

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.04.2018

+ **O.M.P. (COMM) 258/2017 & IA Nos.7520/2017
& 8780/2017**

GETAMBER ANAND & ANR.

.....Petitioners

Versus

ANIL KUMAR SAHA

.....Respondent

Advocates who appeared in this case:

For the Petitioner	:Mr Mukul Rohatgi, Senior Advocate with : Mr Ninad Laud, Mr Kunal Kher and : Mr Ivo D'Costa, Advocates.
For the Respondent	:Mr Rajiv Nayyar, Sr. Advocate with : Mr Abhijeet Sinha, Mr Arijit Mazumdar, : Mr shambo Nandy, Mr Akshay Chandna, : Mr Saikat Sarkar and Ms Rashmi Gogoi, : Advocates.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 04.03.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a Sole Arbitrator, Dr. Justice Mukandkam Sharma, former Judge of the Supreme Court of India in the matter numbered as Arbitration Case

No. 9/2012 and captioned as “*Sh Anil Saha v. Ashwani Talwar and Anr*”.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with a Memorandum of Understanding dated 03.03.2008 (hereafter ‘the MOU’). It is contended on behalf of the petitioners that the MOU only obliged the petitioners to make their best efforts for providing an exit to the respondent from M/s ATS Promoters and Developers Private Limited (hereafter ‘the company’) and, therefore, the impugned award directing them to pay the awarded sum to the respondent is contrary to the MOU. The petitioners further contend that the transactions contemplated under the MOU are in violation of Section 297 of the Companies Act, 1956 and, thus, was void.

3. By the impugned award, the Arbitral Tribunal has directed the petitioners to pay, jointly and severally, a sum of ₹110 crores along with interest at the rate of 12% per annum from 31.05.2008 till the date of the award. The Arbitral Tribunal has also awarded interest at the rate of 12% per annum from the date of the award till the date of the payment and in the event the payment is not made within a period of 120 days from the date of the award, the petitioners are also liable to pay interest at the rate of 15% per annum from 121st day till the date of receipt of the outstanding amount. In addition, the petitioners are also directed (i) to procure, jointly and severally, the ownership, title and possession of a Penthouse measuring 5650 sq. feet covered area along with lower floor terrace of 1894.85 sq. feet and above floor

terrace of 5361.54 sq. feet and a swimming pool situated in ATS Project titled 'Paradiso' located in Greater Noida; (ii) to procure a Row House built on 450 sq. meter plot having a covered area of 7355 sq. feet located in the same project; (iii) to jointly and severally pay an amount of ₹16,46,00,000/- to the company along with interest at the rate of 12% per annum from the date of filing of the counter claims by the said company (in Arbitration Case No. 10/2012 captioned "*Shri Anil Kumar Saha v. ATS Infrastructure Ltd. & Anr.*"); and (iv) ₹5 lakhs as cost. The Arbitral Tribunal has also directed the respondent to transfer all its shareholdings in favour of the petitioners as agreed in terms of Schedule 3 of the MOU at face/par value.

4. Briefly stated, the relevant facts necessary to address the controversy are as under:-

4.1 In the year 1998, the petitioners, namely, Sh Ashwani Talwar and Sh Getamber Anand joined together with the respondent – who is an architect by profession – to promote the company (M/s ATS Promoters and Developers Private Limited) for the purposes of carrying on the business of real estate development. Each of the three promoters (the parties herein) held equal number of shares in the company.

4.2 Certain disputes arose between the petitioners on one hand and the respondent, on the other hand, agreed to exit from all the companies promoted and incorporated by the parties to carry on their businesses.

4.3 In the aforesaid context, the parties entered into the MOU. The MOU, *inter alia*, records that the three parties had started the Real Estate Development and Construction Business and had promoted and incorporated companies set out in Schedule 1 to the MOU for the purposes of carrying on the Real Estate Development and Construction. The recitals of the MOU also records that pursuant to a mutual agreement, the respondent had amicably disengaged himself from the companies from 23.09.2007 and had completely stopped visiting and attending offices of the said companies. The parties agreed that the respondent would exit the companies for a net realized amount of ₹150 crores (One Hundred Fifty Crores), which was described as the exit amount.

