

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**RA-CR-25-2021 in ARB-52-2021 (O&M) and
ARB-52-2021 (O&M)**

Reserved on 05.04.2021

Date of Decision: 12.05.2021

M/s ABW Suncity

... Petitioner

VS.

Tarun Malik & Ors.

... Respondents

CORAM: HON'BLE MR.JUSTICE GIRISH AGNIHOTRI

Present: Mr. Kuldip Kumar Kohli, Advocate
for the review-applicant(s)/respondents

Mr. Aman Chaudhary, Advocate
for non-applicant/petitioner

Mr. Sumesh Malhotra, Advocate
for the respondents (ARB-40 & 66-2021)

GIRISH AGNIHOTRI, J. (Oral)

(1) The matter has been taken up through video conferencing on account of restrictions due to outbreak of COVID-19 pandemic.

(2) This order shall dispose of the following Arbitration cases and review applications collectively by way of a common order:-

RA-CR-18-2021 IN ARB-48-2021	ARB-48-2021
RA-CR-19-2021 IN ARB-16-2021	ARB-16-2021
RA-CR-20-2021 IN ARB-45-2021	ARB-45-2021
RA-CR-21-2021 IN ARB-25-2021	ARB-25-2021
RA-CR-22-2021 IN ARB-26-2021	ARB-26-2021
RA-CR-23-2021 IN ARB-27-2021	ARB-27-2021
RA-CR-24-2021 IN ARB-28-2021	ARB-28-2021
RA-CR-25-2021 IN ARB-52-2021	ARB-52-2021
RA-CR-27-2021 IN ARB-39-2021	ARB-39-2021

(3) For the sake of facts, order is being passed in RA-CR-25-2021 in/and ARB-52-2021 and for the sake of facts, reference is also being made to ARB-52-2021 and ARB-25-2021.

(4) Learned counsel for the review-applicant/appellant-respondent submits that the written arguments submitted by the respondents in ARB-52-2021 be treated the common stand of the respondents in all cases.

(5) Learned counsel for the non-applicant/petitioner submits that the reply to the RA-CR-21-2021 in ARB-25-2021 be treated the common stand on behalf of the petitioner(s) in all cases.

(6) ARB-52-2021 has been filed by M/s ABW Suncity in the nature of petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 *inter alia* with a prayer for appointment of a Sole Arbitrator to settle the dispute *inter se* petitioner and the respondents.

(7) Records of the case show that when this case along with other connected matters came up for hearing before this Court on 21.01.2021, this Court had disposed of the present case vide order dated 21.01.2021. In that order, reliance was also placed upon an earlier order passed by this Court dated 09.09.2020 in ARB-134-2020 titled as M/s ABW Suncity vs. Kishen M. Seshadari & Ors.

(8) Thereafter RA-CR-25-2021 was filed in ARB-52-2021 under Order XLVII Rule 1 read with Sections 114 and 151 CPC *inter alia* with a prayer to review the order dated 21.01.2021 passed by this Court. In the review application filed on behalf of the respondents, it has been contended that the respondent(s) for whom learned advocate(s) appeared on 21.01.2021 had not given any instructions to the advocate(s) to the effect that they have no objection in case the Arbitrator from the panel of arbitrators is appointed.

(9) At this stage, learned counsel for the respondents-review applicants submits that it is correct that this Court on 21.01.2021 had directed that counsel who are giving consent and have instructions from their respective

clients that they have no objection in case an Arbitrator is appointed by this Court, should convey their respective attendance to the admin of the video conferencing group. It is also not disputed that counsel for the review-applicant(s)/respondent(s) had given their presence. However, learned counsel has specifically contended that they had not correctly understood the observations of the Court at the time of hearing and, therefore, in the review applications *inasmuch* as the review applicant(s)/respondent(s) be allowed to address the oral arguments in support of their review applications and against the appointment of the Sole Arbitrator.

(10) In view of the above, this Court in the peculiar facts and circumstances stated above and in the interest of justice, decided to accept the request of the review applicant(s)/respondent(s) through the counsel for the respondent(s) to address the oral arguments on merits. Accordingly, earlier order dated 21.01.2021 is recalled.

(11) Records would further show that on 03.03.2021 notice in the review applications was issued to counsel for the non-applicant/petitioner. On 31.03.2021, the matter was adjourned to 05.04.2021. In the meantime, respective counsel were directed to complete their pleadings. Accordingly, the matter was heard in detail.

(12) This Court for the facts noticed hereinunder and reasons so recorded, has accepted the prayer of the petitioners and further proceeds to accept the petition under Section 11(6) of the 1996 Act and thereby appoint a retired Hon'ble Judge of this Court as Sole Arbitrator.

