

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

Judgment reserved on April 20, 2015

Judgment delivered on May 22, 2015

+ ARB.P. 113/2012

SANJAY GAMBHIR & ORS.

..... Petitioners

Through: Mr.K.Datta, Adv.with Mr.Diggaj
Pathak, Advocate

versus

BEEKMAN HELIX INDIA CONSULTING PVT LTD.

..... Respondent

Through: Mr.Divjyot Singh, Advocate with
Ms.Avsi Malik, Adv. for R-1
Mr.Manish Sharma, Adv. with
Ms.Chandni Mehra, Mr.Pranay Raj
Singh, Advs. for R-2 and R-3

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The present petition has been filed by the four petitioners namely Sanjay Gambhir, Karan Gambhir, Kanish Raaj Gambhir and M/s D.D. Global Capital Ltd. under Section 11 of the Arbitration & Conciliation Act, 1996 ('Act' in short).

2. The facts as noted are that the petitioner Nos.1 and 2 are the former shareholders and founding promoter and director and petitioner Nos.3 and 4 are the former shareholders of the D.D Housing Ltd. (Subsequently

known as New Age Town Planners Ltd, and now known as BPTP Parkland Pvt. Ltd) which was incorporated by the petitioners in the year 2006, set up primarily for the purpose of undertaking development of an integrated township project comprising residential plots, group housing, commercial, community facilities etc spread over, approximately 160 acres of land in Sector 77, Faridabad.

Petitioner's case

3. It is the case of the petitioners that the respondent represented itself as an investment advisory company which assists Indian developers in obtaining investments in the form of debt, quasi debt and equity for their real estate projects. The respondent offered to provide the petitioners advisory services for raising funds for the integrated township project initiated by the petitioners.

4. Thereafter, the respondent started negotiating with the petitioners on behalf of foreign investor and requested the petitioners to sign a Mandate Agreement with the respondent. According to the petitioners, the petitioner No.1 entered into a Mandate Agreement on behalf of D.D Housing Ltd. on August 23, 2006 with the respondent. Vide Mandate Letter dated August 23, 2006, it was agreed that the respondent and the promoters of the D.D Housing Ltd. including the petitioners shall execute a Call Option Agreement under which the respondent can require the

promoters to sell all of their shares on terms and conditions contained therein. It is the case of the petitioners that the said Mandate Letter was signed by the promoters and subsequent to the signing of the Mandate Letter on August 23, 2006, the D.D Housing Ltd. was incorporated on September 05, 2006 on the direction of the respondent. It was represented by the respondent that Call Option Agreements with regard to shareholding of the petitioners in favour of the respondent and the Deed of Pledge and Power of Attorney in favour of the respondent with regard to the said shares was only for the purpose of securing the investment made by the foreign investor in the project of the D.D Housing Ltd. and towards the mental satisfaction of the investor. The Mandate Letter dated August 23, 2006 was executed for the purpose of same transaction under which the foreign direct investment was received later by D.D Housing Ltd. for which specific agreements were entered into between the petitioners and the foreign investor namely Debenture Subscription Agreement and the Shareholders Agreement.

5. According to the petitioners, the respondent introduced TMW ASPFI Cyprus Holding Co. Ltd. to invest in the integrated township project of the D.D Housing Ltd. at Sector-77, Faridabad and the respondent continued to negotiate with the petitioners with regard to the investment to be made by TMW in D.D Housing Ltd. It was agreed that

TMW would subscribe to 2,25,000 fully and mandatory convertible debentures of Rs.5,000/- each of the D.D Housing Ltd., equivalent to 1,12,50,00,000 with a coupon rate of 4% p.a on the terms and conditions contained in the Debenture Subscription Agreement dated October 16, 2006 entered between TMW and D.D Housing Ltd.

6. The TMW also entered into Shareholders Agreement dated October 16, 2006 with the petitioners and the other promoters of D.D Housing Ltd.

7. The Shareholders Agreement dated October 16, 2006 incorporated in itself put option clause which was available to TMW in case TMW sought an exit from the project. The option price was fixed at the rate of total value of foreign investment along with interest @ 18% p.a compounded half yearly on such subscription consideration less any interest, dividend paid for the period from the date of subscription of the FCD's by the investor till the date of payment of the option price. That after the execution of the Debenture Subscription Agreement and the Shareholders Agreement both dated October 16, 2006 the respondent again requested the petitioners to execute the Call Option Agreement, deed of pledge and power of attorney in favour of the respondent and again represented that the said documents will not be acted upon by the respondent as the same are a mere formality to be done for the release of first tranche of investment in favour of D.D Housing Ltd. and for the

mental satisfaction of the foreign investor. It is also the case of the petitioners that the petitioners and the other promoters of D.D Housing Ltd. in terms of the Mandate Letter dated August 23, 2006 and on the representation of the respondent executed Call Option Agreements dated October 18/19, 2006 in favour of the respondent. Share Pledge Agreements and Irrevocable Power of Attorneys dated October 19, 2006 were also executed in favour of the respondent by the petitioners and other promoters of D.D Housing Ltd. The investment of the TMW was received by D.D Housing Ltd. on March 03, 2007. The D.D Housing Ltd. and TMW ASPFI Cyprus Holding Co. Ltd. entered into a supplementary debenture subscription agreement dated August 07, 2008 vide which TMW invested additional funds amounting to Rs.11,82,00,000/-.

