

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

+ **ARB.P. 883/2018**

Reserved on: 23.01.2019
Date of decision : 01.02.2019

RAJ DUTTA & ORS.

..... Petitioners

Through: Mr.P. Chidambaram, Sr. Adv. with
Mr.Satish Kishanchandari,
Mr.Parag Khandhar & Mr.Sohil
Shah & Mr.Tejas Patel, Advs.

versus

LAMBDA CONTENT INDIA PRIVATE LIMITED & ORS.

..... Respondents

Through: Mr.Abhinav Vasisht, Sr. Adv. with
Ms.Aayushi Sharma, Mr.Nandish
Vyas, Mr.Joran Dewan &
Ms.Priya Singh, Advs. for R-1 &
R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioners seeking appointment of the Nominee Arbitrator on behalf of respondent nos.1 and 2 for adjudicating the disputes that have arisen between the parties in relation to the Share Purchase Agreement dated 09.04.2018 executed between the petitioners as the 'Sellers' and

respondent nos.1 and 2 as the 'Purchasers' of the shares in respondent no.3 company (hereinafter referred to as 'Domestic SPA').

2. It is the case of the petitioners that the petitioners were holding 26.36% of the total paid up share capital of the respondent no.3 company, which the respondent nos.1 and 2 acquired pursuant to the Domestic SPA. It is further asserted by the petitioners that as per the terms of the Domestic SPA, a part of the sale consideration was payable upfront by the respondent nos.1 and 2 to the petitioners and the balance consideration of US\$ 26,68,117.00 (equivalent to Rs.18,15,12,009/-) out of aggregate consideration (referred in the Domestic SPA as Additional Consideration) was deferred and under Clause 5.7.1 of the Domestic SPA, the same was deposited by respondent nos.1 and 2 in an Onshore Escrow Account as per terms of Onshore Escrow Agreement executed between the parties.

3. It is further submitted that this Additional Consideration was to be released to the petitioners in accordance with Clause 5.7.3 of the Domestic SPA on fulfilment of the conditions mentioned therein.

4. The Domestic SPA was amended on 02.06.2018, however, the terms thereof are stated to be not relevant for the present adjudication.

5. The petitioners further claim that they complied with Clauses 5.7.2 and 5.7.3 of the Domestic SPA and as the respondent no.1 and 2 did not notify any dispute thereto, the amount in the Escrow Account was to be released in favour of the petitioners. The petitioners, therefore, vide their letter dated 05.09.2018 sought release of the Additional Consideration

from the Escrow Account. However, the respondent nos. 1 and 2 disputed the same vide its letter dated 07.09.2018 and further by its letter dated 11.09.2018 sought recession of the Domestic SPA.

6. The petitioners, vide letter dated 22.09.2018, in compliance with Clause 15 of the Domestic SPA, which provides the Dispute Resolution Mechanism, called upon the respondent nos.1 and 2, to attempt to amicably resolve the disputes. Thereafter, a series of correspondence was exchanged between the parties, however, as the dispute could not be amicably resolved, the petitioners invoked the Arbitration Agreement contained in Clause 15 of the Domestic SPA and nominated a Sole Arbitrator.

7. The respondent nos.1 and 2, however, vide their letter dated 20.11.2018 refused to concur to the appointment of the Sole Arbitrator and instead contended that the disputes have to be resolved through a separate Share Purchase Agreement dated 09.04.2018 executed between SPI Global Content Mauritius Holding as ‘Purchaser’ and Olympus Capital Asia Investments Ltd.; Walden Investments VI; D.E. Shaw Composite Investments (Mauritius) Ltd. as ‘Investor Sellers’ and Edward Quinterro, Karen Kase as ‘Minority Investor Sellers’ (hereinafter referred to as ‘Foreign SPA’).

8. The petitioners assert that as respondent nos.1 and 2 did not agree to the appointment of the Arbitrator in accordance with Clause 15 of the Domestic SPA, the Arbitrator proposed by the petitioner has to be considered as its Nominee Arbitrator and a Nominee Arbitrator on behalf of the respondent nos.1 and 2 is to be appointed by this Court.

