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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 20th March, 2018

O.M.P. (COMM) 499/2016

ALTUS GROUP INDIA PRIVATE LIMITED Petitioner

Through Mr.Gopal Jain, Sr. Adv. with
Ms.Savita Sarna, Ms.Chinmayee
Chandra and Ms.Manila Munjal,
Advs.

versus

DARRAMEKS HOTELS & DEVELOPERS PRIVATE LIMITED

..... Respondent

Through Mr.Saurabh Banerjee and Mr.Bikranu
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 06.07.2015 passed by the Sole Arbitrator inter-alia holding therein that the termination of the Agreement dated 14.02.2011 by the respondent was invalid and consequentially granting the claims of the respondent for refund of the mobilization advance as also awarding damages for such unlawful termination in favour of the respondent and against the petitioner. The

amount payable under the award was directed to be paid along with interest @ 12% p.a.

2. The dispute between the parties is in relation to the “Professional Service Agreement for the appointment of a Project Manager and Cost Consultant” dated 14.02.2011 executed between the parties. The dispute is confined only to Clause 9 of the agreement and interpretation thereof and therefore, Clause 9 is reproduced herein below:

9. TERMINATION

- I. The Owner may terminate the Agreement with a prior notice of 30 days.*
- II. The Project Management Consultant may terminate this agreement only in case the Owner fails to pay its correctly invoiced fees within 30 days of receipt of a reminder by courier letter informing Owner of due amounts.*
- III. Upon the termination or expiry of this Agreement, the Project Management Consultant shall return to the Owner any and all data, technical details, designs, drawings and the like and shall not retain any copies and/or extract thereof.*
- IV. Either party may upon Thirty (30) days notice in writing to the other terminate this Agreement.*
- V. In the event of termination of the Agreement, the Owner shall pay to the PMC the fee corresponding to the Services which were completed up to the date of contract termination.”*

3. The petitioner relying upon Clause 9(IV) of the agreement, issued a notice of termination dated 23.12.2011.

4. The respondent contending that the termination was invalid, raised its claim for damages and refund of the mobilization advance, which was referred to arbitration and has resulted in the Impugned Award dated 06.07.2015.

5. Learned senior counsel for the petitioner submits that Clause 9(IV) of the agreement required no interpretation. It plainly and simply allowed either party to terminate the agreement by giving a notice of 30 days in writing to the other party. Such termination can be without cause and is to be distinguished from Clause 9(II) of the agreement which provides for termination by the Project Management Consultant (PMC) for a cause i.e. on the owner's failure to pay correctly the invoiced fee within 30 days of the receipt of the reminder from PMC. He submits that in the agreement there are two modes of termination provided; (i) with; and (ii) without cause. Equal right is given to both the parties to terminate the agreement without assigning any cause under Clause 9(IV) of the agreement. He submits that in the name of interpretation, the Arbitrator has in fact re-written the agreement between the parties and has made Clause 9(IV) otiose and redundant.

6. Learned counsel for the respondent on the other hand, submits that the Arbitrator having interpreted the contract, this Court in exercise of its power under Section 34 of the Act, cannot set aside the Award only because it would have preferred another interpretation of the same.

7. I have considered the submission of the learned counsels for the parties. I would first quote the relevant discussion on the two Clauses in the Impugned Award:

Analysis & conclusion:

5.5 Perusal of the said clauses would reveal that Clause 9(I) of the agreement provides a right to the “owner” alone to terminate the agreement with 30 days prior notice; clause 9(II) provides a limited right to the respondent to terminate the agreement only when owner fails to pay the fee correctly within 30 days of the receipt of the written reminder for payment. But, it is not the respondent's case. However, Clause 9 (IV) also provides that, “either party may, upon thirty (30) days notice in writing to the other party, terminate the agreement.” In sub-clauses 9(II) and 9(IV), there is an apparent contradiction. Therefore, we need to find out, whether Clause 9 (IV) gives an independent right to the respondent to terminate the contract any time, irrespective of the fact that 9(II) gives only limited right of termination, namely non-payment of fee, despite reminder.

5.6 Guiding rules for construction of documents are all well settled by several authoritative pronouncements. These are: (a) to read the document as a whole for gathering intention of the parties; (b) to give natural, ordinary and sensible meaning to the language used in the document; and (c) the conflict, if any, is first to be resolved by giving harmonious construction to its various clauses. Thus, an interpretation which renders any clause in the document redundant is to be avoided. When we apply these principles to the facts at hand, it becomes obvious that the respondent could not validly terminate the contract under Clause 9(IV) for the following reasons:-

(A) If it is held that clause 9(IV) is independent and confers a right on the respondent to terminate the contract at any point of time and for any reason by merely serving 30 days notice, in that eventuality Clause 9 (II), which restricts right of the respondent for termination only in the eventuality of their fee not being paid despite reminder, would become redundant. It would be against basic rule of harmonious construction, of the various clauses of documents. In view of the same, it is held that Clause 9(IV) of the agreement does not provide any independent right of termination of the

contract for the respondent. They could terminate the contract only for non-payment of their fees or other dues, despite reminders and not otherwise.”

