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

+ **ARB.P. 606/2016**

NEWTECH CINEMAS PVT.LTD

..... Petitioner

Through: Mr Yomesh Dutt Sharma, Advocate.

versus

OSR CINEMAS AND ENTERTAINMENT PVT.

LTD

..... Respondent

Through: Mr G. S. Narula and Mr M. Sarwar,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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30.11.2016

VIBHU BAKHRU, J

1. The petitioner (hereafter 'Newtech') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to a Lease Deed dated 21.03.2013 executed between Vikas Promoters Private Limited (hereafter 'VPPL') and OSR Cinemas and Entertainment Private Limited (hereafter 'OSR').

2. Admittedly, OSR, VPPL and Newtech had executed a Deed of Adherence dated 22.07.2014 whereby Newtech had agreed to accept all rights and obligations of the lessor, VPPL, under the Lease Deed.

3. The learned counsel appearing for the respondent (OSR) does not dispute the existence of the Lease Deed or the Deed of Adherence. He, however, has advanced two contentions to oppose the present petition. First,

he submits that since there is no arbitration clause in the Deed of Adherence, therefore an arbitration agreement does not exist between the parties. Secondly, he submits that clause 3 of the Deed of Adherence specifically provides that any dispute arising out of the Deed of Adherence would be brought in Courts or Tribunal at Mumbai. He submits that in view of the aforesaid clause, this Court does not have the jurisdiction to entertain the present petition.

4. He, however, submits that without prejudice to the aforesaid contentions, OSR is ready and willing to resolve the disputes amicably and requests that the parties be referred to the Delhi High Court Mediation and Conciliation Centre (hereafter 'DHCMCC').

5. Insofar as the first objection is concerned, there is no dispute that the Lease Deed contains an arbitration clause, which is set out below:-

“18.2 Any claim, controversy or dispute arising out of or in connection with this Deed, not settled by mutual agreement of the Parties involved within 30 days after a Party is provided written notice for settlement thereof, shall be referred to arbitration to a sole arbitrator jointly appointed by the Parties under the Indian Arbitration and Conciliation Act of 1996. In the event, the Parties are unable to agree upon a sole arbitrator, the claim, controversy or dispute shall be referred to a panel of three arbitrators, one of whom shall be appointed by Q CINEMAS and the other by the Lessor and a third by the aforesaid two arbitrators. Pending the arbitration proceedings, all disputed amount/payments, shall be deposited in the custody of the arbitrator(s), appointed under this clause until the completion of the arbitration proceedings. These disputed amounts/payments held by the arbitrator(s) shall be paid to the Parties as per the

provisions of the arbitration award after successful completion of the proceedings. The arbitration proceedings shall be conducted in Delhi, India and shall be governed by and construed in accordance with the laws of India. The language of the arbitration shall be English. The decision of the arbitrator(s) shall be final in the matter. The costs and expenses of the arbitrator(s) and holding the arbitration shall initially be borne in equal shares by Q CINEMAS and the Lessor. Initially, each Party will bear its own legal, travelling and other similar costs. However, the arbitrator(s) may in his/their award, require any Party to pay such costs as the arbitrator(s) think fit, including the costs and expenses of the arbitration, travel, costs and advocates fees.”

6. A plain reading of the Deed of Adherence also indicates that OSR had accepted Newtech as a party to the Lease Deed and had further unequivocally accepted that Newtech would be entitled to the rights and privileges as Lessor under the Lease Deed as available to VPPL. The relevant clauses of the Deed of Adherence are set out below:

“1. CONSENT TO TERMS OF THE CONDUCTING AGREEMENT

(i) Each of the Existing Parties covenant, undertake and agree with the Acceding Party that by the Acceding Party’s execution of this Deed, the Acceding Party shall be deemed to be a party to the Lease Deed and shall be entitled to the rights and privileges as Lessor under the Lease Deed and shall be subject to all the duties and obligations provided therein and same as being enjoyed by VPPL hereinbefore.

