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

+ **ARB.P. 202/2016**

SHINE TRAVELS & CARGO PVT. LTD Petitioner

Through: Mr Manish Vashisht with Mr A. K. Pandey, Mr Sameer Vashisht and Mr Vikas Kumar Sharma, Advocates.

versus

MITISUI PRIME ADVANCED COMPOSITE
INDIA LTD

..... Respondent

Through: Mr Siddharth Bawa, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **27.07.2016**

VIBHU BAKHRU, J (ORAL)

1. The petitioner has filed the present application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act'), *inter alia*, praying that a Sole Arbitrator be appointed to adjudicate the disputes and claims as raised by the petitioner in terms of the Agreement dated 09.08.2011.

2. Mr Manish Vashisht, the learned counsel appearing for the petitioner referred to a copy of the Agreement dated 09.08.2011 and also drew the attention of this Court to Clause 14 of the said Agreement (Arbitration Clause). He also referred to the legal notice dated 12.08.2015 whereby the petitioner had called upon the respondent to pay to the petitioner a sum of ₹ 18,26,79,927/- along with interest and further cost of ₹1,00,000/- failing which the disputes would be referred to the Sole Arbitrator in terms of the

Agreement. He also referred to a letter dated 29.09.2015 sent by the respondent in response to the aforesaid notice and drew the attention of the Court to sub para (g) of para 2 of the said letter whereby respondent had expressly admitted that it had agreed to continue to avail the services at the rates specified in the Second Service Agreement as an interim measure even though the term of the said Service Agreement had expired.

3. Mr Manish Vashisht also referred to the decision of the Supreme Court in *Bharat Petroleum Corporation Ltd. v. The Great Eastern Shipping Co. Ltd.: 2008 1 SCC 503* in support of his contention that where the services under an agreement are extended even after expiry of the term of the agreement between the parties, the dispute arising therefrom are subject to resolution in terms of the arbitration clause contained in the agreement.

4. Mr Siddharth Bawa, the learned counsel for the respondent countered the arguments advanced on behalf of the petitioner and submitted that since it was an admitted case that the term of the Agreement in question had expired, on 31.08.2014, the Arbitration Clause contained therein had also perished. He submitted that availing of the services on similar terms and conditions would not extend the validity of the arbitration agreement which expires with the term of the written agreement. He further referred to the decisions of this Court in *R. C. Aggarwal v. Delhi Tourism & Transportation Development Corporation Ltd.: 2003 (66) DRJ 92* - and *Interocean Shippng (I) Pvt. Ltd. v. Ashish Dhull : 133 (2006) DLT 77* - in support of his contention that the disputes arising after expiry of the term of an agreement would not be arbitrable. He further referred to Section 7 of the

Act and submitted that certain parameters are required to be met for a valid arbitration agreement and one of the parameters is that the arbitration agreement should be in writing. He contended that the arbitration clause in an agreement would perish with that agreement; and unless a further agreement is executed in writing, there could be no arbitration agreement between the parties.

5. I have heard the learned counsel for the parties.

6. At the outset, it is necessary to refer to Clause 14 of the Agreement between the parties which reads as under:-

“14. **ARBITRATION**

If any question, issue, difference or dispute arises between the Parties as to the interpretation of this Agreement or as to the duties or liabilities of either Party hereunder or as to any matter or thing arising out of or under this Agreement, the same shall be referred to and settled by a sole Arbitrator to be appointed by both parties. The Arbitration proceedings shall be conducted at New Delhi, India in accordance with the Indian Laws (both Substantive and Procedural) under the Arbitration and Conciliation Act, 1996. The award of such arbitration shall be final and binding upon both parties hereto, and may be entered in any court having jurisdiction over the party against whom the award is rendered or the assets thereof.”

