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

Date of decision: 6th December, 2018

+ **CS(COMM) 1250/2018 & I.As. 16078/2018, 16619/2018**

MANI KUMAR SUBBA & ANR. Plaintiff

Through: Mr. Balbir Singh, Senior Advocate
with Mr. Kunal Sabharwal & Mr. K.
Gurumurti, Advcoates (M-
9891117595).

versus

**FUTURE GAMING AND HOTEL SERVICES PRIVATE
LIMITED** Defendant

Through: Mr. Abhijeet Sinha, Mr. Ayush
Agrawal, Mr. Vikrant Singh Bhoria,
Mr. Aditya Shukla & Mr. S.N.
Samith, Advocates (M-9560060735).

**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J. (Oral)

1. The present suit has been filed by the Plaintiff – Mr. Mani Kumar Subba (*hereinafter 'Plaintiff no.1'*) and Subba Microsystems Limited (*hereinafter 'Plaintiff no.2'*) against M/s Future Gaming and Hotel Services Private Limited. The prayer in the present suit is as under:

“a. Permanent & Mandatory Injunction as regards the arbitration proceedings initiated by the Defendant in terms of the Agreement to Sell dated 24.12.2013 by unilaterally appointing Honlile Mr. Justice K.S.P. Radhakrishnan (Retd.) as the Sole Arbitrator”

2. The suit has been filed in rather peculiar circumstances, wherein two separate Arbitrators have entered reference in order to adjudicate disputes between the parties in the present suit- one arbitration under the Agreement dated 2nd April, 2015 and the other under Agreement dated 24th December, 2013.

3. Learned Sole Arbitrator – Justice Ajit Bharihoke (Retd.) was appointed vide order dated 21st August, 2018 to adjudicate the disputes between the parties, arising out of agreement dated 2nd April 2015. However, the question as to whether Plaintiff no.2 is a party to the said agreement has been left open to be decided by the Learned Arbitrator.

4. In the meantime, the Defendant invoked arbitration under an agreement dated 24th December, 2013 to which Plaintiffs no.1 and 2 as also the Defendant are parties. Pursuant to the said invocation, Ld. Sole Arbitrator – Justice KSP Radhakrishnan (Retd.) has entered reference.

5. In this background the Plaintiffs seek a restraint on the arbitral proceedings arising out of the first agreement of 2013, on the ground that the said agreement was superseded by the agreement dated 2015, in which Bharihoke J., (Retd) was appointed and before whom arbitral proceedings have already commenced.

6. The background of the litigation is that an agreement dated 24th December, 2013 (first agreement) was entered into between the Plaintiff nos.1 and 2 and Defendant in respect of land measuring 1.515125 acres or 110 kathas, bearing Plot No. 81/297 and 83 (part). In Khatain No. 282/3 and 282/5, located in Mauza Dabgram, Paragana Baikunthapur, P.O. & P.S. Bhaktinagar, District Jalpaiguri, West Bengal (*hereinafter 'suit land'*). The

Plaintiffs were running a hotel in the said land and the Defendant was to pay a total consideration of Rs.51,11,00,000/- to Plaintiffs no.1 and 2 in order to acquire ownership of the land as also the hotel. Pursuant to the first agreement, an amount of Rs.42 crores was paid by the Defendant. In the first agreement, it was clearly stipulated that the owner of the hotel is Plaintiff no.2. For various reasons including objections raised by the Government of West Bengal which objected to the transfer of the land on the ground that the same was tribal land, a second agreement came to be executed being agreement dated 2nd April, 2015. In this agreement, Plaintiff no.1 and Defendant are the parties but Plaintiff no.2 has signed as a confirming party.

7. Pursuant to the said agreement, a total payment of approximately Rs.48 crores is claimed to have been paid to Plaintiff nos.1 and 2. According to the counsel for the Plaintiffs, the said sum stands forfeited for various reasons which, this Court is not going into in this case.

8. Disputes arose between the parties under agreement dated 2nd April 2015, and a petition under Section 11 came to be filed before this Court wherein reference to arbitration was sought by the Defendant. In the said petition, a Learned Single Judge of this Court referred the disputes to arbitration in the following terms:

“ARB.P. 73/2018

1 This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996. The petitioner seeks appointment of an Arbitrator pursuant to an agreement dated 02.04.2015. The peculiarity of this agreement is that while the said agreement mentions the petitioner and respondent No.1 as parties to the agreement, respondent No.2 has been referred to as the confirming party. Therefore, what lies at the heart of the dispute before me is : whether respondent No.2 is a

party to the arbitration agreement.

