

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

% Date of decision: 13th February, 2019

+ FAO(OS) 33/2019 & CAV No. 130/2019 and CM. No. 6506/2019

SAMYAK PROJECTS PRIVATE LIMITED Appellant

Through: Mr. Vivek Kohli, Adv. with
Mr. Sandeep Bhuraria, Ms. Neetika
Bajaj, Ms. Perna Kohli & Mr. Sunil
Tyagi, Advs.

versus

**ANSAL HOUSING & CONSTRUCTION
LIMITED Respondent**

Through: Mr. Neeraj Kr. Gupta, Adv.

**CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO**

V. KAMESWAR RAO, J. (ORAL)

CM. No. 6506/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

CAV No. 130/2019

Learned counsel for the caveator has put in appearance.

Caveat stands discharged.

FAO(OS) 33/2019

1. The challenge in this appeal is to the order dated November 20, 2018 passed by the learned Single Judge in IA 14031/2018 which is an application filed by the appellant herein under Section 8

of the Arbitration & Conciliation Act, 1996 (for short 'Act of 1996').

2. Some of the relevant facts are that the respondent herein had instituted a suit under Order XXXVII of the CPC for recovery of ₹11,79,83,525/- pleading that (i) the appellant was the purchaser of land admeasuring 1.7 acres in Block A of Integrated Residential Colony called "Esencia" in the revenue estate of Village Badshapur, Tehsil and District Gurgaon, Haryana; (ii) that the defendant had entered into an agreement with Universal Buildwell Pvt. Ltd. (UBL) to undertake development and construction over the said land of which the UBL failed to perform its part of the agreement; (iii) that the appellant was in the process of finalizing the termination agreement with UBL and was in need of funds, to pay off UBL; (iv) that the appellant had entered into a Memorandum of Understanding (MoU) dated July 12, 2012 with the respondent herein whereunder the respondent had advanced a sum of ₹12 Crores to the appellant to enable the appellant pay off UBL and achieve termination of the agreement with UBL and to pay the balance sale consideration to the owners of the land to achieve execution of sale deed of the land in favour of the appellant; (v) that the appellant under the aforesaid

MoU has agreed with the respondent and the respondent will carry out work of development and construction of the aforesaid land and proceeds of the sale of built up area / developed land shall be shared by appellant and the respondent in the ratio of 45% and 55% respectively; (vi) that it terms of the MoU if the appellant did not achieve termination of the earlier agreement with UBL within four months from the date of the MoU, the respondent had the option, either to demand refund of the amount of ₹12 crores with interest @ 24% per annum, or to extend the time for the appellant to achieve termination of the earlier agreement with UBL; (vii) the appellant failed to terminate the earlier agreement with UBL and on the contrary ratified the earlier agreement with UBL; (viii) a Deed of Cancellation dated April 20, 2013 was entered into between the respondent and the appellant whereunder the parties cancelled the MoU dated July 12, 2012 and it was agreed that the appellant shall refund the entire amount of ₹12 crores with interest at the rate of 24% per annum to be calculated from the date of receipt of the said ₹12 crores by the appellant, on or before December 31, 2013; (ix) the appellant did not repay the said amount and sought extension from time to time; (x) the appellant has been deducting tax at source

at 10% on the interest accrued and has been depositing the same to the credit of the government; (xi) the appellant has made last on account payment of ₹1 crore to the respondent on March 27, 2015; and, (xii) as on the date of filing of the suit, a sum of ₹11,79,83,525/- was due from the appellant to the respondent.

