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

% **Decided on : 27.07.2016**

+ **FAO(OS) (COMM) 54/2016 & C.M.Nos.26569-26570/2016**

**M/S LALL CONSTRUCTIONS CO. .... Appellant**

**Through: Mr.Chandan Kumar, Advocate**

**versus**

**THE GENERAL MANAGER NORHTERN RAILWAY**

**..... Respondent**

**Through:**

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MS. JUSTICE DEEPA SHARMA**

**MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)**

1. A learned Single Judge by the impugned order, rejected the objections filed under Section 34 of the Arbitration Act against the award made by the Arbitral Tribunal dated 17.03.2016.

2. The necessary facts for deciding this case are that the appellant had entered into a supply contract with the Northern Railways. The appellant had invoked Clause 64 of the agreement arguing that it contained an arbitration clause. The invocation was apparently questioned; this Court, however, proceeded to appoint an Arbitrator under Section 11 (6) of the Act. The order of the court was carried in appeal by special leave to the Supreme Court which on 04.08.2014 rejected the appeal. However, it reserved the respondent railways' contention pertaining to the purport and effect of the supplementary agreement. In arbitral proceedings, the railways contended that the

disputes raised by the appellant were not arbitrable and relied upon a supplementary agreement dated 14.02.2010. The relevant part of the said supplementary agreement, which sought to terminate the previous dispute regarding amounts, reads as under:

*“Now, it is hereby agreed by and between the parties in the considerations of sums already paid (by the party hereto of the first part to the party hereto of the second part against all outstanding dues and claims for, all works done under the aforesaid principal agreement including/excluding the security deposit the party hereto of the second part have no, further dues of claims against the party hereto the first part under the said Principal Agreement. It is further agreed by and between the parties that the party hereto of the second part has accepted the said sums mentioned above in full and final satisfaction of all its dues and claims under the said Principal Agreement.*

*It is further agreed and understood by and between the parties that in consideration of the payment already made, under the agreement, the said Principal Agreement shall stand finally discharged and rescinded all the terms and conditions including the arbitration clause.*

*It is further agreed and understood by and between the parties that the arbitration clause contained in the said principal agreement shall cease to have any effect and/or shall be deemed to be non-existent for all purposes.”*

3. The Arbitral Tribunal first considered whether at all the disputes urged on behalf of the appellant could be gone into and whether the supplementary agreement had the effect of effacing the arbitral agreement itself. The Tribunal extracted the relevant part of the supplementary agreement and thereafter discussed its purport as follows:

*“And, what does it signify? I have already observed that in view of the order of the Supreme Court, it is no more open to challenge the legality and validity of its execution. What then was its purport and thus its effect? To my mind it was to wash away completely the earlier arbitration agreement entered into between the parties. In other words it became non-existent” and that too “for all purposes” and thus ceased “to have any effect”, It was not the case of the Claimant nor was it argued, even obliquely that the said clause had no retrospective effect, In any case, since it obliterates completely the “arbitration clause contained in the said principal agreement” it does operate retrospectively. Anyhow, the Supplementary Agreement was entered into on February 14, 2010. Even if that part of the Supplementary Agreement which has been reproduced by me above is taken to be prospective and not retrospective, as on February 14, 2010 it ceased to exist. Thus, as I see it, I am being asked to arbitrate on the basis of a non-existent arbitration agreement. It did not exist on the date I was appointed. It does not exist even today. And if that be so, and it being so, how can I deal with the claims? This, to my mind, was the purport and effect of that part of the Supplementary Agreement as reproduced by me above.”*

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*What then? As the Supplementary Agreement of February 14, 2010 washed away the Arbitration Agreement as contained in the Principal Agreement, at least with effect from February 14, 2010, there is no such agreement at least from the said date and since there is no such arbitration agreement and I, having been appointed thereafter, cannot go into and arbitrate over the disputes. This, to my mind, is the purport and effect of the Supplementary Agreement. And this is precisely what I hold.*

*In view of the peculiar facts and circumstances of the case, the parties are left to bear their own costs.”*

4. The appellant carried the matter under Section 34 before this Court. Learned Single Judge rejected the appellant's objections. The contention urged by the counsel for the appellant inter alia was that in view of Section 16 (1) (a) of the Arbitration and Conciliation Act, the arbitration agreement in a sense stood entrenched and could not have been altered in any manner whatsoever. The counsel had at the same time conceded that an averment to that effect was never made before the arbitral tribunal. After noting the contention, the Single Judge was of the opinion that it was of no avail and rejected them.

