

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: May 06, 2013*
Judgment delivered on: May 10, 2013

+ **Arb.P.No.407/2012**

WSP ENGINEERING SERVICES LTD Petitioner
Through Mr.Shambhu Sharan, Adv. with
Mr.Yaman Kumar, Adv.

versus

R.C PANWAR Respondent
Through Mr.I.S.Alag, Adv. with Mr.J.S.
Bindra & Ms.Ishita Chakrabarti,
Advs.

+ **Arb.P.No.408/2012**

WSP CONSULTANTS INDIA LTD Petitioner
Through Mr.Shambhu Sharan, Adv. with
Mr.Yaman Kumar, Adv.

versus

R.C PANWAR Respondent
Through Mr.I.S.Alag, Adv. with Mr.J.S.
Bindra & Ms.Ishita Chakrabarti,
Advs.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this order, I propose to decide the two petitions being Arb.P. Nos.407/2012 & 408/2012 filed by the same petitioner.

2. The facts in the first petition being Arb.P.No.407/2012 are that the parties entered into three Lease Deeds dated 15th December, 2009, 17th April, 2010 and 6th May, 2011 whereby the respondent agreed to let out to the petitioner the 4th Floor, 1st Floor and 2nd Floor of the premises at 118, Shahpur Jat, New Delhi. The details and description of the said Lease Deeds entered into between the parties are given as under:-

Sl. No.	Lease Premises	Date of execution	Lock in Period from the date of execution	Expiry of Lock in period	Amount of security deposit
1.	4 th Floor	15.12.09	24 months	14.02.11	₹7,50,000/-
2.	1 st Floor	17.04.10	24 months	16.04.12	₹6,30,000/-
3.	2 nd Floor	06.05.11	11 months	05.04.12	₹10,50,000/-

3. As per clause 2 contained in the above three Lease Deeds, the petitioner had deposited with the respondent a total advance deposit of ₹24,30,000/- on account of refundable security deposits.

4. Similarly, as per the facts stated in another petition being Arb.P.No.408/2012, both the parties had also entered into other two Lease Deeds dated 1st December, 2008 and 1st January, 2009 whereby the respondent agreed to let out to the petitioner Ground Floor and Lower Ground Floor and 3rd Floor of the same premises. The details and description of the said Lease Deeds entered into between the parties are given as under:-

Sl. No.	Lease Premises	Date of execution	Lock in Period from the date of execution	Expiry of Lock in period	Amount of security deposit
1.	Ground Floor and	01.12.08	36 months	30.11.11	₹16,89,600/-

	Lower Ground Floor				
2.	3 rd Floor	01.01.09	36 months	31.12.11	₹9,90,000/-

5. As per clause 2 contained in the above two Lease Deeds, the petitioner had deposited with the respondent a total advance deposit of ₹26,79,600/- on account of refundable security deposits.

6. Clause 8 of the respective Lease Deeds provides that either of the parties to the Lease Deeds had the option to terminate the abovementioned Lease Deeds by giving three months advance notice in writing.

7. The petitioner by way of its letter dated 29th February, 2012 conveyed to the respondent its intention to vacate the abovementioned premises because of business and commercial reasons and had terminated all the five Lease Deeds and promised to hand over the vacant possession of the leased premises to the respondent on 31st May, 2012. A request was made by the petitioner to the respondent to release the total security deposits of ₹51,09,600/- which includes the security deposits of ₹24,30,000/- which is the subject matter of Arb.P.No.407/2012 and ₹26,79,600/- against the premises of Ground Floor & Lower Ground Floor and 3rd Floor which is the subject matter of Arb.P.No.408/2012.

8. By way of letter dated 1st March, 2012, the respondent had acknowledged and accepted the notice of termination of Lease Deeds and inclined to take the vacant possession of the leased premises on 31st May, 2012 and to refund the security deposits within 15 days from taking the physical possession on the said date, as per the case of the petitioner. However, the respondent failed to release the security deposits, as alleged by the petitioner.