8. It is the case of the petitioners that the call option price under Call Option Agreements dated October 18/19, 2006 between the petitioners and respondent was to be determined by a qualified chartered accountant, however, the respondent with mala fide intent to cheat the petitioners of their stakes in D.D Housing Ltd. in view of arranging the additional funding for the project made the petitioners to sign the amendments to the Call Option Agreements dated April 16, 2009 to bring the call option price to negligible amount of Rs.100/-. It is also the case of the petitioners that the respondent by amending the Call Option Agreements inserted the

provision of determination of the call option price by valuation equivalent to 0.335% of the (average valuation of the company less total cost of the foreign holding in the company) or Rs.100/-, whichever is higher. However, the respondent forced upon the petitioners to execute re-stated Call Option Agreements dated June 18, 2009 in order to reduce the call option price to Rs.100 only. According to the petitioners, the respondent forced upon the petitioners the restated Call Option Agreements and the amended agreements with the assurance that the same was mere formality towards the additional funding received for integrated township project. It was the case of the petitioners that the Call Option Agreements @ Rs.100/- cannot be acted upon as the same was against CCI guidelines.

9. A Second Amendment Agreement dated August 20, 2009 was executed between DD Housing Limited and TMW ASPF I CYPRUS HOLDING COMPANY LIMITED / Investor for extension of date of conversion of the FCDs by a period of 3 months. The new date for conversion of FCDs in case of non-exercise of option by the Investor was November 20, 2009.

10. On January 29, 2010 TMW ASPF I CYPRUS HOLDING COMPANY PRIVATE LIMITED through Beekman Helix India Consulting Pvt. Ltd. issued a legal notice calling upon for compliance of

the provisions of Shareholders Agreements and Debenture Subscription Agreement and alleging non-compliance.

11. It is also averred by the petitioners that the call option was used by the respondent for fraudulently acquiring the shares of the petitioners by way of Share Purchase Agreement dated February 15, 2010 even though the call option was given to the respondent for the limited purpose of securing the investment made by the foreign investor TMW and in effect the respondent took all the stakes of the petitioners in D.D Housing Ltd. for mere Rs.400/-. The respondent further acting fraudulently on the basis of revoked power of attorneys which were earlier issued by the land owning companies of the petitioners in favour of D.D Housing Ltd. got the title of the lands transferred in the name of New Age Town Planners Ltd. (formerly known as D.D Housing Ltd.). The petitioners in the petition have also contested the rationale of the petitioners using any call option against the petitioners as the investor TMW always had the option of converting its FCD's into 74.99% of the share capital of D.D Housing. However, the respondent had no right to take away the hundred per cent shares of the petitioners in D.D Housing Ltd. That even if the FCD's of TMW are converted into fully paid up share equity the petitioners and the other promoters of D.D Housing Ltd. (later New Age Town Planner Ltd, now BPTP Parkland Pvt. Ltd) were entitled to 25.1% of the total stakes of the

D.D Housing Ltd. and neither TMW or the respondent had any right over the share equity being held by the petitioners and the other promoters.

12. According to the petitioners, in their synopsis, the respondent had got four letters signed from Mr. Sanjay Gambhir, petitioner no. 1 on March 02, 2010, which allegedly confirmed the said illegal transfer of shares. It was averred that the documents were signed by petitioner No.2 under severe compulsion, and coercion. On March 02, 2010 the respondent allegedly gave the option to Sanjay Gambhir to buyback the respondent's 14,88,100 shares of DD Housing Ltd. upon mutually accepted terms. The buyback option was kept open till August 31, 2010. The petitioners handed over accounts files, documents and cheque books relating to DD Housing Ltd. to the respondent. It is the case of the petitioners that the aforesaid documents have been signed by the Promoters on the representation that the said documents would be returned upon the grant of license by DTCP. It was alleged that the petitioners were never supplied with the documents and that they were not aware of the said alleged buy back option. The petitioners claimed that the respondent has malafidely put up a false case by relying on the said documents.