5. Mr.Chandan Kumar, learned counsel urges that the learned Single Judge fell into serious error in not analyzing firstly that by virtue of Section 16 (1) (a) of the Act and Section 23 of the Contract Act there was no question of a permissive variance. Amplifying on this, learned counsel urged that once parties enter into an arbitral agreement, it assumes the character of a "stand alone" clause incapable of variation. Thus, even if the parties decide to rescind the main contract, if any residual conflict exists this would be arbitrable. Therefore, submitted counsel, an agreement which varies or completely takes away or undos the arbitration clause would have the effect of defeating the provisions of law and would thus fall foul of Section 23 of the Contract Act. In support learned counsel relied on the judgment of the Supreme Court in *Ashapura Mine-Chem Limited vs. Gujarat Mineral Development Corporation C.A.No.3702 of 2015 (SLP (C) No.1963 of 2014)*. The Supreme Court had in that decision relied upon the judgment in *Today Homes and Infrastructure Pvt.*

**Ltd. vs. Ludhiana Improvement Trust and Anr. 2014 (5) SCC 68** and other cases which emphasized that an arbitration clause though part of a contract would be severable. The Supreme Court stressed that even if there is a challenge to the validity or legality or breach of the underlying contract, the dispute resolution mechanism parties agree upon, stands insulated. The relevant part of the paragraph quoted from **Today Homes and Infrastructure Pvt. Ltd.**’ case (supra) is as follows:

*83. 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.”*

6. Learned counsel then relied upon ruling in **Ashapura Mine-Chem Limited**’s case (supra) where the Supreme Court had stated that

condition contained in the agreement in question i.e. MOU nevertheless was a valid arbitration agreement.

7. This court is of the opinion that there is no merit in the appeal. Firstly, the parties voluntarily entered into an agreement to deem as non-existent the arbitration clause. To use the arbitrator's expression it "washed away" the effect of the original arbitration clause. There is no doubt that Section 16 (1) (a) as interpreted by the Supreme Court in numerous decisions leads to the conclusion that an arbitration clause is insulated from the vicissitudes that the underlying contract suffers when it is terminated/stopped. The corollary that if parties choose or by an act of variation agree not to be bound by such arbitration clause, then such an agreement would be contrary to public policy does not however follow. The kind of situation which is visualized by Section 23 in our opinion is where the subsequent agreement would "defeat the provisions of any law or is fraudulent" i.e. is of such an egregious character as to make the agreement illegal. It would be the doing of something prohibited by law, expressly or by necessary implication, or something unenforceable in law. Obviously, this would not comprehend a situation where parties who entered into a contract at an earlier point of time, agreed to do away with their inter se obligations.

8. Mr.Kumar also cited judgment of *Naveen Chandra Sharma vs. 6<sup>th</sup> Additional District and Sessions Judge, Meerut and Others* AIR 1983 ALL 116. In that case, the question which arose was whether a lease agreement entered into before the coming into force of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act,

1972, could be enforced through civil process i.e. through the courts or whether the parties' relationship was regulated by its provisions – inasmuch as it created an embargo on the powers of the lessor to eject tenants. The court after analysis of various provisions of the Act concluded that having regard to the imperative nature of the provision of the special enactment, recourse to the normal civil process was impermissible. We do not see any such embargo here today. Section 16 merely carves out a special place for arbitration agreements but does not in any manner inhibit the parties from voluntarily agreeing not to be bound by it.

9. For the above reasons, we are of the opinion that there is no merit in the appeal; it is consequently dismissed. All applications also stand disposed of.

**S. RAVINDRA BHAT  
(JUDGE)**

**DEEPA SHARMA  
(JUDGE)**

**JULY 27, 2016**  
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