IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 30.05.2023

\+ **FAO (COMM) 69/2023**

UNIQUE DECOR (INDIA) PVT.LTD. ..... Appellant

versus

SYNCHRONIZED SUPPLY SYSTEMSLTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Nishant Nigam & Mr. Aman Abbi, Advs.

For the Respondent : Mr. Sushil Shukla, Adv.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. Unique Décor (India) Pvt. Ltd. – a company incorporated under the Companies Act, 1956 – has filed the present appeal under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 24.02.2023 (hereafter '**the impugned order**') passed by the learned Commercial Court, whereby the appellant's application under Section 8 of the A&C Act, in a suit for recovery filed by the respondent, Synchronised Supply Systems Ltd., bearing no. C.S. (Comm) 150/2020, was rejected.

Factual Context

2. The appellant / defendant is the owner of a property/warehouse situated at SP 1-31, RIICO Industrial Area, Neemrana, Rajasthan (hereafter '**the Demised Premises**'). The parties entered into an agreement for the purpose of leasing out the property to the respondent and, in this regard, executed a rent agreement dated 01.07.2017 (hereafter '**the Rent Agreement**').

3. The Rent Agreement provided that the lease period for the Demised Premises would be for the period of one year, from 01.08.2017 to 31.07.2018, subject to further renewal on a yearly basis. In terms of the Rent Agreement, the respondent / plaintiff also agreed to deposit a sum of ₹28,64,043/- (Rupees Twenty-eight Lac Sixty-four Thousand Forty-three Only), being three months' rent as interest free refundable security.

4. The respondent continued to be in possession of the Demised Premises after the expiry of the period of one year from 01.08.2017. Admittedly, the respondent continued to pay rent as agreed and vacated the Demised Premises on 20.03.2019.

5. After vacating the Demised Premises, the respondent called upon the appellant to refund the security deposit. The appellant declined to refund the security deposit alleging that the Demised Premises have been damaged and repair of the flooring of the Demised Premises itself would cost twice the amount of the security deposit.

6. In the aforesaid background, the respondent instituted the suit [C.S.(COMM) No.150/2020], seeking a decree for recovery of ₹33,11,775/- (Rupees Thirty-three Lacs Eleven Thousand Seven Hundred Seventy-five Only) being the amount of security deposit of ₹28,64,043/- plus pre-suit interest at the rate of 18% per annum on the said amount quantified at ₹4,47,732/-. The respondent also sought interest at the rate of 18% per annum from the date of institution of the suit.

7. The appellant filed an application under Section 8 of the A&C Act praying that the parties be referred to arbitration in terms of the arbitration agreement as embodied in Clause 21 of the Rent Agreement.

Impugned Order

8. The learned Commercial Court rejected the application filed by the appellant to refer the parties to arbitration. The learned Commercial Court held that since the Rent Agreement had come to an end on 31.07.2018, and the parties chose not to enter into a fresh written agreement or renew the prior agreement, the appellant could not rely on the arbitration clause of the expired Rent Agreement. It held that there was no arbitration agreement subsisting between the parties and therefore, they could not be referred to arbitration. Additionally, the learned Commercial Court imposed costs of ₹10,000 on the appellant, to be paid to the respondent.

Reasons & Conclusion

9. At the outset, it is noted that there is no dispute that the parties had entered into the Rent Agreement and that, the same included an arbitration clause. Clause 21 of the Rent Agreement reads as under:

> **"21. ARBITRATION**
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> All disputes and differences between the parties hereto regarding the interpretation scope or effect of any of the terms and condition herein contained or in any way touching or concerning those presents shall be referred to a sole Arbitrator appointed jointly by TENANT and LANDLORD and the same shall be deemed to be a reference within the meaning of the arbitration and conciliation Act 1996 or any other statutory reenactment or modification thereto for the time being in force. The venue of such Arbitration shall be New Delhi. The courts at New Delhi shall have jurisdiction to entertain and try all actions suits and proceedings arising out of these presents."

10. It is apparent from the above that the arbitration agreement between the parties is couched in wide terms and any dispute relating to the interpretation, scope and effect of any of the terms and condition of the Rent Agreement or in any way "*touching or concerning*" the Rent Agreement is required to be referred to arbitration.