7. It is not disputed that the parties had agreed that the disputes as to the interpretation of the Agreement or as to the duties or liabilities of either party or any matter arising out of or under the agreement in question, would be referred to and settled by the Sole Arbitrator to be appointed by the

parties. It is also an admitted case that the respondent continued to avail all the services under the said Agreement even beyond its term. Infact, the respondent expressly stated in its letter dated 29.09.2015 that "*till such time a fresh Agreement is entered into with mutually agreed rates and period of Agreement, our Client agreed to continue to avail services at the rates specified in the Second Service Agreement, as an interim measure. Your Client agreed to the interim measure and continued to provide services at the rates stated in the Second Service Agreement.*"

8. It is thus an admitted case that the contractual relationship between the parties continued even after 31.08.2014, that is, even after the term of the Agreement had expired. It is also not disputed that the services were availed at the same rates as specified in the Agreement.

9. By virtue of the Arbitration and Conciliation (Amendment) Act, 2015, sub section (6A) has been introduced in Section 11 of the Act, which reads as under:-

“6A. The Supreme Court or, as the case may be the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

10. Since it is not disputed that the contractual relationship between the parties continued and there existed an Arbitration Agreement, the contention that the Arbitration Clause had perished cannot be accepted. The question whether the disputes raised in the present petition are arbitrable under the said Clause is a matter for consideration by the Arbitral Tribunal and the

parties would be at liberty to agitate the said issue before the Arbitral Tribunal.

11. There can be no dispute that an arbitration agreement is required to be in writing; the same is an essential condition under Section 7 of the Act. In the present case, there is no dispute that the Arbitration Agreement is in writing. The only question is whether the Arbitration Agreement has perished even though the parties continued to implement the Agreement, *albeit*, without any written extension.

12. In the present case, the parties had entered into the Agreement in question on 09.08.2011 and the duration of the Agreement was agreed to be till 31.08.2014. In terms of the Agreement, the respondent had appointed the petitioner to provide the following services:-

- " (a) Warehouse Receiving & Issuing
- (b) Warehouse Operation
- (c) Raw Material preparation for production
- (d) Delivery to customer"

13. The Agreement further provided for the price payable to the Petitioner for its services. The Agreement further provided that the petitioner would raise invoices and charges relating to the services and the same would be paid by the respondent. Admittedly, the aforesaid contractual relationship did not end on 31.08.2014 even though the duration of the Agreement was till 31.08.2014. It is an admitted case that the parties continued the relationship thereafter; the petitioner continued to provide the services and the respondent continued to avail the same at the rates as agreed to in terms of the Agreement. According to Mr Bawa, although the Agreement could

continue for all other purposes as there was no bar for the parties to contract orally but the same would not apply to the arbitration clause which necessarily has to be in writing.

14. In my view, the aforesaid contention cannot be accepted. There is no requirement that extension of an arbitration clause, which is in writing, must also be reaffirmed in writing even though the parties continue to extend the principal agreement orally. Section 7 mandates that the arbitration agreement must be in writing and this condition is satisfied if the principal agreement containing an arbitration clause is in writing.

15. In *Bharat Petroleum Corporation Ltd v. The Great Eastern Shipping Co. Ltd*, (Supra) the Supreme Court considered a case where a 'Time Charter Party' was entered into between Bharat Petroleum Corporation Ltd. (BPCL) and Great Eastern Shipping Company (GESC). The said agreement dated 06.05.1997 was entered into for letting on hire vessels for a period of two years from 22.09.1996 to 30.06.1997 and from 1.7.1997 to 30.06.1998. Before the charter party came to an end, the same was extended for a further period of one month with an option of two further extensions for a period of 15 days each. Thus, undisputedly, the charter party was extended till 31.08.1998. However, it was not in dispute that the vessels in question continued to be let out to BPCL even subsequent to 31.08.1998. Certain disputes arose between the parties and GESC issued a notice calling upon BPCL to pay a sum of ₹4,39,47,517/- as charter hire charges in respect of vessel *Jag Praja* for the period from 01.09.1998 to 31.08.1999 within a period of 15 days or treat the said notice as a notice for arbitration. There was some correspondence exchanged between the parties

and an Arbitral Tribunal was constituted. Claims and counter claims was also filed before the Arbitral Tribunal. One of the issues framed by the Tribunal was whether it had jurisdiction to adjudicate upon the disputes between the claimant (GESG) and respondent (BPCL) for the period September, 1998 to August, 1999 in respect of vessel *Jag Praja*. The Tribunal also struck an issue as to whether the charter party dated 6.5.1997 had come to an end by efflux of time on 30.08.1999.

