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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 30th October, 2018

+ O.M.P. (COMM) 169/2018 & IA No. 5393/2018
A N TRADERS PRIVATE LIMITED Petitioner
Through: Mr.Ashim Vachher, Mr.P. Piyush &
Mr.Vaibhav Dabas, Advs.

versus

SHRIRAM DISTRIBUTION SERVICES PRIVATE LIMITED
..... Respondent
Through: Mr.Ashish Bhagat & Mr.Ritik Malik,
Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 11.01.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 25.01.2008 executed between the petitioner and Shriram Value Services Pvt. Ltd. It is the case of the respondent that by an e-mail dated 18.12.2009 the respondent had informed the petitioner that all rights and obligations under the said Contract are now to be discharged by the respondent.

2. The respondent had filed its claims before the Arbitrator seeking recovery of alleged dues owed by the petitioner in terms of the said Contract.

3. The petitioner opposed the said claims *inter alia* on the ground that the Agreement between the parties had expired by efflux of time with effect from 25.01.2009 and also that the Agreement was confined to the supplies to be made to the seven locations mentioned in Schedule A to the Agreement while the claim having been filed for additional locations, the same was not covered by the Arbitration Agreement between the parties.

4. The Arbitrator has rejected the objections of the petitioner holding as under:-

*“21. That during cross examination, the witness of the Claimant has stated that the Respondent has given oral concurrences and continued to place Orders for supplies, in terms of the original Agreement on the Claimant and the operations continued in the Company. It is also the case of the Respondent that since they were the Franchisee of Yum Brands Inc, it had put a condition that the entire material required for running the KFC Restaurants would be purchased from the Claimant only. Admittedly under the Agreement between Yum Brands Inc and the Respondent, the Respondent was assigned the Claimant as the Sole Vendor / Distributor for managing supply chain. The scope of the responsibilities of the Claimant included procuring raw material, packing material, consumables etc. The Respondent has also relied on various other Judgments, namely, **Taipack Ltd vs. Ram Kishore Nagar Mal - (143) 2007 DLT, Page 123.***

22. That there is no dispute that the Claimant was the Supplier and continued to make supplies to the Respondent, as such, the plea that the Agreement had come to an end by efflux of time is without any basis and is rejected hereby. Since the Agreement between the parties was binding and acted upon, I hold this Arbitral Tribunal has jurisdiction to try and entertain the present dispute between the parties under the Agreement dated 25.01.2008 not only with respect to the Stores referred initially in the Agreement, but also, all the stores, which were subsequently added.”

5. Some of the terms of the Agreement dated 25.01.2008 which are relevant for answering the objections raised by the petitioner are reproduced hereinbelow:-

“1. SCOPE OF THE AGREEMENT

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1.2 The Supplier shall supply the Products at any of the locations given in Schedule A, as required by the Company (hereinafter called “the Site”). The Parties may add any other site on mutual agreement, in writing.

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7. TERMS AND TERMINATION

7.1 This Agreement shall subsist during period commencing from the date of execution hereof and ending on the earlier of (a) 1 years from the date of execution of this Agreement; or (b) the date on which this Agreement is terminated in accordance with its terms. However, the Parties may extend the Term for such further period and upon such terms and conditions as may be mutually agreed by the Parties, in writing.

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12.8 Amendment or Rescission

This Agreement shall not be modified, amended or rescinded except by a written instrument signed by persons authorized by both Parties. (Emphasis supplied)

6. A reading of the above Clauses would clearly show that the term of the Agreement was specified and agreed between the parties to be one year from the date of the execution of the Agreement or till earlier termination thereof in accordance with the terms of the Agreement. It had also been agreed that the term of the Agreement may be extended by the parties by mutual agreement “in writing”. Even with respect to the locations of supplies, the same had been specifically mentioned in Schedule A of the

Agreement and it had further been agreed upon that the parties may add other sites on mutual agreement “in writing”. Any modification to the terms of the Agreement was also to be done only by a written instrument signed by persons authorised by both the parties.

7. The Arbitration Agreement between the parties was contained in Clause 11.2 of the said Agreement which is reproduced hereinbelow:-

“11.2 All disputes, differences or disagreements arising out of in connection with or in relation to this Agreement shall be mutually discussed and settled between the Company and the Supplier. All disputes, differences or disagreements arising out of, in connection with or in relation to this Agreement, which cannot be amicably settled, shall be finally decided by arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The venue of the arbitration shall be New Delhi and the language for the conduct of the arbitration proceedings shall be English. The arbitration shall take place before a single arbitrator to be appointed by the Company, within thirty days of the invocation of the arbitration. The award shall be rendered in the English Language and shall be final and binding between Parties to this Agreement. The cost of arbitration shall be borne by both the parties equally.”

