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

Reserved on: 12.01.2021
% Pronounced on: 25.01.2021

\+ CS(COMM) 377/2020

KNOWLEDGE PODIUM SYSTEMS PVT. LTD..... Plaintiff
Through Mr.Shyam Kapadia, Mr.Vikram B.Trivedi, Mr.S.R.Trilokchandani, Ms.Priya Diwadkar and Mr.Kartik Nagarkatti, Ads.

Versus

S M PROFESSIONAL SERVICES PVT. LTD..... Defendant
Through Mr Saurav Agrawal, Mr Madhav Misra, Mr Harshavardhan Singh Rathore, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.8471/2020

1. This application is filed under Section 8 of the Arbitration and Conciliation Act, 1996 read with Order 7 Rule 11 CPC for rejection of the plaint and for referring the parties to arbitration.

2. The present suit is filed by the plaintiff for recovery of Rs.2,58,24,648/- being refund of the available interest-free refundable security deposit together with interest. A decree of mandatory injunction is also sought to handover the movables of the plaintiff which, it is stated, have been illegally detained by the defendant. Alternative relief of Rs.91,05,539/- by way of damages or compensation is also sought.

3. Some of the relevant facts are that vide a Lease Deed dated 21.02.2017, the defendant leased to the plaintiff the office premises on the First Floor and Second Floor at 21, IT Park, Sahastradha Road, Dehradun, Uttarakhand admeasuring 39,614 sq.ft. super built up area with 22 car parking slots in the building for nine years from 01.01.2017. Simultaneously, a Maintenance Agreement was also executed between the parties which was co-terminus with the Lease Deed for payment of fit out and maintenance charges for the said premises. As per the lease deed, there was a lock-in period from 01.01.2017 to 31.12.2022. The plaintiff deposited with the defendant, an interest free refundable deposit of Rs.1,90,14,720/- being 12 months rental under the Lease Deed, Rs.1,04,58,096/- being 12 months monthly fit out charges and Rs.57,04,416/- being annual maintenance charges respectively under the Maintenance Agreement.

4. It is the case of the plaintiff that a Fresh Agreement was arrived at between the parties in respect of use and occupation of the said premises and maintenance thereof with effect from April 2018. It is stated that the terms and conditions of the Fresh Agreement were captured and agreed upon in emails dated 26.09.2018 and 15.10.2018 exchanged between the parties. Hence, it is the case of the plaintiff that the Lease Deed and the Maintenance Agreement stood substituted/novated on account of the said Fresh Agreement.

5. It is stated that later it became commercially unviable for the plaintiff to retain the rented premises. It is stated that the plaintiff initiated negotiations with the defendant for reduction of rentals and maintenance with effect from April, 2019. However, it is stated that the defendant did not budge. On 17.01.2020, it is stated, the defendant illegally disconnected the

electricity connection of the rented premises as means to coerce the plaintiff to make payments. It is stated that before the plaintiff could formally terminate the Fresh Agreement and remove its movables, assets, furniture, etc, lying in the rented premises and hand over vacant physical possession of the premises to the defendant, one of the employees of the plaintiff who was present at the rented premises at that time acting in concert with the defendant handed over the keys of the rented premises to the defendant without seeking authorization of the plaintiff.

6. On 03.02.2020, the plaintiff sent a legal notice to the defendant whereby it terminated the Fresh Agreement for the reasons stated therein and also requested defendant No. 1 to adjust a sum of Rs. 61,02,584/- from the available interest-free refundable security deposit of Rs. 3,19,27,232/- and to refund the remaining interest-free refundable security deposit of Rs.2,58,24,648/-. The legal notice also sought grant of access to the authorised representative of the plaintiff to remove the movables and the server. Hence, the present suit.

7. In the present application, the defendant/applicant has taken the stand that the plaintiff has failed to place on record the fact that the plaintiff was on 10.08.2020 served with an advance copy of the petition filed under Section 11 of the Arbitration and Conciliation Act which has since been registered as Arbitration Petition No. 360/2020. The said arbitration petition is said to be pending.

8. Essentially, the case of the defendant is that the registered Lease Deed dated 21.02.2017 and the Maintenance Agreement had a lock-in period of six years and was valid up to 31.12.2022. It is the case of the defendant that in terms of the Lease Deed dated 21.02.2017 and the Maintenance

Agreement of the same date, the plaintiff is obliged to pay the outstanding rents and maintenance charges for the lock-in period i.e. upto 31.12.2022.

9. It is further pleaded in the present application that the parties to the present *lis* have already chosen their forum for the resolution of disputes i.e. arbitration and as such, the present suit is not maintainable. It is pleaded that both the Lease Agreement dated 21.02.2017 and the Maintenance Agreement of the same date contain arbitration clauses and hence, the present application under Section 8 of the Arbitration and Conciliation Act.