9. The respondent nos.1 and 2 in their reply have reiterated their objection to the appointment of an Arbitral Tribunal under the Domestic SPA. They submit that the disputes raised by the petitioner and the respondent nos.1 and 2 can only be adjudicated through an Arbitral Tribunal appointed under the Foreign SPA.

10. To answer the claims and counter claims of the parties, certain clauses of the Domestic SPA and of the Foreign SPA would need consideration and are reproduced hereinbelow.

11. Clause 15 of the Domestic SPA, which provides for the Dispute Resolution Mechanism is reproduced hereinunder:

“15. DISPUTE RESOLUTION

15.1. In the event a dispute, difference, claim, or controversy arises in connection with the interpretation or implementation of this Agreement or the performance of any obligation hereunder (each a “Dispute”), the Parties shall attempt in the first instance to resolve such dispute through friendly consultations.

15.2. If the Dispute is not resolved through friendly consultations within 30 (thirty) days from the date of commencement of discussions or such longer period as the Parties agree in writing, then either Party may invoke this arbitration clause under notice to the other. The Dispute shall then be referred to and finally resolved by arbitration in accordance with the succeeding provisions of this Clause 15.

15.3. If the Dispute is not resolved as aforesaid, then such Dispute shall be referred to arbitration in accordance with Arbitration and Conciliation Act, 1996 in force at the relevant time (which is deemed to be incorporated into this Agreement by reference) and as may be amended by the rest of this Clause 15 (as amended) (“Rules”) before 1 (one) arbitrator appointed jointly by

*the Parties, failing which the claimant(s) shall be entitled to appoint 1 (one) arbitrator and the respondent(s) shall be entitled to collectively appoint 1 (one) arbitrator and the 2 (two) arbitrators so appointed shall jointly appoint a third arbitrator who shall preside as the chairman, failing which such third arbitrator shall be appointed in accordance with the Rules (collectively, “**Arbitral Tribunal**”), unless the Arbitral Tribunal determines to the contrary. All arbitration proceedings shall be conducted in the English language in accordance with the Rules and the place, seat, venue and legal place of arbitration shall be at New Delhi.*

15.4. The Parties hereto acknowledge that simultaneously with the Purchasers entering into this Agreement, the Purchasers and its affiliates are also entering into other agreements in order to acquire shares of the Company from the Investors, who are shareholders of the Company. To the extent that there are any disputes that arise between one or more Purchasers or Sellers under this agreement, and the Investors under the Investor SPA, which disputes arise out of or relate to similar set of facts, or are based on a common cause of action (including a breach of a common representation which has been provided by the sellers under this Agreement as well as Investors under the Investor SPA), such dispute shall be resolved in the manner set out in clause 14 of the Investor SPA. It is expressly acknowledged by the Parties that this sub-clause has been agreed to by the Parties for the purpose of resolving the specific disputes as set out in this clause with the intention of avoiding multiplicity of proceedings and in the interests of ensuring speedy and efficient resolution of such disputes. Hence, the Sellers acknowledge that they shall not raise a defence in connection with any such arbitration to the effect that such arbitration is invalid merely on account of there being an alternate dispute resolution mechanism for all other types of disputes under this Agreement.

12. As noted hereinabove, the Foreign SPA was also executed on the same day as the Domestic SPA. Clause 15 thereof also provides for the Dispute Resolution Mechanism and is reproduced hereinunder:

“15. DISPUTE RESOLUTION

15.1. *In the event a dispute, difference, claim or controversy arises in connection with the interpretation or implementation of this Agreement or the performance of any obligation hereunder (each a "Dispute"), the Parties shall attempt in the first instance to resolve such dispute through friendly consultations.*

15.2. *If the Dispute is not resolved through friendly consultations within 30 (thirty) days from the date of commencement of discussions or such longer period as the Parties agree in writing, then either Party may invoke this arbitration clause under notice to the other. The Dispute shall then be referred to and finally resolved by arbitration in accordance with the succeeding provisions of this Clause 15.*