8. A reading of the above would show that the Arbitrator has held that there is an apparent contradiction between Clauses 9(II) and 9(IV) of the agreement and therefore, applying the principal of harmonious construction of a contract, which is to avoid interpretation which renders any clause redundant, holds that Clause 9(IV) does not provide any independent right of termination of the contract for the petitioner; the petitioner can terminate the contract only for non-payment of its fees and other dues, despite reminder and not otherwise.

9. In my opinion, the Arbitrator has completely misguided himself. It cannot be denied that commercial contracts by their very nature are determinable. A contract may provide for the termination of the contract with or without a cause. Private commercial transactions can be terminated by the parties even without assigning any reason, with a reasonable period of notice in terms of a clause in the agreement authorizing such termination. Such termination cannot be challenged even on the grounds of it being malafide.

10. In ***Central Bank of India, Ltd, Amritsar v. Hartford Fire Insurance Co., Ltd.***, AIR 1965 SC 1288, the Supreme Court, held as under:

“7. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court’s duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear,

there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says "This Insurance may be terminated at any time at the request of the Insured" and "The Insurance may also at any time be terminated at the instance of the company." These are all the words of the clause that matter for the present purpose. The words "at any time" can only mean "at any time the party concerned likes". Shortly put clause 10 says "Either party may at its will terminate the policy". No other meaning of the words used is conceivable."

11. In ***Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel and Ors.***, (2001) 5 SCC 101, the Supreme Court, has held as under:

"49. We are unable to agree with the approach of the High Court and find substance in the contention of Mr. Nariman. Clause (17) is in the nature of express stipulation that before delivery of possession, the contract could be unilaterally terminated. When there is no ambiguity in the clause, the question of intendment is immaterial. The fact that the clause is couched in a negative form is of no consequence. The intention is clear from the plain language of clause (17) of the agreement. In the case in hand, Section 202 has no applicability. It is not a case of agency coupled with interest. No interest can be said to have been created on account of plaintiff being permitted to prepare the Scheme and take ancillary steps. The plaintiff could not get possession before declaration under Section 21 of the ULC Act.

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51. It has been held that "in the case of an ambiguous instrument, there is no reason why subsequent interpreting

statement should be inadmissible". In the present case we are concerned with an unambiguous document and, therefore, we have to go by its plain meaning. Further, affidavit-cum-declaration only reiterated what was contained in the agreement. It did not enlarge the agreement. It did not substitute any clause in the agreement. It was not a document executed between the parties. It was a document executed by original Defendant no.1 alone for the purposes of filing it before the competent authority. Clause 17 of the agreement does not call for any other interpretation except that the contract could be unilaterally rescinded before delivery of possession.

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56. From the aforesaid, it is clear that this Court did not accept the contention that the clause in the insurance policy which gave absolute right to the Insurance Company was void and had to be ignored. The termination as per the term in the insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract, is itself enough to void it cannot be accepted."

12. This Court, after analysing various judgments on this issue, in ***Classic Motors Ltd.v. Maruti Udyog Ltd.***, 65(1997) DLT 166, of course in relation to the franchise agreement, had held as under:

“(59) A critical analysis of the various articles and decisions placed at the bar shows that termination of a franchise agreement is possible provided reasonable notice

is given so that slight recoupment of profits is made by the party against whom such an action is envisaged. It is thus apparent that the franchise agreements are terminable in character. Besides it must be noticed that there are State Legislations in America whereunder franchise agreements have been recognised and provisions have been made therein for terminating such agreements at will terminable for good cause, terminable with reasonable notice or terminable after profits have been recouped as would appear from reappraisal of the following cases:-

*(60) In the case of **Gary H.Sharman Vs. British Leyland Ltd.**; 601 Fr 2d 429 (supra.) which was heavily relied upon by the counsel for the plaintiff in support of his submissions appears to be a case rendered in the context of the local State Legislation. In the said case it was held that a showing of coercion and intimidation which produces unfair and inequitable results is essential to a valid claim of lack of good faith.*