(Emphasis supplied)

8. A reading of the above Arbitration Agreement would show that it was only the disputes, differences, disagreements arising out of or in connection with or in relation to the said Agreement that were to be resolved through arbitration.

9. Though the Arbitration Agreement is an Agreement which is severable in nature and independent of the main Contract, the disputes between the parties that are not covered by the main Agreement could not be adjudicated through the process of arbitration.

10. In ***Penumalli Sulochana v. Harish Rawtani***, 2013 SCC OnLine AP 667, the Andhra Pradesh High Court has held as under:

“13. A perusal of the clause, at the first blush, would give an impression that it covers not only the disputes that arise during the subsistence of lease, but also on expiry thereof. However, if one takes into account, the principles of law that govern a lease, a different view point emerges. The only purpose that a lease deed would serve is that it governs the relationship between a lessor and a lessee as long as the lease subsists. The subsistence of lease under the deed can be up to the specific period mentioned in it. If there exists any provision for extension of lease subject to certain conditions, there is a possibility to construe that the term of the lease, covered by the document, can be extended. Where, however, the term is for fixed time and the parties also understood that the lease does not spillover beyond a date mentioned therein, the relationship between the parties ceases to be governed by the lease deed. Once the lease deed became redundant, any clause contained in it also ceases to be of any relevance to the parties.

14. The expression “after its expiry or earlier determination thereof” employed in clause 32 has a clear and definite purpose to serve. The intention of the parties can be gathered from the language employed therein. This has to be understood in the context of the circumstances mentioned in the same clause. An early determination of the lease can certainly become the subject-matter of arbitration since the document remains in force till 31.1.2012. The words “after expiry” have to be understood as covering the disputes that arise during the subsistence of the lease, under the document. For instance, if there existed any dispute between the parties as to violation of terms and conditions during the subsistence of the lease, the mere fact that the lease expired by the time the claim was raised or resolved does not take away them from the purview of arbitration.”

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16. Therefore, the arbitration clause contained in the lease deed ceases to be of any relevance unless the dispute between the parties is the one that has arisen during the subsistence of the lease.

In other words, if the claim of one of the parties is in relation to state of affairs that arose after the expiry of the lease period, the clause would not bar adjudication of the dispute through Courts.”

11. In ***Union of India v. Kishorilal Gupta & Bros.***, (1960) 1 SCR 493, the Supreme Court laid down the principles in relation to survival of an Arbitration Clause as under:

“10. The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising

under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.”

12. In *Litton Financial Printing Division, A Division of Litton Business Systems, Inc. v. National Labor Relations Board et al.*, MANU/USSC/0077/1991, the Supreme Court of the United States also considered the effect of an agreement terminating with efflux of time on the Arbitration Agreement and held as under:

“The Agreement's unlimited arbitration clause, by which the parties agreed to arbitrate all “[d]ifferences that may arise between the parties” regarding the Agreement, violations thereof, or “the construction to be placed on any clause or clauses of the Agreement,” id., at 34, places it within the precise rationale of Nolde Bros. It follows that if a dispute arises under the contract here in question, it is subject to arbitration even in the postcontract period.

With these matters resolved, we come to the crux of our inquiry. We agree with the approach of the Board and those courts which have interpreted Nolde Bros. to apply only where a dispute has its real source in the contract. The object of an arbitration clause is to implement a contract, not to transcend it. Nolde Bros. does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable. A rule of that sweep in fact would contradict the rationale of Nolde Bros. The Nolde Bros. presumption is limited to disputes arising under the contract. A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Any other reading of Nolde Bros. seems to assume that postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired. But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract. See Office and Professional Employees Ins. Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc. MANU/FENT/0255/1986 : 783 F.2d 919, 922 (CA9 1986) ("An expired [collective bargaining agreement] . . . is no longer a 'legally enforceable document'." (citation omitted)); cf. Derrico v. Sheehan Emergency Hosp., 844 F.2d 22, 25-27 (CA2 1988) (Section 301 of the LMRA, 29 U.S.C. § 185, does not provide a federal court jurisdiction where a bargaining agreement has expired, although rights and duties under the expired agreement "retain legal significance because they define the status quo" for purposes of the prohibition on unilateral changes)."

