

(2013) 04 P&H CK 0097

In the Punjab And Haryana At Chandigarh

Case No : Arbitration Case No. 44 of 2011 (O and M)

Reckitt Benckiser (India) Limited

APPELLANT

Vs

Landmark Builders Private Limited and Others

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 17, 8

Citation : (2013) 04 P&H CK 0097

Hon'ble Judges : A.K. Sikri, C.J

Bench : Single Bench

Advocate : Ashok Aggarwal, with Mr. Deepak Suri, for the Appellant; Sanjeev Sharma with Mr. Jaivir S. Chandail, for the Respondent

Judgement

A.K. Sikri, C.J.—Reckitt Benckiser (India) Limited (hereinafter referred to as the petitioner) is in the business of manufacturing of household products in India including fast moving consumer goods and household products such as Dettol, Disprin, Cherry Blossom, Harpic, Lizol, Robin Blue, Mortein Mosquito Repellants etc. The turn over of the petitioner as on 31.03.2010 is Rs. 1,880/- Crores and is a subsidiary of Reckitt Benckiser Plc. a leading transactional having a turn over of GBP 8.5 billion (equivalent to approx. Rs. 59,000/- Crores) for the year 2010. The petitioner had taken the premises on rent which are situated on the 2nd floor of the building known as Enkay Centre located at Nikunj Commercial Complex, Udyog Vihar, Phase-V, Gurgaon (Haryana). These premises approximately 30,000/- sq. feet. on the 2nd floor of the said premises alongwith exclusive reserved basement space, reserved parking space, reserved terrace space, reserved lower basement space for UPS, were taken on rent vide lease-deed dated 14.02.2000 from the respondents (nine in number) (hereafter referred to as the "lessors"). The monthly rent was fixed at Rs. 11,41,332.50 paise and the petitioner had planned to set up its corporate office there. Respondent No. 2 Enkay Stock Invest Pvt. Ltd. who is one of the lessors (hereafter referred to as "Enkay") also undertook to provide Air Conditioned lift, power back-up etc. in the leased premises. The agreement between the

petitioner and Enkay was executed in this behalf on 14.02.2000 known as "Initial Maintenance Agreement". This agreement was to run concurrently with the petitioner and the petitioner was to be in occupation of the leased premises in terms of the initial lease-deed. One more agreement was executed on the same date known as "Security Deposit Agreement" between the petitioner and the respondents. The initial period of lease deed was 4 years commencing from 01.04.2004 and ending with 31.03.2004. It could be renewed for two terms of four years each at the sole option of the petitioner. On the expiry of first term, the petitioner exercised its right of renewal. After certain hiccups the parties entered into fresh lease deed dated 04.05.2006 (which was registered on 06.10.2006) as per which lease deeds were renewed after enhancing rent by 15% over the previous rent. On 04.05.2006, fresh "Maintenance Agreement" with Enkay and another "Security Deposit Agreement" with the respondents was also executed. In terms of the Security Deposit Agreement, a sum of Rs. 1,02,71,992.50 paise was to remain as the security deposit which was deposited while entering into the first lease agreement. Differential of Rs. 15,40,798.50 was also deposited on signing this agreement. This Security Deposit was to be refunded simultaneously with handing over the physical possession of the lease premises upon termination/determination of the lease. Clause 2 of the Security Deposit Agreement further provides that the petitioner would be entitled to hold on to the possession leased premises without being liable to pay rent till refund of security deposit was made by the respondents. Additionally, the petitioner was also to receive interest @ 20% per annum compounded quarterly on the security deposit liable to be refunded under this agreement. Before the second lease agreement was to expire on 31.03.2008, the petitioner served a notice dated 29.11.2007 indicating its intent to renew the term of the lease for a further period of 4 years commencing from 01.04.2008 to 31.03.2012 on the same terms and conditions as contained in the lease deed dated 04.05.2006 but subject to enhancement of rent by 15% over the last paid rent. The respondents, however, did not come forward to execute the lease. On the contrary, vide letter dated 16.11.2007, respondents No. 2, 8 and 9 asserted that lease deeds stood terminated and the petitioner was called to vacate the premises. At that stage, a dispute had arisen between the parties about the payment of service tax which was imposed by the Government of India on the services rendered for management and maintenance of immovable property and towards renting of immovable property by the Finance Act, 2005 and Finance Act of 2007 respectively. As per the petitioner, the payment of this tax was the sole responsibility of the respondents whereas the respondents claimed that the obligation to pay the aforesaid tax lays on the petitioner. A dispute thus arose on this count. As the agreements contain arbitration clause. The petitioner invoked the arbitration proceedings and in terms of the arbitration agreement an Arbitral Tribunal comprising of Justice A.V. Mohta (Retd.), Justice K. Ramamoorthy (Retd.) and Mr. A.K. Panda, (Senior Advocate), was constituted. The said dispute which started in the year 2008 is still pending before the Arbitral Tribunal. The Arbitral Tribunal had passed interim orders dated 28.02.2008 granting status-quo