13. It is also averred by the petitioners that some amount of money was received towards the provisional booking of units/plots/flats from customers/investors at the early stage of development of township project;

however, M/s Rose Infracon Ltd. and New Age Town Planners Ltd. acknowledged the liability of the investors and undertook to pay the liability of the said customers/investors along with interest. They requested the petitioners to participate in the refund of money by identifying the investors and make payments for New Age Town Planners Ltd. Subsequently, an agreement dated February 16, 2011 was entered with the petitioners.

14. The case of the petitioners is that the respondent with mala fide and fraudulent intention had sought to take over the project of the petitioners under the garb of foreign direct investment. The respondent has cheated the petitioners and has fraudulently taken over the 100% shares of the petitioners in D.D Housing Ltd. In view of the alleged fraudulent transaction, certain disputes arose between the parties which required resolution through arbitration. The petitioners in the petition have referred to clause 14 of the Mandate Letter dated August 23, 2006, pursuant to which Call Option Agreements dated October 18/19, 2006 and the amendments thereafter were executed between the petitioners and the respondent, which incorporated an arbitration clause.

15. The petitioners have averred that on December 19, 2011, a notice for arbitration was served upon the respondent for the appointment of arbitrator to adjudicate the disputes which arose between the parties; out of

the Mandate Letter dated August 23, 2006. However, the respondent vide its reply dated February 03, 2012 has refused to honour its obligation under the Mandate Letter dated August 23, 2006 and has refused to appoint an Arbitrator.

Respondent's case

16. A Mandate Letter dated August 23, 2006 was executed between M/s DD Housing Limited (now known as BPTP Parkland Pride Pvt. Ltd.) ('Company') and the respondent in terms of which the respondent was to identify potential investors to invest in the Company which was set up for the purposes of development of an integrated township project in Faridabad. The scope of services to be provided by the respondent and the consideration for the services was detailed in the Mandate Letter. Clause 14 of the Mandate Letter contains the arbitration clause which is allegedly being invoked by the petitioners.

17. In terms of Clause 1.1 of the Mandate Letter the petitioners executed Call Option Agreements dated October 18/19, 2006 in favour of the respondent. The call option was provided to the respondent in consideration of a call option fee which was admittedly paid by the respondent. In terms of the Call Option Agreements, the respondent could call upon or require the petitioners by way of a written notice to sell, transfer and assign all their rights, title and interest in the shares of the

Company upon occurrence of a call option event at a call option price specified in the call option notice.

18. Further in terms of Clause 1.2 of the Mandate Letter and Clause 2.3 of the Call Option Agreements the petitioners executed Deeds of Pledge dated October 19, 2006 pursuant to which the petitioners pledged their shares in the Company in favour of the respondent to secure the performance and discharge of their obligations under the Call Option Agreements.

19. Further in terms of the Deeds of Pledge, the petitioners executed Irrevocable Power of Attorneys dated October 19, 2006 in favour of the respondent. The Power of Attorneys inter alia conferred the power on the respondent to exercise all rights in relation to the shares; to transfer or alienate the shares in favour of third person(s) and/or to transfer, sell or otherwise dispose of or deal with the pledged securities or any of them and to receive all consideration consequent on any sale, transfer or disposition of the shares and to give proper receipts and valid and effectual discharges for the same.

20. Subsequently an Amendment to Call Option Agreements dated 16.04.2009 and a Restated Call Option Agreements dated June 18, 2009 were executed between the parties pursuant to which inter alia the call option price was re-defined. As a consequence to the execution of the

Restated Call Option Agreements dated June 18, 2009, amendments to the Deeds of Pledge and Power of Attorneys were executed on June 18, 2009.

21. The Company failed to fulfil its obligations under the agreements with third parties including those with the investor introduced by the respondent. Despite repeated assurances the company failed to honour its commitments. One of the material events of default was the failure to obtain the license for the integrated township project over and above 14 months from the date of commitment. The events of default constrained the respondent to issue a Call Option Notice dated February 06, 2010 to the petitioners calling upon them to sell, transfer their shares in Company on February 15, 2010.

22. Thereafter the respondent on the basis of the Power of Attorneys dated October 19, 2006 and the Amended Power of Attorneys dated June 18, 2009 executed Share Purchase Agreements dated February 15, 2010 pursuant to which all the shares of the petitioners in the Company were transferred to the respondent. Since the Company reflected a negative valuation at the relevant time, the shares were transferred for Rs 100/- under each of the Share Purchase Agreement. The respondent thereafter sent letters dated February 15, 2010 along with a copy of the said Share Purchase Agreements and the demand draft of the consideration to the petitioners to intimate them of the transaction.

