

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

% **Judgment reserved on: 10th May, 2016**
Judgment pronounced on: 1st June, 2016

+ **Arb. P. No.471/2015**

ARVIND BHARDWAJ & ANR Petitioners
Through Mr. Amit Kr. Singh, Adv.

versus

SANA REALTORS PVT LTD & ORS Respondents
Through Mr. Sanchit Dhawan, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioners have filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of an Arbitrator.
2. Brief facts of the case as per the petition are that on 20th March, 2010, the petitioners and the respondent-Company entered into an Agreement to Sell for a space on third floor admeasuring 3100 Sq. ft at "Silverton Towers" being developed in Sector-50 Gurgaon (Haryana) by the respondents for a consideration of Rs. 60,00,000/-.
3. On 18th November, 2011, the petitioners and the respondent-Company entered into a Memorandum of Understanding wherein it was mentioned that after the receipt of consideration of Rs.60,00,000/- from the petitioners, the respondent/developer shall give an investment return @ Rs. 1,55,000/- per month with effect

from June, 2010 till the time respondent/developer is not able to lease the proposed space.

4. The petitioners made the entire payment of Rs.60,00,000/- as a consideration for the space provided by the respondent-Company through cheques dated 24th March, 2010, 24th April, 2010, 4th May, 2010 and 10th May, 2010.

5. It is further stated that the said investment of the petitioners was done solely on the premise of assured return on the said property/investment of Rs. 1,55,000/- till the date the respondent-Company got the said space of the petitioners leased out for the first time.

6. It is further stated in the petition that the respondent-Company started paying Rs.1,55,000/- every month as an assured return as guaranteed to the petitioners since June,2010 which was paid to the petitioners till 30th March, 2014 with some delay on some occasions.

7. It is also stated that the respondent-Company stopped making the payment of the assured monthly return from 1st April, 2014 on the ground that the respondent-Company had introduced a proposed lessee to the petitioners which was refused by the petitioners; as such the respondent-Company was absolved from its liability to pay the assured return to the petitioners as guaranteed. Since then, an outstanding of more than Rs. 23,00,000/- is pending against the respondent-Company till date which is accruing with every passing month.

8. The MOU dated 18th November, 2011 contained an arbitration clause for the resolution of any kind of dispute or differences as per the Act. The same is reproduced here as under:

"13. That all disputes or differences arising between the Parties under or in relation to this Memorandum of Understanding, shall be resolved by reference to Arbitration in accordance with the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be New Delhi only."

9. Accordingly, the petitioners issued a notice dated 17th June, 2015 to the respondent-Company seeking its concurrence on the name of the arbitrator proposed by them i.e., Sh. Ashok Kumar Singh, Advocate to be the sole arbitrator. The said notice was duly received by the respondent-Company on 18th June, 2015. The respondents till date have not responded to the said notice despite having received the same. The petitioners are left with no option but to file the present petition.

10. Respondents have been served. Reply has been filed. It is stated in the reply that the petitioner has concealed the material fact as the MOU being relied upon by the petitioner has been superseded by the execution of the sale deed in favour of the petitioner on 5th May, 2015, wherein the petitioner has categorically admitted of having settled the issue of assured return.

11. It is further stated in the reply that the present petition is nothing but a counter blast to the complaints filed by the respondent-Company under Section 138 of the Negotiable Instruments Act, 1881 and the petitioner despite being served with the registered legal notice dated 28th February, 2015 has failed to make payment towards his outstanding dues.

12. As per the respondent-Company, the petitioner has also concealed the fact that the respondent-Company has duly replied to the legal notice dated 17th June, 2015 sent by the petitioner and had declined to concur with the appointment of the arbitrator as the MOU

has concluded and since the terms have been settled, the MOU and the Arbitration Clause do not survive.

13. The rejoinder on behalf of the petitioners has been filed wherein it is stated that the clause 31 of the conveyance deed dated 5th May, 2015 is ex-facie contradictory and self-defeating since the said sale deed was executed by threat and coercion and the clause 31 was deliberately inserted by the respondents to wriggle out of their contractual liability of paying assured monthly returns to the petitioners as agreed.

