

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No.82 of 2011 (O&M)

DATE OF DECISION: 21.02.2015

M/s Amway India Enterprises Pvt. Limited

....Petitioner

versus

M/s DLF Limited and another

.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE

Present: Mr. Sumeet Mahajan, Senior Advocate with
Mr. Rohit Khanna, Advocate for the petitioner

Mr. Chetan Mittal, Senior Advocate with
Mr. Rajeev Anand, Mr. Varun Issar and
Ms. Rubina, Advocates for the respondents

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE (Oral):

This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitrator.

2. According to the petitioner, an arbitration agreement exists between the parties as contained in Clause-48 of an undated draft agreement for sale forwarded as an attachment to an e-mail dated 28.5.2010.

The record, however, establishes quite clearly that there was no concluded contract between the parties and that there is no arbitration agreement. There was only an agreement to enter into an agreement which is not enforceable in law. The following facts and correspondence would indicate that there were

several proposals and counter-proposals between the parties which, however, did not culminate into a concluded agreement.

3. A letter dated 25.05.2010 prefaced "without prejudice" was addressed by the respondent to the petitioner referring to the sale of an office space proposed to be developed by the respondent with a super built up area of approximately 1,10,000 square feet at Gurgaon, Haryana. The letter referred to a series of meetings, inspections and discussions that preceded it and stated: "We are pleased to set out the terms on which DLF Limited ("THE VENDOR") would be willing to consider selling office Tower No.5 at City Centre, DLF City, Phase-V, Gurgaon, Haryana. You are requested to sign and return a copy of this letter ("Letter") confirming your in-principle acceptance of these terms ("Offer"). Please note that this Offer is subject to execution of a binding Agreement to Sale within 45 (forty five) days of the date hereof by both THE VENDOR and THE VENDEE." The enclosure to this letter is titled "The proposed terms of the offer are as follows".

The terms and conditions contained in "The proposed terms of the offer" are indeed exhaustive. There are several terms and conditions stated therein including as to the area, price, taxes on the property, car parking, maintenance charges, stamp duty and force majeure. There is, however, no provision for arbitration. Moreover, the terms and conditions must be read with the letter itself. The letter clearly indicates that it was merely an offer.

4. By an e-mail dated 28.5.2010, the respondent forwarded a draft of an agreement for sale as an attachment and requested the petitioner for its comments. The e-mail stated that the terms in the LOI had been incorporated in the draft agreement. This draft agreement contained Clause-48 relating to arbitration which is sought to be enforced in this petition. The question is whether the parties entered into an agreement in terms of this draft agreement. The following correspondence in relation thereto that ensued clearly indicates that this was not a concluded agreement.

(a) By an e-mail dated 18.6.2010, the respondent requested the petitioner for a feedback on the above draft agreement for sale. The petitioner by its reply dated 18.6.2010 confirmed having received the draft agreement for sale and stated that it had engaged with its corporate counsel and legal team in USA for going through the document. The e-mail further stated that the draft agreement "with edits" would be ready for review by the respondent the next day and further stated that the edits were mainly to support the spirit of the LOI. The petitioner requested a meeting with the respondent on 23rd June "to go through in detail some of the clauses if required and close the same by the end of the week." This, therefore, establishes that the petitioner had not accepted the respondent's proposal contained in the draft agreement forwarded by the respondent's e-mail dated 28.05.2010.

(b) By a further e-mail dated 21.06.2010, the petitioner stated that it had gone through the draft agreement for sale and based on a comprehensive review with its legal team in India and abroad, it enclosed a final agreement for sale" (with track changes). The petitioner further stated that it had edited sections of various clauses based on its understanding during the course of many meetings/LOI intent/other communications as provided time to time from the respondent. The petitioner stated that it would like to sign this draft agreement and requested a meeting to be scheduled "to bring the AFS to a mutual closure".

5. It is clear, therefore, that up to this stage there were proposals and counter-proposals. It cannot by any stretch of imagination be suggested that there was any concluded contract between the parties. The draft agreement which is now sought to be enforced was clearly not agreed to by the petitioner. This is evident from the fact that by the aforesaid e-mails it suggested changes to the terms and conditions proposed by the respondents in the said draft agreement. These changes were substantial not cosmetic. For instance, the petitioner sought to add another party, namely, respondent No.2 - DLF Utilities Limited. That respondent No.2 is an associate of respondent No.1 makes little difference. A substantial deviation always occurs when parties are added to an agreement and such parties are expected to be liable for the performance of the terms and conditions thereof. Some of the commercial terms were also sought to be changed. For

instance, Clause 3(a), which pertains to the construction on 3/4 levels of basement and 5 level podiums and the allocation of car parking slots, was deleted. Clause 3(b), which foisted the taxes and duties upon the petitioner, was also sought to be deleted. The nature of the user of the property was sought to be changed. Clause 4(a) of the draft agreement forwarded by the respondent permitted the use only for corporate offices whereas the petitioner suggested that the same be used for corporate offices and commercial purposes. Further, the petitioner sought to introduce a covenant by the respondents to the effect that the property can be used for corporate offices and for commercial areas and that there would be no restriction on the use of the property for the said purposes. Several other substantial clauses were also sought to be amended and deleted.

6. Mr. Mittal, learned senior counsel appearing on behalf of the respondents, contended that there were 17 major differences. It is not necessary to refer to all these differences. Suffice it to state that in the two agreements there are substantial differences which affected the material terms and conditions, commercial and financial, between the parties. The essential terms and conditions proposed by the petitioner were entirely at variance from the essential terms and conditions proposed by the respondents.