3. The issue, which fell for consideration before the learned Single Judge was, whether the Deed of Cancellation dated April 20, 2013 between the parties herein contains an arbitration clause. The plea of the counsel for the appellant before the learned Single Judge was that (i) notwithstanding the Deed of Cancellation, the Arbitration Agreement in the MoU dated July 12, 2012 survives; (ii) the obligation of the appellant to pay the amounts aforesaid to the respondent has its origin in the MoU dated July 12, 2012 which contains an Arbitration Agreement and (iii) reliance was placed on the judgment of the House of Lords in *Moschi Vs. Lep Air Services Ltd. 1973 Appeal Court 331* (House of Lords) and the Division Bench of the High Court of Bombay in *Mulheim Pipecoatings GmbH Vs. Welspun Fintrade Ltd. 2013 SCC OnLine Bom 1048*.

4. We may note, that the relevant arbitration clauses in the MoU dated July 12, 2012 reads as under:-

“8. That any dispute between the Parties arising out of this MOU shall be subject to provisions of Arbitration and Conciliation Act, 1996 and the venue for arbitration shall be New Delhi.

9. That this Agreement shall be subject to jurisdiction of Courts at Gurgaon.”

5. Some of the relevant clauses of the Deed of Cancellation, as noted by the learned Single Judge are as under:-

“1. That the MOU dated 12th July, 2012 shall stand cancelled without any Party having any claim against each other except as agreed hereinafter.

2. That SPPL will refund the entire amount of ₹12 Crores with interest calculated @24% p.a. The interest will be calculated from the date of receipt of advance of ₹12 Crores and till the entire amount together with interest is refunded by SPPL to AHCL.

3. That the entire amount of ₹12 Crores together with interest thereon would be refunded by SPPL to AHCL latest by 31st December, 2013 failing which AHCL shall be at liberty to adjust amount due to SPPL in any other account.

4. That AHCL shall not claim any right on the Said Land or the Project being developed on the Said Land.

5. That this Deed of Cancellation is subject to jurisdiction of Courts at New Delhi.”

6. On the other hand, the case of the respondent herein before the learned Single Judge was that the Deed of Cancellation dated April 20, 2013, which did not contain any arbitration clause was in supersession of the MoU dated July 12,

2012 and the Arbitration Agreement in MoU dated July 12, 2012 disappears. Reliance was placed on the judgment of the Division Bench of this Court in ***Young Achievers Vs. IMS Learning Resources Pvt. Ltd. (2012) 191 DLT 378 (DB)***.

7. The learned Single Judge has, by relying upon the judgment in the case of ***Young Achievers (supra)***, which judgment has been upheld by the Supreme Court in ***(2013) 10 SCC 535*** and distinguishing the judgment relied upon by the learned counsel for the appellant in ***Mulheim Pipecoatings GmbH (supra)***, in paras 17, 18 and 19, held as under:-

“17. I have looked at the MoU dated 12th July, 2012 and the Deed of Cancellation dated 20th April, 2013 signed by the parties and find (i) the arbitration clause contained in the MoU dated 12th July, 2012 to be of arbitration only of “any dispute between the parties arising out of this MoU” and not all encompassing as is often found by use of the words “arising out of and in relation to”; (ii) the disputes which could arise out of the MoU dated 12th July, 2012 were in limited domain, considering that the MoU was not a complete agreement between the parties but envisaged execution of a “detailed agreement”; (iii) the Deed of Cancellation dated 20th April, 2013 in recitals thereof recorded that the plaintiff and the defendant had “agreed to mutually cancel the MoU dated 12th July, 2012” and in habendum / operative part thereof records that “the MoU dated 12th July, 2012 shall stand cancelled without any Party having any claim against each other except as agreed hereinafter”.

