

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

+ **ARB.P. 486/2014**

% Judgement reserved on: 11.12.2014
Judgement pronounced on: 19.01.2015

I.T.E. INDIA PVT LTD Petitioner

Through: Mr Rajiv Bansal and Ms Neerua
Sharma, Advs.

versus

DELHI TOURISM AND TRANSPORTATION DEVELOPMENT
CORPORATION Respondent

Through: Ms Shobhana Takiar, Advocate

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. Vide this present petition, the petitioner has prayed for appointment of an Arbitrator in terms of clause 12.2 of the agreement dated 08.08.2005 to adjudicate the disputes between the parties.

2. The admitted facts of the case are that on 08.08.2005, the petitioner was awarded an operational contract of commercial outlets at Garden of Five Senses located at Said-ul-Ajaib, Saket, New Delhi by the respondent. On 23.08.2005, the said contract was awarded to the petitioner for 10 years, commencing from the operational contract period during which the petitioner was authorized to exclusively operate and maintain the facility in accordance with the provisions of agreement dated 08.08.2005 and the

possession of the same was handed over to the petitioner on the same day, i.e., 23.08.2005. Between 25.07.2009 to 08.08.2009, the petitioner had sub-contracted few outlets to sub-contractees without NOC of the respondent. The respondent issued the NOC on 25.07.2009. Thereafter, on 14.05.2010, certain disputes arose between the parties and the respondent sent a show-cause notice to the petitioner. However, the dispute could not be resolved between the parties and the parties had undergone several litigations before the Court. Few of them are still pending.

3. The petitioner, however, raised the dispute vide its letters dated 19.02.2012 and 27.02.2012 and asked the respondent to amicably settle the dispute. These letters were issued by him pursuant to the arbitration clause 12 forming part of the contract between the parties. Thereafter, the petitioner filed an Arbitration Petition No.439/2013 before the Court under Section 11 for appointment of an Arbitrator. The said application was withdrawn by the petitioner for taking recourse of the provisions of Article 12.1 of the agreement and sought liberty to take recourse to an appropriate remedy in accordance with law. While disposing of the said arbitration petition vide order dated 05.07.2013, the liberty to take appropriate remedy in accordance with law was given to petitioner and petition was disposed of. The

contention of the petitioner is that thereafter in view of Article 12.1, he had sent a letter dated 11.07.2013 to the respondent, whereby the petitioner had raised the dispute and appointed his nominee member of conciliation panel and called upon the respondent to appoint its representative/nominee for conciliation panel in order to facilitate the conciliation in terms of clause (b) of Article 12.1 of the agreement. It is submitted that despite the service of the said notice upon the respondent, the respondent did not appoint his nominee to the conciliation panel and rather sent a reply dated 10.09.2013, wherein it is alleged by them that the letter was not sent in conformity with clause 12.1 of the agreement dated 08.08.2005. It is submitted that thereafter, the petitioner had written another letter to the respondent dated 30.09.2013, wherein they had shown their intention to settle the matter amicably and asked the respondent to indicate the name of the official, the time and the date convenient to sit across the table for settlement. It is submitted that despite that, the respondent took no action and hence the present petition.

4. The petition is contested by the respondent. The respondent has raised the preliminary objection that since the agreement between the parties stands terminated, all the terms and conditions has come to an end and, therefore,

the arbitration agreement cannot be enforced. It is further contended that after the termination of the contract, the petitioner had become unauthorized occupant in the premises. The respondent had already initiated the action before the Estate Officer. It is further contended that the petitioner had filed OMP No.575/2013 with the prayer that respondent be restrained from adopting any other mechanism except as provided in the agreement dated 08.08.2005 and the Court passed an order dated 05.07.2013, wherein the Estate Officer was permitted to continue with the hearing and pass the final order, but, will not give effect to its order till the next date of hearing. On the subsequent date, i.e., 15.05.2014, the said petition was dismissed since the issue whether premises in question was a public premises or not was pending adjudication in W.P. (C) No.4034/2013 before the Court. It is contended that on termination of the agreement, the petitioner is unauthorized occupant and the proceedings under Public Premises Act (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as “the P.P. Act”) had already been initiated, therefore, this Court has no jurisdiction to entertain the present petition. It is further contended that in view Section 15 of P.P. Act, the proceedings under Arbitration and Conciliation Act, 1996 on the question of eviction of the petitioner from the