7. In the circumstances, even at this stage there was clearly no concluded contract between the parties. Thus, the

fact that the petitioner's draft contained an arbitration clause would make no difference.

8. The respondent by a letter dated 15.9.2010 stated that it had finalized a draft agreement to sell which it expected to share with the petitioner the following Thursday. The respondent requested the petitioner to arrange the balance consideration of Rs.46.64 crores. Earlier, an amount of Rs.11 crores had been deposited by the petitioner with the respondents which the respondents have admittedly returned.

9. The respondent forwarded a draft document regarding sale/purchase of the property as an attachment to its e-mail dated 16.9.2010 and requested the petitioner for its comments/suggestions, if any, in respect thereof. The draft agreement contained an arbitration clause but that would make no difference. It is of vital importance to note that by an e-mail dated 20.10.2010 the petitioner refused to accept the same. This is clear from the contents of the e-mail. It would be convenient to set out the e-mail message in its entirety:

"Dear Mr. Sanka/Mr. Karmakar

With reference to the draft Commercial Space Purchasers's Agreement sent to us for review, we have been repeatedly requesting DLF for the Annexures so that we may be able to provide our inputs at the earliest. Regret the same have not been provided till date. To avoid further delays in execution of the Agreement, we have reviewed the same along with our counsel and have marked our preliminary comments on the attached draft. It appears that the said draft does not capture/reflect the terms and conditions as agreed upon in the LOI and the understanding arrived between us. We therefore request that the document be suitably customised as per the LOI signed between us and the earlier Agreement

to Sell as amended by us. We shall await the modified draft along with all the Annexures for our review.

Pending the execution of this Agreement we request you to send a letter extending the date for signing of the Agreement to Sell to 31.10.2010. Please also note that since the delay in execution of this Agreement is being caused at your end, there shall be no variation in the date for delivering of possession of the property and DLF shall be obliged to deliver possession of the property in bare shell form for fit outs within 24 months w.e.f. 01.06.2010 in terms of the LOI." (emphasis supplied)

The letter is a clear refusal to accept the draft agreement forwarded by the respondent. The portion emphasised by me in the above quotation makes that clear. The doubt, if any, is set at rest by the assertion in the e-mail that the respondent's draft "does not capture/reflect the terms and conditions as agreed upon in the LOI and the understanding arrived between us". As I have already observed, there were no terms and conditions arrived at between the parties. What transpired earlier were only proposals and counter-proposals, but not the formation of a concluded agreement.

10. It is true that by a letter dated 19.11.2010 the respondent stated that it was for the time being not proceeding further with the construction and development and that consequentially the transaction stipulated in the agreement for purchase could not materialise. The mere use of the words "Agreement for purchase" in the letter is not conclusive of the matter. Had there been a doubt, it may have been of some assistance to the petitioner. However, the aforesaid facts clearly establish that there was no concluded contract between

the parties. This is further clear from the fact that in the said letter the respondent refunded the advance payment of Rs.11.66 crores towards refund of the amount paid pursuant to the LOI and further stated that all claims of the parties against each other with reference to the LOI stood settled. Therefore, the respondents did not, in fact, consider there ever to have been a legally binding agreement between the parties.

11. There was, at the highest, as I have mentioned at the outset, only an agreement to enter into an agreement. An agreement to enter into an agreement is not enforceable in law. (see AIR 1968 SC 1028 titled: Kollipara Sriramulu (dead) by his legal representative vs. T. Aswatha Narayana (dead) by his legal representative and others). In these facts and circumstances, the condition stipulated in the very first letter dated 25.5.2010 that the offer is subject to execution of a binding agreement to sell was not a mere formality but a term of the bargain between the parties.

12. It was then contended that although there was no concluded contract as per the drafts exchanged in their entirety the arbitration clause was agreed upon as there was no change proposed by the petitioner in respect thereof.

13. There was no agreement between the parties at all. The arbitration clause refers to the disputes and differences between the parties in respect of the agreement. The parties having

failed to arrive at an agreement, there would be no question of the arbitration clause operating for there would be no dispute between the parties in respect of the agreement. The arbitration clause was subject to the parties having arrived at an agreement in terms of the draft agreement or a modification thereof. There is understandably nothing to indicate that the arbitration clause was to operate even if there was no agreement entered into. It is not suggested that the parties had agreed to let the arbitration clause operate with respect to the question whether or not a concluded agreement had been entered into.

It is not as if the parties had negotiated the arbitration agreement separately and independent of the other terms and conditions in the draft agreement in the negotiations during the course of which proposals and counter-proposals were made. On each occasion the proposal was forwarded as a whole and considered as a whole. There is nothing to indicate that the clauses in the written proposals were bifurcated for consideration. Much less is there anything to indicate that there was an agreement in respect of any of the clauses including the clause relating to arbitration. There is, therefore, no arbitration agreement for any purpose whatsoever including for the purpose of deciding whether a concluded agreement was entered into or not. In fact, the issue of a concluded agreement never arose. It is a question that arose in this petition and in the

connected petition which was filed by the petitioner under Section 9 of the Act for interim reliefs.

14. The petitioner vide its letter dated 28.12.2010 replied to the respondent's letter dated 19.11.2010. The petitioner stated that it was ready and willing to perform its obligation. It is important to note, however, that the petitioner did not state as to which of the draft agreements it sought enforcement of. In view of above facts, this was entirely understandable.

15. In the circumstances, the petition is dismissed.

21.02.2015
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(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

Whether reportable: YES/NO
