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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 22nd November, 2019

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Judgment pronounced on: 4 December, 2019

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FAO(OS) (COMM) 293/2018

M/S SHRIRAM DISTRIBUTION SERVICES PVT LTD

..... Appellant

Through Mr. Ashish Bhagat, Mr. Tanmeet
Singh & Mr. Ritik Malik, Advocates

versus

M/S A N TRADERS PVT LTD

..... Respondent

Through Mr. Ashim Vachher & Mr. Vaibhav
Dabas, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J.

1. The present appeal, filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Act') read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, is directed against the order dated 30.10.2018 passed by a learned Single Judge of this Court in O.M.P. (COMM) 169/2018, by which the learned Single Judge has set aside the arbitral award dated 11.01.2018.
2. Brief facts required to be considered for disposal of this appeal are that an agreement dated 25.01.2008 (hereinafter referred to as the 'said agreement') was executed between Shriram Value Services Pvt. Ltd.

(‘SVS’) and the respondent for supply of the approved food products for the locations set out in Schedule ‘A’ to the said agreement. The said agreement was to be effective for the period between 25.01.2008 to 25.01.2009. The appellant submits that vide e-mail dated 18.12.2009, the respondent had been informed that all rights and obligations under the said contract are now to be discharged by the appellant herein.

3. The appellant is a business process management Company leveraging its domain knowledge in the field of supply chain in the food service industry, primarily in the Quick Service Restaurant segment.
4. In the year 2009, the Foods Division of Shriram Value Services was hived off into the newly formed appellant Company.
5. The respondent company, inter-alia, owned and operated restaurants under the franchisee/brand name of KFC, having their outlets in Delhi and at other locations in North India. Being a franchisee of Yum Brands Inc., the respondent under its agreement with Yum Brands Inc. assigned to the appellant sole distributorship for managing the supply chain. Therefore, the respondent under an obligation to procure all the materials required for running the KFC restaurants from the appellant, entered into the said agreement with SVS.
6. By the third quarter of the financial year 2013-2014, the balance amounts due to the appellant were totalling Rs.12,00,00,000/- and were unpaid. Subsequently, the appellant again approached the respondent for clearing of the dues, against which the respondent issued 24 cheques of Rs. 50,00,000/- each, as an assurance for clearance of the unpaid balance amounts. The respondent however requested the appellant not

to encash the same for the present, keeping in mind the respondent's financial situation.

7. The appellant in the fourth quarter of the financial year 2013-2014, refused to make further supplies to the respondent company until the previous dues amounting to approximately Rs.12,00,00,000/- were cleared. Pursuant to this stand of the appellant Company, one of the Directors of the respondent company agreed to execute a Personal Guarantee for the abovementioned amount, and a Personal Guarantee Agreement dated 21.01.2014 for the same was signed by the parties.
8. Thereafter in February 2014, the appellant received communication from the respondent to present the earlier cheques for payment. However, all 24 cheques on presentation were returned with an endorsement, "payment stopped by drawer". Against the said dishonouring of cheques, separate criminal proceedings have been initiated against the respondent by the appellant.
9. Dishonouring of the said cheques also led to the appellant herein filing O.M.P. 647/2014 before this Court, under Section 9 of the Act, wherein this Court vide order dated 30.05.2014 restrained the respondent herein from creating any third party rights in respect of certain immovable properties.
10. The appellant vide notice dated 03.07.2014, invoked the Arbitration Clause, in the said agreement dated 25.1.2008, requesting the respondent to appoint an Arbitrator to adjudicate the dispute with respect to the outstanding dues from the respondent. The respondent in reply to said notice, while appointing an Arbitrator in the matter, raised

the objection that the said agreement stood expired by efflux of time. Further, the respondent herein, even during the course of the Arbitral proceedings, moved an application under Section 16 of the Act for dismissal of the arbitration proceedings.

