

\$~10 (2020)

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

Date of Decision: 16th July, 2021

+ **ARB. P. 398/2020**

ASHIANA INFRABUILD LLP

.... Petitioner

Through: Mr. Rahul Malhotra and Mr. Rishu
Kant Sharma, Advocates.

versus

S.D. BHALERAO CONSTRUCTIONS PVT. LTD. Respondent

Through: Mr. Vibhav Krishna and Mr. Akul
Mehandru, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER
(ORAL)

SANJEEV NARULA, J.

[VIA VIDEO CONFERENCING]

1. Ashiana Infrabuild LLP - the Petitioner herein - by way of the instant petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as 'the Act'*], seeks appointment of the Arbitral Tribunal for adjudication of the disputes arising out of certain agreements between the parties.

Brief facts:

2. The brief facts that are necessary for the disposal of the present petition are as follows:

2.1. The parties herein entered into a Joint Venture Agreement dated 24th

March, 2011 [*hereinafter referred to as 'JVA'*] for the re-development/reconstruction of a residential project in Mumbai.

- 2.2. As a result of certain issues arising therein, a Cancellation Agreement dated 1st April, 2017 [*hereinafter referred to as 'CA'*] was executed, by virtue whereof, the JV, along with all the rights and obligations arising thereunder, stood cancelled.
- 2.3. Parties also agreed that the legal entity, “M/s. S.D. Bhalerao Constructions Pvt. Ltd. - Project Building No. 58 - JV” shall automatically come to an end and all financial liabilities of the Project will stand merged and taken over by the Respondent w.e.f. 01st April, 2017.
- 2.4. Petitioner contends that the Respondent has failed to fulfil its payments obligation of refunding the capital contribution of the Petitioner (along with the interest accrued thereon), under the CA. Due to its inordinately delay and lack of inclination shown towards making such payment, a demand notice dated 24th May, 2018 was issued by the Petitioner, followed by another notice dated 25th June, 2018. There has been no response to either notice.
- 2.5. The continual failure on the part of the Respondent to honour its obligations towards the Petitioner gave rise to “disputes” in terms of the provisions of the CA. Petitioner invoked arbitration *vide* notice dated 24th June, 2020. There was no response to the said notice as well.
- 2.6. In the above background, Petitioner has approached this Court seeking appointment of the Arbitral Tribunal in terms of the arbitration clause contained in the CA.

Contentions of the Parties:

3. Mr. Vibhav Krishna, counsel for the Respondent, does not dispute the existence of CA, but opposes the petition on the following grounds:

3.1. The arbitration clause under the CA has not come into effect as the JVA is still subsisting. The firm set up under the JVA continues to function till date, as evident from a perusal of the additional affidavit dated 25th January, 2021 filed by the Respondent. The CA also acknowledges that the JVA survives and does not *ipso facto* come to an end. Thus, it cannot be held that the JVA has been terminated or cancelled, due to which, the arbitration clause therein would still be in effect. Further, the capital contribution of the Petitioner (Rs. 3,31,75,659/-) was to be returned in terms of recital 'h' of the CA. The Petitioner has acknowledged that the payment of Rs. 3,31,75,659/- or any part thereof has not been paid and the pre-condition stipulated under CA for cancellation of JVA has not been fulfilled. Thus, the CA has not come into effect; therefore, the arbitration clause therein cannot govern the disputes between the parties.

3.2. The court lacks territorial jurisdiction, as the arbitration clause in the still-subsisting JVA provides for seat of arbitration at Mumbai and exclusive jurisdiction of the Mumbai courts. The jurisdiction of this court is ousted; the petition is thus not maintainable. In support of this submission, he relies upon the judgments in **BALCO v. Kaiser Aluminium Technical Services Inc.**,¹ **Reliance Industries Ltd. v. Union of India**,² **Indus Mobile Distribution Private Limited v.**

¹ (2012) 9 SCC 552.