(ii) The Acceding Party confirms, covenants, undertake and agree with the Existing Parties that by execution of this Deed by the Acceding Party, the Acceding Party shall become a party to the Lease Deed and shall be subject to all the covenants, obligations and undertakings as contained in the Lease Deed and shall assume, keep,

observe and perform all the terms, covenants undertakings, agreements, provisions and conditions in the Lease Deed as if it were a party to the Lease Deed. The Acceding Party has requested that on and from 22nd July, 2014 all rights of the Lessor as mentioned in the Lease Deed i.e. VPPL be transferred to the Acceding Party.

(iii) The Acceding Party hereby confirms to the Existing Parties that it has received the original copies of the Lease Deed and the provisions thereof are incorporated by reference herein and deemed to be part of this Deed to be same extent as if such provisions had been set forth in full herein.”

7. Thus, the parties had agreed that Newtech would succeed to the rights and obligations of VPPL and OSR had accepted Newtech as a party to the Lease Deed. The contention that Newtech would step into the shoes of VPPL as the lessor and would be entitled to all rights and also be liable for all obligations of VPPL but not the rights and obligations under the arbitration clause, cannot be accepted. The said contention would be contrary to the plain language of the Clauses (i) to (iii) of the Deed of Adherence.

8. Insofar as the objection regarding jurisdiction of this Court to entertain the present petition is concerned, the same is also without merit. The arbitration clause expressly provides that the arbitration would be held in Delhi. The question whether the court, where the place of arbitration is situated, would have the jurisdiction under Section 2(e) of the Act, is no longer *res integra*. It is now well settled that the Courts having the jurisdiction over the seat of arbitration would also have the jurisdiction under Part-I of the Act. This issue has been authoritatively settled by the Constitution Bench of the Supreme Court in **Bharat Aluminium Company**

and Ors. v. Kaiser Aluminium Technical Services, Inc. and Ors.: 2012 (9)

SCC 552, wherein it has been held as under:-

"96. **Section 2(1)(e) of the Arbitration Act, 1996** reads as under:-

2. Definitions.-(1) In this Part, unless the context otherwise requires-

(a)-(d)

(e) 'Court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may

provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located."

9. The aforementioned decision in *Bharat Aluminium (supra)* has also been followed by a Division Bench of this Court in *Ion Exchange (India) Ltd.v. Panasonic Electric Works Co. Ltd.*: 208(2014) DLT 597 (DB).

10. In view of the conclusion that the OSR would be bound by the arbitration clause, this Court would have jurisdiction notwithstanding clause 3 of the Deed of Adherence.

11. Newtech had issued a notice invoking arbitration on 15.07.2016. However, the Arbitrator has not been appointed as yet. The aforesaid notice was responded to by OSR by a letter dated 28.07.2016. It is relevant to note that in the said letter, OSR did not dispute the existence of the arbitration

clause. On the contrary, it was specifically stated that *“in accordance with the said clause the Arbitrator was to be appointed by mutual agreement and not at the sole desire of your client”*. Thus, although OSR objected to the unilateral appointment of the Arbitrator by Newtech, it did not dispute the existence of the arbitration clause.

12. In view of the above, an Arbitrator is required to be appointed. It is therefore directed - with the consent of the parties - that an Arbitrator be appointed under the Rules of Delhi International Arbitration Centre (DIAC). The parties shall appear before the Co-ordinator, DIAC on 02.02.2017 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

13. In view of the submission made by the learned counsel for OSR, OSR is willing to resolve the disputes amicably. It is directed that parties/representatives of the parties shall appear before the DHCMCC on 16.12.2016 at 3:30 PM. The parties shall endeavour to resolve the disputes within a period of six weeks, thereafter. In the event, the parties are able to resolve the disputes, they shall communicate the same to the Co-ordinator DIAC and no further steps would be required to be taken thereafter for adjudication of the disputes. However, if the parties are unable to resolve the disputes within the period as specified, they shall appear before the Co-ordinator as directed.

14. The petition is disposed of with the aforesaid observations.

VIBHU BAKHRU, J

NOVEMBER 30, 2016/MK