14. It is further stated in the rejoinder that the petitioners have registered a complaint dated 2nd January, 2016 with the Connaught Place Police Station, New Delhi against the respondents. The proposed lessee introduced by the respondents was a dummy lessee, deliberately introduced to fulfil the formality of their obligation which had no capacity to pay the monthly rentals of the commercial units. The execution of the conveyance deed is only a subsequent event which happened much later. The actual dispute between the petitioners and the respondent-Company is not the conveyance deed but whether the alleged proposed lessee introduced by the respondents was a real interested lessee or it was just planted by the respondents to wriggle out of their liability which needs to be decided by the arbitrator.

15. The copy of the sale deed in question has been filed along with the reply. The relevant clause of the sale deed is reproduced here as under:

"31. That the VENDEE(S) undertake not to dispute or raise the issue of Assured Investment Return Plan after the execution of this Deed and the same is deemed to have been settled between the Parties for all the times to

come. Since the VENDOR has complied with the terms of the MOU dated 18.11.2011, by offering the property for lease on 17.04.2014, the assured return stands terminated thenceforth."

16. The execution of the sale deed is not denied by the petitioner who has also not challenged the same in the Court of law.

17. An arbitration agreement contained in a contract cannot be invoked to seek reference to any dispute when the contract is discharged by mutual agreement and the parties accept a substitute contract. Reliance is placed on **National Insurance Company Limited v. Boghara Polyfab Private Ltd.** (2009) 1 SCC 267 (para 27, 28 and 29)

18. It is also settled law that if the original contract has no legal existence, the arbitration clause also cannot operate as since "the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it". Reliance is placed on **Union of India v. Kishorilal Gupta** AIR 1959 SC 1362 (para 10), **Damodar Valley Corporation v. K.K.Kar** AIR 1974 SC 158 (para 7), **Young Achievers v. IMS Learning Resources** 191 (2012) DLT 378.

i. In the case of **Kishorilal Gupta** (supra) it was held as under:-

"29. This decision is not directly in point; but the principles laid down therein are of wider application than the actual decision involved. If an arbitration clause is couched in widest terms as in the present case, the dispute, whether there is frustration or repudiation of the contract, will be covered by it. It is not because the arbitration clause survives, but because, though such repudiation ends the liability of the parties to perform the contract, it does not put an end to their liability to pay damages for any breach of the contract. The contract is still in existence for certain purposes. But

where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it. The argument, therefore, that the legal position is the same whether the dispute is in respect of repudiation or frustration or novation is not borne out by these decisions. An equally illuminating judgment of Das, J., as he then was, in *Tolaram Nathmull v. Birla Jute Manufacturing Co. Ltd.* [ILR (1948) 2 Cal. 171] is strongly relied upon by the learned counsel for the appellant. There the question was whether an arbitration clause which was expressed in wide terms would take in a dispute raised in that case. It was contended on one side that the contract was void ab initio and on the other side that, even on the allegations in the plaint, the contract was not ab initio void. The learned Judge, on the facts of that case, held that no case had been made out for staying the suit and therefore dismissed the application filed by the defendant for stay of the suit. The learned Judge exhaustively considered the case-law on the subject and deduced the principles and enumerated them at p. 187. The learned Judge was not called upon to decide the present question, namely, whether an arbitration clause survived in spite of substitution of the earlier contract containing the arbitration clause by a fresh one, and therefore we do not think that it is necessary to express our opinion on the principles culled out and enumerated in that decision.

23. The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it

perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

- ii. In the case of ***National Insurance Company Limited*** (supra) it was held as under :-

"29. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both the parties or by the party seeking arbitration):

(a) where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt, nothing survives in regard to such discharged contract;

(b) where the parties to the contract, by mutual agreement, accept performance of altered, modified and

substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations;

(c) where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there are no outstanding claims or disputes.”

19. In view of the admitted facts and the clauses of the subsequent sale deed and Clause 31 therein, it is evident that the earlier Agreement was terminated. The said fact cannot be denied by the petitioners. All the arguments raised by the petitioners are an afterthought and misconceived. Thus, no ground is made out by the petitioners to allow the prayer made in the present petition.

20. The present petition has been filed as an afterthought. The earlier agreement is already terminated after the parties executed the sale deed. The disputes were settled. There is no live claim left. The sale deed was acted upon.

21. The petition is accordingly dismissed.

22. No costs.

(MANMOHAN SINGH)
JUDGE

JUNE 01, 2016