9. Thereafter, the respondent entered into a Memorandum of Understanding (MOU) dated 14th March, 2012 with the petitioner in respect of issues related to the termination of all the five Lease Deeds.

10. The petitioner's case is that pursuant to the terms of the MOU dated 14th March, 2012, the petitioner had approached Mr.Anil Kumar, Manager of the respondent and discussed with him the issue about handing over the vacant possession of the leased premises. However, he had shown reluctance in taking of physical possession of the leased premises for some reasons. Thereafter, Mr.J.S.Arora, Head-Legal Department of the petitioner's Group Company personally visited Mr.Anil Kumar on 24th May, 2012 and also on 25th May, 2012 and tried to clarify things and make him understand to take back the physical possession of the leased premises on the agreed date. However, Mr.Anil Kumar was still reluctant. Thereafter, Mr.Amit Grover, Manager (Property & Administration), representative of the petitioner again discussed the issue with Mr.Anil Kumar on 26th, 28th, 29th and 30th of May, 2012, but said representative of the respondent refused to take back the physical possession of the property from the petitioner. On 30th May, 2012, the petitioner issued a letter to the respondent and thereby handed over to the respondent the peaceful and vacant physical possession of the leased premises along with the articles, the details of which are mentioned in the notice dated 9th July, 2012 issued by the petitioner to the respondent. However, the case of the petitioner is that despite of the same, the respondent did not release the security deposits, therefore, two notices dated 9th July, 2012 were issued by the petitioner to the respondent for releasing the security deposits to the petitioner along with interest, as agreed by the respondent in the MOU dated 14th March, 2012, for the delayed

period. Since the amount against the security deposits was not released by the respondent, the petitioner by rejoinder-cum-letter dated 9th August, 2012 invoked the arbitration as per clause 21 contained in the respective Lease Deeds and has also proposed few names of the Arbitrators to adjudicate upon the disputes between the parties. As the respondent failed to nominate the Arbitrator in terms of the letter dated 9th August, 2012, the petitioner has filed the present petitions seeking appointment of an Arbitrator in terms of Sections 11(5) & 11(6) of the Arbitration and Conciliation Act, 1996.

11. Reply has been filed by the respondent. Various objections have been taken in the reply. However, Mr.I.S.Alag, learned counsel appearing on behalf of the respondent has mainly made his submissions on the issue of non-subsisting arbitration agreement between the parties. His submission is that the reliance on the Lease Deeds is absolute misplaced, as the same has been terminated by the petitioner itself and at the first instance, there is no arbitration agreement between the parties, thus the petitions are not maintainable. It is alleged that the petitioner has invoked the arbitration clause on the basis of the Lease Deeds which are now terminated and as such, the same cannot be looked into. Though, various other points are raised by the respondent in reply, however, as mentioned earlier, Mr.Alag has only argued on the issue of non-subsisting arbitration agreement. Learned counsel has placed reliance on the decision passed by a learned Single Judge of this Court in the case of ***Seema Bhatia vs. Yamaha Motor India Pvt. Ltd.***, reported as 114 (2007) Delhi Law Times 772. Relevant para-21 reads as under:-

“21. The observations made in ***M/s. Saraswati Industrial Syndicate Ltd. v. Apollo Tyres Limited*** case (supra), in my considered view, squarely apply to the

facts of the present case. In fact, there is a similarity in the factual matrix of both the cases. An agreement having an arbitration clause and the arbitration clause not being resorted to but a subsequent agreement/MOU having been entered into between the parties for resolution of the disputes and even thereafter the disputes not being resolved. In both cases, the MOU was acted upon. The Division Bench of this Court in ***Jindal Aromatic v. South Coast Spices Exports Pvt. Ltd.*** case (supra) has approved the judgment in ***M/s. Saraswati Industrial Syndicate Ltd. v. Apollo Tyres Limited*** case (supra) and thus the legal proposition propounded in these two judgments are binding on this Court. The legal position has been succinctly set out that an accord discharges the performance of obligations under the contract and a dispute pertaining to satisfaction furnishes a fresh and independent cause of action, until and unless it is provided that the performance of the satisfaction was a condition precedent for discharge under the contract. There is no such stipulation in the present agreement in question.”