13. From the above, it would be apparent that though an Arbitration Agreement, being an independent agreement, would survive the termination of the main Agreement of which it is a part, at the same time it cannot be put in service for adjudicating the disputes that have not arisen under or in relation to such main Agreement but have arisen between the parties post such Agreement, even though the post Agreement "arrangement" may have been between the parties on similar terms and conditions as contained in the main Agreement.

14. It must be remembered that resolution of disputes through arbitration,

unless mandated through a statute, is a matter of volition of the parties to an Agreement. The parties have to agree to have their disputes adjudicated through Arbitration. Such Agreement has to conform to Section 7 of the Act and is a *sine-qua-non*. It cannot be oral. There has to be a consensus *ad idem*. It must therefore, be shown that parties not only agreed that their post-Agreement arrangement would be governed by the general terms of the Agreement that expired by efflux of time, but also that any dispute in relation to such post Agreement arrangement would be adjudicated through arbitration.

15. In the present case, admittedly there was no extension of the Term of the Agreement agreed to 'in writing' between the parties. The Agreement including the Arbitration Agreement, therefore, expired by efflux of time. The Arbitration Agreement could thereafter have been invoked only for disputes that arose out of or in relation to the Agreement and not for transactions thereafter.

16. The learned counsel for the respondent submits that the witness of the petitioner in his cross-examination had agreed that the description of the prices for various Purchase Orders issued by the petitioner even after the expiry of the Agreement were the same as provided in the Agreement itself. He further submits that there was no reply given by the petitioner to the e-mail dated 18.12.2009 addressed by the respondent to the petitioner making a reference to the Agreement between the parties and seeking substitution of the respondent in place of Shriram Value Services Pvt. Ltd. for the same. He submits that the conduct of the parties therefore, shows that the Agreement continued even after 25.01.2009.

17. I am unable to agree with the said submission of the learned counsel

for the respondent. The cross-examination of Mr.Rakesh Aggarwal, witness of the petitioner referred to by the learned counsel for the respondent reads as under:-

“I joined the Respondent Company in August 2011. I have no personal knowledge with the signing of the Agreement dated 25.01.2008 and its continuity thereafter but since the period I joined the Company, the then existing arrangement which was there at the time of my joining continued for supply of goods thereafter. I joined the Company as Chief Financial Officer. Our stores were raising indents at the Corporate Office of the Respondent and thereafter the Corporate Office used to issue purchase orders for each store / restaurants on the Claimant.

Q.1 Did you enquire from the records or from the Directors of the Respondent Company as to how the transfer of business of supply of goods changed from Shriram Value Services Pvt Ltd (SVS) to Shriram Distribution Services Pvt Ltd (SDS)?

Ans. I had enquired and was informed that whatever arrangements there with SVS have now been transferred to SDS as both companies are performing same functions and are under same parent / group company.

The accounts of the goods supplied by the Claimant were maintained state-wise by the Respondents. There was no segregation of stores before and after the Agreement for the purposes of accounting.

Q.2 Was there any segregation of products which were covered initially with the Agreement with SVS and those added later on for supply by SDS?

Ans No.

There are some C-Forms still to be issued by the Respondent Company to the Claimant Company. These are for Chandigarh and Haryana. I am not aware of any communication exchanged from YUM to SDS with respect to any short supplies made to Respondent by SDS. (Vol.) Whatever short supply reports were being issued by SDS to the Respondent Company were also

being marked to YUM by SDS

Q.3 Was there ever any communication from the Respondent to Claimant indicating termination of the Agreement dated 25.01.2008?

Ans I am not aware atleast after my joining there has been no such communication.

Q.4 Have you placed on record of the Arbitral Tribunal any document indicating termination of the Agreement dated 25.01.2008?

Ans No.

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Q.15 Has the Respondent filed any document on the record of the Tribunal of any alternative pricing and nomenclature than what has been described in the Agreement dated 25.01.2008?

Ans No

Q.16 Has the Respondent ever issued any other order/ mandate/ fresh agreement for fresh pricing and nomenclature than what has been stated in the Agreement dated 25.01.2008 to the Claimant for supply of goods? If so, have you filed any document before the AT?

Ans No.”

18. Similarly the e-mail dated 18.12.2009, after referring to the bifurcation of business within the Shriram Group and handing over of its food division to the respondent, made the following request:-

“We therefore seek to align the current contract with you to SDS effective 1th January 2010.”

