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

Date of decision: 8th May, 2018

+ O.M.P. (COMM) 392/2016
M/S AGYA HOLDING PVT. LTD Petitioner
Through: Mr.Anil Agarwalla, Mrs.Neha
Sharma & Mr.Shakya Sen, Advs.
versus

JONES LANG LASALLE PROPERTY Respondent
Through: Mr.Vasanth Rajasekaran, Mr.Saurabh
Babulkar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 29.05.2015 passed by the Sole Arbitrator *inter alia* dismissing the claim filed by the petitioner on the ground of *res judicata*.
2. The disputes between the parties are in relation to the payment of fee by the petitioner to the respondent who was appointed as a Valuer for valuation of the land owned by Agya Boortmalt Pvt. Ltd., which is a Joint Venture Company between the petitioner and M/s. Boortmalt N.V., a company registered in Antwerp, Belgium. The respondent had been appointed as a Valuer for valuation of the land in terms of the order dated 10.09.2009 passed by the Company Law Board in C.P. NO. 58(ND)/2008 and C.P. NO. 63(ND)/2008 filed by the two joint venture partners against each other.

3. By a subsequent order dated 09.02.2010 passed in the above Company Petitions, the petitioner had undertaken to pay the entire cost of valuation to the respondent.

4. Claiming that the respondent had not taken into account the relevant information supplied by the petitioner during the valuation exercise and delayed the submission of its report to the Company Law Board which resulted in the breaking down of negotiations between the petitioner and its Joint Venture partners, the petitioner filed an application before the Company Law Board *inter alia* praying for the refund of amount already paid by the petitioner to the respondent for the valuation exercise in terms of the above mentioned orders. The Company Law Board by its order dated 14.03.2013 dismissed the said application *inter alia* holding that the said application was nothing but a blatant abuse of the process of the Board. It was further held that as the respondent had been appointed in terms of the order passed by the Company Law Board, the petitioner was under an obligation to pay the balance fee to the respondent alongwith interest at the rate of 18% per annum from 13.07.2012.

5. The above order was challenged by way of an appeal filed by the petitioner before this Court being, CO.A(SB) 19/2013 (*Agya Holdings Pvt. Ltd v. M / S Jones Lang Lasalle Property Consultants (India) Pvt. Ltd. & Ors.*). The said appeal was dismissed by this Court by its detailed order on 09.09.2013. This Court *inter alia* held as under:-

“12. After hearing the rival arguments, I am satisfied that there is absolutely no merit in the appeal. The appellant, as pointed by the CLB, had undertook and agreed before the CLB that it would bear the entire fees payable to JLL who were appointed by the CLB to carry out the work of valuation of the land. Accordingly, the first instalment

of the fee of ₹16 lakhs together with service tax etc. was paid in April, 2010. Thereafter, it kept on communicating with JLL and giving information, which it claims to be relevant information, regarding the valuation of the land. It must be remembered that JLL is the appointee of CLB and is a professional valuer. It is not bound to respond or communicate with the appellant in respect of each and every information or input given by the latter, even though it may be relevant for the purpose of valuation of the land. As a professional valuer it was not the duty of JLL to keep the appellant informed as to how every input supplied by the latter was considered and factored while arriving at the value of the land. It would have been unprofessional if JLL were to do so. It went about the task in a professional manner and when it found necessary to seek an extension of time, it did so by writing to the CLB seeking extension of time for submission of the final report. Even on 20.5.2010 the appellant was intimated by JLL that the report was ready for submission and it was awaiting the payment of the balance of the fees. This was done by JLL by marking a copy of its letter dated 20.5.2010 addressed to the CLB to the counsel for the appellant. On 14.12.2010 JLL wrote an e-mail to the counsel for the appellant intimating that the report will be submitted directly to the CLB once the full payment of the fees was made. JLL also pointed out that since it was appointed by the CLB, the report would be sent directly to the CLB in confidence and therefore it will not be in a position to share any details pertaining to the report with the appellant prior to the submission of the same to the CLB. Despite being notified by JLL about the fact that the report was ready for submission and the appellant should therefore remit the balance of the fees agreed upon, the appellant went on making excuses and did not pay balance fees. Merely because the appellant had agreed to bear the entire fees payable to JLL, it gives no right to the appellant to demand that every step in the process of valuation of the land should be made known to it and it should be taken into confidence as to how the valuation is arrived at and what is the value determined. The conduct of the appellant in insisting of being made aware of the process of valuation at every stage leaves much to be desired. I agree with the sentiments expressed by the CLB, with respect, regarding the conduct of the appellant in filing CA 260/2012.

