creation of the agency. So, it must prima facie be held that the right / interest has arisen after the creation of agency in favour of the petitioner and the Agreement is revocable.

46. Further, I find the stipulations in the Agreement as relied upon by Mr. Dutt, in no way create any interest of the petitioner in the hotel except to operate the same by appointing a General Manager who shall be the employee of the petitioner and the other employees being of the respondent. The right of the respondent being Owner was absolute right of selling / exchange / lease or create mortgage charge etc. of land, hotel furniture, equipment etc. Whereas the reliance placed by Mr. Dutt on Article (II) (4) only depict the right of the petitioner as an Operator to lease, sub-lease or grant concession in respect of commercial spaces or services of hotel which are customarily made in hotels in order to generate revenue. Mr. Pachnanda is justified by relying upon Article XXV (5) of the agreement which provides that the petitioner will become entitled to interest @ 24% in case the petitioner's accounts and dues are not settled upon the termination of the agreement. This negates the submission of Mr. Dutt that the petitioner has to be compensated before vacation of the premises by it. The reliance placed by Mr. Dutt on sub-clause (3) of Article XXV, that upon termination, and before vacation of premises, the Management and Incentive Fees shall be payable to the petitioner which creates an interest in favour of the petitioner in the Hotel and the respondent cannot seek possession is misplaced. As the said clause has to be read

with sub-clause (5) of the same Article, which according to me, stipulates failure on the part of the respondent to pay all accounts and dues between the parties including the amount mentioned above, i.e., (sub-clause (3)) on vacation of the premises, the petitioner shall be entitled to an interest of 24% per annum. So, prima facie it is clear that there is no stipulation in the contract that the petitioner can retain possession even after termination. Section 221 of the Contract Act has no applicability in the facts and also because it is the case of the respondent that the petitioner is not entitled to any amount. In any case, such a claim shall be decided by the Arbitrator. Section 221 (in view of Clause XXV (5)) shall also not come into play, as it is a settled law that the agent cannot exercise any lien under Section 221, if it interferes with the principal's business. In this regard, I may refer to the judgement of the Apex Court in ***Southern Roadways Ltd. (supra),*** wherein in Para 13**,** it is held as under:

> *"The force of this argument cannot be gainsaid. Counsel, in our opinion, appears to be on terra firma. The principal has right to carry on business as usual after the removal of his agent. The Courts are rarely willing to imply a term fettering such freedom of the principal unless there is some agreement to the contrary. The agreement between the parties in this case does not confer right on the respondent to continue in possession of the suit premises even after termination of agency. Nor does it preserve right for him to interfere with the company's business. On the contrary, it provides that the respondent could be removed at any time without notice and after removal the company could carry on its business as usual. The company under the terms often agreement is, therefore, entitled to insert and exercise its right which cannot be disputed or denied by the respondent".*

(emphasis supplied)

47. Even in ***USA (supra),*** this Court has referred to the judgment of the Supreme Court in ***Southern Roadways (supra)*** that the agent cannot exercise lien if it interferes with the Principal's business. In the case in hand, I have already held, there is no stipulation in the contract which states that after termination of the Agreement the petitioner can be in possession of the Hotel. The reliance placed by Mr. Dutt on the Judgment of ***Kavita Trehan (supra)*** is misplaced in the facts of this case, as the petitioner has neither substantiated any claims/amount due and payable under the Agreement nor has the respondent admitted any liability.

48. In view of the above discussion, this Court is of the view that the petitioner has not made out any case for grant of prayers, made in this petition.

The petition is dismissed.

V. KAMESWAR RAO, J

NOVEMBER 03, 2020*/ak/jg*