23. Thereafter the petitioners executed undertakings dated March 02, 2010 pursuant to which they inter alia confirmed:

- (i) that the execution of the Share Purchase Agreements and other documents for the transfer of shares and receipt of consideration by the respondent was a valid, lawful and binding discharge of the powers vested in the respondent vide Amended Power of Attorneys dated June 18, 2009;
- (ii) that the transfer of shares under the Share Purchase Agreements is valid, enforceable and binding and receipt of the consideration discharges all obligations of the respondent under the Share Purchase Agreements;
- (iii) that the petitioners do not have any rights or claims in respect of the Company, shares or assets of the Company and the respondent has the right to sell, pledge or alienate the shares freely and without encumbrances.

24. The respondent vide letter dated March 02, 2010 addressed to petitioner No.1, granted the option to the petitioners to buy-back 14,88,100 shares of the Company on the price, terms and conditions mutually acceptable to the parties. The buy-back option was valid till August 31, 2010.

25. On March 04, 2010 the petitioners handed over the entire original records of the Company including but not limited to the ROC documents, cheque books, vouchers and bank statements, income tax files, original IDS files to the respondent against proper receipts. The petitioner No.1

and his wife Ms. Reena Gambhir vide undertakings dated March 02, 2010 resigned from the Board of Directors of the Company with effect from February 01, 2010 and undertook to indemnify the Company, its shareholders, directors etc. against losses, liabilities incurred, claims etc.

26. Thereafter the respondent sold, transferred the shares held by it in the Company to M/s Rose Infracon Pvt. Ltd. vide a Share Subscription and Transfer Agreement dated September 27, 2010 for a total consideration of Rs. 2,23,21,410/- (Rupees Two Crores Twenty Three Lakhs Twenty One Thousand Four Hundred and Ten Only).

27. The petitioners vide undertaking dated February 16, 2011 inter alia confirmed and acknowledged that;

(i) the petitioners do not have any rights, title, interest, liabilities or options of any nature whatsoever with respect to the securities of the Company;

(ii) without prejudice to clause (i) above the petitioners irrevocably agreed and confirmed that they shall not seek to exercise any call option/buy back/purchase rights with respect to the securities of the Company under the Shareholders Agreement dated October 16, 2006 or the letter dated March 02, 2010;

(iii) the securities of the Company can be freely transferred and the petitioners do not have and shall not raise in future any

objection/claim/hindrance with regard to the securities of the Company or the sale/disposal/transfer of securities of the Company to any person;

(iv) the 14,88,094 equity shares of the Company were validly sold and transferred by the respondent to M/s Rose Infracon Pvt. Ltd and M/s Rose Infracon Pvt. Ltd is a legal and beneficial owner of those shares.

(v) the petitioners do not have any rights, interest, title, entitlements or options of any nature in the shares held by M/s Rose Infracon Pvt. Ltd in the Company.

28. The petitioners vide another and separate undertakings dated February 16, 2011 inter alia confirmed that the shares were validly transferred to the respondent under the Share Purchase Agreement and acknowledged the receipt and adequacy of the consideration.

29. An Agreement dated February 16, 2011 was executed inter alia between the respondent, Company, M/s Rose Infracon Pvt. Ltd. and the petitioners, pursuant to which the documents listed in Schedule I of the Agreement were terminated with effect from the date of the Agreement. The petitioners further confirmed inter alia that the transfer of the 14,88,100 shares of the Company is valid and binding; the petitioners do not have any right, title or interest in the said shares; and they shall not create hindrance/objections in the sale, transfer, disposal of the said shares.

30. A Non Compete Agreement dated February 16, 2011 was also executed between M/s Rose Infracon Pvt. Ltd., the Company and the petitioners wherein the petitioners have acknowledged and confirmed that the petitioners have sold certain shareholding of the Company to the respondent and the respondent has further sold the shareholding to M/s Rose Infracon Pvt. Ltd.

31. The petitioners sent a Legal Notice dated December 19, 2011 to the respondent invoking the arbitration clause in the Mandate Letter and seeking constitution of an Arbitral Tribunal. The respondent replied to the said notice vide reply dated February 03, 2012 refuting the allegations of the petitioners and denying the existence of an arbitration agreement or any arbitrable disputes between the parties.

32. Learned counsel for the petitioners would submit that the Call Option Agreements dated October 18/19, 2006 and the subsequent agreements are the related documents to the Mandate Letter dated August 23, 2006. He has also drawn my attention to clause 1.1 and 1.2 of the Mandate Letter which refers to execution of Call Option Agreement under which the respondent would require the promoters i.e the petitioners to sell all their shares in S.P.V on terms and conditions contained therein. He would state that the Call Option Agreements have been entered into, in view of the statement in the Mandate Letter. The arbitration clause which

is very wide also governs the disputes arising out of Call Option Agreements dated October 18/19, 2006. He would rely upon the judgment of Supreme Court reported in **2013 (1) SCC 641 Chloro Controls (I) Private Limited Vs Severn Trent Water Purification Inc. & Others** in support of his contention.

