

IN THE HIGH COURT OF DELHI AT NEW DELHI

**CS (OS) No. 2317 of 2010 & IA Nos. IA No. 2315 of 2010
(u/S. 5 & 8 - Arb. & Conc. Act, 1996), 15271 of 2009, 13400
of 2012 (u/O 39 R 1 & 2 CPC) and IA No. 13043 of 2012**

SARNA INTERNATIONAL PVT. LTD. Plaintiff
Through: Ms. Anusuya Salwan with
Mr. Vikas Sood and Mr. Kunal Kohli,
Advocates.

versus

DLF UNIVERSAL LIMITED & ORS. Defendants
Through: Mr. Rajiv Nayar, Senior
Advocate with Mr. Pravin Badhur,
Ms. Malika Joshi, Mr. Amit
Aggarwal, Mr. Kishan Rawat,
Mr. Prabhat Malhotra and Mr. Rajan
Narain, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
29.11.2013

**IA No. 13043 of 2012 (filed by D-2 u/S 151 CPC r/w S 153 CPC for
amendment of the cause title of the suit)**

1. The above suit was originally filed against Defendant No. 1, DLF Commercial Complexes Limited ('DCCL'), and Defendant No. 2, DLF Universal Limited ('DUL') and two others. DUL in its application stated that by an order dated 30th April 2010 passed by the Court in Company Petition No. 305 of 2009, DCCL merged with DLF Retail Developers Limited ('DRDL') and the merged entity DRDL was subsequently renamed as DUL which has already been impleaded as

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Defendant No. 2. The certificate dated 23rd July 2010 issued by the Registrar of Companies giving effect to the above change has been placed on record.

2. As a result, the present application is allowed and the cause title is permitted to be changed by replacing Defendant Nos. 1 and 2 with Defendant No. 2, i.e., DUL, which shall be renumbered as Defendant No. 1. The changed cause title as proposed in the application is taken on record.

IA No. 2315 of 2010 (u/S. 5 and 8 of the Arbitration and Conciliation Act, 1996)

3. This is an application filed by the Defendant under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 seeking reference of the disputes between the parties to arbitration.

4. The background to this application is that the above suit has been filed by the Plaintiff, Sarna International Private Limited, through its Director Mr. Rabinder Singh Sarna. The Plaintiff had applied to DCCL and was allotted two commercial spaces DTS-626 and DTS-627 DLF Towers, Shivaji Marg, New Delhi. In respect of the property at DTS-626, a Commercial Buyer's Agreement ('CBA') dated 27th June 2008 was executed between the parties. The basic sale price was Rs. 1,25,84,000, parking charges were Rs. 6,00,000, and maintenance security was Rs. 4,84,000. The total consideration was Rs. 1,36,68,000. In para 5 of the plaint, the Plaintiff has set out the details

of the payment made towards the aforementioned property at DTC-626 made to the DCCL. A total sum of Rs. 82,42,709.04 by way of seven cheques between 28th September 2007 and 30th September 2008 was paid by the Plaintiff to DCCL.

5. As regards DTS-627, another CBA dated 27th June 2008 was executed. The total sale price was Rs. 1,36,81,500. The details of the payment of Rs. 82,50,565.71 made by the Plaintiff towards DTS-627 by way seven cheques between 28th September 2007 and 30th September 2008 have been set out in the plaint.

6. On 30th December 2008, DCCL wrote to the Plaintiff stating that the construction was not proceeding as per the schedule due to delays in procuring statutory approvals and proposed a rescheduled payment plan. DCCL offered that those who had paid in excess beyond 35% of the cost would be given an advance payment rebate @ 13% per annum and such rebate would be adjusted in the next instalment. Since construction did not commence even thereafter, the Plaintiff decided to exit from the project. On 2nd May 2009, the Plaintiff wrote to the DCCL seeking refund of the money paid together with interest.

7. On 15th July 2009, DCCL informed the Plaintiff that on its exiting from the project, the entire money would be refunded along with interest @ 13% per annum from the date of receipt of the amount till the date of refund which would be on or before 31st January 2010. On 13th October 2009, DCCL sent a cheque for Rs. 1,07,000 towards the

payment of interest accrued up to 30th September 2009 after deduction of tax at source. On 11th January 2010, DCCL informed the Plaintiff that the agreement should be cancelled and returned and thereafter the amounts deposited by the Plaintiff would be refunded to it. On 21st January 2010, the Plaintiff returned the original agreements and receipts for cancellation and requested for refund of the sum paid as proposed by DCCL.

8. On 11th February 2010, DCCL sent the Plaintiff a statement of account whereby for the property at DTS-626, the net amount refundable was shown as Rs. 95,04,846.04 and for the property at DTS-627 it was Rs. 95,14,351.71. The Plaintiff states that DCCL arbitrarily deducted an amount of Rs. 1,39,84,260 in respect of the both the properties including brokerage which was purportedly due against another property which the Plaintiff had booked from DRDL at DLF South Court, Saket for a total consideration of Rs. 1,90,61,636. As regards the said property, the Plaintiff had entered into a Space Buyer's Agreement ('SBA') and also Retail Buyer's Agreement ('RBA') with DUL. The Plaintiff had paid Rs. 84,41,251.80 for the said property, i.e., DSC-138 in DLF South Court, Saket, New Delhi.