4.4 In terms of the MOU, it was agreed that the petitioners shall procure that ATS Infrastructure Limited (one of the Group Companies) transfers three crore shares held by it in ATS Estates Private Limited at a price of ₹18.30/- per share aggregating ₹54,90,00,000/- on or before 07.03.2008. The petitioners also agreed that they shall procure appropriate investors, who would purchase the said shares to enable the respondent to realize the exit amount of ₹150 crores.

4.5 In addition, the parties also agreed that the petitioners would jointly and severally procure the ownership, title and possession of certain properties to be transferred to the respondent on or before 31.05.2008. On the same date, as the parties entered into the MOU (i.e. 03.03.2008), the respondent entered into a Share Purchase

Agreement (SPA) with ATS Infrastructure Limited and ATS Estates Private Limited for transfer of three crore shares of ATS Estate Private Limited held by ATS Infrastructure Limited. Thereafter, on 08.04.2008, the petitioners arranged buyers/investors to acquire 90,66,183 shares of ATS Estate Private Limited at the consideration of ₹44.12/- per share aggregating to ₹40 crores. However, the petitioners could not arrange investors for purchasing the balance 2.1 crore shares as contemplated under the MOU.

4.6 The petitioners claim that the respondent terminated the MOU by a letter dated 14.11.2008.

4.7 On 24.02.2009, the respondent filed a petition under Section 397 and 398 of the Companies Act, 1956 alleging oppression and mismanagement. On 02.03.2011, the respondent issued a notice invoking arbitration clause under the MOU. On 08.03.2011, the respondent also sent a notice invoking the arbitration clause under the SPA.

4.8 Thereafter, the respondent filed a petition under Section 11 of the Act (being ARB. P. 411/2011) for appointment of an arbitrator to adjudicate the disputes that had arisen between the parties in respect of the MOU. The respondent also filed another petition under Section 11 of the Act (ARB. P. 412/2011) seeking appointment of an arbitrator to adjudicate the disputes that had arisen in respect of the SPA. Both the aforesaid petitions (ARB. P. 411/2011 and 412/2011) were disposed of by this Court by a common order dated 16.04.2012 appointing Dr.

Justice Mukandkam Sharma (Retired) as the Sole Arbitrator to adjudicate the disputes.

4.9 The arbitral proceeding relating to the disputes pertaining to the MOU was numbered as Arbitration Case No. 09/2012, and the arbitral proceeding relating to the SPA was numbered as Arbitration Case No. 10/2012. Both the arbitral proceedings culminated into two separate arbitral awards, although, they were recorded on the same document.

Submissions

5. Mr Mukul Rohatgi, learned Senior Counsel appearing for the petitioners had restricted the petitioners' challenge to the impugned award only on two grounds. First, he submitted that the Arbitral Tribunal had grossly erred in proceeding on the basis that there was any obligation on the part of the petitioners to ensure that the respondent realizes the exit amount. He submitted that the terms of the MOU made it explicitly clear that the petitioners were only obliged to make their best efforts and, thus, they could not be held responsible for non-realization of ₹150 crores (the exit amount) by the respondent. He submitted that the impugned award was, thus, contrary to the terms of the MOU and was, therefore, liable to be set aside.

6. Second, he contended that the agreement for the respondent to acquire three crore shares of ATS Estate Private Limited from ATS Infrastructure Ltd (which formed a subject matter of the MOU) was contrary to Section 297 of the Companies Act, 1956 and, thus, was contrary to law. He urged that any such arrangement, being contrary to

the provisions of Section 297 of the Companies Act, 1956, was void and, consequently, the impugned award rendered on the basis of the MOU was also void.

Reasons and Conclusions

7. At the outset, it is necessary to note that although the petitioners in the present petition have stated several grounds to assail the impugned award, Mr Rohatgi has restricted the challenge only to two grounds as indicated above. Thus, it is not necessary for this Court to address any of the other issues raised in the petition.