33. On the other hand, Ld. Counsel for the respondent would submit that the respondent is resisting the Arbitration Petition of the petitioners on the following two grounds:

There is no arbitration agreement between the petitioners and the respondent.

He would state, the petitioners have relied on the arbitration clause in the Mandate Letter dated August 23, 2006 which was executed between the respondent and the Company, yet to be registered. The petitioners were not party to the Mandate Letter. Admittedly there is no arbitration clause in the Call Option Agreements dated October 18/19, 2006, Amendment to Call Option Agreements dated April 16, 2009 or the Restated Call Option Agreements dated June 18, 2009. He would rely on Section 2 (h) and Section 7 of the Act in support of his contentions.

34. He would further submit that there is no arbitration agreement between the parties as contemplated by Section 7 of the Act and rely on the judgment of Supreme Court in the case of **M.R. Engineers and**

Contractors Pvt. Ltd. v. Som Datt and Builders Ltd. reported as 2009 (3) R.A.J. 448 (SC), wherein it was held that an arbitration clause in an independent document would be incorporated in the contract between the parties if the contract makes a clear reference to the document which indicates an intention to incorporate the arbitration clause. A general reference to the independent document would not have the effect of incorporating the arbitration clause in the contract. There should be a specific reference to the arbitration clause.

35. Accordingly, in the present case the only reference of the Mandate Letter in the Call Option Agreements and the Restated Call Option Agreements is in recital which is reproduced herein below:

"BHIC has been given a mandate vide letter dated 14th August, 2006 ("Mandate Letter") by the Promoters to search for strategic investors for investing into the Company. Pursuant to the Mandate Letter, BHIC has introduced the Promoters to TMW ASPF I Cyprus Holding Company Limited, a Cyprus based Company incorporated for the purposes of making investments in India including in the development of real estate, hospitality and other infrastructure projects, as permitted under the extant regulatory regime and has expressed its keenness to invest into the proposed Company."

36. Clearly, the Call Option Agreements/Restated Call Option Agreements make a general reference to the Mandate Letter. The former do not incorporate the Mandate Letter in its entirety nor there is a specific reference to the arbitration clause in the Mandate Letter. The parties had no

intention to incorporate the arbitration clause from the Mandate Letter to the Call Option Agreements. In the absence of an arbitration agreement, the parties cannot be referred to arbitration.

37. He also relies upon the decision of the Supreme Court in the case of *Indowind Energy Ltd. v. Wescare (I) Ltd. & Anr. reported as 2010 (4) R.A.J. 1 (SC)*. According to him, in the said case an agreement was signed between the respondent No.1 and respondent No.2 which contained an arbitration clause. The agreement described the respondent No.2 as a promoter of the Appellant. When disputes arose between the parties, respondent No.1 filed a petition against the appellant and respondent No.2 for appointment of arbitrator. The Court while considering the question when the Appellant is not a signatory to the agreement containing the arbitration clause can it be considered to be a 'party' to the arbitration agreement, held that an arbitration agreement can come into existence only in the manner contemplated in Section 7 of the Act. In the absence of an arbitration agreement in terms of Section 7 of the Act between the respondent No.1 and the appellant in that case, no claim against or dispute with the appellant can be the subject-matter of reference to an arbitrator.

Full and Final discharge of obligations.

38. He would also highlight, the petitioners have acknowledged and confirmed that the transfer/sale of 14,88,100 shares of the Company vide

the Share Purchase Agreements is valid and binding and the petitioners have no right, title or interest in the said shares. According to him, the petitioners have also acknowledged and confirmed the adequacy of the consideration and that the receipt of the same discharged the respondent of its obligations under the Share Purchase Agreements. The petitioners have confirmed in writing vide undertakings dated March 02, 2010, undertakings dated February 16, 2011 and agreements dated February 16, 2011 that they have received the payment in full and final satisfaction of all claims and they have no outstanding claims. Therefore, there are no arbitrable disputes between the parties which can be referred to arbitration.

He would rely on the judgment of the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. v, Boghara Polyfab Pvt. Ltd.* reported as **2008 (4) R.A.J. 557 (SC)**.

39. He would state, the stand of the petitioners that the documents were signed by them under misrepresentation and coercion, apart from a bald statement the petitioners have nowhere in their petition disclosed the details of the aforesaid documents wherein they had confirmed and acknowledged the discharge of the obligations of the parties. The petitioners had fraudulently concealed the details of the said documents and have alleged that the documents were signed under coercion and misrepresentation only as an after-thought. The petitioners have even failed

to explain the acknowledgment of the sale of shares to the respondent in the Non-Compete Agreement dated February 16, 2011 executed by them with M/s Rose Infracon Pvt. Ltd. The petitioners have only made oral, bald statements in their pleadings that the documents were signed under misrepresentation and coercion and there is nothing on record to prove the same.

