

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

Reserved on: 4th September, 2013
% *Date of Decision: 9th September, 2013*

+ CO.A(SB) 19/2013 & Co.Appls.691/2013, 692/2013 & 848/2013

M/S AGYA HOLDINGS PVT. LTD. Appellant

Through: Mr. Anil Agarwal, Advocate.

versus

M/S JONES LANG LASALLE PROPERTY

CONSULTANTS (INDIA) P. LTD. & ORS. Respondents

Through: Mr. Navin Kumar with Ms. Rupal
Bhatia and Ms. Rashmeet Kaur,
Advocates for R-1.

Mr. Abhishek Kumar, Advocate
for R-2.

CORAM:

MR. JUSTICE R.V. EASWAR

JUDGMENT

R.V. EASWAR, J.:

This is an appeal filed under section 10F of the Companies Act, 1956 against the order passed by the Company Law Board on 14.3.2013 in CA No.260/2012 in Co.Pet.63(ND)/2008.

2. The appeal has been filed in the following circumstances. The appellant is a company incorporated under the Companies Act. It entered into a joint venture agreement on 28.10.2007 with another

company by name 'Boortmal N.V.', which is a company registered in Antwerp, Belgium for the purpose of setting up a malt manufacturing plant in India. In terms of the joint venture agreement another company by name of Agya Boortmalt Pvt. Ltd. (hereinafter referred to as "Indian company") was incorporated with registered office at Delhi. In this company the appellant as well as the Belgium company had equal shareholding. Pursuant to the setting up of this company, 18.6 acres of lands were acquired in Uttarakhand for putting up the plant, loans were obtained and other steps were taken to make the company functional. It is alleged that sometime in June/July, 2008, the Belgium company and its directors started acting against the interest of the Indian company incorporated in terms of the joint venture agreement leading to disputes between the appellant and the Belgium company. The appellant therefore filed CP 58(ND)/2008 before the Company Law Board on 19.9.2008 under sections 397 and 398 of the Companies Act, complaining against the acts of oppression by the Belgium company. In October, 2008, the Belgium company filed a company petition before the Company Law Board in CP 63(ND)/2008 against the appellant alleging oppression and mismanagement.

3. In the course of the arguments advanced on 31.8.2009 before the CLB during the hearing of the company petition filed by the Belgium company, there was an attempt at settling the issues and both parties agreed before the CLB that the price of the shares of the Indian company may be determined. The CLB accordingly passed an order on 10.9.2009 appointing M/s Ernst and Young for the purpose of determining the share price on the date of filing the company petition. Since the process of determining the fair price of the shares involved the process of valuing the land, the CLB on the same date appointed M/s Jones Lang Lasalle Property Consultants (India) Pvt. Ltd., the first respondent herein, for determining the value of the land as on January, 2008. The question of fees payable to M/s Jones Lang Lasalle Property Consultants (India) Pvt. Ltd. (hereinafter referred to as "JLL") was left to be negotiated between the parties. JLL quoted their professional fees for valuing the land at ₹32 lakhs. The Belgium Company filed an application before the CLB stating that the fees payable to JLL were very high. In the course of the hearing of the application, the appellant herein, apparently in an attempt to cut short the litigation, agreed to bear the entire fees payable to JLL.

4. Thereupon a Consulting Services Agreement (CSA) was entered into between the appellant and the first respondent on 12.4.2010 at New Delhi. Amongst elaborate provisions made for the purpose of valuation of the land, the CSA also contained Clause 17 titled “dispute resolution”, which provided for arbitration in case of any dispute which may arise between the parties.

5. In terms of the CSA, the appellant paid a sum of ₹17,64,800/- to JLL pursuant to the invoice raised by the latter on 27.4.2010. This consisted of 50% of the fees of ₹32 lakhs negotiated, which amounted to ₹16 lakhs and taxes such as service tax, educational cess etc. On 29.4.2010 JLL wrote a letter to the CLB seeking extension of time till 21.5.2010 for completing the assignment of valuation. According to the appellant, between April, 2010 and December, 2010 several e-mails were written by it to JLL requesting them to complete the work properly and also giving information which according to the appellant constituted relevant inputs for the purpose of the valuation.