15.3. *If the Dispute is not resolved as aforesaid, then such Dispute shall be referred to arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre in force at the relevant time (which is deemed to be incorporated into this Agreement by reference) and as may be amended by the rest of this Clause 15 ("Rules") before 1 (one) arbitrator appointed jointly by the Parties, failing which the Purchaser shall be entitled to appoint 1 (one) arbitrator and the Investor Sellers (who are a party to the Dispute) shall be entitled to collectively appoint 1 (one) arbitrator and the 2 (two) arbitrators so appointed shall jointly appoint a third arbitrator who shall preside as the chairman, failing which such third arbitrator shall be appointed in accordance with the Rules (collectively, "Arbitral Tribunal"), unless the Arbitral Tribunal determines to the contrary.*

15.4. *The Parties hereto acknowledge that simultaneously with the Purchaser entering into this agreement, the Primary SPA Purchasers are also entering into the other agreements in order to acquire shares of the Company from the Other Shareholders including the Primary SPA and the Minority Sellers Agreement (collectively, "Other Transfer Agreements"). To the extent that there are any disputes that arise between the Purchaser or the Investors and/or Minority Investor Sellers under this Agreement,*

and Other Shareholders under Other Transfer Agreement, which dispute arises out of or relate to similar set of facts, or are based on a common cause of action (including a breach of a common representation which has been provided by the Investors Seller and/or Minority Investor Sellers under this Agreement as well as Other Shareholders under the Other Transfer Agreements), such dispute shall be resolved in the manner set out in this Clause 15 of this Agreement. It is expressly acknowledged by the Parties that this sub-clause has been agreed to by the Parties for the purpose of resolving the specific disputes as set out in this clause with the intention of avoiding multiplicity of proceedings and in the interests of ensuring speedy and efficient resolution of such disputes.

15.5. All arbitration proceedings shall be conducted in the English language in accordance with the Rules and the place, seat, venue and legal place of arbitration shall be Singapore. The arbitrators shall decide any such dispute or claim strictly in accordance with the governing law specified in Clause 14 above. Judgment upon any arbitral award rendered hereunder may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.”

13. I may only note herein that the ‘Investor Sellers’ in the Foreign SPA held around 64.764% of the total paid up share capital of respondent no.3 company, while the ‘Minority Investor Sellers’ held around 8.875% of the total paid up share capital of respondent no.3 company.

14. A reading of Clause 15 in the Domestic SPA as also in the Foreign SPA, especially Clause 15.4 in both, would clearly show that the parties acknowledged and intended to give primacy to the Dispute Resolution Mechanism as contained in the Foreign SPA where the disputes arise out of or relate to a similar set of facts, or are based on a common cause of action (including a breach of common representation which has been

provided by the Sellers / Investor Sellers and/or Minority Investor Sellers under the Domestic SPA or the Foreign SPA, as the case may be). Both the Agreements further acknowledge that this primacy to the Dispute Resolution Mechanism has been agreed upon ‘with the intention of avoiding multiplicity of proceedings and in the interest of ensuring speedy and efficient resolution of such disputes’.

15. In the Domestic SPA, the petitioners as Sellers have further acknowledged that they shall not raise a defence in connection with any such arbitration under the Foreign SPA to the effect that such arbitration is invalid merely on account of their being an Alternate Dispute Resolution Mechanism for all other types of disputes under the Domestic SPA.

16. At this stage, I may also note that Clause 5.5 of the Foreign SPA also requires the deposit of Additional Consideration in an Offshore Additional Consideration Escrow Account and for the release of the same in favour of the Investor Sellers on the Additional Consideration being released in favour of the petitioners herein under the Domestic SPA. Therefore, the dispute whether the said Additional Consideration has to be released in favour of the petitioners / Investor Sellers or not and whether the respondent no.1 and 2 are entitled to claim recession of the Domestic and Foreign SPA for the reasons asserted by them, would be a dispute arising out of or relating to a similar set of facts and based on a common cause of action.

17. In fact, the respondent no.1 and 2 along with the purchaser in the Foreign SPA have invoked the Arbitration Agreement as contained in

Clause 15 of the Foreign SPA vide their letter dated 21.01.2019, making the petitioners herein also party to such invocation.