*(61) In **Hill Oils & Sales Ltd.** case reported in 1987 LRC 468, on the ratio of which the counsel for the plaintiff relied upon, appears to be a case where there was no provisions for termination without cause. In the said case the court held that the contract could not be terminated immediately without cause since there was no provisions for immediate termination without cause. The court further held that the rule requiring reasonable notice of termination should be implied as a reasonable term of contract.*

*(62) **Gillespie Brothers Ltd.** reported in 1973(1) All E.R. 193 is a case based on difference of opinion between the two Judges - wherein Lord Denning took a view that an unconscionable term should not be enforced, while Lord Buckley took a view that since the contract is between commercial businessmen, the contention and plea of unconscionability does not arise.*

*(63) In **Martin Baker Aircrafts Vs. Canadian Flight Equipment**; 1955(2) All E.R. 722 the Queen's Bench decision distinguished the case of **Llanelly Railway and Doc***

Co. by holding that the Llanelly case was based on a peculiar agreement which did not provide for a termination power and the statutory scheme under which there was an indication of such an agreement being permanent. It was further held that mercantile and commercial agreements were always intended not to be permanent.

*(64) In 1928 (1) Chancery 447 (Vol.II) the case of **Credition Gas Company** it was held that the contract for supply and purchase of gas without determination and termination of the contract was held not to be permanent in character.*

*(65) In **Staffordshire Area Health Authority Vs. South Staffordshire Waterworks Co.** 1978(3) All E.R. 769 the Court of Appeal held that the contract for water supply to a Hospital at a given rate was terminable after giving reasonable notice.*

(66) The law, therefore, laid down by the aforesaid decisions rendered by the various courts outside India did not intend to lay down a law that an agreement is indeterminable and permanent in character. The judgments of United States were in the context of the State Legislations therein and original scheme of such franchise was under public law. However, the law governing specific performance in India is covered under Section 14 of the Specific Relief Act, a provision similar to that does not exist under the American Law. The scheme of legislation in United States and India is entirely different and unless and until there is Legislation on the similar line as existing in the U.S.A, it is not possible to import the idea and concept of franchise as exists in American law particularly in the realm of private contract arising out of purely private commercial transaction.

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Interpretation and meaning of the express “without any cause”

(68) The aforesaid expression appears in clause 21 of the agreement which states that either party to the agreement could terminate the contract after giving to the other party a notice of 90 days ‘without assigning any cause’. The present

agreement, it must be remembered, was entered into by the parties in the realm of private law as a result of purely private commercial transaction. It is also to be remembered that in a private contract a party is free to choose the person and the subject matter of the transaction according to its own free Will. No restriction or fetter could be imposed on either of the parties to the manner, mode and the nature of the agreement that they choose to enter into. But the law applicable would be different when such an agreement is entered into in the realm of public law.

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(70) In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reason with a reasonable period of notice in terms of such a clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.

(71) On an overall view of the entire matter, it appears to me that the present agreement was never intended to be permanent and that in respect of dealership sales agreements between private parties such agreements could never be held to be perpetual unless so intended by the parties and specifically stated in the agreement itself. On a reasonable construction of the agreement in hand I hold that either party to the agreement was entitled to terminate the contract without assigning any reason by giving 90 days notice or even without giving any notice upon the happening of an event. Termination without cause in common law is a valid power which the parties may give to themselves.

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(85) However, in view of the specific provision in the agreement that the defendant could terminate the contract

in accordance with Clause 21 without assigning any reason, which according to the defendant was resorted to in the present case, this finding appears to be not very material for the purpose of answering Issue No.1.”

13. In ***Oil and Natural Gas Corporation Ltd. v. M/s Streamline Shipping Co. Pvt. Ltd.***, 2002 SCC OnLine Bom 303, the High Court of Bombay, held as under:

“5. Having heard the learned Advocate General for the appellant and Mr. Thakkar for respondent, in our opinion, it is not possible to agree with the view expressed by the learned single Judge that Clause 19.3 is unconscionable and opposed to public policy. Clause 19.3 gives power to the appellant to determine the contract after expiry of one year without assigning any reason. All that the appellant did was to exercise that right or power to terminate the contract whose terms and conditions were well known and agreed to by the respondent. Thus the contract by virtue of Clause 19.3 sets out the power of termination by the appellant and the appellant has so acted under that clause. The clause while setting out the right of termination further says that the appellant can do so without assigning any reasons for the same. However, in the present case the duty to act fairly is sought to be imported into the contract to modify and alter its terms and create an obligation upon the appellant which is not there in the contract. It is settled position of law that where the contracts are freely entered with the State there is no scope for invoking the doctrine of fairness and reasonableness for the purpose of altering or adding to the terms and conditions of the contracts. In such cases the question of public law based on Article 14 of the Constitution do not arise and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the

provisions of Specific Relief Act providing for non-enforceability of certain types of contracts.”