18. *The language used by the parties in the arbitration clause in the MoU dated 12th July, 2012 and in the Deed of Cancellation dated 20th April, 2013 negates the survival of the arbitration clause in the MoU post the Deed of Cancellation. The disputes arising between the parties out of the Deed of Cancellation, which in supersession of the clause in the MoU of refund of the entire amount of ₹12 crores advanced by the plaintiff to the defendant at the option of the plaintiff, also gives liberty to the plaintiff to adjust the amount in the amounts due from the plaintiff to the defendant in any other account, in the light of the defence of the defendant of such adjustment, cannot be said to be arising out of the MoU, to be covered by the arbitration clause in the MoU.*

19. *The facts and circumstances of the present case thus do not make out a case of survival of the arbitration clause in the MoU.”*

8. That apart, the learned Single Judge has also relied upon the judgment of the Supreme Court in ***Damodar Valley Corporation Vs. K.K. Kar (1974) 1 SCC 141; Chatterjee Petrochem Company Vs. Haldia Petrochemicals Ltd. (2014) 14 SCC 574; Hema Khattar Vs. Shiv Khera (2017) 7 SCC 716, Nalini Singh Associates Vs. Prime Time – IP Media Services Ltd. 2008 (106) DRJ 734; C.E. Construction Ltd. Vs. Intertoll ICS Cecons O&M Company Pvt. Ltd. 2017 SCC OnLine Del 6401*** and other judgments has dismissed the application.

9. Mr. Vivek Kohli, learned counsel for the appellant would make similar submissions as were made before the learned Single

Judge and had also placed reliance on the judgment of the Bombay High Court in *Mulheim Pipecoatings GmbH (supra)*. According to him, there were two obligations under the initial MoU dated July 12, 2012. The Deed of Cancellation dated April 20, 2013 was to fulfill the secondary obligation and as such would be governed by the arbitration clause contained in the MoU. In other words, it is his submission that the parties had envisaged the scenario of non performance of the primary obligation and therefore the secondary obligation was inserted into it and then took the shape of Deed of Cancellation, which was in the form of settlement between the parties and hence, the arbitration clause survives.

10. That apart, it is his submission that it is a settled position of law that arbitration clause is a separate agreement, which does not perish with the main contract. He stated that the MoU dated July 12, 2012 and the Deed of Cancellation dated April 20, 2013 are so inextricably linked that the Deed of Cancellation does not have any relevance without the existence of MoU. Mere usage of the line that MoU stands cancelled does not render the MoU non-existent since the Deed of Cancellation owes its birth and existence to the clauses mentioned in the MoU. It is his submission that the learned

Single Judge did not consider the fact that the parties did not expressly and explicitly obliterate the arbitration clause from the Deed of Cancellation. He stated that the reliance placed by the learned Single Judge on the judgment of the Division Bench of this Court in *Young Achievers (supra)*, is totally misplaced.

11. Having heard the learned counsel for the parties, we are not impressed by the submissions made by Mr. Kohli for the reason that the terms of MoU dated July 12, 2012 and the Deed of Cancellation dated April 20, 2013, reproduced above are clear and the intent of the parties was to cancel the MoU from its existence, as is clear from the very nomenclature, i.e “the Deed of Cancellation”, whereby the MoU stood extinguished. It is an admitted position that the Deed of Cancellation did not have any arbitration clause.

12. The plea of Mr. Kohli that the Deed of Cancellation did not expressly / explicitly obliterate the arbitration clause from the Deed of Cancellation, does not impress us for two reasons; (i) the intention of the parties was to cancel the MoU; (ii) when the parties have expressly incorporated an arbitration clause in the MoU and having not done that in the Deed of Cancellation, the necessary implication is that they have decided not to incorporate the same.

The MoU stands superseded by the Deed of Cancellation. A fresh agreement has been entered without arbitration clause.