18. In my view, therefore, the stand of the respondent nos.1 and 2 that the disputes between the parties would have to be adjudicated through the Dispute Resolution Mechanism as provided in Clause 15 of the Foreign SPA deserves acceptance.

19. The learned senior counsel for the petitioners has placed reliance on the judgment of the Supreme Court in *Duro Felguera, S.A. vs. Gangavaram Port Ltd.* (2017) 9 SCC 729; and of this Court in *Parsvnath Developers Ltd. & Anr. vs. Rail Land Development Authority* 2018 SCC OnLine Del 12399 and *KSC Construction Co. vs. Union of India* MANU/DE/5924/2017, to contend that in terms of Section 11 (6A) of the Act, this Court cannot enter into an adjudication of the dispute as to the applicability of Clause 15 of the Foreign SPA to the disputes so raised by the petitioners. He submits that the scrutiny of this Court has to be necessarily confined only to the existence of the Arbitration Agreement and no further. He submits that as the existence of the Arbitration Agreement cannot be denied by the respondent nos.1 and 2 and as the same exists in the form of Clause 15.3 of the Domestic SPA as quoted hereinabove, this Court should necessarily appoint a Nominee Arbitrator for the respondent and leave it open for the Arbitral Tribunal to adjudicate upon the submission of the respondent nos.1 and 2 that such disputes do not fall within the ambit and scope of Clause 15.3 of the Domestic SPA or are excluded due to Clause 15.4 of the Foreign SPA. He submits that in terms of Section 16 of the Act such a dispute is

to be necessarily raised before the Arbitral Tribunal alone and not before this Court.

20. I have considered the submissions made by the learned senior counsel for the petitioner, however, find no merit in the same.

21. While it is true that the scrutiny of this Court while exercising powers under Section 11 of the Act has to be necessarily confined only to the existence of the Arbitration Agreement, however, where there are two separate procedures/Arbitration Agreements provided in the Agreements for adjudication of different types of disputes, this Court would necessarily have to consider which of these procedures/Arbitration Agreements would be applicable to the nature of dispute raised by the parties.

22. The Supreme Court in ***United India Insurance Co. Ltd.. vs. Hyundai Engineering & Construction Co. Ltd.*** 2018 SCC OnLine SC 1045, has held that an Arbitration Clause has to be interpreted strictly and would enliven or invigorate only if the pre-conditions and the *sine quo non* for triggering the Arbitration Clauses are fulfilled. In the present case, as noted above, the conditions for invocation of Clause 15 of the Foreign SPA have been met and the said Clause has also been invoked by the respondent nos.1 and 2. Therefore, the disputes have to be resolved through the Dispute Resolution Mechanism provided in Clause 15 of the Foreign SPA.

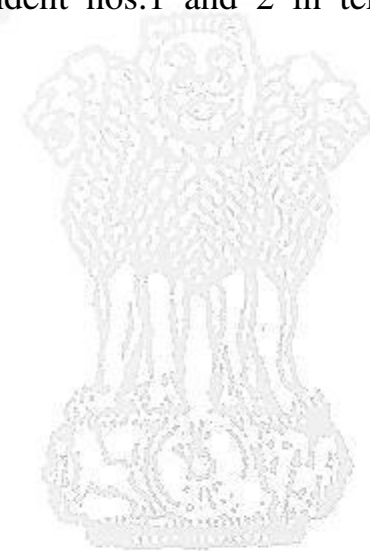
23. As far as Foreign SPA is concerned, this Court will not have jurisdiction to appoint the Nominee Arbitrator for the respondent nos.1 and 2, if at all.

24. In view of the above, the present petition is not maintainable and is dismissed, with no order as to costs.

25. I may only add that the above observations would not bind the Arbitral Tribunal that may be appointed pursuant to the invocation of the Foreign SPA by respondent nos.1 and 2 in terms of its notice dated 21.01.2019.

NAVIN CHAWLA, J

FEBRUARY 01, 2019
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