in relation to the possession of the leased premises. The petitioner thus remained in possession of the premises even after 01.04.2008, though no fresh agreement was executed in view of the aforesaid disputes. The petitioner, however, gave enhanced security deposit i.e. differential amount of rent calculated after providing for 15% enhancement of rent paid prior to 31.03.2008 and this additional sum of Rs. 1,71,68, 418/- was encashed by the respondents.

2. When the petitioner was continuing in possession of the premises in the aforesaid manner, vide notice dated 21.01.2010 the petitioner terminated the tenancy on the plea that it had decided to shift to another premises as the petitioner needed larger space. The petitioner also called upon the lessor(s) to refund the security deposit amount. However, thereafter vide letters dated 04.06.2010 and 17.08.2010, the petitioner deferred the effective date of vacation of the leased premises to 30.09.2010 as the new premises to which the petitioner intended to shift were not ready. According to the petitioner, it ultimately vacated these premises on 30.09.2010 and the physical possession of the leased premises was offered to the respondents on that date. However, the respondents delayed in taking the possession of the premises and ultimately accepted the physical possession on 04.10.2010. However, the security deposit was not refunded. According to the petitioner, non-refund of the security deposit has given rise to disputes between the parties. Clause 17 of the lease-deed contains arbitration clause:-

CLAUSE 17. ARBITRATION:-

In the event of there being any dispute or difference between the parties in relation to or arising out of the Lease at any time, then such dispute or difference shall be referred to arbitration of a Sole Arbitrator if the parties agree upon, or to the arbitration of three arbitrators of which one shall be appointed by the lessors and one shall be appointed by the lessee, and the two arbitrators shall appoint the third arbitrators who shall be a retired Judge. Such arbitration shall be in accordance with the Arbitration & Conciliation Act, 1996 or any modification or re-enactment thereof. The venue of arbitration shall be at New Delhi

3. As per the Security Deposit Agreement forms an integral part of the Lease Deed dated 04.05.2006 (per clause 13). Clause 13 of the Security Deposit Agreement is reproduced herein for ease of reference:-

13. The Security Deposit Agreement shall form an integral part of the Lease Deed dated 4th May, 2006.

4. On this basis, the petitioner invoked the arbitration clause vide letter dated 16.12.2010. It was replied to by the petitioner vide letter dated 05.01.2011 opposing the appointment of Arbitrator and stating that the disputes, if any, under the Security Deposit Agreement ought to be referred to the same Arbitral Tribunal which was seized of the previous disputes. That is not acceptable to the petitioner as the petitioner wants another Arbitral Tribunal for the disputes which have arisen now. Vide communication dated 16.12.2010, the petitioner has

proposed the name of Hon"ble Mr. Justice R.C. Lahoti, a retired Chief Justice of India as the Arbitrator which has not been accepted by the respondents. Since the parties are not ad-idem on the constitution of the Arbitral Tribunal, the present petition is preferred by the petitioner with the following prayers:-

a. Appoint Hon"ble Mr. Justice R.C. Lahoti (Retd. Chief Justice of India) residing at B-56, Sector 14, Noida, Gautam Buddha Nagar, as the sole Arbitrator to adjudicate the disputes arising under the Security Deposit Agreement dated 04.05.2006 between the petitioner and the respondents herein.

b. In the alternative appoint any other Sole Arbitrator to adjudicate upon and decide the aforesaid disputes between the petitioner and the respondent arising under the Security Deposit Agreement."

5. The respondents have filed the reply contesting the prayers made in this petition. Primary objection of the respondents is that the issue raised in the petition is already pending before the Arbitral Tribunal consisting of Hon"ble Mr. Justice A.V. Mohta (Retd.), Justice K. Ramamoorthy (Retd.) and Mr. A.K. Panda, Senior Advocate.

6. In this behalf, it is pointed out that the claim of refund of security amount is the subject matter of arbitration proceedings No. 10 of 2008 and 11 of 2008 before the said Arbitral Tribunal. Arguments in these applications have been heard at length by the said Tribunal and are at the advance stage of disposal. It is thus contended that the petitioner cannot now allege that the claim made now is not the subject matter of the applications which are pending adjudication before the Arbitral Tribunal. More so, when the parties have themselves approached the said Arbitral Tribunal and the petitioner itself is contending that the Security Deposit Agreement is an integral part of the lease agreement. It is thus pleaded that the application be dismissed.