8. Before proceeding further, it would be relevant to refer to the terms of the MOU. The recitals indicate the background in the context of which the MOU was entered into. The said recitals are set out below:-

“(A) AKS, GA and T had together started real estate development and construction business and at present are carrying out such business jointly as real estate developers.

(B) AKS, GA and T promoted and incorporated companies as set out in Schedule I (hereinafter referred to as the ("Companies")) to this MOU for the purpose of carrying on the business of real estate development and construction.

(C) The Companies are at preset at different stages of implementing various projects as set out in Schedule 2 hereto.

(D) AKS, GA and T are holding Shares as set out Schedule 3 in Companies.

- (E) The issued, subscribed and paid up share capital of the Companies is set out in Schedule 3.
- (F) Pursuant to the mutual agreement of the Parties, AKS has amicably disengaged himself from the Companies and, accordingly, with effect from 23rd September, 2007 AKS has completely stopped (i) visiting and attending the offices and premises of the Companies and all project sites thereof and (ii) handling or participating in any affairs of the Companies. Further, AKS, GA and T have mutually decided that AKS shall exit from the Companies after taking a net realized amount of Rs. 1,50,00,00,000 (Rupees One Hundred Fifty Crores) (“Exit Amount”).
- (G) AKS, GA and T have mutually decided that AKS shall exit from the Companies and AKS is desirous of exiting the Companies on the basis of the undertakings provided by the Parties in this MOU, on the terms in the manner laid down in this MOU.”

9. It is apparent from the said recitals that the parties had jointly commenced the business as real estate developers and had incorporated several companies, which were mentioned in Schedule 1 of the MOU (hereafter referred to as ‘the Group Companies’) for carrying on their business. It is also expressly stated that in terms of the mutual agreement, the respondent had disengaged himself from the business and had stopped participating in the affairs of the Group Companies. The recitals also record the mutual understanding between the parties that the respondent would exit the joint businesses after realizing a net amount of ₹150 crores (the exit amount). The MOU indicates the agreement between the parties as to the mutual obligations for the respondent’s exit from the jointly held businesses.

10. Some of the relevant clauses of the MOU are set out below:-

1. That GA and T shall procure that ATS Infrastructure Limited transfers 3,00,00,000 (three crores) shares held by it in ATS Estates Private Limited to AKS with clear title and free of any charge or encumbrance for an aggregate consideration of Rs.54,90,00,000 (Rupees Fifty Four Crores Ninety Lacs only) (hereinafter referred to as “Consideration”) determined on the basis of a value of Rs.18.30 per share, on or before 7th March 2008;
2. That upon transfer of shares of ATS Estates Private Limited from ATS Infrastructure Limited to AKS, GA and T shall procure that appropriate investor(s) purchases such shares of ATS Estates Private Limited from AKS, either in a single transaction or in tranche, at such value(s) that AKS shall be able to realize a minimum net amount equivalent to his complete Exit Amount of Rs.1,50,00,00,000 after deducting the amount of Consideration from the amounts realized by sale of such shares of ATS Estate Private Limited to such investor(s) (For the purpose of clarity it shall be noted that any tax implication arising out of such transaction/transactions in the hands of AKS shall be AKS liability);
3. That GA and T shall, jointly and severally, ensure on a best efforts basis that AKS shall be able to realize a minimum net amount equivalent to his complete Exit Amount of Rs.1,50,00,00,000/- after deducting the amount of Consideration from the amounts realized by sale of such shares of ATS Estate Private Limited to such investor(s) on or before May 31, 2008;
4. That in order to ensure that AKS shall be able to realize a minimum net amount equivalent to his complete Exist Amount of Rs.1,50,00,00,000 (and further enhanced amounts as per Clause 5 (with penalty) and Clause 6 (fair market value) herein below) after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Estate Private Limited, ATS Infrastructure Limited shall transfer further

shares of ATS Estate Private Limited to AKS if required and GA and T shall procure this action;