(13) Learned counsel by making reference to the pleadings in the petition submits that the petitioner had developed a residential group housing project known as "the LA LAGUNE" situated in Sector 54, Golf Course Road,

Gurugram. It is submitted that this was in accordance with the Licences bearing No.1189 to 1193 all dated 28.09.2006 and also licences bearing No.231 dated 10.10.2007 issued by the Town and Country Planning Department, Haryana. It is pleaded that during the course of construction, the original allottee had been allotted apartment No.B-1001, 10th Floor, B-Tower, vide letter dated 05.02.2008 and thereafter the original allottee/transferee executed an 'Apartment Buyers Agreement' dated 30.07.2009 (P2). The said original allottee had then transferred/endorsed/assigned their rights in favour of the respondent Tarun Malik and respondents No.2 to 4 vide endorsement dated 10.10.2011.

(14) On this issue, the petitioner thus concludes that respondents accordingly undertook to be bound by the terms and conditions of the 'Apartment Buyers Agreement'. Subsequently, the petitioner transferred/conveyed the said apartment to the respondents by executing the conveyance deed dated 14.08.2013 and actual physical and vacant possession of the apartment was also duly handed over to the respondents. The petitioner specifically pleads that as per Clause C-20 of the agreement dated 30.07.2009, the respondents categorically agreed to make payments of Wealth Tax, Property Tax & Cesses. As per the petitioner, the liability of payment of taxes was also subsequently acknowledged and confirmed by the respondents in the conveyance deed so executed.

(15) At this stage, from the pleadings of the petitioner brief history needs to be noticed. In the year 2003, the Haryana Value Added Tax, 2003 was enacted to provide for levy and collection of tax on the sale or purchase of goods in the State of Haryana and matters incidental thereto and connected therewith. However, till the judgment by the Hon'ble Supreme Court in the

case of *Larsen and Turbo vs. State of Karnataka & Anr., (2014) 1 SCC 708*, the Haryana Government did not insist on payment of any tax. However, after the judgment, the Haryana Government re-agitated the demand of VAT payable and in order to bring clarity/mechanism had formulated the amnesty scheme named as the 'Haryana Alternative Tax Compliance Scheme for Contractors, 2016' notified on 12.09.2016 for the recovery of tax interest or penalty. It is specifically mentioned in para 11 of the petition that the petitioner keeping in view the interest of the apartment owners availed the said scheme by filing its application TC-I on 06.12.2016. Accordingly, Deputy Excise and Taxation Commissioner (ST), Gurugram (East) vide order dated 20.01.2017 as supplemented on 27.01.2017 accepted the said declaration. Vide demand letter dated 27.06.2017, the petitioner further apprised the respondent(s) about the applicability of VAT and requested them to make payment of total amount of Rs.1,80,687/- within 30 days failing which interest shall be leviable. The petitioner made efforts through various meetings with the members of the Resident Welfare Association, however, was constrained to file civil suit titled as "ABW Suncity vs. Tarun Malik & Ors." bearing CS37/163/2019 *inter alia* with a prayer in the nature of summary suit under Order 37 of CPC for recovery of Rs.2,27,666/- along with interest. In this suit, the respondent himself moved an application under Section 8 of the 1996 Act claiming that there is an arbitration clause applicable between the parties. The petitioner, therefore, deemed it appropriate to withdraw the suit to pursue the dispute through arbitration vide order (P8). Thereafter, the petitioner by making reference to Clause 75 of the agreement dated 30.07.2009 issued notice dated 15.01.2020 proposing the name who may act as Sole Arbitrator for adjudication of the dispute. It is, however, pleaded that the respondent(s),

however, denied to give consent. It is thus the specific case of the petitioner that as per the arbitration clause, the dispute was to be decided by the Sole Arbitrator, however, keeping in view the judgment of the Hon'ble Supreme Court in **Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd. (2019) SCC OnLine SC 1517**, the petitioner has filed the petition under Section 11(6) of the 1996 Act for appointment of the Sole Arbitrator to settle the dispute. The petitioner has also relied upon the earlier order dated 09.09.2020 passed by this Court in ARB No.134 of 2020 whereby this Court had appointed a retired District & Sessions Judge as Arbitrator (P9).

(16) As noticed above, this Court vide order dated 21.01.2021 had disposed of the petition i.e. ARB case No.52 of 2021. The proceedings thereafter have already been noticed in the foregoing paras. Briefly it would be appropriate to record here that the review application i.e. RA-CR-25-2021 was filed in this case. Notice of the review application was issued on 03.03.2021 for 31.03.2021. In the review application, it was *inter alia* prayed that the review application be allowed to address the oral arguments against the appointment of Sole Arbitrator. Learned counsel for the review applicant(s)/respondent(s) had filed written arguments on 24.03.2021. It was also submitted that the said written arguments be treated as submissions on behalf of review-applicant(s)/respondent(s) in other connected/similar matters.