2 Learned counsel for the parties have advanced arguments at length on this issue. While it was the contention of Mr. Sinha that respondent No.2 is a party to the arbitration agreement, Mr. Balbir Singh, learned senior counsel, who appears for respondent No.2 contends to the contrary. It is, however, the contention of the parties that evidence may have to be led on this aspect of the matter and, therefore, it is only, thereafter, that the Arbitrator may be able to come to a conclusion, one way or the other, as to whether respondent No.2 ought to be considered as a party to the arbitration agreement.

3 Since, there is no dispute with regard to an arbitration agreement obtaining between the petitioner and respondent No.1, parties have agreed that this petition can be disposed of based on the following directions:

(i) Hon'ble Mr. Justice Ajit Bharihoke, Former Judge of this Court shall stand appointed as an Arbitrator in the matter.

(ii) The learned Arbitrator will delve into the issue as to whether or not respondent No.2 is a party to the arbitration agreement, notwithstanding, the nomenclature given to respondent No.2 in the main agreement.

(iii) The arbitration proceedings shall be conducted in consonance with the Rules and Fee Schedule prescribed by the Delhi International Arbitration Centre.

4 Needless to say, in case the petitioner or respondent No.2 is aggrieved by the determination made by the learned Arbitrator with regard to whether or not respondent No.2 is a party to the arbitration agreement, they would have liberty to take recourse to the extant provisions of law, to ventilate their grievance.

5 Petition is disposed of with the aforesaid directions.

I.A. Nos. 9664-65/2018

6 In view of the order passed in the main petition, the captioned interlocutory applications shall stand closed.”

9. In the meantime, notice dated 18th July 2018 was issued by the Defendant under the first Agreement dated 24th December 2013. Plaintiff replied to the said notice on 18th August 2018. The said notice issued under the first agreement resulted in the appointment of Justice KSP Radhakrishnan (Retd.) The first date of hearing before the Ld. Arbitrator - Justice KSP Radhakrishnan (Retd.) was 28th November, 2018. The present suit came to be filed and was listed on 27th November, 2018. On the said date, notice was issued to the Defendant.

10. Submissions have been heard on behalf of both the parties. It is the submission of Mr. Balbir Singh, Ld. Senior Counsel that two arbitrations in respect of the same/identical transaction cannot go on simultaneously. It is his submission that the first agreement stood superceded and novated with the second agreement hence the invocation of the arbitration clause under the second agreement is invalid. It is his further submission that the question as to whether Plaintiff no.2 is in fact a party to the second agreement or not, is already pending in the arbitration proceedings which have commenced pursuant to the order dated 21st August, 2018. In the said proceedings claim petition and defence statement have already been filed. According to Mr. Balbir Singh, therefore, supersession/ substitution having taken place, the arbitration clause in the first agreement no longer survives.

11. He relies on the following judgments:

(i) ***Union of India v Kishorilal Gupta & Bros. (1960) 1 SCR 493***

(ii) ***GSBA Builder Pvt. Ltd. v Radha Soami Satsang Beas, ARB.P. 774/2016, Decided on 1st March, 2017***

(iii) ***Young Achivers v IMS Learning Resources Private Limited (2013) 10 SCC 535***

12. On the other hand, Mr. Abhijeet Sinha, Ld. Counsel for the Defendant submits that there has been no supersession or novation. According to him, it is the settled position in law that in order for any supersession/novation to take place, the parties to both the agreements have to be the same. Since, it is the stand of the Plaintiff no.2 itself that it is only a confirming party to the second agreement, the first agreement cannot be stated to be superceded or substituted. He further submits that the crux of the disputes between the parties relates to a hotel premise located in Siliguri, West Bengal. The said hotel admittedly belongs to Plaintiff no.2. Thus, Plaintiff no.2, which has received a large payment from Defendant ought to be made a party in the arbitration proceedings. Since Plaintiff no.2 did not agree to submit to arbitration under the second agreement and has challenged the existence of any arbitration clause between the Defendant and Plaintiff no.2, the Defendant has had no option but to invoke arbitration under the first agreement. He relies on the following judgments:

(i) ***Citi Bank N.A. v Standard Chartered Bank and Others (2004) 1 SCC 12***

(ii) ***Kvaerner Cementation India Limited v Bajranglal Agarwal and Anr. (2001) 6 SCC 265***