13. Insofar as the other submissions made by Mr. Kohli by placing reliance on the judgment in the case of **Mulheim Pipecoatings GmbH (supra)** is concerned, in **Mulheim Pipecoatings GmbH (supra)**, the Bombay High Court has summarized the law in terms of the following paragraphs:-

“(i) The arbitration agreement constitutes a collateral term in the contract which relates to the resolution of disputes and not to the performance of the contract. Whereas the substantive terms of a contract define the rights and obligations of the parties, an arbitration agreement provides for modalities agreed upon by parties for the resolution of their disputes. Parties agree thereby to have their disputes resolved before an arbitral tribunal as distinct from the ordinary courts of law in the jurisdiction;

(ii) Upon the termination of the main contract, the arbitration agreement does not ipso facto or necessarily come to an end;

(iii) The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself;

(iv) If the nature of the controversy is such that the main contract would itself be treated as non est in the sense that it never came into existence or was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void. Similarly, though the contract was validly executed, parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities thereunder. Even in such a case, since the original contract is extinguished or

annihilated by another, the arbitration clause forming a part of the contract would perish with it;

(v) There may, however, be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to a number of circumstances, in which one or both the parties may be discharged from further performance. Termination of the contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end to for all purposes because there may be rights and obligations which had arisen earlier when it had not come to an end. The contract subsists for those purposes and the arbitration clause would operate for those purposes;

(vi) The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. In other words, arguments for impeaching the arbitration agreement must be based on facts which are specific to the arbitration agreement. There may, of course, be facts which are specific to both the main agreement and the arbitration agreement, but there may well be facts which are specific to the main agreement, but not to the arbitration agreement. In the former case, the arbitration clause would perish with the main contract while in the latter case, it would not. Another way of considering the matter is whether it is the further performance of the contract that is brought to an end or it is the existence of the contract which is brought to an end. In the former case, where the further performance of the contract has been brought to an end, the arbitration clause would survive whereas when the existence of the contract is itself brought to an end, the arbitration clause would not survive.”

(emphasis added)

14. Whereas the reliance placed by the respondent on the judgment of the Coordinate Bench of this Court in *Young Achievers (supra)*, the Court has summarized the law in paras 8 to 16, which are reproduced as under:-

“8. We are unable to agree with the submissions of learned counsel for the appellant, though there can be no dispute about the legal proposition propounded aforesaid and the law laid down by the Hon’ble Supreme Court. In fact, there is no quibble over the legal proposition that the arbitration clause would survive the termination/cessation of an agreement and the disputes pertaining to the same would still be resolved by arbitration. In the present case it is not a case of unilateral termination by one of the parties which has occurred. Mutually, a fresh document has been drawn called the Exit Paper, an agreement containing comprehensive terms & conditions on which the parties continued with their association. Despite this Exit Paper setting out all the terms & conditions, the allegation of the respondent is that the appellant continued to infringe the trademark of the respondent by using the same, contrary to the said agreement. This Exit Paper undisputedly does not contain an arbitration clause.

9. The Supreme Court in Magma Leasing & Finance Limited (supra), which is a two-Judge bench decision, after referring to the judgment of the House of Lords in Heymen v. Darwins Ltd., 1942 AC 356 : 1942 1 All ER 337 (HL), referred to the following observations of Subba Rao, J (as his Lordship then was) in Union of India Vs. Kishorilal Gupta & Bros., AIR 1959 SC 1362:

“8. Uninfluenced by authorities or case-law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was nonetheless an integral part of the contract, which

had no existence de hors the contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract not only did not provide for the survival of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including the arbitration clause. The case-law referred to by the learned counsel in this connection does not, in our view, lend support to his broad contention and indeed the principle on which the said decisions are based is a pointer to the contrary.

9...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... But where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it."

(emphasis supplied)

10. We may note at this stage that the present is not a case involving the assertion by the respondent of accord and satisfaction in respect of the earlier contracts dated 01.04.2007 and 01.04.2010. In terms of the decision of the

Supreme Court in Kishorilal Gupta (supra) (which is a three-Judge bench decision), if that had been the issue raised, the appellant may have been justified in claiming that the said dispute, i.e. whether there has been accord and satisfaction in respect of the two agreements should be referred to arbitration in terms of the arbitration agreement contained in the said two agreements.