6. Piqued by the absence of any response from JLL to the e-mails written by it giving what it claims to be relevant information for the purpose of the valuation, the appellant filed an application on 16.5.2012

before the CLB in CA 260/2012. In this application, the appellant stated that the valuers JLL acted in gross violation of the CSA, that the micro and macro research for transactions related to development around the subject land were not done, that under the CSA it was the duty of the appellant to supply relevant information which would constitute the basis of the valuation and that JLL had whimsically chosen not to take into consideration the inputs and details pertaining to the land furnished by the appellant. It was pointed out that the entire purpose of the valuation would stand defeated if the inputs supplied by the appellant were not taken into consideration. On this basis it was contended that JLL had completely failed to carry out its duties and obligations as per the orders passed by the CLB and within the time frame. The applicant accordingly prayed that the CLB may direct JLL to refund the amount of ₹16 lakhs paid by the appellant and appoint some other valuer to carry out the valuation of the land.

7. JLL filed a reply to the aforesaid application and stoutly denied the allegation made by the appellant in the application. It was first submitted that JLL was not a party to the litigation pending before the CLB in the company petition and that it was only appointed for a limited

purpose to carry out the valuation of the land consisting of 18.6 acres in Kashipur, Dist. Udham Singh Nagar, Uttarakhand. Referring to the affidavit filed by the appellant in the application seeking reference of the dispute to arbitration in terms of clause 17 of the CSA, JLL contended that neither the contents of the valuation report nor the payment of provisional fee could be made the subject matter of arbitration within the scope of clause 17 of the CSA. It was submitted that the applicant (appellant herein) was refusing to pay the balance of the fees and also asking for refund of the fees paid on the ground that JLL had submitted an inappropriate valuation report, which cannot be a subject matter of arbitration within the scope of clause 17 of the CSA. It was further pointed out that none of the conditions of section 8 of the Arbitration and Conciliation Act, 1996 was satisfied and it was not open to the applicant to present a plea under section 8 that the question of payment of fees should be referred to arbitration.

8. In the reply, JLL also pointed out that it had sent a letter dated 20.5.2010 to the Company Law Board stating that the report is ready for submission and soliciting formal instructions and the final payment prior to submitting the report, a copy of which was also marked to the counsel

for the appellant. It was thus submitted by JLL that the delay in submitting the report, even though it was ready, to the CLB was only on account of the refusal of the applicant to pay the balance of fees. The e-mails written by the JLL to the counsel for the applicant were also referred to in the reply. On this basis, JLL prayed that the application be dismissed with exemplary costs and a direction be issued to the applicant to pay the balance professional fee of ₹16 lakhs together with interest at 12% per annum from the due date till the actual date of payment.

9. After hearing the rival submissions in CA 260/2012, the CLB passed the impugned order rejecting the application and directed the applicant (appellant herein) to deposit the remaining fee of ₹16 lakhs with the bench officer by a demand draft made out in the name of JLL on or before 21.3.2013, failing which the applicant shall render itself liable for payment of interest at 18% per annum from 13.7.2012 till payment and also for coercive action for recovery of the said amount under orders of the Board. Thus, the application filed by the appellant was dismissed.

10. The reasoning given by the CLB was that clause 17 of the CSA is not attracted since once the appellant agreed to the appointment of JLL and also agreed and undertook before the CLB to bear the fees payable for the work of valuation and also paid the first instalment, it was bound to pay the balance of the fee to JLL on submission of the valuation report as per orders of the CLB. Commenting on the conduct of the appellant (applicant before the CLB), the CLB observed that the application was nothing but a blatant abuse of the process of the Board.

11. It is the aforesaid order of the CLB that is challenged in appeal before this Court.

12. After hearing the rival arguments, I am satisfied that there is absolutely no merit in the appeal. The appellant, as pointed by the CLB, had undertaken and agreed before the CLB that it would bear the entire fees payable to JLL who were appointed by the CLB to carry out the work of valuation of the land. Accordingly, the first instalment of the fee of ₹16 lakhs together with service tax etc. was paid in April, 2010. Thereafter, it kept on communicating with JLL and giving information, which it claims to be relevant information, regarding the valuation of the land. It must be remembered that JLL is the appointee of CLB and is a