14. In ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49, the Supreme Court had cautioned the courts that in exercise of its power under Section 34 of the Act, if an Arbitrator construes the terms of the contract in a “reasonable manner”, the Award cannot be set aside; construction of the terms of the Contract is primary for an Arbitrator to decide, unless the Arbitrator construed the Contract in such a way that it can be said to be something that no fair minded and reasonable man could do. In the present case, the arbitrator, in the name of interpreting the contract, has in fact, rewritten the same. Equally, in his endeavour to harmoniously construe Clause 9 so as to prevent 9(II) from becoming redundant, has made 9(IV) redundant.

15. In ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) & Anr.***, 2017(12) SCALE 241, the Supreme Court, has held as under:-

“Needless to say that the application of these principles would not be to substitute this Court’s own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.”

16. As noted by me above, in the present case, there was no question of interpretation involved at all. Clause 9(IV) being explicit, was the final word

on the intent of the parties. There are two distinct rights of termination vested in the hands of the parties in Clause 9 of the agreement. While Clause 9(II) empowers the petitioner to terminate the agreement for a cause, Clause 9(IV) authorizes either party to terminate the agreement without cause and by simply giving notice to the other. The Arbitrator seems to have proceeded on the basis that merely because a right to terminate for a cause is provided in the agreement, a separate right given to a party to terminate the agreement without cause would run counter to the same and therefore, would require to be harmoniously constructed with the right to terminate for a cause. This was a fundamental error committed by the Arbitrator vitiating the Impugned Award.

17. Another contention raised by the learned senior counsel for the petitioner is that the Arbitrator has wrongly gone into the issue of reasons for the termination of the agreement by the petitioner. It is submitted that the termination of the agreement by the petitioner was relying upon Clause 9(IV) of the agreement, for which the petitioner was not required to show any cause. As noted by me above, all commercial contracts by their very nature are determinable. The party may, however, restrict the rights of termination by specifically providing so in the agreement itself.

18. The agreement in form of Clause 9(IV) being explicit in the present case; authorizing either party to terminate the agreement with a simple notice of thirty days and not requiring any reason thereof to be in existence or stated in such notice, the Arbitrator could not have gone into the reasons behind the notice of termination by the petitioner.

19. The damages being awarded in favour of the respondent under Claim nos. 2 and 3 are consequential to the finding of the Arbitrator that the

petitioner was in breach of the agreement and as such must compensate the respondent for the same. Though various submissions have been made by the learned senior counsel for the petitioner challenging the award of damages, I need not go into the same in view of my finding that the petitioner cannot be held to be in breach of the agreement.

20. As far as Claim no. 1 is concerned, the same is in relation to the refund of the mobilization advance. The learned Arbitrator in his Impugned Award, in my opinion, has given cogent reasons for awarding the said Claim in favour of the respondent. I would only reproduce the same in the present order:-

(V) However, mobilization advance of 10% on the total fee of Rs.1,78,10,000/- which comes to Rs.17,81,000/- plus taxes, Rs.19,64,443/- stands on a totally different footing. It was received by the respondents as an advance for the entire contract. The contract having been abandoned after about 7 months, there can be no justification for the respondent to keep this amount. Leaving aside the taxes paid to the government in my view, interest of justice would be met if the respondent is directed to refund & pay back Rs. 18,00,000 (eighteen lacs) to the claimant under this claim. It is held accordingly.

(vi) For the foregoing reasons, it is held that claimant is entitled to a sum of Rs,18,00,000/- (Rupees Eighteen Lac) towards the refund of the amount received by the respondent during the pre-construction period. Claim No.1 is decided accordingly.”

21. The learned counsel for the respondent has also rightly drawn my attention to the email dated 12.04.2012 wherein the petitioner had also offered to refund the mobilization advance to the respondent. I, therefore, find no reason to interfere with the above finding of the Arbitrator.

22. As far as the rate of interest awarded under the Impugned Award is concerned, the same being at the discretion of the Arbitrator and even otherwise, no reasons been given by the petitioner for challenging the same, the same is upheld.

23. In view of the above discussion, the Impugned Award so far as it grants Claim nos. 2 and 3 and interest there on in favour of the respondent is set aside while the grant of Claim no. 1 and interest there on in favour of the respondent under the Impugned Award is upheld.

24. The petition is allowed in the above terms, with no order as to costs.

NAVIN CHAWLA, J

MARCH 20, 2018/Arya