16. The Arbitral Tribunal came to the conclusion that they had no jurisdiction to decide the reference as the arbitration clause invoked was contained in the agreement dated 6.5.1997 which was valid only up to 31.08.1998 and the disputes between the parties related to the period subsequent to 31.08.1998. The said decision was challenged by GESG before the Bombay High Court and the award made by the Arbitral Tribunal was set aside by the learned Single Judge. By an order dated 01.03.2005, the learned Single Judge, *inter alia*, held that the Arbitral Tribunal had the jurisdiction to adjudicate the disputes between the parties as the vessel continued to be hired by BPCL for the period subsequent to 31.08.1998. The aforesaid order passed by the Bombay High Court was impugned before the Supreme Court. The Supreme Court, *inter alia*, considered the question, “*whether on the expiry of the extended period of charter hire on 31-08-1998, charter party dated 6-5-1997 came to an end and the arbitration agreement between the parties perished with it?*” The Court examined the conduct of the parties and held that the principle of *sub silentio* was clearly attracted in the case as even though no agreement was signed between the parties and there was no exchange of correspondence after some time, nonetheless

BPCL continued to use the vessel on hire under the time charter dated 6.5.1997. The Supreme Court held that the conduct of the parties and in particular BPCL in respect of certain correspondences indicated that except for the charter rate there was no other dispute between the parties. The Supreme Court finally concluded that the arbitration clause of the said charter party continued to operate since the vessel continued to remain with BPCL.

17. In the present case, there is no dispute that the contractual agreement between the parties was extended; the petitioner continued to render the services and the respondent admittedly continued to accept the said services on the terms under the Agreement in question. In view of this admitted position, the respondent's contention that there was no arbitration agreement cannot be accepted.

18. The decisions of this Court relied upon by Mr Bawa are not applicable to the facts of the present; principally for the reason that in those cases there was a serious dispute as to whether the contract (which contained the arbitration clause) had been extended by the parties. In *Interocean Shipping (I) Pvt. Ltd. v Ashish Dhull (Supra)*, this Court found that the contract between the parties was entered into for a period of three years. The contract in question was an employment contract which had come to an end and thereafter the employees were employed on varying terms and conditions. The Court also accepted that under the employment contract in question, the employees were treated as trainees and such period could not be extended. Thus the parties in that case had serious disputes as to whether the employees had rendered services on the terms and conditions under the

contract in question after the said contract came to an end. Similarly, in *R.C. Aggarwal v Delhi Tourism & Transportation Development Corporation Ltd.* (*supra*), there was a serious dispute whether the agreement could itself be extended. In that case, the respondent had requested the plaintiff to enter into or renew the agreement and had further enclosed a draft agreement along with its communication. In response thereto, the plaintiff had unequivocally stated that he was no more interested in entering into or renewing the agreement on the same terms and conditions. The facts in the present case are materially different from the facts in those cases as there is no dispute between the parties that the petitioner continued to render services and the respondent continued to avail them in terms of the agreement between them even after the said Agreement had expired.

19. Accordingly, the petition is allowed.

20. Mr Rakesh Siddhartha (Retired ADJ) (Mobile 9910384657) is proposed to be appointed as the Sole Arbitrator. However, in terms of Section 11(8) of the Act it would be necessary to obtain a disclosure in writing from the prospective Arbitrator as required under Section 12(1) of the Act. Accordingly, the Registry is directed to communicate the copy of this order to Mr Rakesh Siddhartha with a request to furnish the disclosure required under Section 12(1) of the Act within a period of two weeks from today.

21. List on 07.09.2016.

VIBHU BAKHRU, J

JULY 27, 2016

MK/pkv