40. He would also rely on *Union of India and Ors.V. Master Construction Company* reported as *2011(3) R.A.J. 487 (SC)* wherein it was held, bald plea of coercion, fraud, duress or undue influence is not enough and the party who sets up the plea must establish it prima facie by placing materials before the Court, where the dispute raised by the party regarding the validity of the discharge voucher' or a 'no-claim certificate' prima facie lacks credibility there may be no need to refer the parties to arbitration at all.

41. He would also submit that the judgment of the Supreme Court in *Chloro Controls (I) Pvt. Ltd. (Supra)* relied upon by learned counsel for the petitioner is not applicable to the facts of the case.

42. Before I deal with the submissions made by counsel for the parties, I would like to state that the petitioners have also filed a petition under Section 9 of the Act being O.M.P No. 946 of 2011 seeking some interim reliefs wherein an I.A NO. 2868 of 2013 was filed by the petitioners

seeking Impleadment of M/s Rose Infracon Pvt Ltd and M/s BPTP Parks Land Pride Pvt. Ltd. The said petition is pending consideration.

43. Having heard, learned counsel for the parties, the issue which would primarily arise for the consideration of this Court is whether the arbitration clause in the Mandate Letter dated August 23, 2006 would govern the parties herein.

44. There is no dispute that the Mandate Letter dated August 23, 2006 was signed and accepted by Mr. Sanjay Gambhir, petitioner no. 1 on behalf of DD Housing Ltd on August 23, 2006 itself. On the said date, the DD Housing Ltd, S.P.V, was not in existence as it was not incorporated under the Companies Act. It was registered under the Companies Act only on September 5, 2006. Mr. Sanjay Gambhir could not have signed/accepted the contents of the Mandate Letter on behalf of an entity which was not in existence. It is an undisputed fact that the other petitioners herein have not put their signatures in token of acceptance of the conditions of the Mandate Letter. A reading of sections 2 (h), 2 (b) and 7 would reveal that an arbitration agreement will be considered to be in writing if it is contained in (a) a document signed by the parties or; (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or; (c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not

denied by the other; (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the arbitration clause from such other document into the contract.

45. As has been held by the Supreme Court in *Yogi Agarwal Vs. Inspiration Clothes and U and ors 2009 (1) SCC 372*, to constitute an arbitration agreement for the purpose of section 7, the following two conditions need to be satisfied; (i) it should be between the parties to the dispute and; (ii) it should relate to or be applicable to the dispute. It is not the case of at least petitioner Nos. 2, 3 and 4 that they have signed the Mandate Letter in acceptance of the terms and conditions therein nor it is the case of the said petitioners that an exchange of letters, telex, telegrams or other means of telecommunication which provided a record of the agreement nor it is their case of exchange of statements of claim and defence in which the existence of the agreement is alleged by them and not denied by the respondent. Suffice to state, there is no agreement to refer to arbitration in the eventuality of dispute between them and the respondent. So, the Mandate Letter dated August 23, 2006 would not bind the respondent qua petitioner Nos. 2, 3 and 4. Even though, the Mandate Letter stipulates execution of Call Option Agreement which in fact has

been executed. The Call Option Agreement does not have the arbitration clause.

46. In so far as the petitioner No. 1 is concerned, it is not in dispute that he had signed in acceptance of all the conditions of the Mandate Letter, even though as Director of DD Housing Ltd, a non-existent company, would still bind the respondent. This is because, if his signatures as Director of DD Housing Ltd are of no consequence, his signatures on the Mandate Letter as one of the promoters need to be recognized and cannot be brushed aside. It is also not in dispute that Mr. Sanjay Gambhir and the respondent did execute a Call Option Agreement on October 18/19, 2006 and there is no doubt that it relates to the Mandate Letter dated August 23, 2006. The clause 14 of the Mandate Letter states that any dispute, controversy or claim arising out of, or relating to this Mandate Letter or any related agreement or other document (emphasis supplied) or the valid interpretation, breach of termination thereof shall be resolved and finally settled in accordance with the act. The disputes between the petitioner No.1 and the respondent are arbitrable. The reliance placed by learned counsel for the respondent on the judgment of Supreme Court in ***M.R. Engineers & Contractors Pvt Ltd (supra)*** is concerned, there the Supreme Court was primarily concerned with an issue as to whether an arbitration clause contained in a main contract would stand incorporated by reference

in a sub-contract, where the sub-contract provided that it shall be carried out on the terms and conditions as applicable to the main contract. The facts of the said case are that the appellant before the Supreme Court was a sub-contractor of the respondent and was entrusted a part of the work by the PW Department in terms of work order dated May 4, 1994. The relevant portion of the work order is extracted as under;

“With reference to your offer and subsequent discussions, we are pleased to accept your offer for the construction of the office building at the unit, firm and fixed price of Rs. 3150/- (Rupees Three Thousand One Hundred Fifty Only) per square metre. The construction shall be carried out as per the tender specifications and drawings issued for construction by the client.