11. The question whether the parties are required to be referred to arbitration is required to be determined in reference to the disputes between the parties.

12. Article 3 of the Rent Agreement provided for the 'rent period' and Article 5 of the Rent Agreement provided for the 'security deposit'. Articles 3 and 5 of the Rent Agreement are set out below:

> **"3. RENT PERIOD**
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> The RENT to use the DEMISED PREMISES shall be for a period of 1 year from 1st August, 2017 to 31st July, 2018 subject to further renewal on a yearly basis as the RENT period as mentioned in Clause 6 hereunder, hereinafter referred as RENT PERIOD. The LANDLORD assures that they will not take /initiate any action directly on indirectly to vacate TENANT provided the TENANT continues to pay the rent reserved as per the RENT to be executed. However, in case if the rent is unpaid for a period of two successive months the LANDLORD shall have the right to enter into the premises and get it vacated from the TENANT. However, the LANDLORD shall first provide one month notice to the TENANT to make the payment of the unpaid rent and if inspite of the notice the TENANT doesn't make the payment of the unpaid rent, the LANDLORD can enter the premises and get it vacated from the TENANT.
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> *** *** ***
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> **5. SECURITY DEPOSIT**
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> The TENANT shall pay the LANDLORD an amount of Rs.28,64,043/- (Rupees Twenty Eight Lakhs Sixty Four Thousand and Forty Three Only) or three month's rent as interest Free Refundable Security Deposit and the LANDLORD acknowledges the receipt of the security deposit to be paid by the TENANT.

> The LANDLORD shall not demand any additional deposit by virtue of Increase in rent during the currency of this agreement of twelve months. The interest free Refundable security deposit of Rs.28,64,043/- (Rupees Twenty Eight Lakhs Sixty Four Thousand and Forty Three Only) shall be refunded by the LANDLORD in the event of expiry/termination of this agreement without any demur, failing to which shall attract consequences as has been enumerated in the termination clause."

13. The Rent Agreement does not include any clause numbered as 6.

14. The respondent had relied on the terms of the Rent Agreement and averred that it had deposited the security amount in terms of the Rent Agreement and that the appellant was obliged to refund the same upon vacation and handing over of the peaceful possession of the Demised Premises. The respondent also disputed the allegation that it had caused any damage to the Demised Premises; it claimed that the Demised Premises were not fit for occupation at the commencement of the rent period. The relevant extract of paragraph 10 of the plaint reads as under:

> "10. From the beginning itself, the Plaintiff noticed that said warehouse / property was not fit for occupation and various changes / repairs were suggested to the Defendant. The Defendant even agreed to repair and fix the same before handing over of possession. It is relevant to mention here that flooring in said property was not proper and broken, the same was even pointed out to the Defendant and Defendant even got it repaired locally….."

15. The respondent further averred that the Rent Agreement provided for nine months lock-in period. Therefore, after expiry of nine months, the respondent had informed the appellant that it would vacate the Demised Premises after a period of three months, that is, upon expiry of the Rent Agreement, on 31.07.2018. According to the respondent, the Rent Agreement expired on 31.07.2018 by efflux of time but "*both parties agreed to continue the same without signing and registering the Rent Agreement*" and as such the Rent Agreement between the parties continued on a month-to-month basis.

16. The respondent claimed that the amount of security deposit under the Rent Agreement is also treated and reaffirmed as security deposit under a month-to-month tenancy and the appellant had agreed that it would be refunded without any delay.

17. According to the appellant, the Rent Agreement was extended up to March, 2019. The appellant claims that there are written communications on record, whereby the respondent had agreed to extend the Rent Agreement. The appellant referred to an e-mail dated 23.04.2019 sent by the respondent, *inter alia*, stating as under:

> "This is in reference to the **rent agreement dated 5th July 2017 ended in the month of March 2019** and we had handover the warehouse along with the keys on dated 20th March 2019."

18. The appellant claims that by an agreement discernible from the written communications, the Rent Agreement, as existing, was

extended. The appellant also claims that the respondent had relied upon the terms of the Rent Agreement for seeking refund of the security deposit. The appellant referred to the e-mail dated 26.04.2019, sent by the respondent, the relevant contents of which are extracted below:

> "Please refer your mail below. As requested earlier and **as per the terms of the agreement signed** we would request you to refund the deposit as we have already vacated the premises in Neemrana on the 20th of March 2019…..Any future agreement will be a fresh agreement and on fresh terms."

