

\$~1

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

+ **ARB.P. 350/2017 & IA No. 12374/2017**

VARINDER PAL SINGH & ANR Petitioners

Through: Mr Sharique Hussain, Advocate.

versus

BPTP LTD Respondent

Through: Mr Manish Sharma and Mr Ninad
Dogra, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

28.05.2018

VIBHU BAKHRU, J

1. The petitioner 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 are stated to have arisen between the parties in relation to the Flat Buyers' Agreement dated 24.07.2007 (hereafter 'the Flat Buyers' Agreement'). The Flat Buyers' Agreement includes an arbitration clause, which reads as under:-

“33. Arbitration:

All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration

shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Seller and whose decision shall be final and binding upon the Parties. The Purchaser hereby confirms that he shall have no objection to this appointment even if the person so appointed, as the Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/Confirming Party and the Purchaser confirms that notwithstanding such relationship/connection, the Purchaser shall have no doubts as to the independence or impartiality of the said Arbitrator. The Courts at New Delhi and the Delhi High Court at New Delhi alone shall have the jurisdiction.”

2. Mr Sharma, learned counsel appearing for the respondent states that the said arbitration agreement (clause) no longer survives, as the parties have subsequently entered into a Conveyance Deed dated 08.11.2013 (hereafter ‘the Conveyance Deed’). He also referred to Clause 29 of the Conveyance Deed, which reads as under:-

“29. That, this Conveyance Deed and the Annexure(s) hereto constitute the entire agreement among the Parties hereto with respect to the subject matter hereof. The, preamble, recitals and the annexure(s) to this Conveyance Deed shall form an integral part of the covenants and terms of this Conveyance Deed.”

3. Mr Sharma submits that the Flat Buyers’ Agreement has since been discharged by execution of the Conveyance Deed. Further, the possession of

the flat in question has also been, undisputedly, handed over to the petitioner. He contends that since the Conveyance Deed does not include an arbitration clause, no arbitration agreement exists between the parties.

4. Mr Hussain, learned counsel appearing for the petitioner countered the aforesaid submission. He states that in terms of Clause 8 of the Conveyance Deed, all terms and conditions of Flat Buyers' Agreement are incorporated by reference in the Conveyance Deed. In addition, he urges that an arbitration agreement, although embodied in an arbitration clause, is a separate agreement and the same would survive notwithstanding that the main agreement has been discharged. He relied on the decision of the Supreme Court *Today Homes And Infrastructure Private Limited v. Ludhiana Improvement Trust And Another: (2014) 5 SCC 68* in support of his contention.

5. I have heard the learned counsel for the parties. At the outset, it is relevant to refer to Clause 8 of the Conveyance Deed, which reads as under:-

“8. The Vendee shall observe all terms and conditions of this Conveyance Deed, the Flat Buyers Agreement and also those of the License granted to the Vendor and shall also abide by all the laws, bye-laws, rules, regulations and policies applicable thereto or as may be, imposed by any competent authority including Haryana Urban Development Authority/Director 'General Town and Country Planning, Haryana or any other government/local bodies. The Vendee shall at all times be solely responsible and liable for any contravention of applicable laws, bye-laws, rules, regulations and policies.”

6. As is apparent from the above, the arbitration agreement has not been incorporated by reference in the Conveyance Deed. The said clause obliges the vendee – that is, the petitioner – to abide by the terms and conditions of the Conveyance Deed and the Flat Buyers’ Agreement and also those of the licence granted to the vendor; the aforesaid clause does not refer to any obligations of the vendor – that is, the respondent. However, even if it is accepted that there is mutuality of obligations between the said parties and both were obliged to abide by the terms and conditions of the Flat Buyers’ Agreement, the arbitration clause is a separate agreement and unless the same is specifically incorporated by reference, it cannot be readily inferred that an agreement includes the same. The said proposition has authoritatively explained by the Supreme Court in *M. R. Engineers And Contractors Private Limited v. Som Datt Builders Limited: (2009) 7 SCC 696*. In that case, the Court had observed as under:-

“22. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a Standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms & conditions for the benefit of the members or others who want to adopt the same.”

7. Further, the Supreme Court had summarised the law as under:-

“24. The scope and intent of Section 7(5) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled :

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the Standard terms & conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such

standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.”

8. Applying the aforesaid principle, it is apparent that the arbitration clause in the Flat Buyers’ Agreement cannot be read as incorporated in the Conveyance Deed.

9. The next question to be addressed is whether the Flat Buyers’ Agreement stood discharged by execution of the Conveyance Deed.

10. There is much merit in Mr Sharma’s contention that after the parties had entered into the Conveyance Deed, the Flat Buyers’ Agreement did not survive and was superseded by the Conveyance Deed. Clause 29 of the Conveyance Deed clarified that it was the only agreement that constituted between the parties.

11. In *Union of India v. Kishori Lal Gupta and Bros.: AIR 1959 SC 1362*, the Supreme Court held that:

“These observations throw considerable light on the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract. The principle

is obvious; if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it.”

12. In view of the above, this Court is not persuaded to accept that the arbitration agreement exists between the parties. Accordingly, the present petition is dismissed. However, all other remedies that are available in law are available to the petitioner.

13. The pending application also stands disposed of.

MAY 28, 2018
MK

VIBHU BAKHRU, J



न्यायमेव जयते