professional valuer. It is not bound to respond or communicate with the appellant in respect of each and every information or input given by the latter, even though it may be relevant for the purpose of valuation of the land. As a professional valuer it was not the duty of JLL to keep the appellant informed as to how every input supplied by the latter was considered and factored while arriving at the value of the land. It would have been unprofessional if JLL were to do so. It went about the task in a professional manner and when it found necessary to seek an extension of time, it did so by writing to the CLB seeking extension of time for submission of the final report. Even on 20.5.2010 the appellant was intimated by JLL that the report was ready for submission and it was awaiting the payment of the balance of the fees. This was done by JLL by marking a copy of its letter dated 20.5.2010 addressed to the CLB to the counsel for the appellant. On 14.12.2010 JLL wrote an e-mail to the counsel for the appellant intimating that the report will be submitted directly to the CLB once the full payment of the fees was made. JLL also pointed out that since it was appointed by the CLB, the report would be sent directly to the CLB in confidence and therefore it will not be in a position to share any details pertaining to the report with the

appellant prior to the submission of the same to the CLB. Despite being notified by JLL about the fact that the report was ready for submission and the appellant should therefore remit the balance of the fees agreed upon, the appellant went on making excuses and did not pay balance fees. Merely because the appellant had agreed to bear the entire fees payable to JLL, it gives no right to the appellant to demand that every step in the process of valuation of the land should be made known to it and it should be taken into confidence as to how the valuation is arrived at and what is the value determined. The conduct of the appellant in insisting of being made aware of the process of valuation at every stage leaves much to be desired. I agree with the sentiments expressed by the CLB, with respect, regarding the conduct of the appellant in filing CA 260/2012.

13. The learned counsel for the appellant relied on section 8 of the Arbitration and Conciliation Act and submitted that the CLB ought to have referred the matter to arbitration instead of deciding the matter itself. Section 8(1) is 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 so applies not

later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.”

After the judgment of the Supreme Court in ***Canara Bank Vs. Nuclear Power Corporation of India*** (1995) 84 Company Cases 70, it cannot be disputed that the Company Law Board is a judicial authority. However, the other condition of the sub-section is that the action which was brought before the CLB should have been in a matter which is the subject of an arbitration agreement. This condition is not satisfied in the present case. The main company petition No.63(ND)/2013 was filed by the Belgium Company against the appellant herein, under sections 397 and 398 of the Companies Act alleging oppression and mismanagement. The appellant had also filed a petition under section 397 and 398 of the Companies Act in CP 58(ND)/2008 complaining against acts of oppression and mismanagement by the Belgium company. Thus there were cross-petitions before the CLB containing mutual allegations of oppression and mismanagement. It was in one of those petitions that the CLB, in an attempt to ascertain the fair price of the shares of the Indian company, appointed JLL as the valuer for valuing the land as part of the process of valuing the shares. Thus the matter which is the subject of an arbitration agreement between the appellant and JLL was not the action

which was brought before the CLB. The order passed by the CLB on 10.9.2009 was an order seeking an expert opinion regarding the fair price of the shares of the Indian Company which was to be determined keeping in view of the possibility of resolving the disputes between the parties amicably. Therefore, section 8(1) of the Arbitration and Conciliation Act, 1996 is not attracted to the dispute between the appellant and JLL. Moreover, it is the appellant which approached the CLB with an application in CA 260/2012 seeking refund of the first instalment of the fee of ₹16 paid to JLL and also seeking directions from the CLB appointing another valuer, other than JLL. After approaching the CLB with the application and having lost it, it now contends that the CLB had no jurisdiction to pass the impugned order. Its stand is contradictory.

14. It was further argued on behalf of the appellant that on 18.5.2012 the appellant had sent a communication to JLL requesting for appointment of an arbitrator and that this amounted to commencement of arbitral proceedings under section 21 of the Arbitration and Conciliation Act and therefore from this date the CLB lost jurisdiction to adjudicate upon the matter. I have already discussed how section 8(1)

of the aforesaid Act is not attracted to the dispute between appellant and JLL. Therefore, the CLB was well within its jurisdiction to have decided CA 260/2012.

15. In the view I have taken, namely, that the provisions of section 8(1) of the Arbitration and Conciliation Act, 1996 are not attracted to the dispute between the appellant and JLL I do not think it necessary to consider the other subsidiary arguments advanced on behalf of both the sides.

16. In the result, the impugned order is confirmed and the appeal and all connected applications are dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

SEPTEMBER 09, 2013
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