19. The contentions advanced by the appellant are not insubstantial. Plainly, if the parties had, by written communications or by an agreement which is apparent from the written communications, extended the Rent Agreement, the arbitration clause which is a part of the Rent Agreement would continue to be operative. There is a distinction in a case where an agreement comes to an end and the parties enter into a fresh agreement, which supersedes the earlier one. Clearly, in such circumstances, the arbitration clause contained in the earlier agreement would not survive in respect of the disputes that arise in connection with a later agreement. In case of novation of an agreement, where a subsequent agreement replaces an earlier agreement, arbitration clause in the earlier agreement may not survive, if the agreement novated does not contain any such clause. However, these principles may have no application where the parties, by a written agreement or by an exchange of communications, which provide a record of the agreement, extend the agreement that contains an arbitration clause. In

such circumstances, the clause relating to the agreement to refer the disputes to an arbitration would continue to be operative. The arbitration agreement would cover the extended period if the communications bear out such an agreement.

20. Having stated the above, it is necessary to state that the question whether the disputes are arbitrable are required to be determined at the first instance by the arbitral tribunal. At this stage of Section 8 of the A&C Act, the Court is concerned as to the existence of the arbitration agreement.

21. The Supreme Court in ***National Insurance Company Limited v. Boghara Polyfab Private Limited.: (2009) 1 SCC 267*** had classified the issues that could be considered by a Court in an application filed under Section 11(6) of the A&C Act into three categories, namely: (i) issues that are required to be decided by the Chief Justice or his designate; (ii) issues that may be decided by the Chief Justice or his designate or may be left to the arbitral tribunal to decide; and, (iii) issues that are required to be left to the arbitral tribunal to decide. The relevant extract of the judgment which sets out the different issues that can be classified under the three categories is set out below:

> "22.1 The issues (first category) which the Chief Justice/his designate will have to decide are:
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> (a) Whether the party making the application has approached the appropriate High Court.
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> (b) Whether there is an arbitration agreement and whether the party who has applied Under Section 11 of the Act, is a party to such an agreement.

22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b)Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration Clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

22. In cases where there is substantial dispute whether the original contract containing the arbitration clause has been novated or superseded, it would be apposite to refer the parties to an arbitration. It is only in cases where it is, *ex facie*, apparent that the arbitration agreement does not exist, that the court may decline an application for appointment of an arbitrator under Section 11(6) of the A&C Act or for referring the parties to an arbitration under Section 8 of the A&C Act.

23. In ***Vidya Drolia & Ors. v. Durga Trading Corporation: (2021) 2 SCC 1***, the Supreme Court had, in the context of arbitrability in landlord-tenant disputes, discussed the scope of Section 8 of the A&C Act and, *inter alia*, held as under:

"154. Discussion under the heading **"Who Decides Arbitrability?"** can be crystallised as under:

154.1**.** Ratio of the decision in *Patel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] 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 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. 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 non-arbitrability 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.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, 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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238. At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not (*sic*) 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 analysing 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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244. Before we part, the conclusions reached, with respect to Question 1, are:

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

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. 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.

244.4. 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".

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or

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

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

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

24. Undisputedly, the considerations as relevant for an application under Section 11 of the A&C Act are equally applicable for an application under Section 8 of the A&C Act.

25. In a recent decision in ***Meenakshi Solar Power Pvt. Ltd. v. Abhyudaya Green Economic Zones Pvt. Ltd. & Ors.: 2022 SCC OnLine SC 1616***, the Supreme Court considered an appeal filed against an order of the High Court dismissing an application filed under Section 11(6) of the A&C Act, on the ground that the agreement containing the arbitration clause was novated. The Supreme Court referred to the earlier decisions in the cases of ***National Insurance Company Limited. v. Boghara Polyfab Private Limited.*** (*supra*), ***Vidya Drolia & Ors. v. Durga Trading Corporation*** (*supra*) and ***Damodar Valley Corporation v. K.K. Kar: (1974) 1 SCC 141*** and concluded as under:

"20. In view of the aforesaid discussion, we find that High Court was not right in dismissing the petition under Section

> 11(6) of the Act of 1996 filed by the appellant herein by giving a finding on novation of the Share Purchase Agreement between the parties as the said aspect would have a bearing on the merits of the controversy between the parties. Therefore, it must be left to the Arbitrator to decide on the said issue also. Hence, the impugned judgment and order passed by the High Court has to be set-aside."