12. The judgment in case titled as ***M/s. Saraswati Industrial Syndicate Ltd. v. M/s. Apollo Tyres Limited***, reported in ILR (1986) 1 Delhi 382 also found favour with the Division Bench in ***Jindal Aromatic v. South Coast Spices Exports Pvt. Ltd.***, 106 (2003) DLT 708 (DB). It was observed in paragraphs 22 and 23 as under:

“22. A similar view was taken by a Single Judge of this Court in the judgment reported as 2nd (1986) 1 Delhi 382, ***M/s. Saraswati Industrial Syndicate Ltd. v. Apollo Tyres Limited***. Parties were governed by an agreement which contained an arbitration clause. Disputes arose, resulting in a settlement arrived at pursuant to which a cheque was issued towards satisfaction of the settlement arrived at. The cheque was dishonoured. A suit for recovery was filed. An application under Section 34 of the Arbitration Act was filed praying that the suit be

stayed in view of the arbitration clause between the parties. It was held that the dispute under the cheque did not relate to a dispute under the agreement. With the settlement arrived at, the dispute under the agreement between the parties stood settled. The agreement stood discharged and so did the arbitration clause. It was held that the cause of action was the settlement arrived at and not the contract.

23. The legal position which emerges from the aforesaid judgment is that an accord discharges the performance of obligations under the contract. A dispute pertaining to satisfaction furnishes a fresh and independent cause of action, until and unless it is provided that the performance of the satisfaction was a condition precedent for discharge under the contract. If promise is received in satisfaction, it is a good satisfaction, but if the performance and not the promise is intended to operate in satisfaction, then there will be no satisfaction without performance. Wherever there is an accord, obligations under the original contract would be discharged until and unless it is specifically provided that the performance of the satisfaction would discharge the obligations under the contract.”

13. The submission of Mr.Alag is that once the liability of the parties was crystallized in terms of the MOU dated 14th March, 2012, a fresh agreement came into existence novating the earlier Lease Deeds executed between the parties. Thus, the arbitration agreement would be deemed to have been abrogated, abandoned and waived by the parties. The said agreement which contains the arbitration clause stands discharged and cannot be revived by any of the parties, therefore, the petitioner cannot invoke the arbitration clause contained in the Lease Deeds with regard to the disputes and differences between the parties. The said disputes are merged with the MOU dated 14th March, 2012.

14. The question which thus arose for consideration was whether the MOU had been given a go by and the parties arrived at some mutual settlement whereby the parties were at liberty to revert to the original arbitration agreement. No doubt, once the arbitration agreement had been given a go by and the parties arrived at a mutual settlement, terms of which were acted upon, the arbitration agreement would be deemed to have been abrogated, abandoned or waived by the parties, the arbitration agreement stands discharged and under those circumstances, the arbitration provisions could not be invoked by the parties as the disputes and differences between the parties would merge into the new settlement whereby the parties cannot revert back to the original arbitration agreement.

15. Learned counsel for the petitioner has relied upon a judgment passed by the three Judges of the Supreme Court, in the case of ***Union of India vs. Salween Timber and Construction Co. (India) and Others***, reported in AIR 1969 SC 488. Relevant para-5 thereof reads as under:-