(iii) ***A. Ayyasamy v A. Paramasivam and Ors. (2016) 10 SCC 386***

(iv) ***Havels India Ltd. v Electrium Sales Ltd. CS (OS) No. 2221/2012, Decided on 16th April, 2013***

(v) *Handicrafts & Handlooms Exports Corporation of India Ltd. v Ashok Metal Corporation & Anr. (2010) 117 DRJ 370*

(vi) *Branch Manager, Magma Leasing and Finance Limited and Anr. V Porluri Madhvilata & Anr. (2009) 10 SCC 103*

(vii) *GMR Energy Limited v Doosan Power Systems India Private Limited CS (COMM) 447/2017, Decided on 14th November, 2017*

13. After hearing the counsels for the parties, it is necessary and relevant to extract the relevant clauses in the second agreement:

7. The First Party hereby authorizes the Second Party to make payment of the amounts claimed by said Consortium Banks to liquidate the said Term Loan Account and Funded Interest Term Loan, at any time hereafter, and release the securities and guarantees provided and receive and retain the original title deeds relating to the above said Land and Building with the Second Party. It is agreed that the amount mentioned in clause 6b is the amount as informed by Banks and in case any additional amount is payable, as on the date of actual payment, the First Party authorizes the Second Party to make such payment out of the balance consideration referred to in Clause 1 above.

...

20. That the First Party and SML assure the Second Party that, except to the extent stated above, prior to this agreement to sell, there is no charge, encumbrance or lien with regard to the said Land and the Hotel Building and the same are free from all encumbrances including sale, mortgage transfer, gift, will, trust, exchange, legal flaws, claims, prior Agreement to Sell, court litigation, court injunction or attachment, and also free from actions by any Government Agency or Department. The First Party further do not assure that after this Agreement, neither of them nor shall anyone claiming through them have any claim of any claim of

any nature whatsoever. In the event any of the claims and assurances of the First Party are claimed to be wrong and/or incorrect and the rights of the Second Party to own and use the said Land and the Hotel Building is curtailed or defeated, then and in that event the First Party and the SML shall be jointly and severally liable to compensate the Second Party all the losses and expenses that may suffer including refunding the sale consideration paid by the Second Party under this Agreement.”

On the basis of this clause, it is argued that the first agreement does not subsist and Plaintiff no. 2 is not a party to the same.

14. The signature page of the second agreement describes Plaintiff no.2 as a confirming party. The question as to whether the Defendant can maintain any claims against Plaintiff no.2 under either the first agreement or the second agreement has to be determined in arbitral proceedings. It cannot be said that the Defendant has no remedy against the Plaintiff no.2. The core dispute between the parties relating to the hotel has to be resolved under either the first or the second agreement. Plaintiff no.2 had clearly represented itself as the owner of the hotel in the first agreement which is clear from a reading of clause 1(b):

“Second Party hereby agrees to sell, transfer and convey to the Third Party and the Third Party agrees to purchase from the Second Party all its rights, titles, interest and claims in the Hotel Building constructed on the said Land, together with all equipment, infrastructure, privileges and appurtenances thereto with all fitting, fixtures and connections provided therein, hereinafter collectively referred to as ‘the said Hotel Building’, more particularly detailed in SCHEDULE ‘B’ hereunder for a total consideration of Rs.42,00,00,000/- (Rupees Forty two crores only). It is

agreed that if considered necessary, the Parties of the Second and Third Parts may agree to enter into a separate agreement with respect to the purchase of the equipment, furniture, fixtures and other infrastructure, however, the consideration above mentioned is inclusive of the cost of the building as well as the equipment, infrastructure, etc ”

15. A perusal of clause 1 (b) shows that it was Plaintiff No.2 who had agreed to sell, transfer and convey to the Defendant its right, title, interest and claim in the hotel building including all its furniture, fittings and fixtures, etc. Admittedly, the said transaction has not fructified and the hotel continues to remain in the possession of the Plaintiffs. The Defendant having paid almost the entire consideration amount agreed under the two agreements, it cannot be said that the Defendant cannot maintain any claim against Plaintiff No.2. This Court while referring the parties to arbitration under the second agreement has held that the Plaintiff no.2 shall continue to appear in the said arbitration and the question as to whether the second Plaintiff has to be a party to the said agreement or not has to be determined by the Id. Arbitrator.