11. The appellant raised a claim of Rs.16,29,05,341/- before the Arbitral Tribunal, which comprised of the following claims: -
 - a. Rs.12,86,85,209/- as the amount due for goods supplied till the date of 30.09.2014;
 - b. Rs.2,79,70,132 in lieu of Sales Tax 'C' Forms not issued by the respondent for the goods and raw materials supplied to them up till the month of March;
 - c. Rs.12,50,000/- on account of Arbitrator's fee and;
 - d. Rs.50,00,000/- on account of compensation for harassment and mental agony caused to the appellant.
12. The respondent raised objections to the claims of the appellant on the grounds that, firstly, the agreement stood expired by efflux of time and secondly, that the agreement only related to the locations mentioned in Schedule 'A' to the agreement, and thus the claims made for additional locations would not be maintainable before the Arbitrator.
13. The Arbitrator vide Award dated 11.01.2018 rejected the objections/defence of the respondent, and allowed the claims of the appellant.
14. Thereafter, the respondent herein filed a petition under Section 34 of the Act against the Award dated 11.01.2018, being O.M.P. (COMM) 169/2018. The learned Single Judge vide impugned order dated 30.10.2018 set aside the Arbitral Award, leaving it open for the parties

to seek any other remedies as may be available to them under the law, and held as under:

“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 a 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.

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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.”

15. Learned counsel for the appellant submits that the learned Single Judge exceeded his jurisdiction in going beyond the Award, to declare that the claims of the appellant herein were not covered by the Arbitration Clause in the said agreement. Learned counsel further contends that the Single Judge has erred in bifurcating the business relationship between the parties into the period of the said agreement i.e. 25.01.2008 to 25.01.2009 and the ‘post agreement arrangement’. It is also contended that even after the expiry of the said agreement by efflux of time, the parties continued their business relations and conducted regular transactions on the same business model as was agreed to in the said agreement.

16. Learned counsel for the appellant contends that despite the large outstanding sums owed to the appellant by the respondent, and the subsequent representations by the appellant to clear the same, the respondent continued to place regular orders with the appellant in the same terms as that of the said agreement with the addition of other locations which were orally agreed to between the parties.
17. It is further contended by the learned counsel for the appellant that despite the said agreement having expired by efflux of time on 24.01.2009, the transactions between the parties continued to be governed by the terms of the agreement till 2014 on account of various correspondences, more particularly the email dated 18.12.2009; issuance of C-Forms by the respondent against the goods supplied to them; and conveyance of Personal Guarantee by Mr. Ashok Sharma, a Director of the respondent company, which amounted to written amendments to the said agreement. Learned counsel also submits that the email dated 18.12.2009 sent by SVS Private Limited to the respondent informing it of hiving of the business from SVS Pvt. Ltd. to SDS/appellant and the subsequent change in responsibilities under the said agreement was not replied to by the respondent, showing their tacit consent and acceptance with regard to extension of the terms of the said agreement. Reliance is placed on the judgement in the case of ***Bharat Petroleum Corporation Limited v. Great Eastern Shipping Company Ltd.*** AIR 2008 SC 357, (paras 19 and 20).
18. Learned counsel contends that since the parties never terminated the said agreement until 2014, as a corollary the Arbitration Clause would govern all disputes arising until 2014. Learned counsel relies on a

judgment of this court in the case of *Shine Travels & Cargo Pvt. Ltd. v. Mitsui Prime Advanced Composite India Ltd.*, (2016) 232 DLT 499, in support of this contention.

19. Learned counsel for the appellant further relies on Clause 12.4 of the said agreement to submit that the words ‘arrangement’ and ‘agreement’ have been intentionally used interchangeably in the covenants and the cross examination of respondent’s witness Mr. Rakesh Aggarwal, mentioned at page 34 of the paper book, referring to an arrangement between the parties must be seen as an acknowledgment of extension of the terms of the said agreement. His testimony may further be seen as an assertion of the fact that no communication was made on part of the respondent for termination of the agreement. The said Clause 12.4 of the said agreement is reproduced hereunder:

“Supersedes prior agreements or arrangements

This Agreement supersedes any prior agreement between the Parties whether written or oral and any such prior agreements or arrangements are cancelled as at the date of execution of this Agreement but without prejudice to any rights which already accrued to either of the Parties”

20. Learned counsel for the appellant submits that, even assuming that the said agreement expired by efflux of time, the Arbitration Clause/Agreement would continue to subsist independently, regardless of the expiry of the said agreement. Learned counsel further submits that the parties continued to transact business in terms of the said Agreement, and consequently the Arbitration Clause/Agreement survived the expiry of the said agreement and would govern any dispute arising out of these transactions. Therefore, in the present case the

Arbitration Clause would continue to govern the post expiry transactions. Reliance is placed on the judgement in the case of ***Reva Electric Car Company Private Limited v. Green Mobil***, AIR 2012 SC 739, which inter alia relies on ***Everest Holding Limited v. Shyam Kumar Shrivastava***, (2008) 16 SCC 774.