5. That GA and T agree and acknowledge that in case they fail in procuring the realization of the minimum net amount equivalent to the complete Exit Amount of Rs.1,50,00,00,000 to AKS after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Estate Private Limited by AKS to the investor(s) on or before May 31, 2008, the aforesaid Exit Amount of Rs.1 ,50,00,00,000 or any balance thereof as on May 31, 2008 (as the case may be) shall stand increased at the rate of 12% per annum till August 31, 2008 and thereupon all the provisions of this MOU shall apply mutatis mutandis in respect of such increased amount of the Exit Amount or any such balance thereof as the case may be. Further, in case GA and T fail in procuring the realization of the minimum net amount equivalent to the complete Exit Amount of Rs.1,50,00,00,000 to AKS after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Estate Private Limited by AKS to the investor(s) on or before August 31, 2008, the aforesaid Exit Amount of Rs.1,50,00,00,000 or the amount increased after applying the provisions of this Clause or any balance thereof as on August 31, 2008 (as the case may be) shall further stand increased at the rate of 24% per annum for the period after August 31, 2008 and thereupon all the provisions of this MOU shall apply mutatis mutandis in respect of such further increased amount of the Exit Amount or any such balance thereof as the case may be. In both the above cases of delays the Exit Amount payable to AKS shall be deemed to have been increased in the above manner.
6. That without prejudice to the provisions contained in clause 5 above, GA and T agree and acknowledge that in case they fail in procuring the realization of the minimum net amount equivalent to the complete Exit Amount of Rs.1,50,00,00,000 or the increased amount after applying the provisions of Clause 5, as the case may be, to AKS after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Este Private Limited by AKS to the investor(s) on or

7. xxxx xxxx xxxx xxx

11. It is apparent from the plain reading of Clause 1 of the MOU that the petitioners had agreed to procure that ATS Infrastructure Limited (one of the Group Companies) transfers three crore shares held in ATS Estate Private Limited to the respondent with clear title and free of any charge or encumbrances at an agreed consideration of

₹54,90,00,000/-. In terms of Clause 2 of the MOU, the petitioners had also agreed to procure appropriate investors for purchase of the said shares from the respondent. Before the Arbitral Tribunal, the petitioners had taken somewhat contrary stand. On one hand, the petitioners had contended that the MOU stood fulfilled as the respondent had entered into the SPA with ATS Infrastructure Ltd and ATS Estate Pvt. Ltd for procurement of three crore shares as contemplated under the MOU. On the other hand, contrary to the statement, the petitioners also contended that the MOU was frustrated because of falling market. With regard to transfer of shares of ATS Estate Private Ltd, the petitioners had contended that the same could not be transferred on account of breach of the MOU/SPA by the respondent as it had not paid the consideration for the first tranche of 90,00,000 shares. It was also contended that the parties had agreed that the further shares would be transferred only when the appropriate investors were located.

12. It is apparent from the above that the balance 2.1 crore shares of ATS Estate Pvt. Ltd. were not transferred to the respondent. It can hardly be disputed that transfer of such shares was within their control; thus, plainly, the petitioners had breached their agreement, which obliged them to procure the transfer of three crore shares of ATS Estate Pvt. Ltd. held by ATS Infrastructure Ltd.

13. In terms of Clause 2 of the MOU, the petitioners were also obliged to locate appropriate investors to purchase the shares of ATS Estate Pvt. Ltd from the respondent. Admittedly, the petitioners were

unable to find any such investors. In terms of Clause 6 of the MOU, in the event the petitioners failed to procure realization of the minimum net amount equivalent to the exit amount of ₹150 crores, the respondent would be at liberty to sell the shares of ATS Estate Pvt. Ltd. to the investors of his choice. Since the petitioners had failed to procure the transfer of the balance 2.1 crore shares, the respondent was also prevented from exercising his rights under Clause 6 of the MOU. The Arbitral Tribunal also, after appreciating the evidence led by the parties, concluded as under:-

