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

\+ O.M.P. (COMM) 365/2016

SINGHANIA HORIZONS

..... Petitioner

Through: Mr Rajshekhar Rao & Ms Renu Gupta, Advs.

versus

HRC ENGINEERS ESTATE PRIVATE LIMITED & ANR.

..... Respondents

Through: NEMO.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **05.08.2016**

<u>IA No.9377/2016</u>

In view of the reasons stated in the application, the delay of 75 days in re-filing stands condoned.

The application is disposed of.

<u>IA No.9376/2016</u>

Allowed, subject to all just exceptions.

The application is disposed of.

<u>O.M.P. (COMM) 365/2016</u>

1. The petitioner has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996, (hereafter 'the Act') *inter alia,* impugning the Award dated 22.01.2016 (hereafter 'impugned Award')

passed by the Sole Arbitrator (Hon'ble Justice D.P. Wadhwa, Former Judge of the Supreme Court).

2. The petitioner - who was the claimant before the Arbitrator - had sought to raise disputes relating to an agreement dated 28.03.2007 captioned as "Exit Agreement". The respondents also filed counter claims in relation to the said Exit Agreement.

3. The Arbitrator found that the said Agreement was obliterated by a subsequent 'Shareholder's Agreement' dated 28.11.2007 between the parties and concluded that the arbitration clause contained in the afore-mentioned Exit Agreement had also perished. In the present petition, the petitioner seeks to contend the aforesaid conclusion as perverse and contrary to the material/evidence on record.

4. The learned counsel for the petitioner referred to the cross-examination of Mr Piyush Singhania, Sole Proprietor of the petitioner and drew the attention of this Court to his response to question No.19, 39 and 52, which are reproduced below for ready reference:-

> "Q. 19 Is it correct that this shareholders agreement was entered into laying down the mechanism for your exiting out of the joint venture and selling your stake to the respondent

no.2?

Ans. It did so, besides the exit agreement of March, 2007.

xxxx xxxx xxxx

Q.39 Is it correct that the purpose of incorporating this company was recorded by the parties in a document executed by them?

Ans. Yes it was recorded in the form of a share holder agreement. But this document was only additional to the exit agreement which was the main document.

xxxx xxxx xxxx

Q.52 Please see answer to Q.19 given by you? Can you elaborate what you mean by saying "besides the exit agreement of March, 2007"?

Ans. The exit agreement of March, 2007 was the main agreement which laid down the terms of my exit from the joint venture. It laid down the payments to be received by me and properties to be transferred to me. The share holders agreement was signed later as I had suggested the formation of a company to transfer the business of the joint venture so that the accounts would be more difficult to fuddle and it would be more transparent so that the investors brought in by me would be more secure than before."

5. Mr Rajshekhar Rao, learned counsel appearing for petitioner contended that the above testimony of Mr Piyush Singhania established that the Shareholders Agreement dated 28.11.2007 was in addition to the Exit Agreement and, therefore, did not in any manner either novate the Exit

Agreement or curtail its operation. He earnestly contended that the impugned Award was liable to be set aside as it was contrary to the aforesaid evidence on record.

6. I have heard the learned counsel for the petitioner.

7. On 05.08.2005, the petitioner and respondent no.1 entered into a Joint Venture Agreement for the purpose of, *inter alia,* carrying on the business of (i) development of Plot at Agra and (ii) sale of demarcated plots, residential houses, flats, commercial space at the Agra plot. The parties agreed to initially invest a sum of ₹40,00,000/- in the said venture. The petitioner's share in the said joint venture was 25%.

8. The petitioner states that he was excluded from the business venture in a clandestine manner and alleges that respondents repeatedly breached the Joint Venture Agreement; consequently, the relationship between the petitioner and the respondents became so strained that there was no option but to exit the Joint Venture upon receiving his share (25%). The parties entered into the Exit Agreement dated 28.03.2007 whereby respondent no.2 agreed to purchase the 25% share of the petitioner in the business of the Joint Venture.