*The square metre rate includes cost of all materials, labour, equivalent etc., required for the completion of building work but excludes the furniture required for the same. No escalation shall be payable on the above contracted price. The work shall be carried out as per the drawings furnished by the Department. **This sub- contract shall be carried out on the terms and conditions as applicable to main contract unless otherwise mentioned in this order letter.***

In case there are any change in the foundation design from the tender drawing, suitable variation claim shall be submitted to the client by us and the amount approved and

*paid shall be payable to you after **deducting** twenty percent amount.*

x x x

*The approximate cost of this order comes to Rs.
33,07,500/-*

(emphasis supplied)”

47. It was the case of the appellant in the said case that it executed certain extra items and excess quantities of agreed items on the instructions of the PW Department and requested the respondent to make a claim on the PW Department in that behalf. Necessary claims in that behalf were made on the PW Department. The Arbitrator made an award on August 18, 1999 whereby the Arbitrator awarded certain amounts in regard to its claims put through the respondent and in terms of the arrangement between the respondent and the appellant, the respondent was liable to pay to the appellant, eighty percent of the amounts awarded for such claims, i.e Rs. 37,55,893/-, along with Rs. 1,55,807/- towards pre- reference interest upto December 4, 1996 and compensation at 18% per annum for non-payment of the said amount from December 5, 1996. As the claim was not settled, the appellant sent a letter dated December 6, 2000 seeking reference of the dispute by arbitration. As the respondent failed to comply, the appellant filed an application under Section 11 of the Act. According to the

appellant, clause 67.3 of the General Conditions of Contract forming part of the contract between the PW department and the respondent providing for arbitration was imported into the sub-contract between the respondent and the appellant. The appellant relied upon the term in the work order dated May 4, 1994 that the “*sub-contract shall be carried out on the terms and conditions as applicable to main contract*” to contend that the entire contract between the department and the respondent including clause 67.3 relating to arbitration became a part and parcel of the contract between the parties. It was the case of the appellant that the arbitration clause contained in the main contract between the PW department and the respondent constituted an arbitration agreement between the respondent and appellant on account of the incorporation thereof by reference in the contract between the appellant and respondent. The Supreme Court in para 13 of the judgment has laid down the scope and intent of Section 7 (5) of the Act which is as under;

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled : (i) The contract should contain a clear reference to the documents containing arbitration clause, (ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, (iii) The arbitration clause should be

appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects

Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) *Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.*

48. The Supreme Court has finally held that the work order (sub-contract) would show that the intention of the parties was not to incorporate the main contract in entirety in sub-contract. The Supreme Court was of the view that the words “*this sub-contract shall be carried out on the terms and conditions as applicable to main contract*” in the work order would indicate an intention that only the terms and conditions in the main contract relating to execution of the work were adopted as part of the sub-contract between the respondent and appellant and not the parts

of the main contract which did not relate to execution of the work. The Supreme Court was also of the view that the wording of the arbitration clause in the main contract between PW department and the Contractor makes it clear that it cannot be applied to sub-contract between the Contractor and the sub-contractor. Suffice to state, the facts in the case before the Supreme Court were totally different from the facts of the case in hand. In the case in hand, the arbitration clause would cover dispute, controversy or claim arising out or relating to this Mandate Letter or any related agreement or other document (emphasis supplied). There is no dispute that clause 1.1 of the Mandate Letter stipulates execution of a Call Option Agreement and it is pursuant to this provision that the Call Option Agreement has been executed, if that be so then the Call Option Agreement dated October 18/19, 2006 was a related agreement. But a further question/issue would arise in view of the facts pleaded by the respondent, whether any dispute exist as on date between the petitioner no. 1 and the respondent to be arbitrated. The said facts are;

(i) on March 4, 2010 the petitioners including petitioner no. 1 handed over the entire original records of the company including but not limited to the ROC documents, cheque books, vouchers and bank statements, income tax files, original IDS files to the respondent against proper receipts;

- (ii) the petitioner no. 1 vide undertaking dated March 2, 2010 resigned from the Board of Directors of the Company with effect from February 01, 2010 and undertook to indemnify the Company, its shareholders, directors etc. against losses, liabilities incurred, claims etc.;
- (iii) vide share subscription and transfer agreement dated September 27, 2010, the respondent sold, transferred the shares held by it in the company to M/s Rose INfracore Pvt. Ltd;
- (iv) on February 16, 2011, the petitioner No.1 acknowledged that he did not have any right title, interest, liabilities or options of any nature whatsoever with respect to the securities of the Company;
- (v) the petitioner No.1 irrevocably agreed and confirmed that he shall not seek to exercise any call option/buy back/purchase rights with respect to the securities of the Company under the Shareholders Agreement dated October 16, 2006 or the letter dated March 02, 2010;
- (vi) the securities of the Company can be freely transferred and the petitioner No.1 do not have and shall not raise in future any objection/claim/hindrance with regard to the securities of the Company or the sale/disposal/transfer of securities of the Company to any person;
- (vii) the 14,88,094 equity shares of the Company including his 20,100 shares were validly sold and transferred by the respondent to M/s Rose