21. Per contra, learned counsel for the respondent contends that there is no infirmity or illegality in the order passed by the learned Single Judge, and the same is based on settled principles of law which would not require any interference by this Court in an appeal under Section 37 of the Act.
22. It is further contended by the learned counsel for the respondent that there does not exist any evidence to show that the parties were *ad idem* with regard to the extension of the Arbitration Clause. Furthermore, learned counsel submits that it is clear from the terms of the said agreement that any amendments to the said agreement were to be necessarily made in writing.
23. We have heard the learned counsels for the parties and have carefully examined the Arbitral Award, the order dated 30.10.2018 passed by the Single Judge as well as the terms of the agreement and the rival contentions of the learned counsels appearing in the matter.
24. The two questions which arise for our consideration are (i) Whether there exists a valid Arbitration Clause between the parties, governing the disputes arising between them, post the expiry of the said agreement in the year 2009; and (ii) Whether the Single Judge exceeded his jurisdiction in holding that the Arbitrator lacked jurisdiction to

adjudicate over the disputes, arising between the parties, in the ‘post agreement arrangement’ phase.

25. As regards the first question, learned counsel for the appellant has labored hard to contend that the agreement dated 25.01.2008 despite having a term of one year, subsisted till the year 2014 and had not expired due to efflux of time for the reason that the respondent continued to carry on business transactions with the appellant as per the terms of the said agreement by placing orders for supplies. In our view, the said contention is without any merit. As per Clause 7.1 of the said agreement the parties were at a liberty to extend the term of the agreement, but the same was to be done in writing. Moreover, Clause 12.8 of the said agreement provides that the modification, amendment or rescission to the said agreement must also be done using a written instrument signed by the authorized persons of the both parties. Therefore, the contention of the appellant that the addition of locations for supplying the material was made under the terms of the said agreement is ill-founded for the reason that the additional locations were originally not a part of the said agreement and for addition of the new locations for the supplies, a modification or amendment had to be made to the said agreement, in writing. However, in the present case, admittedly, the new locations were not added by any agreement in writing. Thus, in the present case, though there was exchange of correspondences with respect to the transactions of the business, post the expiry of agreement dated 25.01.2008 but this cannot be regarded as extension of the agreement. Clause 7.2 and Clause 12.8 are reproduced hereunder: -

“1. SCOPE OF THE AGREEMENT

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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. MISCELLANEOUS PROVISIONS

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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.”

26. Learned counsel for the appellant also contended that even if the said agreement expired, the Arbitration Clause, being independent of the main agreement, would survive the termination of the main agreement. In response to the said contention, the Single Judge while relying on Clause 11.2 of the said agreement, has rightly held that the Arbitration Clause would only govern disputes arising in connection with and in relation to the terms of the agreement for the year 2008 – 2009. The relevant paras 13 and 14 are reproduced hereunder:

“13.....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.”

27. In the light of the above discussion, we find no infirmity in the order passed by the Single Judge in setting aside of the arbitral award, as without the existence of a valid arbitration agreement, no dispute can be referred to the arbitrator, and thus the award passed would be without jurisdiction.
28. Law pertaining to the narrow scope of judicial intervention in an appeal under Section 37 of the Act has been crystallised by a Division Bench of this Court in the judgement rendered in the case of ***Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited***, FAO(OS) 227/2017 wherein it has been held as under:

“41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law

settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse. The impugned judgement dated 11th April, 2017 of the ld. Single Judge cannot be said to suffer from any such infirmity."

29. In view of the law laid down in the abovementioned judgement, and applying the same to the facts of the present case, we find the arbitral award to be without jurisdiction. There is no infirmity in the judgement impugned before us.
30. Accordingly, the appeal is hereby dismissed.

G.S.SISTANI, J.

JYOTI SINGH, J.

DECEMBER 4, 2019//