“5. On behalf of the appellant Dr. Seyid Mohammad presented the argument that the dispute regarding the respondent’s claim in respect of the excess quantity of timber measuring 4,900 tons said to have been tendered but not inspected was not a dispute “arising under the contract” or “in connection with the contract” and hence the arbitrators had no jurisdiction to adjudicate upon that claim. It was stated that the terms of contract did not require the respondent firm to tender for inspection any quantity in excess of the contracted quantity of timber and the alleged placing of unlimited stocks of timber at the disposal of the Government officials far in excess of the quantity ordered was beyond the scope of the contract. It was argued that the claim should be treated as a claim relating to a transaction of involuntary bailment and not to anything done in the performance, implementation or execution of the contract. It was

said that the claim for return of these goods and damages for deterioration or in the alternative for their market value was a claim in detinue and the dispute was not hence a dispute "arising out of the contract" or 'in connection with the contract' but was a dispute relating, to a tort of wrongful detention. We do not think that there is any justification for the argument put forward on behalf of the appellant. In our opinion, the claim made by the respondent firm was a claim arising out of the contract. The test for determining the question is whether recourse to the contract by which both the parties are bound is necessary for the purpose of determining whether the claim of the respondent firm is justified or otherwise. If it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute, it must be held that the matter is within the scope of the arbitration clause and the arbitrators have jurisdiction to decide this case. In ***Heyman v. Darwins Ltd.*** the law on the point is very clearly stated in the following passage:

"An arbitration clause is a written submission agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. if the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has

arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of' or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar expressions should be construed accordingly".

16. The scope and intent of Section 7(5) of the Act has also been discussed in great details in the case of ***M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.***, (2009) 7 SCC 696, para-13 of which is summarized as under:-

“13(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled: (i) The contract should contain a clear reference to the documents containing arbitration clause, (ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, (iii) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and

conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.”

17. Section 62 of the Indian Contract Act, 1872 reads as under:

“62. Effect of novation, rescission, and alteration of contract – If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

18. The relevant clauses of the MOU are reproduced here as under:-

“1. That in terms of the notice dated February 29, 2012 issued by the Lessee and accepted by the Lessor,

the Lease Deeds will terminate w.e.f. May 31, 2012.

2. That the Lessor will hand over the vacant physical possession of the Leased Premises on the expiry of the notice period of three months i.e. on May 31, 2012. In case of any delay on the part of the Lessee in vacating the Leased Premises, the Lessee agrees to pay Rs.10,000 per day penalty on the same terms and condition as mentioned in Clause 4 of the Lease Deeds for the 1st & 2nd Floor, Clause 5 of the Lease Deeds for the 3rd & 4th Floor and Rs.20,000 per day as mentioned in Clause 5 of the Lease Deed for the Basement & Ground Floor.

3. That the Lessee will keep paying the monthly rentals of the Leased Premises during the notice period of three months and also the electricity, water and maintenance charges.

4. That if any of the charges towards electricity, water and maintenance remains unpaid for the period up to May 31, 2012, the Lessee shall pay the same, either actual on the basis of bills of such services or average of bills of such services for the last 3 months.

5. That the total amount of the security deposit lying with the Lessor in respect of the aforesaid lease deeds is Rs.51,09,600 (Rs. Fifty One Lakhs, Nine Thousand and Six hundred only) (hereinafter the "Security Deposit"), which the Lessor agrees to refund to the Lessee within a period of 15 days of receiving the vacant physical possession of the Leased Premises i.e. by June 15, 2012.

6. That if the Lessor fails to refund to the Lessee the total amount of the Security Deposit within a period of 15 days of receiving the vacant physical possession of the Leased Premises i.e. by June 15, 2012, the Lessor shall pay interest on the same at prevailing bank fixed deposit rate of State Bank of India with 365 days maturity.

7. That simultaneous to handover of the vacant physical possession of the Leased Premises by the Lessee

to the Lessor on May 31, 2012, the Lessor shall issue a certificate to the Lessee that there are no dues in respect of the electricity, water and maintenance charges or such charges (if any) shall be adjusted against the Security Deposit and that the Lessor has received the vacant and peaceful possession of the Leased Premises and that the Lessor shall refund the Security Deposit by June 15, 2012 after deducting dues in respect of the electricity, water and maintenance charges (if any).”