Infracon Pvt. Ltd and M/s Rose Infracon Pvt. Ltd is a legal and beneficial owner of those shares;

(viii) the petitioner No.1 do not have any right, interest, title, entitlement or option of any nature in the shares held by M/s Rose Infracon Pvt. Ltd in the Company;

(ix) the petitioner no. 1 gave an undertaking dated February 16, 2011 inter-alia confirmed that the shares were validly transferred to the respondent under the Share Purchase Agreement and acknowledged the receipt and adequacy of the consideration.

49. An Agreement dated February 16, 2011 was executed inter alia between the respondent, Company, M/s Rose Infracon Pvt. Ltd. and the petitioners including the petitioner No.1, pursuant to which the documents listed in Schedule I of the Agreement were terminated with effect from the date of the Agreement. The petitioners including petitioner no.1 confirmed inter alia that the transfer of the 14,88,100 shares of the Company is valid and binding; the petitioners do not have any right, title or interest in the said shares; and they shall not create hindrance/objections in the sale, transfer, disposal of the said shares.

50. A Non Compete Agreement dated February 16, 2011 was also executed between M/s Rose Infracon Pvt. Ltd., the Company and the petitioners including petitioner No.1, wherein the petitioners including

petitioner No.1 have acknowledged and confirmed that the petitioners including petitioner No.1 have sold certain shareholding of the Company to the respondent and the respondent has further sold the shareholding to M/s Rose Infracon Pvt. Ltd.

51. From the perusal of the aforesaid facts, it is clear that the petitioner No.1 had given up his claims with regard to the transfer of 20,100 shares held by him. It is not only one document but several documents were executed by the petitioner No.1 to forego his claim and not to challenge the transfer of the shares on any account. He has rather acknowledged the selling of shares by the respondent to M/s Rose Infracon Pvt. Ltd.

52. I agree with the learned counsel for the respondent that the petitioner No.1 having confirmed in writing of having received the payment in full and final satisfaction of all the claims, he has no outstanding claims and as such there are no arbitrable dispute(s) between the petitioner No.1 and respondent, which can be referred to arbitration. Insofar as the plea of coercion, fraud, duress and undue influence pleaded by the petitioner No.1, suffice to state that the petitioner No.1 had not even referred to the aforesaid agreements/undertakings in the notice dated December 19, 2011, which was got issued after almost 10 months after non-compete agreement dated February 16, 2011 was executed. Even I note in the petition that there are no pleadings with regard to coercion, fraud, duress and undue

influence except stating mala fide, fraudulent intention and cheating. Surely in the given facts, the petitioner No.1 was required to set up a case of fraud, coercion, duress or undue influence resulting in the execution of the agreements and the undertakings. A reference, for the first time, was given by the petitioner No.1 in the written synopsis, wherein pressure and coercion are pleaded. I only note, for benefit, the following observation of Supreme Court in ***Union of India Vs. Master Construction Company (Supra)***. The relevant portion of the work order is extracted as under;

“In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all. It cannot be overlooked that the cost of arbitration is quite huge - most of the time, it runs in six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence

has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.”

53. I agree with the submissions of Mr. Divjyot Singh, learned counsel for the respondent that the judgment of the Supreme Court in ***Chloro Controls (I) Private Limited (Supra)*** relied upon by learned counsel for the petitioner, would not be applicable to the facts of the case, inasmuch as in that case the Supreme Court dealt with the ambit and scope of Section 45 of the Act. The language of Section 45 of the Act is at substantial variance to the language of Section 8/11 of the Act. Section 45 uses the expression 'one of the parties or any person claiming through or under him' whereas Section 8/11 only uses the words 'parties'. The language of Section 45 has a wider import. The Court can refer the parties to arbitration under Section 45 if the applicant establishes that he claims through or under the signatory party. However the same is not the case when an

application is made under Section 8/11 of the Act. A Court can refer the parties to arbitration under Section 8 or appoint an arbitrator under Section 11 only on an application of a party to the arbitration agreement.

54. In view of my above discussion, it is clear that there is no dispute existing between petitioner No.1 and the respondent, which is arbitrable.

55. The petition is accordingly dismissed.

56. No order as to costs.

(V.KAMESWAR RAO)
JUDGE

MAY 22, 2015
km/ak