9. The Plaintiff states that as regards the said property at DSC-138, the Plaintiff had entered into an agreement to sell on 11th February 2008 with one Mr. Amit Kohli and Mr. Diwakar Gupta, Defendant Nos. 2 and 3 respectively, for a sale consideration of Rs. 1,89,05,200. The Plaintiff had received a sum of Rs. 30,00,000 on signing the

agreement. A further sum of Rs. 55,87,399 was to be paid to the Plaintiff within thirty days thereafter. A balance sum of Rs. 1,03,17,801 was to be paid directly by Defendant Nos. 2 and 3 to DRDL. It is contended by the Plaintiff that upon execution of the aforementioned agreement to sell dated 11th February 2008, the Plaintiff was left with no right in the property at DSC-138, DLF South Court, Saket, New Delhi. However, on 22nd April 2008 the Plaintiff received a letter from DUL stating that the allotment of DSC-138 at DLF South Court, Saket, New Delhi had been cancelled and that the earnest money along with the processing fee and interest on delayed payment has been forfeited. In other words, a sum of Rs. 43,78,319.15 was forfeited and the balance amount of Rs. 40,62,939.05 would be refundable. The Plaintiff states that since it had already entered into the aforementioned agreement to sell and had sold all rights under the agreement, the Plaintiff forwarded the said letter to Defendant Nos. 2 and 3. The Plaintiff further states that on 16th May 2008 the Plaintiff received a notice from Narcotics Control Bureau ('NCB') regarding a freezing order that had been passed against the properties owned by Defendant Nos. 2 and 3 and that the property at DSC-138 has been frozen. The said order was confirmed on 12th June 2008.

10. The grievance made by the Plaintiff in the present suit is that DCCL has arbitrarily adjusted towards the refund of the sums in respect of the properties at DTS-626 and DTS-627 in DLF Towers, Shivaji Marg, New Delhi, the sums purportedly deductible in respect of the DSC-138, South Court, Saket. Consequently, the Plaintiff by a

letter dated 6th July 2010 protested against the aforementioned action and requested for refund a sum of Rs. 1,39,84,260 along with interest. Thereafter, the present suit was filed praying for the following reliefs:

- (a) a decree for possession of property bearing No. DTS-626 and DTS-627 in DLF Towers, Shivaji Marg, New Delhi in favour of the Plaintiff or in the alternative;
- (b) a decree for an amount of Rs. 1,62,41,893 along with interest @ 18% per annum from the date of filing of the suit till realization; and/or
- (c) a decree of permanent injunction restraining the Defendant from creating any third party rights in property bearing No. DTS-626 and DTS-627 at Shivaji Marg, New Delhi.
- (d) Costs in favour of the Plaintiff and against the Defendants.

11. Attempts at mediation before the Delhi High Court Mediation and Conciliation Centre failed. At one stage, on the oral prayer of the counsel for the Plaintiff, NCB was impleaded as Defendant No. 5. However, no relief whatsoever is claimed by the Plaintiff against NCB. In the considered view of the Court, NCB is neither a proper nor a necessary party to this proceeding.

12. Even as regards Defendant Nos. 2 and 3, learned counsel for the Plaintiff was unable to point out how in the context of the reliefs claimed, they were necessary or proper parties. The only proper party

to the present suit, considering the reliefs sought by the Plaintiff, is Defendant No. 1 DUL.

13. It is not in dispute that both the CBAs dated 27th June 2008 between the Plaintiff and DCCL in respect of the properties at DTS-626 and DTS-627 contain an arbitration clause i.e. Clause 51 which reads as under:

“51. Arbitration

All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in Delhi or New Delhi by a Sole Arbitrator who shall be appointed by the Intending Seller and whose decision shall be final and binding upon the parties. The Intending Allottee hereby confirms that he/she shall have no objection to this appointment even if the person so appointed, as the Arbitration is an employee or advocate of the Intending Seller or otherwise connected with the Intending Seller and the Intending Allottee confirms that

notwithstanding such relationship/connection, the Intending Allottee shall have no doubts as to the independence or impartiality of the said Arbitrator. The Courts at Delhi alone shall have the jurisdiction in all matters arising out of/touching and/or concerning this Agreement regardless of the place of execution of this Agreement.”

14. Pursuant to the above clause, DUL nominated Mr. Sudhanshu Batra, Senior Advocate as Arbitrator. However, the parties agreed that till such time the present application was not decided they would seek adjournment before the learned Arbitrator. This has been noted in the orders dated 31st July 2012, 22nd November 2012 and 6th February 2013.