19. In case, the relevant clauses of the MOU are read in a meaningful manner, it indicates that by virtue of said document, the respondent has accepted the factum of terminating the Lease Deeds w.e.f. 31st May, 2012 as requested by the petitioner. The respondent also agreed to comply with all the terms and conditions mentioned in the Lease Deeds and also agreed to pay the total amount of security deposits to the petitioner within 15 days of receiving the vacant physical possession, but the said amount was not paid.

20. The fact of the matter is that the said amount admittedly was not paid by the respondent to the petitioner as agreed. From the entire reading of the MOU, it does not show anywhere that the terms and conditions of the Lease Deeds were substituted in the MOU, nor those were altered by the petitioner in any manner rather those were not fully acted upon.

21. In the case of *M/s. Saraswati Industrial Syndicate Ltd. vs. M/s. Apollo Tyres Limited* (supra), as per new MOU a cheque was issued towards satisfaction of settlement arrived at between the parties which was later on dishonoured, therefore, the Court has rightly held that after satisfaction of amount, if further dispute arose, then it would be a fresh cause of action. (*See para-23 of the said decision*). In view of the facts and circumstances in that case, the correct law has been laid down by the Court

which has also rightly been followed in the case of *Seema Bhatia vs. Yamaha Motor India Pvt. Ltd.* (supra), but the facts in the present case are different, as apparently there is no alteration of any clause in the Lease Deeds in the said MOU which is not acted upon in toto. Infact the same executed by the parties for the purpose of compliance of various terms and conditions stipulated in the five lease deeds. Thus, there is no question of novation of contract arise.

22. In the present case, it is evident that the MOU dated 14th March, 2012 has a clear reference to the Lease Deeds entered into between the parties for leasing out the premises in question. In case, the MOU is read in a meaningful manner, it indicates the intention of the respondent to take back the leased property on 31st May, 2012 and has also accepted the termination of the Lease Deeds entered into between the parties. It was also agreed by the respondent in the MOU that the security deposits lying with the respondent in respect of the aforesaid Lease Deeds shall be paid to the petitioner within 15 days of receiving the vacant physical possession of the leased premises.

23. Therefore, an arbitration clause which contains in the Lease Deeds would get attracted into the MOU by reference. In case, the Clauses 1 to 7 of the MOU above are read together which clearly indicate the intention of the parties to continue and incorporate or compliance with the terms and conditions of the Lease Deeds. The same is capable of application in respect of disputes under the contract. There is a specific reference of the Lease Deeds in the MOU which provides the performance of the contracts which have entered into between the parties by virtue of five Lease Deeds containing the terms and conditions relating to performance in the MOU and

there was no compliance thereof by the respondent who may have its own reason not to comply with the same which would be considered by the sole Arbitrator at its own merit. Thus, it is apparent that the arbitration clause of the Lease Deeds would apply.

24. Under these circumstances, both the petitions are allowed. As the respondent has lost his right not to appoint an Arbitrator within 30 days from the receipt of rejoinder-cum-notice dated 9th August, 2012, the petitioner is entitled for the relief of appointment of an independent sole Arbitrator. Accordingly, Justice K.Ramamoorthy, a Retired Judge of this Court (R/o D-27, G.K.Enclave Part-II, Delhi-110048, Ph.011-26241780/51734069) is appointed as sole Arbitrator to adjudicate upon the disputes and differences in all the five Lease Deeds between the parties as mentioned in this petition, including their claims and counter-claims in terms of the above said agreements. The Arbitrator shall conduct the proceedings under the aegis of the Delhi High Court Arbitration Centre. The fees of the Arbitrator be also paid under the said Rules.

25. The petitions are disposed of in the above said terms.

26. A copy of this order be communicated to the learned Arbitrator as well as the Secretary to the Arbitration Centre forthwith. Copies of the same be also given *dasti* to the learned counsel for the parties.

(MANMOHAN SINGH)
JUDGE

MAY 10, 2013/ka