9. It is stated that in terms of the Exit Agreement, the petitioner was to be paid a sum of ₹20,60,000/- (Twenty Lacs Sixty Thousand) by two post dated cheques of ₹6,60,000/- and ₹14,00,000/-. In addition, certain residential units (independent floors and villas) and land measuring 450 sq. metres of the proposed commercial space was also agreed to be transferred to the petitioner before 31.03.2008. The petitioner alleges that apart from making a payment of ₹6,60,000/-, the respondents failed to fulfil the other obligations. This was disputed by the respondents who claimed that they had handed over the possession of the properties mentioned in the Exit Agreement. It is the case of the petitioner that in the aforesaid context, the parties entered into the Shareholders Agreement dated 28.11.2007 whereby the business of the Joint Venture was to be transferred to a company and shares of the said company were to be issued to the petitioner which would eventually be purchased by the respondent. It is further stated that pursuant to this Shareholders Agreement, a company in the name and style of HRC Horizons Construction Pvt. Ltd. was incorporated on 19.12.2007. The petitioner further alleged that although the company was incorporated but the Shareholders Agreement was not acted upon inasmuch as no shares were allotted to the petitioner.

10. The petitioner invoked arbitration by a notice dated 17.08.2010 referring to Article 22 of the Joint Venture Agreement dated 05.08.2005 and Article 13 of the Exit Agreement dated 28.03.2007. Admittedly, the said notice did not refer to the Shareholders Agreement dated 28.11.2007.

11. The petitioner thereafter filed a petition before this Court (Arbitration Petition No.85/2011) and by an order dated 25.05.2011, Hon'ble Justice D.P. Wadhwa, Former Judge of the Supreme Court was appointed as a Sole Arbitrator. The petitioner filed its statement of claims principally alleging that the respondents had not complied with the Exit Agreement. The petitioner, *inter alia,* prayed that the Exit Agreement be declared to have become incapable of performance and that the petitioner continues to be a Joint Venture partner till its dissolution. The petitioner also sought rendition of accounts and an Award for the value of 25% of the business of the Joint Venture. The petitioner thereafter, also raised a supplementary claim of ₹3,06,97,155/-.

12. The claims made by the petitioner were disputed by the respondents. They alleged that the parties had entered into the Shareholders Agreement in terms of which respondent no.2 had agreed to acquire the 25% stake of the petitioner. It was further claimed that pursuant to the Shareholders

Agreement dated 28.11.2007, the petitioner and respondent no.1 had incorporated a company, namely, HRC Horizons Construction Pvt. Ltd., in which the respondent no.1 held 4,50,000 shares and the petitioner held 1,50,000 shares. The respondents claims that in furtherance of the Shareholders Agreement, the petitioner had transferred his entire shareholding at the agreed amount of ₹16,60,000/- by a Share Transfer Form dated 22.12.2007. The respondents also raised a counter claim against the petitioner, *inter alia*, claiming a sum of ₹5,00,00,000/- as damages for defamation.

13. The Arbitrator considered agreements entered into between the parties and found that the Exit Agreement was novated by the Shareholders Agreement. He further held that the parties had also acted in furtherance of the Shareholders Agreement and not the Exit Agreement.

14. The recitals of the Exit Agreement dated 28.03.2007 read as under:-

> "Whereas
>
> The party of First part M/s. HRC Engineers Estate Pvt. Ltd. and party of Third part M/s. Singhania Horizons had jointly undertaken a project under the name and style of 'HRC HORIZONS' at Agra in the field of Real Estate and infrastructure. The party of Second part are directors of HRC Engineers Estate Pvt. Ltd.

And Whereas the Share of profit and Loss of the First and the Third party in the said Joint Venture was 75 % and 25 % respectively.

And Whereas this Agreement is being executed with the intention to complete the terms, conditions, rights and obligations of the parties to the Joint Venture agreement dated 05.08.2005.

And Whereas the First and the Third party have mutually agreed that the Third party would leave the Joint Venture and the Second party is willing to purchase the stake of Third party.

It is mutually agreed that in order to avoid any future disputes, it is mutually agreed to reduce the terms and conditions for the transfer of 25 % stake of the Third party in favour of Second party as stated hereunder."

15. The recitals of the Shareholders Agreement dated 28.11.2007 read as under:-

"WHEREAS

The party of First part M/s HRC ENGINEERS ESTATE Pvt. Ltd. and party of Third part M/s. Singhania Horizons had jointly undertaken a project under the name and style of 'HRC HORIZONS' at Agra in the field of Real Estate and infrastructure. The party of Second part are directors of HRC Engineers Estate Pvt. Ltd.