16. It is clear that Plaintiff No.2 does play an important role in the entire transaction. Admittedly, the second agreement, is not signed by the Plaintiff No.2 as a party to the agreement and therefore if it is the stand of the Plaintiff No.2 that the second agreement novates or substitutes the first agreement, it ought to have admitted that it is a party to the second agreement. Since the stand of Plaintiff no.2 is that it is not a party to the second agreement, the Defendant is left with no option but to invoke the arbitration clause under the first agreement.

17. The argument of substitution and supersession/novation is liable to be rejected as per the settled position in law in ***Citi Bank N.A v. Standard Chartered Bank and Ors. (2004) 1 SCC 12:***

“47. Novatio, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. The Special Court was right in observing that Section 62 would not be applicable as there was no novatio of the contract. Further, it is neither Citi Bank’s nor CMF’s case nor even SCB’s case that there was a tripartite arrangement between the parties by which CMF was to accept the liability. Such a case of novatio does not arise for consideration. Shri Andhyarujina, the learned Senior Counsel for Citi Bank has also not seriously pressed for Citi Bank’s case being considered by reference to Section 61 abovesaid.”

18. Plaintiff no.2 is clearly not a party to the second agreement but only a confirming party. Unless and until the parties to both agreements are the same, there can be no supersession or novation. The parties to the first and the second agreement are not the same. Thus, the second agreement cannot be treated, prima facie, as being in supersession or novation of the first agreement. Disputes under both the agreements have to be adjudicated comprehensively. There exists an arbitration agreement between the Plaintiff no.2 and the Defendant in as much as the stand of Plaintiff no.2 is that it is not a party to the second agreement but only to the first agreement. A large amount of money has been received by Plaintiff no.2 from the Defendant and the Defendant is not sure as to which way the decision as to the

arbitrability of the disputes would go in the proceedings commenced under the second agreement. The hotel having not yet been given to the Defendant, clearly in view of the payments made, there is a dispute between the Defendant and the Plaintiff no.2 which requires adjudication. In fact Ld. Counsels have cited case law to the effect that the arbitration agreement is distinct from the main contract. There is no dispute to this proposition. This proposition is by itself sufficient reason to consider that the arbitration clause in the first agreement is distinct and continues to apply despite the second agreement having been executed.

19. Under these circumstances, the Court had put to the counsels for the parties to arrive at a consensus as to before which Ld. Arbitrator they wish to proceed further in respect of both agreements. The matter was adjourned yesterday, however, both parties have not arrived at a consensus.

20. Today, during the course of arguments, the Court suggested to the Ld. Counsels that a three member tribunal would be the solution to this conundrum. Neither party had serious objection to the constitution of a three member tribunal.

21. The crux of the dispute between the parties relates to the land and hotel located in Siliguri, West Bengal. Both the agreements i.e., the first agreement dated 24th December 2013 and the second agreement dated 2nd April 2015 are inter-linked. Amounts paid under the first agreement to Plaintiff nos 1 and 2 have been given credit for in the second agreement. The question whether the Plaintiff no.2 ought to be a party and whether the second agreement superceded the first are issues to be finally adjudicated by the Tribunal. There is a clear possibility of multiplicity of proceedings and conflicting awards being rendered if separate arbitral proceedings continue

in respect of the two agreements.

22. Considering the nature of the disputes between the parties, it is directed that the arbitration proceedings shall now be held before a three member Tribunal consisting of Justice Justice Ajit Bharihoke (Retd.) who was already appointed under the second agreement, Justice KSP Radhakrishnan (Retd.), who was appointed between the parties under the first agreement and Justice Kurien Joseph (Retd.) who shall act as the Chairman of the Tribunal.

23. The arbitral proceedings shall commence before the three member tribunal under the aegis of the Delhi International Arbitration Centre (DIAC). The fee of the proceedings shall be equally shared between the parties. The fee already paid to either of the Sole Arbitrators would be given adjustment. Any additional claims in respect of Plaintiff no.2 shall be filed before the three Member Tribunal. In respect of the second agreement the Claim Petition already filed and the Defense thereto already filed, shall be considered. The fee applicable shall be as per the DIAC Rules. The timeline in the Arbitration and Conciliation Act, 1996 shall be followed.

24. The observations made above shall not bind the Arbitral Tribunal and the same are only *prima facie* in nature.

25. The suit is disposed of with these observations.

26. Copy of this order be transmitted by the Registry to all three arbitrators, as also the Co-ordinator, DIAC.

PRATHIBA M. SINGH
JUDGE

DECEMBER 06, 2018
Rahul