13. The learned counsel for the appellant relied on section 8 of the Arbitration and Conciliation Act and submitted that the CLB ought to have referred the matter to arbitration instead of deciding the matter itself. Section 8(1) is as follows:

“8. Power to refer parties to arbitration where there is an arbitration agreement – (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

After the judgment of the Supreme Court in Cannara Bank Vs. Nuclear Power Corporation of India (1995) 84 Company Case 70, it cannot be disputed that the Company Law Board is a judicial authority. However, the other condition of the sub-section is that the action which was brought before the CLB should have been in a matter which is the subject of an arbitration agreement. This condition is not satisfied in the present case. The main company petition No.63(ND)/2013 was filed by the Belgium Company against the appellant herein, under section 397 and 398 of the Companies Act alleging oppression and mismanagement. The appellant had also filed a petition under section 397 and 398 of the Companies Act in CP 58(ND)/2008 complaining against acts of oppression and mismanagement by the Belgium company. Thus there were cross-petition before the CLB containing mutual allegation of oppression and mismanagement. It was in one of those petitions that the CLB, in an attempt to ascertain the fair price of the shares of the Indian company, appointed JLL as the valuer for valuing the land as part of the process of valuing the shares. Thus the matter which is the subject of an arbitration agreement between the appellant and JLL was not the action which was brought before the CLB. The order passed by the CLB on 10.9.2009 was an order seeking an expert opinion regarding the fair price of the shares of the Indian Company which was to be determined keeping in view of the possibility of resolving the disputes between the parties amicably. Therefore, section 8(1) of the Arbitration and Conciliation Act, 1996 is not attracted to the dispute between the appellant and JLL. Moreover, it is the appellant which approached the CLB with an application in CA 260/2012

seeking refund of the first instalment of the fee of ₹16 paid to JLL and also seeking directions from the CLB appointing another valuer, other than JLL. After approaching the CLB with the application and having lost it, it now contends that the CLB had no jurisdiction to pass the impugned order. Its stand is contradictory.”

6. The petitioner was still not satisfied and challenged the order passed by this Court before the Supreme Court by way of SLP (C) No. 32217 of 2013. The same was dismissed in limine by the Supreme Court by its order dated 25.10.2013.

7. One would have thought that atleast now the petitioner would put an end to this part of litigations, however, this was not so. The petitioner pursued its application under Section 11 of the Act seeking appointment of an Arbitrator in terms of the Agreement dated 12.04.2010, which had been executed between the parties to give effect to the appointment of the respondent as a Valuer in terms of the order passed by the Company Law Board.

8. This Court by its order dated 31.10.2013, with the consent of the parties, appointed the present Sole Arbitrator.

9. As noted above, these arbitration proceedings have resulted in the Impugned Award.

10. The learned counsel for the petitioner submits that the Arbitrator has erred in holding that the claim filed by the petitioner would be barred by the principle of *res judicata*. She submits that the orders passed by the Company Law Board, the High Court and the Supreme Court were on an application seeking refund of the 50% of the fee already paid to the respondent and not for seeking restrain from paying a further amount to the respondent. The

Company Law Board and the High Court instead of adjudicating the issue on whether the petitioner was entitled to the refund of the amount already paid to the respondent, directed the petitioner to pay the remaining professional fee as well. However, in the submission of the learned counsel for the petitioner, the Company Law Board or the High Court did not determine the issue, whether the petitioner was entitled to the refund of the amount already paid to the respondent. She submits that in view thereof, these orders cannot act as *res judicata* against the petitioner.

11. I have considered the above submissions of the counsel for the petitioner, however, I find no merit in the same. The Company Law Board in unambiguous words held that the application filed by the petitioner was an abuse of the process of the Board. It further held that the petitioner was under an obligation to pay the agreed balance fee to the respondent, as the respondent has been appointed pursuant to the order passed by the Board. This order was upheld by this Court while dismissing the appeal filed by the petitioner. This Court further held that whether the report was to the liking of the petitioner or not, could not discharge the petitioner from making the full payment to the respondent as directed by the Company Law Board. In view of the above orders, the submissions made by the counsel for the petitioner is completely fallacious and cannot be accepted.

12. It is clear from the various applications filed by the petitioner that the petitioner is merely abusing the process of the Courts in order to avoid making the legitimate payment owed to the respondent not only in terms of the abovementioned order passed by the Company Law Board but also the Agreement between the parties.

13. Having considered the submissions made by the learned counsels for

the parties and having perused the Impugned Award, I find no infirmity in the Impugned Award warranting any interference with the same in exercise of powers under Section 34 of the Act.

14. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with cost quantified at Rs. 50,000/-.

NAVIN CHAWLA, J

MAY 08, 2018/rv