And whereas the share of profit and loss of the First and the Third party in the said joint Venture was 75% and 25% respectively.

And Whereas this Agreement is being executed with the intention to complete the terms, conditions, rights and

> obligations of the parties to the joint venture agreement dated 05.08.2005.
>
> And whereas the First and the third party have mutually agreed that the third party would leave the joint venture and the Second party is willing to purchase the stake of Third party.
>
> It is mutually agreed that in order to avoid any future disputes, the terms and conditions be reduced in writing for the transfer of 25 % stake of the Third party in favour of Second party as stated hereunder."

16. The Arbitrator has reasoned that the recitals of the Shareholders Agreement give a go-by to the Exit Agreement since the object of both the Shareholders Agreement and the Exit Agreement is the same. The recitals of the two agreements – Exit Agreement and Shareholders Agreement - as quoted above clearly support the Arbitrators's conclusion and I find no infirmity with the aforesaid view.

17. A bare perusal of the present petition also indicates that it is the petitioner's case that the Exit Agreement was entered into in view of the disputes that had arisen between the parties in relation to their Joint Venture business. The purpose of the Exit Agreement – as the title itself suggests – was severance of the petitioner from the Joint Venture business.

18. It is the petitioner's case that the Exit Agreement was not performed

by the respondents and this had led the parties to enter into the Shareholders Agreement. It has been contended by Mr Rao that the Shareholders Agreement was in addition to the Exit Agreement as the petitioner continued to hold its stake in the Joint Venture pending performance of the Exit Agreement.

19. In my view, the aforesaid contention is bereft of any merit. A bare perusal of the Shareholders Agreement indicates that it provides the mechanism by which the petitioner was to exit the Joint Venture business. The mechanism being the transfer of the Joint Venture business to an independent company in which the petitioner was to hold 25% shares and thereafter, exit from the company by sale of his shares to respondent no.2. The Exit Agreement provided a totally different mechanism for the petitioner to exit the Joint Venture business. The Arbitrator had, therefore, held - and in my view rightly so - that the two agreements cannot co-exist.

20. The arbitration clause under the Exit Agreement, thus, perished with the parties entering into the Shareholders Agreement and, therefore, the Arbitrator had rightly held that the Arbitration proceedings arising out of the invocation of the arbitration clause under the Exit Agreement must fail.

21. In ***Saraswati Industrial Syndicate Ltd. v. Apollo Tyres Limited***: **ILR 1986 Delhi 382**, a Coordinate Bench of this Court considered a case where the parties had entered into an Agreement containing an arbitration clause. Differences arose between the said parties as to the amounts due and a settlement was arrived at. While the agreement contained an arbitration clause, the settlement agreement did not. In the aforesaid context, the Court observed as under:-

> "9. There could be no doubt that where the parties agreed to refer their disputes and differences to arbitration but subsequently ignoring the arbitration agreement the parties mutually through their representatives agree and arrive at a settlement and that settlement is acted upon as well in part, then only the subsequently arrived at settlement would govern the relations of the parties thereafter and the parties cannot be permitted to ignore such a settlement so as to have recourse to the original arbitration agreement. In these circumstances, the arbitration agreement stands discharged, abrogated and abandoned and the same becomes infructuous and cannot be revived by any of the parties. Such is the position in the instant case and in these circumstances the defendant would be estopped from invoking the provision of arbitration agreement and cannot be permitted to have recourse to it through the instrumentality of Section 34, Arbitration Act."

22. The aforesaid view was also reiterated by this Court in ***Seema Bhatia v. Yamaha Motor India Pvt. Ltd***.: **2007 (144) DLT 772.** In that case, a memorandum of understanding was entered into between the parties to an

agreement, principally for resolution of certain differences. Whilst the initial agreement contained an arbitration clause, the memorandum of understanding did not. In the aforesaid context, this Court held that the Arbitration clause had perished with the parties entering into between the memorandum of understanding.

23. A similar view has also been expressed by this Court in ***Jaiprakash Associates v. National Hydroelectric Power Corporation Ltd.***: **2009 (9) AD (Delhi) 23.**

24. In view of the above, I find no reason to interfere with the impugned Award. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

AUGUST 05, 2016
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