7. I have considered the submissions of the learned Senior Counsel(s) for the parties.

8. It cannot be disputed that when the present Arbitral Tribunal was constituted, invoking the arbitration clause, the dispute which has arisen at that time was made subject matter of adjudication before the Tribunal. This happened in the year 2008-09. Refund of security deposit was not the issue at that time. Obviously, the dispute on account of refund of security deposit arose after the vacation of leased premises on 03/04.10.2010. The petitioner invoked the arbitration clause in the agreement vide letter dated 16.12.2010. Normally speaking, therefore, such a dispute which has arisen subsequently cannot be the subject matter of claims before the Arbitral Tribunal already constituted to go into the issues raised earlier. At that stage, this dispute was not pending before the Tribunal appointed earlier under the Lease and Maintenance Agreement. It is trite that the constitution of the Arbitral Tribunal has to be in accordance with the arbitration agreement. When now disputes arise, even under the same agreement, the parties may proceed to appoint the Arbitrator in accordance with

the arbitration agreement all over again irrespective of the pendency of the earlier disputes which may be pending before the Arbitrators appointed in respect of those earlier disputes. When I read Clause 17 of the lease deed, the modus prescribed is that in the event of disputes arising between the parties, these are to be referred to the arbitration of a sole Arbitrator, if parties agreed upon and if there is no agreement for sole arbitrator, then each party is to nominate one Arbitrator and the two Arbitrators so nominated are called upon to appoint the third Arbitrator who is to be a retired Judge. Thus, when the dispute about non-refund of security arose, it was open for the parties to seek constitution of the Arbitral Tribunal in accordance with Clause 17 and it is this stage which the petitioner took by invoking the arbitration clause and suggesting the name of an Arbitrator.

9. In *Dolphin Drilling Ltd. Vs. Oil and Natural Gas Corporation Ltd.*, the question before the Court was as to whether the arbitration clause once invoked IF CANNOT BE INVOKED again for future disputes arising out of the same contract. The Supreme Court clarified that "all disputes" only means all disputes that were in existence when arbitration clause was invoked and therefore, it does not restrict reference to arbitration of disputes that might arise in future.

10. Had the things rested at that, may be the petitioner was right in his submission that for fresh disputes it is his prerogative to invoke the arbitration clause again in terms of Clause 17. However, according to the respondents, the matter was raised before the same Arbitral Tribunal which is already seized of the disputes. If the respondents are correct in their submissions, the position would be altogether different. Therefore, at this juncture, it needs to be examined as to whether the Arbitral Tribunal already constituted is seized of the dispute pertaining to the refund of security deposit as well.

11. In this behalf, it is argued by the learned Senior Counsel for the respondents that admittedly security deposit agreement is an integral part of the lease deed. All the three agreements executed between the parties were valid uptill 31.03.2008. The dispute which had arisen under the Lease and Maintenance Agreement was referred to the Arbitral Tribunal presided over by Hon"ble Mr. Justice A.V. Mohta. However, the petitioner decided to pre-maturely vacate the premises on 25.07.2010 and asked the respondents to take over the possession and refund the security deposit. Since the refund of security deposit as well as taking over the possession of the premises became the subject matter of dispute, the petitioner sent a notice dated 16.12.2010 seeking reference. However, the matter was raised before the Arbitral Tribunal which has passed several orders u/s 17 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") on the very issue of refund of security deposit. Both the parties have argued this aspect before the present Arbitral Tribunal which are at the advanced stage of proceedings and therefore, the petitioner cannot now seek fresh reference for constitution of new Arbitral Tribunal. Reference is made to the judgment of the Supreme Court in *State of Goa Vs. Praveen Enterprises*, and

that of Delhi High Court in case Mahan Traders Vs. Shri Amar Singh, . In State of Goa (supra), the Court had appointed the Arbitrator and referred the claim of the claimant u/s 11 of the Act. The opposite party wanted to file the counter claim before the Arbitral Tribunal which was objected to on the ground that they were not referred to the Arbitrator. The Supreme Court took the view that the counter claims by the respondents could be raised and filed before the Arbitrator, even when they were not raised in the reply to the application u/s 11 of the Act. While holding so, the Supreme Court explained the meaning of expression "reference to arbitration" occurring in Section 11 of the Act. Relevant discussion in this behalf is contained in paras No. 9 to 12 of the said judgment which is reproduced hereinbelow:-

WHAT IS "REFERENCE TO ARBITRATION"

9. "REFERENCE TO ARBITRATION" describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate.