11. Reliance placed on para 32 of the judgment in Kishorilal Gupta (supra) rendered by A.K. Sarkar, J in his concurring opinion appears to be misplaced. The Supreme Court in para 32 of the decision in Kishorilal Gupta (supra), after setting out section 62 of the Contract Act (which deals with the effect of novation, recession and alteration of contract) went on to observe that "the settlement cannot be said to have altered the original contract or even to have rescinded it. It only settled the dispute as to the breach of the contract and its consequences. For the same reason, it cannot be said to substitute a new contract for the old one".

(emphasis supplied)

12. It is important to note that the Supreme Court made the aforesaid observation in respect of a "settlement" of disputes arising under the original contract, including the dispute as to the breach of the contract and its consequences. In the present case, the parties have clearly entered into a fresh contract contained in the exit agreement, which, as noticed above, is not even in dispute. The exit agreement does not even whisper about any dispute arising under the original agreements or about settlement thereof. It is pure and simple novation of the original contract by mutual agreement of parties.

15. We are, thus, of the view that the learned single Judge was right in coming to the conclusion that both the agreements dated 1.4.2007 and 1.4.2010 have been superseded/novated by the Exit Paper, and in view of Exit Paper being a fresh agreement with no arbitration clause for adjudication of disputes, the application of the appellant was rightly rejected.

16. We may add that, even otherwise, suppose there was no dispute about any item relating to the Exit Paper, then can it really be said thereafter a number of years if the trademark is infringed that the respondent will still have to resort to the contract where there was an agreement inter se the parties for mutual business containing the arbitration clause? The answer to this obviously would be in the negative.”

(emphasis added)

15. That apart, we find, as noted by the learned Single Judge, even the judgment of the Division Bench in ***Young Achievers*** (*supra*) has been upheld by the Supreme Court, wherein the Supreme Court in paras 7 and 8 has held as under:-

“7. Exit paper would clearly indicate that it is a mutually agreed document containing comprehensive terms and conditions which -admittedly does not contain an arbitration clause. We are of the view that the High Court is right in taking the view that in the case on hand, is not a case involving assertion by the respondent of accord a satisfaction in respect of the earlier contracts dated 1-4-2007 and 1-4-2010. If that be so, it could have referred to arbitrator in terms of those two agreements going by the dictum in Union of India v. Kishorilal Gupta and Bros. This Court in Kishorilal Gupta’s case examined the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract. The principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. But where the dispute is whether such contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. The various other observations were made by this Court in the above-mentioned judgment in respect of “settlement of disputes arising under the original contract, including the

dispute as to the breach of the contract and its consequences". The principle laid down by the House of Lords in Heyman v. Darwins Limited was also relied on by this Court for its conclusion. The Collective bargaining principle laid down by the US Supreme Court in Nolde Bros. case would not apply to the facts of the present case.

8. We may indicate that so far as the present case is concerned, parties have entered into a fresh contract contained in the Exit paper which does not even indicate any disputes arising under the original contract or about the settlement thereof, it is nothing but a pure and simple novation of the original contract by mutual consent. Above being the factual and legal position, we find no error in the view taken by the High Court. The appeal, therefore, lacks merit and stands dismissed, with no order as to costs."

16. That apart, the learned Single Judge has distinguished the judgment of *Mulheim Pipecoatings GmbH (supra)* with *Young Achievers (supra)* by stating as under, with which we concur in view of the clauses, as noted above in the Deed of Cancellation, reproduced above.

15. XXX XXX XXX

However, Young Achievers supra, in addition, relying on the earlier judgments cited therein, holds that where a contract containing an arbitration clause is substituted by another contract, the arbitration clause perishes with the original contract unless there is anything in the new contract to show that the parties intended the arbitration clause in the original contract to survive."

17. In view of the clear position of law, as noted by the learned Single Judge, we are of the view that the impugned order does not suffer from any infirmity. The appeal is dismissed. No costs.

V. KAMESWAR RAO, J

CHIEF JUSTICE

FEBRUARY 13, 2019/ak