15. Ms. Anusuya Salwan, learned counsel for the Plaintiff has placed reliance upon the decisions in *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited* 2011 (10) SCC 420, *National Insurance Company Limited v. Boghara Polyfab Private Limited* 2018 (12) SCALE 654, *Nathani Steels Limited v. Associated Constructions* 1985 Suppl (3) SCC 324, *Young Achievers v. IMS Learning Resources Private Limited* 191 (2012) DLT 378 (DB), *Gursharan Singh v. Bharat Petroleum Corporation Limited* [decision dated 17th September 2012 in FAO (OS) No. 102 of 2012] and *Punjab State Electricity Board v. M/s. Veek Kay General Industries* 2008 1 AD (Delhi) 98 to contend that in the facts and

circumstances of the present case the CBAs between the parties stood cancelled, and the said cancellation was duly accepted by DUL and therefore, the arbitration clause in the said CBAs also “perished along with the cancellation of the said agreements” . Ms. Salwan contended that there was a full and final settlement between the parties and unless the settlement was set aside, one of the parties to the agreement could not invoke the arbitration clause. Ms. Salwan further submitted that Defendant Nos. 2 and 3 were not parties to the arbitration agreement and therefore the disputes involving them could not be referred to arbitration. She relied on the decisions in *Sukanya Holdings (P) Limited v. Jayesh H. Pandya* (2003) 5 SCC 531, *Celebi Delhi Cargo Terminal Management India Private Limited v. Aryan Cargo Express Private Limited* 187 (2012) DLT 54 and *Ajay Kirti Kumar Dalmia v. Company Law Board* 2010 (4) RAJ 581 (Delhi). She submitted that allotment of DSC-138 at Saket was cancelled on 22nd April 2008 and this in turn led to the termination of the CBA concerning the said property. Therefore, the arbitration clause in the CBA also ‘perished’.

16. Mr. Rajiv Nayar, learned Senior counsel appearing for DUL, submitted that the arbitration clause in the CBAs between the parties survived the termination of the CBAs. In the present case, Defendant Nos. 2 and 3 were neither proper nor necessary parties as no relief was sought against them. Mr. Nayar pointed out that it was the Plaintiff’s case that there was no full and final settlement of the disputes between the parties.

17. As already observed, Defendant Nos. 2 and 3 are neither proper nor necessary parties to the suit. Indeed, no relief has been claimed against them. The question, therefore, of the Plaintiff relying on the decision in ***Sukanya Holdings (P) Limited v. Jayesh H. Pandya*** to contend that Defendant Nos. 2 and 3 cannot be made parties to the arbitration does not arise.

18. The correspondence between the parties, copies of which are on record, show that there was in fact no full and final settlement of the disputes between the parties. While DUL was offered refund of amounts to the Plaintiff after deducting the sums due in respect of the other property at DSC-138 at Saket, the Plaintiff did not accept this. Even if there was a cancellation of the CBAs in respect of the properties at DTS-626 and DTS-627, it did not bring to an end the arbitration clause. That survived the CBAs and any dispute between the parties arising therefrom would be referable to arbitration.

19. The Plaintiff's contention that there was a 'mutual agreement' between the parties in terms of which the CBAs stood cancelled is refuted by DUL. Admittedly, the alleged 'mutual agreement' was not reduced to writing. In para 29 of the decision in ***National Insurance Company Limited v. Boghara Polyfab Private Limited***, the Supreme Court opined that the arbitration agreement could not be invoked, "in the following circumstances, when the contract is discharged on account of performance, or account and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both the

parties or by the party seeking arbitration)”. In the present case, with the mutual agreement not being reduced to writing, it is not possible for the Court to conclude that the arbitration agreement between the parties came to an end on the termination of the CBAs. In ***Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited***, the Court found on facts that there was a full and final settlement of the disputes and therefore, it declined to refer the disputes to arbitration.

20. Lastly, Ms. Salwan submitted that even if the Court was to allow the present application, the disputes between the parties should be referred to an independent arbitrator appointed by the Court. The Court is unable to accept the above submission. The Plaintiff has not challenged Clause 51 of the CBA as being opposed to public policy. Clause 51 of the both CBAs between the parties states that the arbitration proceedings shall be held in Delhi by a sole arbitrator appointed by DCCL (now DUL) whose decision shall be final and binding upon the parties. Pursuant thereto, DUL has appointed a Senior Advocate as Arbitrator. The Court sees no reason to appoint another arbitrator.

21. Consequently, this application is allowed by holding that the disputes between the Plaintiff and DUL will be adjudicated upon by the arbitrator appointed by DUL in accordance with law. The parties are relieved from their undertakings that they would request the

Arbitrator to adjourn the proceedings. The arbitration proceeding will now continue in accordance with law.

22. In view of the above order, the suit and the pending applications do not survive and are accordingly dismissed.

S. MURALIDHAR, J.

NOVEMBER 29, 2013

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