

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.429 OF 2016

Laguna Resort Private Limited ... Petitioner
Versus
Evergreen Hospitality Private Limited ... Respondent

Mr. Ashutosh Kumbhakoni, Senior Advocate a/w Mr. Shardul Singh, Mr. Mahesh Menon and Mr. Mani Thevar I/b Mahesh Menon & Co. for the Petitioner.

Mr. R.S. Apte, Senior Advocate a/w Mr. Ram Mallar, Ms. Shivangi Vengurlekar and Ms. Shraddha Mastud I/b Mallarr Law Associates LLP for the Respondent.

CORAM : S.C. GUPTE, J.

DATE : 12 MARCH 2019

(Oral Judgement)

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of an agreement termed as “Management Agreement” allowing the Respondent to construct and operate a hotel on the land owned by the Petitioner.

3 The Petitioner herein, who was earlier known as Hasina Resort Pvt. Ltd., was the owner of land situated at Survey No.55, Tungarli, Lonavala, on which it had planned to develop a hotel with about 100 guest rooms

and suites together with other facilities. The predecessor of the Respondent, known as Concept Hospitality Limited, who claimed to have considerable experience and expertise relating to development and operation of hotel/hotel projects and other incidental services, offered to render consultancy and advisory services and as from the date of the opening of the hotel to the public, undertake its entire management and operations in co-ordination with the owner. Accordingly, on 27 September 1999, the parties (Concept Hospitality Limited and Hasina Resorts Private Limited), entered into a management agreement (“first agreement”). The term of the agreement was for a period of five years from the date of commencement of operations, renewable for further period of five years. The date of commencement was the date of formal opening of the hotel to the general public. The hotel opened for general public on 13 March 2006. The five years term of the agreement thus was due to come to an end on 13 March 2011. During this period, the Respondent managed the hotel under the agreement. Just before the end of the term of the first agreement, by a second agreement dated 11 March 2011 (“second agreement”), the Petitioner herein agreed to allow the Respondent (who had come in place of the original operator, Concept Hospitality Limited, through a tripartite deed of assignment) to render consultancy and advisory services and to undertake management and operations of the hotel in co-ordination of the owner. On 8 October 2012, the Respondent herein invoked the arbitration clause of the second agreement and pursuant to an application under Section 11 of the Arbitration and Conciliation Act, 1996 (“Act”), the disputes between the parties were referred to a sole arbitrator. The present arbitration petition arises out of an award passed by the sole arbitrator on 22 December 2015.

On 12 March 2013, the Respondent herein also invoked the arbitration clause under the first agreement. The disputes between the parties covered by the notice of invocation were the subject matter of another arbitration reference, which has since been disposed of by a separate award. We are, however, not concerned with this latter award. The present arbitration petition concerns the award rendered by the learned arbitrator in the first reference, that is to say, the reference out of the arbitration clause in the second agreement.

4 The challenge in the present petition is on the footing that in this reference, which related to the term of operation between 12 March 2011 to 11 March 2016, the learned arbitrator decided disputes covered by the first agreement. The claims referred to the arbitration in this reference, it is not disputed, were claims for management fees and interest, for the period from 1 April 2009 to 6 May 2013, whereas the period covered by the first agreement is between 1 April 2009 and 11 March 2011.

5 Before the learned arbitrator, the Petitioner herein raised an issue of jurisdiction under Section 16 of the Act. It was submitted by the Petitioner that the arbitrator, who was appointed in pursuance of an arbitration clause contained in the second agreement, did not have jurisdiction to decide issues coming under the first agreement. At the hearing of this application, it was agreed between the parties that the issue of jurisdiction could be decided by the arbitrator at the final hearing of the reference. The learned arbitrator, in his impugned award, has come to a conclusion that the second agreement was a renewal agreement; the rights and liabilities incurred under the first agreement devolved on the Respondent

(claimant before the arbitral tribunal). The arbitrator also held that both at the time when the claim was made as also when the arbitration clause under the second agreement was invoked by the Respondent, the Petitioner herein did not object to any claim being made thereunder on the ground that part of it was in respect of the period covered under the first agreement, which was not covered by the arbitration clause contained in the second agreement. The arbitrator held that no objection in that behalf was taken even before this court, when the matter was referred by the court under Section 11 of the Act.

