

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

% Order delivered on: 3rd June, 2016

+ **ARB.P. 138/2016**

VIJAY ANAND & ASSOCIATES PVT. LTD Petitioner
Through Mr.E.R.Kumar, Adv. with Mr.D.P.
Mohanty & Ms.Aakanksha Nehra,
Adv.

versus

AMAN HOSPITALITY PVT. LTD. Respondent
Through Ms. Saima Ansari (proxy counsel)

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner is a private limited company which deals with manufacturing, interior and furniture designing. The petitioner was engaged through a Letter of Award dated 3rd June, 2011 (hereinafter referred to as "Letter of Award") bearing No. Ambience/11-12/047 by the respondent company for supply, erection, execution and commissioning of interior works for Convention Centre and Business Centre of a hotel project at C.B.D., Shahdara, New Delhi (hereinafter referred to as "Hotel Shahdara").

2. Admittedly the Letter of Award was for a total value of Rs.12,75,00,000 exclusive of VAT and Service tax (as applicable), which amount was subject to any variation in quantities or extra items, but were escalation free as per clause 35,43 to 45 of the letter of Award.

3. Amendment Letter dated 5th September, 2011 was issued by the respondent in relation to the Letter of Award making certain

corrections with respect to the units of the work to be undertaken by the petitioner.

4. It is the case of the petitioner that during the years 2011-2013 the petitioner met the representatives of the respondent, who also sent emails and letters to the respondent informing it about the delays in the works that were required to be finished prior. The petitioner also stated that during the course of the execution of the works various times, work was stalled, due to which extra work was required to be done with respect to which the petitioner had charged separately. The petitioner also submitted 1st to 7th final Running Account Bills to the Project Manager of the respondent who thereupon on 28th April, 2013 sent the Abstract of Payments to the petitioner of all the Running Account Bills No. 1st to 7th final bill as per their calculation.

5. The petitioner submits that by its letter dated 4th May, 2013 informed the respondent regarding the handing over the following areas after all the snags having been attended to as identified by the respondent's team:

- (i) Convention Center,
- (ii) Convention Center Rest Room,
- (iii) Business Center 2nd Floor,
- (iv) Business Center Ground Floor,
- (v) Business Center 2nd floor rest room.

6. The petitioner also by letter dated 24th May, 2013 reminded the respondent with respect to the unpaid sum of Rs.4,55,53,837/- as per the certificate of payment.

7. The respondent vide its letter dated 28th May 2013 in response to the petitioner's letter dated 24th May 2013 denied that there is any outstanding which is required to be paid.

8. The petitioner by its letter dated 6th February, 2014 and 25th February, 2014 requested the respondent for release of the outstanding payments as the petitioner was facing acute financial constraints. By its letter dated 28th February, 2014 forwarded the final bills towards the interior work completed to M/s Achal Kataria Associates. In the said letter, the petitioner also stated that the bills had been duly checked and certified by AGM (Billing) and GM (Projects) of respondent and the respondent's appointee. It also asked M/s Achal Kataria Associates to certify the same and to do the needful immediately.

9. The respondent through its letter dated 4th March, 2014 (in response to petitioner's Letter dated 25th February, 2014) informed the petitioner that they have checked their accounts and found no amount is payable to the petitioner with respect to Hotel Shahdara.

10. The petitioner thereafter by its email dated 11th March, 2014 sent to the respondent, requested the respondent to send their ledger account to the petitioner so that the same can be reconciled with the petitioner's books of accounts.

11. It appears from various communication exchanged between the parties but their issues could not be resolved as there were two different.

12. Thus disputes had arisen between the parties in relation to the Letter of Award dated 3rd June, 2011 awarded by the respondent in favour of the petitioner for execution of works at Hotel Project at CBD, Shahdara, New Delhi ("Project"). Clause 64 of the Letter of

Award dated 3rd June, 2011 is the arbitration agreement between the parties, as extracted hereinbelow:

“64. Arbitration

In the event of any dispute or differences between the parties arising howsoever from this contract, the same shall, unless amicably settled, be referred to the arbitration of M/s Achal Kataria & Associates having its offices at E-15, South Extension – I, New Delhi for final settlement. The arbitration proceedings shall be held at New Delhi and shall be binding on both the parties.”

13. In view of disputes arose, the notice dated 3rd October, 2015 was sent by the petitioner's counsel to the respondent seeking payment of the outstanding sums under the Letter of Award. The respondent through its counsel sent reply dated 23rd October, 2015 whereby the claims of the Petitioner were denied.

14. As disputes could not be settled amicably, the Petitioner sent the Notice of invocation of arbitration dated 27th January, 2016 invoking aforementioned Clause 64.

15. The respondent was thereby requested to choose any one of them. The respondent through its counsel sent reply dated 2nd April, 2016 denying the contentions of the petitioner. The respondent suggested for appointment of sole Arbitrator as M/s Achal Kataria & Associates (being the Architect of the Project with respect to which the disputes had arisen) to which the petitioner did not agree as it is submitted that it can't be appointed as Arbitrators in pursuance of the amendments to the Arbitration and Conciliation Act, 1996.