(17) Heard learned counsel for the parties.

(18) For the facts noticed above, and for the reasons recorded hereinunder, this Court finds merit in the submissions made by learned counsel for the petitioner.

(19) The first objection of learned counsel for the review-applicant(s)/respondent(s) *inter alia* is that the application filed on behalf of

the defendants in the civil suit(s) filed by the petitioner [before the learned Civil Judge (Jr.Divn.), Gurgaon] cannot be treated as their 'consent' for referring the matter to arbitration. In support of this submission, learned counsel by referring to para 22 of the petition, submits that the arbitration agreement, which was part of the Buyers Agreement was not in existence at the time of invocation of the arbitration clause through the notice dated 15.01.2020. It is submitted that this new document had been executed immediately on the execution of sale deed. Further the plea of learned counsel for the review-applicant(s)/respondent(s) is that in fact, in the reply to the application under Section 8 of the 1996 Act, the petitioner is alleged to have taken a stand that there is no such dispute left to be decided between the parties. In this regard, the extracts reproduced by the respondents in their written arguments allegedly showing the stand of the petitioner is reproduced hereinunder:-

“The terms and conditions of the Apartment Buyer’s Agreement were superseded by the Conveyance Deed and no specific reference of Arbitration Agreement was given in the said conveyance deed. The defendant is residing in the same after obtaining actual, physical and peaceful possession of the said Apartment. Hence there is no such dispute left to be decided between the parties on the basis of the said apartment buyer’s agreement.”

(20) Learned counsel for the petitioner however submits that in fact the above plea was taken *inter alia* to highlight that in fact since there is a kind of admitted liability, therefore, the said suit was maintainable, however, he submits that in fact if the respondents actually dispute the liability then the said dispute as per their own application under Section 8 of the 1996 Act filed in the suit deserves to be referred to the Sole Arbitrator. Learned counsel by

making reference to the preliminary submission No.1 of the reply to the review application filed in RA-CR-21-2021 submits that this ground is no more available to the review-applicant(s)/respondent(s) as Section 11(6-A) has already been omitted vide Amendment Act, 2019. Learned counsel for the petitioner further submits that the petitioner had filed about 43 civil suits for the recovery of VAT amounts, which is subject matter of present petition. The averments made in Para 2 of the said reply is further referred to but this Court, for the sake of brevity, deems it appropriate not to refer the same in detail as it is already part of the pleadings.

(21) This Court finds force in the submission of learned counsel for the petitioner. It cannot be lost sight of that in fact it is a matter of record that the defendants (respondent herein) in the suit had actually filed application under Section 8 of the 1996 Act. In para 2 of the application, the defendants-respondents had taken a stand that they have been denying the liability altogether. In para 5 of the application, the defendants have specifically averred that “...*the defendants were and are always ready and willing to refer the such disputes and differences to arbitration for adjudication...*”.

(22) The second objection raised by counsel for the review-applicant(s)/respondent(s) is that if the true intent and scope of Section 7 of the 1996 Act is considered, it would show that in the present case also, there is a difference between the reference to another document in contract and incorporation of another document in a contract. Learned counsel in this regard once again, *inter alia*, makes specific reference to para 33 of the written arguments to submit that the arbitration provision under the Apartment Buyers Agreement expired upon execution of conveyance deed. It is submitted that the clear intent behind the conveyance deed is that the governing provision

shall be clause 40 of the conveyance deed. He, therefore, submits that clause 40 of the conveyance deed specifically states that only Courts at Gurgaon shall have exclusive jurisdiction in the matter.

(23) Learned counsel for the petitioner by making reference to para 1 of the preliminary submissions of the reply filed in RA-CR-21-2021 submits that *inter alia*, the above submission of the review-applicant(s)/respondent(s) is misconceived. This Court finds force in the contention of the learned counsel for the petitioner. He makes specific reference to para 36 of the conveyance deed to submit that all the terms and conditions of Apartment Buyers Agreement signed by the vendee shall be deemed to have been incorporated in conveyance deed. Para 36 as referred to by counsel for the petitioner is reproduced hereinunder:-

“All the terms and conditions of the Apartment Buyer’s Agreement dated 30.11.2009 signed by the Vendee shall be deemed to have been incorporated in this deed and shall continue to be binding save and except those of the terms and conditions contained in his Deed in which case the terms and conditions of this Deed shall prevail.”