6 Neither of these two grounds conveys a possible view of the matter entitling the Respondent to an award from the arbitrator. The question is not whether the second agreement was a renewal of the first agreement. The question is whether the arbitration clause contained in the second agreement covers disputes arising under the first agreement. It is one thing to say that the rights under the first agreement devolve or continue to inhere in the Respondent, but quite another to say that simply for that reason the Respondent can actually enforce such rights and make a claim in respect thereof before an arbitrator appointed under another agreement.

7 Besides, under the first agreement, the parties had an option to go for renewal of the lease, which renewal, however, had to be on its own terms and conditions; such separate terms and conditions were to be agreed upon between the parties. Learned Counsel for the Respondent has produced a chart which shows several dissimilarities or differences between the two agreements. In the premises, the second agreement cannot indeed be termed as an extension of the first agreement. But even if we were to

hold that every term of the second agreement is similar or identical to the original term of the first agreement, that still does not imply that the arbitration clause in the second agreement covers disputes under the first agreement. In that sense, the question posed by the arbitrator relating to his jurisdiction was an irrelevant question, which had no bearing on the controversy before him. Naturally, the wrong question yielded a wrong answer.

8 The other ground, on which the learned arbitrator has held in favour of the Respondent on the question of jurisdiction, namely, want of an objection on its part when the application for reference was made under Section 11 of the Act, is also neither here nor there. Merely, because parties agree to have a dispute referred to an arbitral forum, it cannot be said that the parties have submitted to the jurisdiction of the arbitrator. Despite agreeing to appointment of an arbitrator, it is always open to a party to question the arbitrator's jurisdiction. It is another matter that in a case, where the question of jurisdiction is raised before the court in an application under Section 11 and that question is decided by the court whilst referring the matter to arbitration. In that case, the order of the referring court may be decisive so far as the question of jurisdiction is concerned and it may not be open to any party to agitate that issue before the arbitrator. In the present case, the matter was referred to the learned arbitrator by consent of both parties. What was not in dispute was that the existence of an arbitration agreement as between the parties. There is nothing to suggest that the Petitioner had agreed that the arbitrator would have jurisdiction to decide all disputes forming part of the reference by reason of having agreed to the appointment of the sole arbitrator. At any

rate, at the earliest possible opportunity, the question of jurisdiction had indeed been raised by the Petitioner before the arbitral tribunal under Section 16 of the Act and an order of the arbitrator was invited on such objection.

9 Under Section 4 of the Act, where a party despite knowing that any provision of the Act which the party may derogate from, or any requirement under the arbitration agreement has not been complied with, proceeds with the arbitration without stating his objection in that behalf without undue delay or, if a time limit is provided for stating that objection, within such period of time, he shall be deemed to have waived his right to object. It is doubtful, if a waiver referred to in Section 4 would include within its fold an objection to subject matter jurisdiction. Be that as it may, it is not the case of the Respondent that the Petitioner did not take objection of jurisdiction of the learned arbitrator without undue delay or beyond the period reserved by stating such objection. There is, in the premises, no question of any waiver of the Petitioner's right to object to the arbitrator's jurisdiction within the meaning of Section 4.

10 In the premises, the arbitrator clearly lacked jurisdiction to decide a particular part of the dispute, namely, claim for management fees for the period between 1 April 2009 to 11 March 2011 and the petition, to that extent, must succeed. Accordingly, the arbitration petition is partly allowed, by setting aside the impugned award to the extent it relates to recovery of management fees as also other amounts relatable to the period between 1 April 2009 to 11 March 2011 as well as interest thereon. The

rest of the award is sustained.

(S.C. GUPTE, J.)