premises, are incompetent. Therefore, the petition is liable to be dismissed. It is further contended that in view of Article 12 of the Contract, any dispute, differences or controversy of the agreement was to be notified in writing at the first instance and to be resolved amicably by the conciliation panel as per the procedure provided in sub-Article (b) of 12.1 and the petitioner had not followed any such procedure. It is submitted that as per Article 12, no letter has been sent for resolving the dispute amicably by the conciliation panel and that the petitioner had failed to refer the matter to Chief Engineer or Managing Director of the respondent for amicable settlement. Since he has failed to comply with the procedure, the petition is liable to be dismissed.

5. I have heard the arguments and have given considerable thought to the contentions raised by the parties. In the present case, the preliminary objection raised by the respondent is that the present petition is not maintainable in view of the fact that after termination of the contract dated 08.08.2005, the arbitration clause of Article 12 also ceased to be operational and cannot be enforced. Learned counsel for the petitioner has contended that this plea of the respondent is contrary to the established principles of law and has relied on *Enercon (India) Ltd. vs. Eneron GMBH*, (2014) 5 SCC 1 and *Magma Leasing and Finance Ltd. vs. Potluri Madhavi Lata*,

(2009) 10 SCC 103. The respondent, on the other hand, had not produced any case law to support their contention.

6. In the case **Magma Leasing and Finance Ltd.** (*supra*), the issue for determination before the Supreme Court was “*does the arbitration agreement survive for the purpose of resolution of disputes arising under or in connection with the contract even if its performance has come to an end on account of termination due to breach?*” In answer to that question, the Supreme Court has relied on its earlier judgment in the case of **National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd.** (2007) 5 SCC 692, and has held as under:-

“16. The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. Vide *Heyman v. Darwins Ltd.* (1942)AC356; *Union of India v. Kishorilal Gupta & Bros* AIR 1959 SC 13 and *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*: AIR 1968 SC 522. This position is now statutorily recognised. Sub-section (1) of Section [16](#) of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall

not entail ipso jure the invalidity of the arbitration clause.

17. Recently, in the case of *P. Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corporation and Ors.*: (2009) 2 SCC 494 while dealing with the argument of the respondent therein that in terms of the contract the claim for extra work or additional work should have been raised during the pendency of the contract itself and not after it came to an end, this Court considered the concept of separability of the arbitration clause from the contract and made the following observations:

27. An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to an end of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in Article 16(1). The Indian law -- the Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach in Section [16\(1\)\(b\)](#), which reads as under:

16. *Competence of Arbitral Tribunal to rule on its jurisdiction.*--(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) *a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

(emphasis supplied)

Modern laws on arbitration confirm the concept.

28. The United States Supreme Court in a recent judgment in *Buckeye Check Cashing Inc. v. Cardegna* 546 US 460 (2005) acknowledged that the separability rule permits a court "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void". The Court, referring to its earlier judgments in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.* 18 L.Ed. 2d 1270 and *Southland Corporation v. Keating* 465 US 1 (1984) inter alia, held:

“Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”

But this must be distinguished from the situation where the claim itself was to be raised during the subsistence of a contract so as to invoke the arbitration agreement would not apply.”

The Supreme Court has further held that merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract.

7. In the case of **Enercon (India) Ltd.** (*supra*), the Supreme Court has held as under:-

“80. The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the National Courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties.

81. The scope and ambit of provision contained in Section 16 of the Indian Contract Act has been clearly explained in **Reva Electric Car** (supra), wherein it was inter alia observed as follows:

54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the

arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Mr. Ahmadi that with the termination of the MoU on 31-12-2007, the arbitration clause would also cease to exist.