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the "reference" contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the "reference" contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of arbitrator/s as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

10. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/

appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

11. Though an arbitration agreement generally provides for settlement of future disputes by reference to arbitration, there can be "ad-hoc" arbitrations relating to existing disputes. In such cases, there is No. prior arbitration agreement to refer future disputes to arbitration. After a dispute arises between the parties, they enter into an arbitration agreement to refer that specific dispute to arbitration. In such an arbitration, the arbitrator cannot enlarge the scope of arbitration by permitting either the claimant to modify or add to the claim or the Respondent to make a counter claim. The arbitrator can only decide the dispute referred to him, unless the parties again agree to refer the additional disputes/ counter claims to arbitration and authorize the arbitrator to decide them.

12. "Reference to arbitration" can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While Section 11 contemplates appointment of arbitrator [vide Sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the arbitration agreement [vide Sub-section (6)], Section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application u/s 11 of the Act for appointment of an arbitrator. The judicial authority "referring the parties to arbitration" u/s 8 of the Act, has No. power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator.

12. As is clear from para No. 10 above, there can be reference to arbitration in respect of all disputes between the parties or all the disputes regarding a contract or in respect of specific enumerated disputes. Therefore, it will depend upon the terms of the disputes as to whether the parties intended to refer all the disputes or some specific disputes. Likewise, para No. 11 clarifies that there can be some "AD HOC" arbitration relating to existing disputes and as and when dispute arises, the parties may enter into arbitration agreement to refer that specific disputes to arbitration. In such an arbitration, the Arbitrator cannot enlarge the scope of arbitration by permitting either the claimant to modify or add to the claim or the respondent to make a counter claim. However, that situation may not apply in the present case inasmuch as here there was a preexisting arbitration proceeding for settlement of future disputes by reference

of arbitration. Likewise, in para No. 12 of the aforesaid judgment cited supra, the Supreme Court clarifies the legal position to the effect that "Reference to arbitration" can be in respect of reference of disputes between the parties to arbitration or referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration whereas Section 11 of the Act contemplates appointment of an Arbitrator. Then there are significant observations in para No. 23 of the judgment (supra) which reads as under:-

Section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator/s. It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed u/s 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures u/s 11(6) of the Act to ensure compliance by the parties with such procedure. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the Arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator u/s 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application u/s 11 and gets an arbitrator appointed, the arbitrator can decide only the disputes raised by the Applicant u/s 11 of the Act and not the counter claims of the Respondent.

13. After taking into consideration the ratio of all the aforesaid cases, no doubt, the position can be summed up by stating that when the arbitration clause is invoked and the disputes are referred, it would mean those disputes which were existing at the time of invoking the arbitration clause and would not include future disputes. Whenever such future disputes arise, the arbitration clause can be invoked again. At the same time, when the Arbitral Tribunal is already constituted and is seized of the disputes which were referred, whenever future disputes arise, the parties are at liberty to go before the same Tribunal for such disputes as well.

14. Keeping in view this perspective, when I examine the facts of the present case, it is found that even the present claim which is the subject matter of the instant petition has been raised by the parties before the Arbitral Tribunal and has been argued at length. The proceedings before the Arbitral Tribunal show that not only the pleadings in this behalf have been filed but the parties have made submissions on this aspect before the Arbitral Tribunal from time to time. Further more, the issue of refund of security is inextricably linked with the main issue which was earlier referred to the Arbitral Tribunal. Infact, the order sheet

dated 27.11.2012 of the Arbitral Tribunal reflects that oral arguments are complete. The parties were asked to file their detailed submissions along with relevant documents on or before 02.01.2013 when the next date of hearing was fixed. It is at the stage of passing of the Award now. In such circumstances, no useful purpose would be served by appointing another Arbitral Tribunal and referring the issue pertaining to refund of security deposit thereby leading to multiplicity of proceedings which may even delay the completion of arbitral proceedings. Mr. Ashok Aggarwal, learned Senior Counsel for the petitioner had pointed out that the proceedings before the Arbitral Tribunal are getting prolonged. To that extent, the grievance may be justified. Needless to emphasize that the Arbitral Tribunal adjudication is not to be delayed and attempts should be made to conclude such proceedings at the earliest possible. This is necessary to keep the confidence and faith in the arbitration system alive.

Therefore, this Court would impress upon the Arbitral Tribunal to conclude the Arbitral proceedings and give its award at the earliest. Subject to this observation, the present application is disposed of by holding that the existing Arbitral Tribunal is competent to go into the dispute raised in the present petition and therefore, there is no need to constitute a fresh Arbitral Tribunal for this purpose.