16. Under such situation, the petitioner filed the captioned petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 (“Act”) for appointment of sole arbitrator. The said petition has been filed on the various grounds.

17. The respondent has further in its reply dated 23rd October, 2015 stated that if there are any disputes, then the same can be referred to arbitration as per Clause 64, for settlement. Thus, intention of the parties to arbitrate disputes arising out of Letter of Award is clear and unequivocal.

18. The respondent in his reply has made the submissions that the arbitration clause itself specifies and names the arbitrator and the Petitioner at his own will cannot revoke the authority of the arbitrator appointed with consent and once arbitrator is named in the arbitration clause, Section 11 is not attracted and accordingly, the instant petition is not maintainable thus this Court does not have the jurisdiction to entertain the captioned Petition.

19. It is admitted position that the arbitration in the present case has been invoked after 23rd October, 2015 (the date from which the Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act") is deemed to have come into force [please refer Section 1(2) thereof])) and by virtue of Section 26 read with Section 1(2) of the Amendment Act, the amended provisions would apply to the instant proceedings. Reliance in support of this submission is placed on the judgment of this Court in the case of **Assignia-VIL JV v. Rail Vikas Nigam Limited** (paras 36, 39-44).

20. It is pertinent to mention here that the respondent has not denied, in its reply, that M/s Achal Kataria & Associates was the Architect of the Project, appointed by the Respondent and that it had shared its comments/ recommendations with the Respondent for the certification of the Bills in pursuance of Clause 37(vii).

Even otherwise, 'M/s Achal Kataria & Associates' in Clause 64 does not amount to appointment of a named arbitrator as required

under law. Further, no individual has been named as an arbitrator in Clause 64. Reliance in support of this submission is placed on the judgment passed by Hon'ble Mr. Justice Amitava Roy of Gauhati High Court (as his Lordship then was) in the case of **Union of India v. Bhaskar Construction Co. & Anr.**, (2003) 2 ArbLR 180 (Paras 2, 28-32).

21. The Supreme Court in the case of **ACC Limited v. Global Cements Ltd.**, 2012 (7) SCC 71 (Paras 19, 28-30) has held that 'arbitration clause would have life so long as any question or dispute or difference between the parties exist unless the language of the clause clearly express an intention to the contrary'. It was further held that objection can be raised only if there is a clear prohibition/debarment to the said effect. The said decision is judgment passed by Supreme Court in **San-A Tradubg Company Ltd. v. I.C. Textiles Ltd.**, (2012) 7 SCC 192 (paras 8, 13, 18-19).

22. I agree with the argument of the counsel for the petitioner that under the amended Section 12(5) read with Seventh Schedule of the Arbitration and Conciliation Act, 1996 (as amended), M/s Achal Kataria & Associates is ineligible to be appointed as an arbitrator, as:

- i. M/s Achal Kataria & Associates was the Architect (appointed by the Respondent) for this Project
- ii. M/s Achal Kataria & Associates was under Clause 37(vii) of the Letter of Award was required to certify the Final Bill of the Petitioner for the said Project, as a pre-requisite for the payment.
- iii. M/s Achal Kataria & Associates has in fact certified the Final bill of the Petitioner. M/s Achal Kataria & Associates has itself admitted to have sent its recommendation/

comments (with respect to Bills raised with respect to the work executed under the Letter of Award dated 3rd June, 2011) to the respondent vide its Letter dated 18th March, 2014 in response to petitioner's Letter dated 28th February, 2014.

23. In case 'M/s Achal Kataria & Associates', referred to as an arbitrator in the arbitration clause, is invalid for any reason, the same does not render the arbitration clause as invalid, in the absence of any express prohibition/ intention to that effect manifested in the arbitration clause. Thus, under no circumstances to exercise of power cannot be take away the jurisdiction of this Court to appoint an arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996 as sought by the Petitioner.

24. In light of the judgment of the Supreme Court in the case of ***Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr.***, (2014) 5 SCC 1 [Paras 80, 88, 94], the parties cannot be permitted to avoid arbitration without satisfying the Court that it would not in the interest of the parties to proceed with the arbitration. It was further held that Courts must work towards the aid and support of the arbitral process and make the arbitration clause workable.

25. In light of the above, this Court while exercising its jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 appoints Justice Sat Pal (Retd. Judge of this Court) (R/o SFS, 53, DDA Flats, East Mukherjee Nagar, Delhi Mobile No.9871693147) as Arbitrator to decide the disputes that have arisen between the parties under the Letter of Award dated 3rd June, 2011 for the works executed by the petitioner at Hotel Project at CBD, Shahdara, New Delhi.

26. The arbitration shall take place under the aegis of Delhi International Arbitration Centre ('DAC'). The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the Delhi International Arbitration Centre (Administrative Cost Arbitrator's Fees) Rules. The parties to appear before the Arbitrator on 10th February, 2016 for directions.

27. The petition is accordingly disposed of.

28. Copy of this order be given dasti to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

JUNE 3 , 2016

**(MANMOHAN SINGH)
JUDGE**