The aforesaid reasoning has also been approved by a two Judge bench of this Court in **Today Homes and Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust and Anr.** MANU/SC/0513/2013 : 2013 (7) SCALE 327, wherein it was inter alia held as under:

14. The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding the case of Reva Electric Car Co. Private Limited v. Green Mobil (MANU/SC/1396/2011 : (2012) 2 SCC 93), wherein the provisions of Section 16(1) in the backdrop of the doctrine of kompetenz kompetenz were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was

also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void.

In view of the aforesaid, we are not inclined to accept the submission of Mr. Nariman that Arbitration Agreement will perish as the IPLA has not been *finalised*.”

8. Thus, the contention of the respondents that on the termination of the contract, the arbitration agreement would also cease to bind the parties is of no force and has no merit. The arbitration agreement is an independent agreement and continues to bind the parties even after the termination of the performance contract.

9. In the present case, Article 12 of the Contract deals with the dispute resolution mechanism. Article 12.2 states that *in the event any disputes, differences arising out of or touching this agreement are not resolved amicably, as provided in Article 12.1, the same shall be referred to the sole Arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any modification.*

Therefore, it is apparent that as per this arbitration agreement before the matter is referred to a sole Arbitrator, the parties are to follow the

procedure prescribed under clause 12.1 for amicable resolution. For the sake of ready reference, Article 12.1 is re-produced as under:-

“12.1 Amicable Resolution

a. Save where expressly stated otherwise in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement between the parties and so notified in writing by either party to the other (the “Dispute”) in the first instance shall be attempted to be resolved amicably by the Conciliation Panel in accordance with procedure set forth in sub-article (b) below.

b. Either Party may require the Dispute to be referred to the Chief Engineer or Managing Director of DTTDC or their nominee, for the time being for amicable settlement. If the dispute remains unresolved within 15 days of such reference, it shall be referred to a Conciliation Panel. Upon such reference, the Conciliation Panel shall meet at the earlier mutual convenience and in any event within 10(ten) days of the constitution of the Panel as set forth in sub-article (c) below, to discuss and attempt to amicably resolve the Dispute. If the Dispute is not amicably settled within 30(thirty) days of such meeting of the Conciliation Panel, either Party may refer the Dispute to arbitration in accordance with the provisions of Article 12.2 below.

c. Along with the notification of the Dispute in writing by either Party to the other, the notifying Party shall also appoint on representative not concerned with the obligations under this Agreement as member of the Conciliation Panel

within 5(five) days of receipt of such notification the other Party shall appoint one representative not concerned with the obligations under this Agreement as the other member of the Conciliation Panel. If either Party defaults in appointing a member of the Conciliation Panel, the other Party may refer the Dispute to arbitration in accordance with the provisions of Article 12.2 below.”

10. This Court, therefore, has to see whether before invoking the jurisdiction of this Court under Article 12.2, the petitioner has complied with the requirements of Article 12.1. Article 12.1 has three sub-articles (a) to (c). Clause (a) requires that dispute be notified in writing by either party to the other, in the first instance, shall be attempted to be resolved amicably by the Conciliation Panel in accordance with the procedure, set forth in sub-article (b). The method or procedure of formation of the Conciliation Panel is provided in sub-article (c) of Article 12.1. This sub-article requires that when the dispute is notified to the other party, the notifying party “**shall**” also appoint a representative as a member of a Conciliation Panel and within five days of receipt of such notification, the other party “**shall**” appoint one representative as the other member of the Conciliation Panel. Sub-article (c) further states that if either party defaults in appointing a member of the Conciliation Panel, the other party may refer the dispute to arbitration in accordance with the provisions of Article 12.2 below. The conjoint reading