“The respondents have failed to fulfill their obligation, firstly, to procure the shares and investor for the sale of balance shares and complete the sale transaction to enable the claimant to realize the entire exit amount. Secondly, there was a failure to procure and transfer the shares in favour of the claimant and provide full assistance, so as to enable the claimant to sell the same and realize the exit amount. Thus, the respondents are in breach of the MOU”

14. This Court finds no infirmity with the aforesaid finding. The contention, that the petitioners were only required to ensure that the respondent realizes the exit amount on a best effort basis and, therefore, there is no breach on the part of the petitioners, is unmerited. First of all, the material placed on record clearly indicates that the petitioners had failed to make the necessary efforts to perform their obligations under the MOU. The transfer of additional shares of ATS Estate Pvt. Ltd was, admittedly, under their control; however, the petitioners had failed to procure such transfer. Before the Arbitral

Tribunal, the petitioners had also contended that once the SPA was entered into between the respondent, ATS Infrastructure Ltd and ATS Estate Pvt. Ltd, there could be no breach of contract on their part. This contention is also unmerited as, admittedly, the balance shares of ATS Estate Pvt. Ltd. had not been transferred to the respondent. Further, the Arbitral Tribunal had also noted that petitioner no.1, in his cross-examination, had stated that the shares of ATS Estate Pvt. Ltd would have been transferred to the respondent whenever a buyer for the same was found. However, the MOU did not stipulate that transfer of shares of ATS Estate Pvt. Ltd. to the respondent would be contingent upon the investor(s) being located in advance.

15. Secondly, Clause 3 of the MOU must be read in the context of other clauses. Whilst, Clause 3 mentions that the petitioners would ensure on best effort basis that the respondent realizes with the net exit amount of ₹150 crores, the obligations to procure transfer of shares of ATS Estate Pvt. Ltd. to the petitioner is unqualified. Clause 4 of the MOU further provided that in the event the respondent is unable to realize the minimum amount of ₹150 crores as further enhanced, the petitioners would also ensure that additional shares of ATS Estate Pvt. Ltd. are transferred to the petitioners. Further, in terms of Clause 6 of the MOU, in the event the petitioners were unable to locate investors before the specified date, the respondent would be entitled to sell the shares of ATS Estate Pvt. Ltd. Thus, the MOU also provided for the eventuality, where despite best efforts, the petitioners were unable to ensure realization of the exit amount on or before 31.05.2008.

(4) xxxx

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(5) If consent is not accorded to any contract under this section, anything done in pursuance of the contract shall be voidable at the option of the Board.”

18. In terms of Section 297(1) of the Companies Act, 1956, a Director of a company is, *inter alia*, prohibited from entering into a contract with the company in which he is a director for sale, purchase or supply of any goods, materials or services except with the consent of the Board of Directors of the said company. In certain cases, prior approval of the Central Government is also required. It is, thus, apparent that there is no absolute bar on such contracts and it merely requires the consent of the Board of Directors of the company. Further, in terms of the proviso to Section 297(1) of the Companies Act, 1956, prior approval of the Central Government may also be required.

19. It is important to note that the MOU was between individuals and required the petitioners to procure the transfer of shares of ATS Estate Pvt. Ltd. by ATS Infrastructure Ltd. to the respondent. In the event, the respondent or the concerned companies were required to ensure any regulatory compliance, it is obvious that the petitioners were also required to ensure the same. The Arbitral Tribunal had examined the aforesaid contention and concluded as under:-

“73. The arguments of the respondents that in terms of Section 297 of the Companies Act, 1956, prior permission of the Central Government is required and in the absence of the same, the agreement will

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relied upon by the respondents which are on the proposition of law are not applicable to the peculiar facts and circumstances of the present case.”

20. The Arbitral Tribunal also noted that ATS Infrastructure Ltd. had transferred the first tranche of 90,00,000 shares of ATS Estate Pvt. Ltd. and none of the parties had challenged the said transaction.

21. Thus, the contention that the MOU is void or that the impugned award is unsustainable, is unmerited.

22. In view of the above, the petition is dismissed. All the pending applications are also disposed of. The parties are left to bear their own costs.

APRIL 06, 2018
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VIBHU BAKHRU, J