19. The counsel for the respondent has relied upon the personal guarantee dated 21.01.2014 issued by Mr.Ashok Sharma in favour of the respondent, which *inter alia* provides as under:-

*“C. The Company procured its business materials from SDS and the payment dues towards SDS has been hovering around Rs. 12 Crs. The Company pays interest at 18% on dues exceeding one month supplies. The Company has now decided to terminate the arrangement with SDS effective 28th January 2014 and has assured that the dues for supplies would be cleared partly in January 14 and partly in February 14 and that the outstanding amount would be settled in full before the end of February 2014 (“**Due Date**”) together with interest.”*

(Emphasis supplied)

20. I have considered the submission made by the learned counsel for the respondent, however, find no merit in the same. The Agreement clearly mentions that the same would expire by efflux of time after an expiry of one year from the date of execution thereof. Any extension of the Agreement was to be “in writing.” The counsel for the respondent has been unable to show any document executed between the parties extending the terms of the Agreement.

21. Admittedly, the supplies after the expiry of the Agreement were made on the basis of the Purchase Orders placed by the petitioner on the respondent. It is not shown if these Purchase Orders made a reference to the Agreement between the parties. The cross-examination merely seems to suggest that the same business model and relationship continued between the parties even after the expiry of the terms of the Agreement. This, however, in my opinion does not lead to an inference that the parties had agreed to resolve all their disputes through arbitration, even for the business relation post Agreement.

22. Similarly merely because the petitioner had not replied to the e-mail dated 18.12.2009, it would not lead to an inference that the Agreement

continued between the parties even after the expiry of the terms thereof.

23. The above also cannot be said to be making a reference to Agreement dated 25.01.2008 or in any case, to the Arbitration Agreement contained therein. In ***M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited*** (2009) 7 SCC 696, Supreme Court has held that:-

“33. An arbitration clause though an integral part of the contract, is an agreement within an agreement. It is a collateral term of a contract, independent of and distinct from its substantive terms. It is not a term relating to “carrying out” of the contract. In the absence of a clear or specific indication that the main contract in entirety including the arbitration agreement was intended to be made applicable to the sub-contract between the parties, and as the wording of the sub-contract discloses only an intention to incorporate by reference the terms of the main contract relating to execution of the work as contrasted from the dispute resolution, we are of the view that the arbitration clause in the main contract did not form part of the sub-contract between the parties.”

24. The personal guarantee and the cross-examination of Mr.Rakesh Aggarwal merely refers to the “arrangement” between the parties and, therefore, cannot be read as an acknowledgement of extension of the Agreement terms.

25. In any case, the Arbitrator has not considered the effect of the terms of the Agreement on the continuation of the Arbitration Agreement between the parties or its application to the disputes and supplies made by the respondent to the petitioner post the expiry of the said Agreement.

26. Sub-Section 3 of Section 7 of the Act provides for the Arbitration Agreement to be in writing. Sub-Section 4 of Section 7 of the Act is reproduced hereinbelow:-

“7(4) An arbitration agreement is in writing if it is contained in-
(a) A document signed by the parties;
(b) An exchange of letters, telex, telegrams or other means of telecommunication (including communication through electronic means) which provide a record of the agreement; or
(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.”

27. In the present case, the respondent has not been able to show any exchange of letters or correspondences which provides for the continuation of the Arbitration Agreement for the transactions post the expiry of the Agreement dated 25.01.2008 between the parties.

28. The learned counsel for the respondent has further submitted that the Arbitrator was infact, appointed by the petitioner itself.

29. In my view the same would have no relevance inasmuch as the petitioner has filed an application under Section 16 of the Act before filing its Statement of Defence and even raised a plea of lack of jurisdiction of the Arbitrator in its Statement of Defence filed before the Arbitrator. Section 16(2) of the Act reads as under:-

“16(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.”

30. The petitioner having raised an objection on the jurisdiction of the Arbitrator not later than the submission of its Statement of Defence, shall not be precluded from raising such a plea merely because it had appointed the Arbitrator.

31. In my view, therefore, the Arbitrator lacked jurisdiction to entertain the claims made by the respondent for the transactions between the parties that were made after expiry of the Agreement by efflux of time. The claims being for the period of the contract and beyond, right till 2014, were not arbitrable and the Award is liable to be set aside on this ground alone.

32. In view of the above finding, I have refrained from making any observations on other challenges made by the petitioner to the Arbitral Award.

33. The Arbitral Award dated 11.01.2018 passed by the Sole Arbitrator is set aside leaving it open to the parties to initiate such other legal proceedings as may be open to them in law. If such proceedings are initiated, they shall be entitled to take the benefit of limitation of the pendency of the arbitration proceedings and these proceedings in terms of Section 43(4) of the Act.

34. There shall be no order as to cost.

NAVIN CHAWLA, J

OCTOBER 30, 2018/rv