of sub-article (a) and sub-article (c) clearly envisages that sub-article (a) and sub-article (c) are supplementing each other and in case one of the parties does not comply with the terms set out in sub-article (a) and sub-article (c) and the Conciliation Panel is not formed due to default on the part of either of the party, any of the party may refer the dispute to arbitration in accordance with Article 12.2 below which notifies that if the dispute is not resolved in terms of Article 12.1 amicably, the same shall be referred to the sole Arbitrator under the provisions of Arbitration and Conciliation Act, 1996. From the conjoint reading of sub-article (a) and sub-article (c), it is apparent that sub-article (b) comes into operation only on the formation of a Conciliation Panel. If the Conciliation Panel could not be formed in terms of sub-article (a) and sub-article (c), then the remedy available to either party is under Article 12.2. Where, however, the Conciliation Panel is formulated, sub-article (b) comes into operation and then the parties are, at the first instance, required to attempt to resolve its dispute amicably in terms of procedure set forth in sub-article (b). Sub-article (b) requires parties, at the first instance, before dispute be put up before Conciliation Panel, shall attempt to resolve it amicably. Sub-article (b) further states that if parties fail to resolve dispute amicably, then matter be referred to Conciliation Panel for

settlement and if Conciliation Panel also fails to settle the dispute amicably within the fixed time span, then either party can take recourse of Article 12.2 and seek appointment of Arbitrator. This shows that sub-article (b) becomes operational only on compliance of sub-article (a) and (c) and sub-article (c) gives liberty to either party to take recourse of Article 12.2 if other party under sub-article (c) fails to appoint its member of Conciliation Panel or the first party while notifying the dispute under sub-article (a) fails to nominate its member of Conciliation Panel. Sub-article (b) is independent of sub-article (a) and (c). It is apparent that either party can take recourse to Article 12.2 either in sub-article (b) or sub-article (c).

11. In the light of this interpretation, it is now required to be seen whether the petitioner before invoking the jurisdiction of this Court under Article 12.2 had fulfilled the conditions laid down under Article 12.1. Admittedly, the petitioner had earlier filed a petition being Arbitration Petition No.439/2013 under Section 11 for appointment of an Arbitrator, but, withdrew the said petition with liberty to take recourse of the provisions of Article 12.1 of the agreement. This liberty was given to him by the Court. Pursuant to that, the petitioner had issued a letter dated 11.07.2013 to the respondent, wherein he had notified the dispute in writing to the respondent

and had also nominated his member of the Conciliation Panel and asked the respondent to appoint his member of Conciliation Panel. Admittedly, the respondent has not so far appointed his member of the Conciliation Panel till now although he was required to do so within five days under sub-clause (c) of Article 12.1. The respondent rather sent a reply dated 10.09.2013 after two months, asking the petitioner to first get the dispute amicably settled through Chief Engineer or Managing Director of the respondent or their nominee. The petitioner conceded to the demand of the respondent and wrote a letter dated 30.09.2013 showing their intention to get the dispute settled amicably by way of conciliation and asked the respondent to communicate the name of the official, the time and the date convenient to sit across the table and settle the matter amicably, but, did not get any response from the respondent. During arguments, the petitioner explained that though in view of sub-article 12.1 (c) he could have approached the Court on failure of respondent to comply with requirement of sub-article (c) that is on its failure to appoint member of Conciliation Panel within five days, but as an abundant caution, he did not do so. It is apparent that the respondent did not show any inclination to get the dispute settled amicably and did not respond to letter of the petitioner.

12. From the above facts, it is apparent that the respondent had failed to nominate his member of the Conciliation Panel in terms of Article 12.1 (c) and so course was open to petitioner to approach the Court under Article 12.2 on non-compliance of terms of Article 12.1 (c).

13. In view of Article 12.2 which requires that the matter be referred to sole Arbitrator, I hereby appoint Ms. Aruna Suresh, Former Judge of Delhi High Court as an Arbitrator to conduct the arbitration. She is free to fix her own fee.

14. The respondent has also raised the plea that in the present case, the matter regarding eviction of the petitioner from the premises is covered under the P.P. Act and in view of Section 15 of the said Act, the Arbitrator cannot enter into a reference regarding eviction. The respondent is free to take this issue before the Arbitrator and Arbitrator is free to decide her jurisdiction in view of the objection of respondent.

15. In view of the above, the petition stands disposed of.

**DEEPA SHARMA
(JUDGE)**

JANUARY 19, 2015
BG