10. I have heard learned counsel for the parties.

11. Learned counsel for the plaintiff has pointed out that the plaintiff and the defendant at the time of execution of the Lease Deed and the Maintenance Agreement were family held companies. The family has exited from the plaintiff company sometimes in September 2018 and a new management has taken over charge of the plaintiff company. It is strongly urged that there is a novation of Agreement and the original Lease Deed and the Maintenance Agreement dated 21.02.2017 stand superseded and novated in view of the terms and conditions settled upon in the emails dated 26.09.2018 and 15.10.2018. In the novated contract, there is no arbitration agreement and hence, the present application is misplaced.

12. Learned counsel for the plaintiff has also relied upon the judgments of the Supreme Court in the case of ***Young Achievers vs. IMS Learning Resources Pvt. Ltd., (2013) 10 SCC 535***, ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Anr., (2003) 5 SCC 531*** and B***ooz Allen and Hamilton INC. vs. SBI Home Finance Ltd. & Ors., (2011) 5 SCC 532.***

13. Learned counsel for the defendant has argued to the contrary. He states that only the agreed rental amount was agreed to be reduced in terms

of the emails that were exchanged and all the other terms and conditions of the Lease Deed dated 21.02.2017 and the Maintenance Agreement remained unchanged. It is stated that the parties remain bound by the arbitration agreement. Learned counsel for the defendant has relied upon the latest judgment of the Supreme Court in the case of ***Vidya Drolia & Ors. vs. Durga Trading Corporation, 2020 SCC OnLine 1018*** to plead that in these circumstances, this court need not dwell deep into the arguments of the plaintiff and the matter be referred to arbitration. It is also stated that in the petition filed under Section 11 of the Arbitration Act for appointment of an arbitrator, the plaintiff keeps taking adjournments on the ground that the present application is pending in the present suit. Hence, he stresses that this court may decide the present application and appoint a learned Arbitrator to adjudicate the dispute between the parties

14. I may first look at the arbitration clause in the Lease Deed dated 21.02.2017. Clause 9.1 of the Lease Deed reads as follows:-

> "9.1 The Parties shall attempt in the first instance to resolve any dispute or difference arising in any way or manner out of, in relation to or in connection with this Lease Deed by conciliation. If such a dispute is not resolved through conciliation within thirty (30) days after commencement of discussions, the same shall be decided by arbitration by a sole arbitrator appointed by the mutual consent of the Parties. The decision of the sole arbitrator shall be final and binding on the parties. The arbitration proceeding shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. Arbitration proceedings shall be conducted in English Language. The place of arbitration shall be New Delhi."

15. A similar arbitration clause, namely, Clause 10.1 also exists in the Maintenance agreement dated 21.02.2017.

16. It undoubtedly follows that in the original lease deed and the maintenance agreement, the parties have agreed to settle their disputes through arbitration.

17. I may now look at the defence of the plaintiff to the present application. It has strongly been urged that on account of the subsequent novation of the contract through exchange of the emails dated 26.09.2018 and 15.10.2018, a new contract has come into being superseding the Lease Deed dated 21.02.2017 and the Maintenance Agreement of the same date.

18. I may now look at the correspondence exchanged between the parties on the basis of which it is pleaded by the plaintiff that there was a novation of contract. On 26.09.2018, the plaintiff had written an e-mail to the defendant which reads as follows:-

> "Anil ji and Rajendra ji,
>
> Refer the discussion last evening again where is was agreed that SM will reduce billing from April 18 , in view of the financial constraints that KP is going thru and the slow down of its growth plans as it was originally envisaged . All other points were agreed and it was asked that the fitout charges should also reduce. Hence I am documenting the Understaning for confirmation so that billing could be closed in September and GST compliance be done.
>
> SM shall Bill only upto 60% of the 2nd floor area of 22172 sq ft. @ 42 rent, fixed fit out amortisation shall be billed For the above area @15 rupees per sq ft on 8 year basis CAM shall be billed @ rs 8 per sq ft
>
> For cafeteria rs 20 per sq ft would be billed for the cafeteria services of the cafeteria space. Electricity will be paid directly at actuals
>
> Since KP is not using campus parking, no billing shall be billed .

SM shall not separate / divide the 2nd floor at the moment but shall try and continue its search to find a suitable tenant to make up for the loss of rent and KP shall have no objections to it. However, before bringing in any new client on 2nd floor KP shall have a first right of refusal to expand .

KP shall not be using the FF other than the cafeteria on shared basis and SM shall try and find out other tenements to cover up on loss of rent.

Regards Mukul"

19. On 15.10.2018, the defendant replied to the said e-mail stating as follows:-

"Hi Mukul,

Following are the agreed terms for your convenience. We will get an addendum created as per the below....

- KP will use the second floor up to 60% of the area. SM shall bill KP for the usage of the second floor as per the following...
  - Rent for 13,300 sq. ft. (60% of the 2nd floor area of 22172 sq. ft.) @ Rs. 42 /sq. ft.
  - Fit out amortization on 8 year basis for 13,300 sq. ft. (above area) @ Rs. 15 /sq. ft.
  - CAM for 13,300 sq. ft. (above area) @ Rs. 8 /sq. ft.