26. The learned counsel appearing for the respondent has referred to the decision in the case of ***Union of India v. Kishorilal Gupta & Bros.: (1960) 1 SCR 493***. In that case, the Supreme Court held that an arbitration clause would perish with the original contract if it is substituted by a new contract. The Supreme Court explained that if the original contract is extinguished by a substituted one, the arbitration clause in the original contract perishes with it. There is no cavil with this proposition. However, the question arises whether the original contract has been substituted. Merely extending the term of the contract may not amount to substituting it with a new contract. Even in cases where the agreement is substituted by a written communication, it would be relevant to examine whether the arbitration clause is incorporated by reference under the new contract.

27. The learned counsel for the respondent also referred to the decisions of this Court in ***Vardhaman Spinning & General Mills Ltd. v. Veena Kumari Wadhawan: 1997 SCC OnLine Del 694; National Textile Corpn. Ltd. & Anr. v. Ashval Vaderaa: 2008 SCC OnLine Del 1201 ; Ravinder Nath & Anr. v. Best Entertaining (P) Ltd.: 2011 SCC OnLine Del 2637; Varinder Pal Singh & Anr. v. BPTP Ltd.: 2018***

SCC OnLine Del 9377 and ***A.N. Traders Private Limited. v. Shriram Distribution Services Private Limited.: 2018 SCC OnLine Del 12416.***

28. In ***Vardhaman Spinning & General Mills Ltd. v. Veena Kumari Wadhawan*** (*supra*), the lease deed between the parties was for a period of four years from 01.11.1980. It expired on 31.10.1984. However, the appellant continued to remain in the suit premises. The respondent continued to pay the rent even after the lease had expired without any extension or renewal, thereof. The Court also observed that the respondent continued to pay the rent even after receipt of the notice dated 05.10.1994. It is in the given facts that the Court concluded that the agreement dated 01.11.1980 had been determined by efflux of time and that the rents had been paid and accepted pursuant to correspondences, thereafter. It was not the case of the appellant that there was any mutual extension of the lease deed.

29. In ***National Textile Corpn. Ltd. & Anr. v. Ashval Vaderaa*** (*supra*), the Court had held that the lease deed which contains the arbitration clause could not be referred to, as the lease was for a period of three years and the same was unregistered and the Court could not look into an unregistered document, which purports to create lease of one year or more.

30. In ***Varinder Pal Singh & Anr. v. BPTP Ltd.*** (*supra*), this Court concluded that the written deed (Conveyance Deed) executed pursuant to the Flat Buyers Agreement had superseded the Flat Buyers Agreement. It was held that since all terms and conditions relating to

the sale of the property, as agreed between the parties, were embodied in the Conveyance Deed, recourse to the arbitration agreement under the Flat Buyers Agreement was unavailable. This was a case where the agreement containing the arbitration clause (Flat Buyers Agreement) was undisputedly, novated.

31. In ***A.N. Traders Private Limited. v. Shriram Distribution Services Private Limited*** (*supra*), the agreement between the parties related to supply of goods in certain locations. The terms of the said agreement was for a period of one year and the parties had agreed that the same could be extended in writing. However, the said agreement was not extended. It is in that view that the Court had held that the disputes relating to the supplies not made under the agreement, but after the same, had come to an end and would not be covered under the arbitration clause.

32. We are of the view that the said decisions are not applicable in the given facts. It is important to note that in the present case the respondent is seeking recovery of security deposit made in terms of the Rent Agreement. Clearly, the dispute whether the said security deposit can be withheld or forfeited by the appellant / defendant is a matter that arises in connection with the Rent Agreement.

33. In view of the above, the impugned order is set aside. The parties are referred to arbitration. The proceedings in the suit filed by the respondent – C.S. (Comm) 150/2020 captioned ***Synchronized Supply Systems Ltd. v. Unique Décor (India) Pvt. Ltd.*** – are terminated.

34. The appeal is allowed in the aforesaid terms. The parties are left to bear their own costs.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MAY 30, 2023
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