(24) Learned counsel for the review-applicant(s)/respondent(s) refers to Clauses 36 & 41 of the conveyance deed/sale deed, reference of which has been made at page 64 of the written arguments filed by the review-applicant(s)/respondent(s). Learned counsel then refers to clause 2 of the conveyance deed/sale deed to submit that in fact the sale price so mentioned and that the same was received by the vendor. Therefore, the plea of learned counsel for the respondent(s) is that in fact no dispute subsists. Counsel for the respondent(s), based upon the submissions, *inter alia* as noticed above, has urged that the petition be dismissed as allegedly no amount is due and payable

(25) Learned counsel for the petitioner, however, submits that the respondent(s) cannot blow hot and cold in the same breath. Initially, they filed Section 8 application to get the Civil Suits filed by the petitioner, dismissed and now when the petitioner had made a prayer for appointment of a Sole Arbitrator in accordance with the provisions of the arbitration agreement and clause 75 containing the arbitration clause, the respondents' objections deserves to be rejected being misconceived. This Court is in agreement with the plea of the petitioner.

(26) For the reasons afore-stated, this Court is inclined to accept the prayer made by the petitioner for appointment of Sole Arbitrator. In this regard, reference is made to the operative part of the judgment dated 08.03.2021 in **Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd., (2021) SCC OnLine SC 190**, In the said judgment, *inter alia*, the appeal had arisen out of a petition filed under Section 11 (C) of the 1996 Act for appointment of Sole Arbitrator for adjudication of the disputes between the parties. The judgment of learned Single Judge of Delhi High Court was impugned before the Apex Court. In the judgment, *inter alia*, consultancy agreement dated 07.07.2014 and the correspondence was referred to. Vide the impugned judgment, the parties were referred to for arbitration of disputes by appointing a former Judge of the Delhi High Court as Sole Arbitrator. The plea, however, of the appellant therein *inter alia* was that the said agreement was in fact a concocted document. The operative part of the judgment reads as under:-

“.....The prima facie review spoken of in Vidya Dhrolia (supra) can lead to only one conclusion on the facts of this case - that a deeper consideration of whether an arbitration agreement exists

between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same. For all these reasons, we set aside the impugned judgment of the Delhi High Court in so far as it conclusively finds that there is an Arbitration Agreement between the parties. However, we uphold the ultimate order appointing Justice G.S. Sistani, a retired Delhi High Court Judge as a Sole Arbitrator. The learned Judge will first determine as a preliminary issue as to whether an Arbitration Agreement exists between the parties, and go on to decide the merits of the case only if it is first found that such an agreement exists. It is clarified that all issues will be decided without being influenced by the observations made by this court which are only prima facie in nature. The appeal is allowed in the aforesaid terms.”

(27) This Court thus deems it appropriate to refer the matter to the Sole Arbitrator who may examine the pleas raised by the parties *inter alia* regarding the existence of an arbitration agreement and also the contrary pleas e.g. reference of para 36 of the conveyance deed and the connected issues. It is made clear that nothing observed in the foregoing paras above shall be construed to be any findings of this Court on any issue. The Arbitrator may proceed to decide the issue *de hors* the *prima facie* observations made above. It is also made clear that this Court has given common orders in connected case(s) as mentioned in the foregoing paras, but the Arbitrator may take up each case as independent case and hear/deal with the dispute raised by each of the party, independently.

(28) After hearing learned counsel for the parties, Justice Dr. Bharat Bhushan Parsoon (Retd.), a former Judge of this Court, is appointed as the Sole Arbitrator. However, such appointment would be subject to the declaration to be made by Justice Dr. Bharat Bhushan Parsoon, under Section 12 of the Act; with regard to his independence and impartiality to settle the disputes between the parties. The Arbitrator is requested to examine the objection/dispute raised by the parties and decide the same in accordance with law especially in view of the observations of the Hon'ble Supreme Court in **Pravin Electricals Pvt. Ltd.** (supra).

(29) The Arbitrator is requested to complete the proceedings within the time limit specified under Section 29A of the Act.

(30) The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator.

(31) A copy of the order be forwarded to Justice Dr. Bharat Bhushan Parsoon at the given address:-

154, Sector 35A
Chandigarh
M. No.8558809906
Landline No.0172-4666606

(32) After seeking the convenience of the Arbitrator, the parties are directed to appear before him (through video conferencing, if suitable) within one month from the date of receipt of a certified copy of this order.

(33) Accordingly, all the arbitration cases along with miscellaneous applications along with review applications are disposed of in the above terms.

12.05.2021
Vvishal

(Girish Agnihotri)
Judge