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

% **Reserved on: 27th November, 2017**
Pronounced on: 30th November, 2017

+ **O.M.P. (COMM) 424/2017 & IA No.13967/2017**

ATEN CAPITAL PVT. LTD. ..... Petitioner
Through : Mr.Rajat Navet, Adv.

versus

CANDOR GURGAON TWO DEVELOPERS & PROJECTS PVT.LTD ..... Respondent
Through : Mr.Ciccu Mukhapadhya, Sr. Adv. with Mr.Aakash Bajaj, Adv.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. Before coming to the objections under Section 34 of the Arbitration and Conciliation Act, 1996, let me state in brief the facts of this case.

2. On 4.10.2012 an Inter Corporate Deposit (ICD) Agreement for a sum of Rs.45 crore was executed between the petitioner and the respondent (the respondent was then known as Unitech Developers & Projects Ltd.) On 06.11.2012 and on 6.12.2012 two other Inter Corporate Deposit Agreements dated 16.11.2012 (for a sum of Rs. 30 crores) and dated 6.12.2012 (for a sum of Rs. 18

crores) were also executed between the Petitioner and the Respondent.

3. The Maturity of the said ICD for Rs.45 crore was extended by the parties till 2.3.2014 by way of an extension letter dated 2.3.2013. The other two ICDs were also extended till 06.03.2014 and 16.03.2014 respectively.

4. It is alleged by the petitioner when the term of the said ICDs were to expire in March 2014 and the amount received thereunder was to be repaid, the Petitioner informed the Respondent that a number of payments were due to the Petitioner from various other group companies/associates of the Unitech group i.e. Unitech Ltd., Unitech Advisors Pvt. Ltd. and Mayfair Capital Pvt. Ltd. and that the Petitioner would be adjusting all the said amounts from the amount of Rs. 45 crores which was to be repaid under the first ICD Agreement dated 4.10.2012. However, the representatives/management of the Respondent Company requested the Petitioner Company not to do so immediately.

5. It is alleged on 14.03.2014 a meeting was held between the representatives of the Petitioner and the representatives/ management of the Respondent Company which included Mr. Ajay Chandra (promoter of the Unitech group), an offer was made by the representatives of the Respondent, which was allegedly accepted by the Petitioner and an oral agreement on the following terms was entered into between the parties, wherein it was agreed

that Inter Corporate Deposit Agreement dated 04.10.2012 would stand terminated, rescinded and novated on the following terms and conditions:-

> ***a***. *The Petitioner would continue to provide services to the companies of the Unitech Group as well as provide further finances, if any, to any of the Companies of the Unitech group.*
>
> ***b***. *The Companies which owed money to the Petitioner would try and make payments and clear all outstanding within 12 months and latest by 31st March of the next year i.e. 31.03.2015.*
>
> ***c***. *No interest would be payable by the Petitioner on the said lCD after 30.9.2014.*
>
> ***d***. *If payments were not received by the Petitioner from the other concerns of the Unitech group by 31.3.2015, the Petitioner would be entitled to initiate appropriate legal proceedings for recovery of the said amounts against the said companies.*
>
> ***e***. *Pending recovery of amounts due to it, the Petitioner would be entitled to retain, withhold and utilize a sum of Rs. 3 crores (without any liability of any interest thereupon) for a period of four years thereafter i.e. till 31.3.2019 and in the event, the Petitioner is not able to recover all its dues from the above mentioned companies till 31.3.2019, the Petitioner would be entitled to set off/adjust the said amounts from the said amount of Rs. 3 crores.*
>
> ***f***. *The withholding/setting of the amount of Rs. 3 crores would be without prejudice to the rights and contentions of the Petitioner to recover its dues from the above mentioned concerns of the Unitech group.*

6. It is alleged acting upon the agreement between the parties as stated above, the petitioner though returned a sum of Rs. 42 crores out of Rs. 45 crores under the said ICD dated 4.2.2012 along with complete interest but retained an amount of Rs.3 crores.

7. The Petitioner also returned the entire amount along with interest of other two ICDs of Rs.30 crores and Rs. 18 crores.

8. It is the submission of the petitioner that M/s. Unitech Advisors Pvt. Ltd., M/s. Unitech Ltd and M/s. MayFair Capital Pvt. Ltd failed to pay the amounts due to the Petitioner resulting in the Petitioner's initiating proceedings against them. However, on account of change in management of the respondent company, the respondent turned dishonest and tried to resile out of the oral arrangement and hence arbitration was initiated wherein the evidence were led; final arguments were addressed and then the impugned order was passed requiring the petitioner herein to re-pay an amount of Rs.3 crore with interest.

9. The learned arbitrator rejected the arguments of the petitioner primarily on an amendment clause in the ICD Agreement dated 4.12.2012 which runs as follows :

> *"No amendment to this agreement shall be binding unless in writing and signed by the duly authorized representative of each party".*

10. The learned arbitrator held in view of the above said clause, oral alteration in the ICD Agreement dated 04.10.2012 was not possible.

11. Admittedly the original ICD agreement dated 04.10.2012 was extended by one year ending on 2.02.2014 *which extension was in writing*. Further though the petitioner talks of an oral agreement in March'2014 but admittedly the petitioner received letters dated 28.5.2014 and dated 04.06.2014 from IDFC and Unitech Corporate Parks Pvt. Ltd. holding 40% and 60% shares in claimant seeking refund but the petitioner ignored such letter and did not disclose qua such oral agreement. The petitioner even ignored letter dated 01.08.2014 sent by respondent for refund. The legal notice dated 09.01.2015 sent by the respondent for refund of the balance amount was though acknowledged but the respondent did not reply to assert alleged novation of contract orally on termination of ICD agreement dated 04.10.2012. It was only on an application filed by the respondent under section 9 of the Act; the petitioner took this plea for the first time in its reply. Now if any alleged oral understanding was entered into between the parties, the petitioner ought not to have kept quite for long. The fact the respondent may be a part of Unitech group would hardly give a right to the petitioner to set off its dues pending against such other group companies, with the respondent.

12. Hence the fact the petitioner ignored the demand of refund on at least four occasions and failed to raise plea of an alleged oral

agreement at the first opportunity available, goes against his assertion of an alleged oral agreement/understanding and hence such plea is wholly untenable.

13. In *MMTC Ltd. vs. G. Premjee Trading Pvt. Ltd.*, OMP No.91/2001 decided on 03.03.2010, it was observed that *where the contract stipulated that any modification of the terms of contract shall bind either parties only if the said amendment was in writing, the oral agreement shall not be relied upon.*

14. The above citation is in line with the amendment clause in ICD Agreement dated 04.10.2012 and hence such plea was rightly rejected by the learned arbitrator.

15. The petition being devoid of merit is thus dismissed. The pending miscellaneous application also stands dismissed. No order as to costs.

YOGESH KHANNA, J

NOVEMBER 30, 2017
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