- KP will use only the cafeteria on the first floor on the shared basis. SM shall bill @ Rs. 20 / sq. ft for the area of cafeteria as per actual floor area.
- KP will not use the campus parking. SM shall not bill KP for the parking.
- KP will pay for electricity as per consumption. SM will ensure that a dedicated meter is installed for measure the electricity usage of KP.

We still need to discuss and finalize the following two items. Can we have a quick chat tomorrow whenever convenient?

- Lock in period
- Deposit

Thanks and regards,
Rajendra"

20. It is admitted by the parties that based on these two documents, there was an adjustment of rents. The question is can it be said that on account of the exchange of these communications, the parties have rescinded the old agreement being the registered Lease Deed dated 21.02.2017 and the Maintenance Agreement of the same date and completely novated the contract.

21. As noted above, the submission of the plaintiff is that on account of these two communications exchanged between the parties, the old contract got novated and was substituted by a new contract which does not have an arbitration agreement.

22. In this context, reference may be had to Section 62 of the Contract Act which defines novation as follows:-

> "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.

23. In this context, reference may be had to the judgment of the Supreme Court in ***Lata Construction and Ors. vs. Dr.Rameshchandra Ramnikalal Shah and Anr., (2000) 1 SCC 586*** where the Supreme Court held as follows:-

> "9. We may, at this stage, refer to the provisions of Section 62 of the Indian Contract Act which provides as under:
>
> > "62. 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."
>
> This provision contains the principle of "novation" of contract.
>
> 10. One of the essential requirements of "novation", as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract."

24. Hence, a novation takes place only when there is a complete substitution of a new contract in place of the old. Do the facts of the present case warrant a conclusion that there was a novation of contract?

25. I may first see the scope of Section 8 of the Arbitration Act. Section 8 of the Arbitration Act reads as follows:-

> "8. Power to refer parties to arbitration where there is an arbitration agreement.—
>
> (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming

through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

26. I may look at the latest judgment of the Supreme Court on Section 8 of the Arbitration Act in the case of ***Vidya Drolia and Ors. vs. Durga Trading Corporation, (supra).*** The Supreme court held as follows:-

"2**.** A deeper consideration of the order of reference reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:

(i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and

(ii) the conundrum - “who decides” - whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.

The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Concilliation Act, 1996 (for short, the ‘Arbitration Act’).

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138**.** Discussion under the heading ‘Who decides Arbitrability?’ can be crystallized as under:

(a) Ratio of the decision in *Patel Engineering Ltd.* on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

(b) Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

(c) The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of nonarbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

(d) Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and *ex facie* certain that the

arbitration agreement is nonexistent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

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223**.** At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not be referred to an arbitration by a court of law unless it finds that *prima facie* there is no valid arbitration agreement. The negative language used in the Section is required to be taken into consideration, while analyzing the Section. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above. Therefore, the rule for the Court is 'when in doubt, do refer'.

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229**.** Before we part, the conclusions reached, with respect to question no. 1, are:

a. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.

c. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a *prima facie* (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

d. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above, i.e., 'when in doubt, do refer'.

e. The scope of the Court to examine the *prima facie* validity of an arbitration agreement includes only:

a. Whether the arbitration agreement was in writing? or

b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?

c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

d. On rare occasions, whether the subject-matter of dispute is arbitrable?"

27. Hence for rejection of a Section 8 application, a party has to make out a prima facie case of non-existence of valid arbitration agreement, by summarily portraying a strong case. But when in doubt, the court has to refer the matter to arbitration. The court should refer the matter if the validity of the arbitration agreement cannot be determined on a prima facie basis.

28. In the present case, in my opinion, as the facts noted above show, it cannot be prima facie said that there is a completely new contract and that the old registered Lease Deed dated 21.02.2017 read with the Maintenance Agreement of the same date have been novated and substituted by a completely new contract. The e-mail dated 15.10.2018 sent by the defendant merely agrees to reduction of rent. It does not specifically state that all the terms and conditions of the Lease Deed and the Maintenance Agreement stand superseded or novated. The issue would require deeper consideration and is best left to the arbitral tribunal to adjudicate upon.

29. I, accordingly, allow the present application.

30. I appoint Mr. Justice G. S. Sistani (Retd.) (Mobile No.+91-9871300034) as the Sole Arbitrator to adjudicate the dispute between the parties. The plaintiff will be at liberty to raise the plea about non-existence of an arbitration agreement before the Learned Arbitrator. It is left to the discretion of the Learned Arbitrator to fix his fees. The learned Arbitrator shall comply with mandatory stipulations.

31. The application stands disposed of.

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In view of the above, the suit and pending applications, if any, also stand disposed of.

JAYANT NATH, J

JANUARY 25, 2021
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