² (2014) 7 SCC 603.

Datawind Innovations Private Limited,³ and *BGS SGS Soma JV v. NHPC Ltd.*⁴ Moreover, even by conduct, after execution of the CA, the parties are continuing to act under the JVA.

3.3. The Petitioner's claim is not confined to only non-payment, and bears reference to the settlement of dispute under the JVA which arose prior to the execution of the CA. The claim for default is directly and intrinsically linked to financial claim of non-payment of capital contribution and interest thereon aggregating to Rs. 3,31,75,659/- under the JVA. Thus, the disputes asserted by the Petitioner have to be settled under the JVA.

4. Mr. Rahul Malhotra, learned counsel for the Petitioner, controverts the contentions of the Respondent, as follows:

4.1. Respondent was to the refund of the entire capital contribution made by the Petitioner in accordance with the terms contained in the CA. Since the Respondent has failed to do so, disputes have arisen under the said agreement and are required to be adjudicated in terms of the arbitration clause contained therein, which provides for seat of arbitration at Delhi. Petition is thus maintainable before this court.

³ AIR 2017 SC 2105.

⁴ 2019 SCC OnLine SC 1585.

- 4.2. Clause 13 of the CA stipulates that all other prior agreements, communications, negotiations between the parties stood ‘superseded’ on the execution of the CA. Since the JVA came to an end, the arbitration clause contained therein also perished. The argument of the Respondent that the arbitration clause contained in the JVA continues to prevail is entirely implausible and untenable in law.
- 4.3. It is a well-settled position of law that once a contract is superseded by another, the arbitration clause contained in the earlier contract also falls with it. The parties would be governed by the arbitration clause as contained in the latter/superseding contract i.e., the CA. In this regard, reliance is placed upon the judgments of the Supreme Court in *Young Achievers v. IMS Learning Resources Pvt. Ltd.*,⁵ and *WAPCOS Ltd. v. Salma Dam Joint Venture*.⁶
- 4.4. The documents relied upon by the Respondent to contend that the JVA is still continuing and subsisting, have no correlation or bearing on the disputes that are sought to be adjudicated. The same nowhere links the Petitioner to either the Joint Venture or to the project which is now being exclusively developed by the Respondent herein, in furtherance of the CA, and should be disregarded.

Analysis

5. The Court has considered the contentions of both the parties. The controversy has arisen as the two agreements in question viz. the JVA and the CA, containing arbitration clauses have different jurisdictional clauses. The arbitration and jurisdiction clauses, as incorporated in the CA, read as under:

⁵ (2013) 10 SCC 535.

⁶ (2020) 3 SCC 169.

“9. It is hereby agreed by and between the parties hereto that if any dispute arises between them in respect of this Cancellation Agreement and/or the rights liabilities or duties of the Parties hereunder the same shall be referred to arbitration. Each party shall appoint an arbitrator, whose decision in the matter shall be final and binding on the Parties hereto and the same shall be subject to and in accordance with the provisions of the Arbitration and Conciliation Act 1996 or any statutory modification or re-enactment thereof or the time being in force. The arbitration proceedings shall be conducted in English language and the place of arbitration shall be New Delhi. The Arbitration Award shall be final and binding on the parties and the parties agree to be bound thereby and to act accordingly. The Parties shall continue to perform such of their respective obligations that do not relate to the subject matter of the dispute, without prejudice to the final determination.

12) This Agreement shall be construed and interpreted in accordance with and governed by the laws of India and the courts of New Delhi/ Mumbai as may be permissible under law, alone shall have jurisdiction over all matters arising out of or relating to this Agreement.”

The corresponding clauses in the JVA read as under:

“17. Dispute/s, if any, amongst the Associates relating to any of the terms and conditions of this Joint Venture shall be referred to the arbitration of an arbitrator who shall be appointed as mutually agreed upon by both the parties to act as an arbitrator, within the provisions of the Indian Arbitration and Conciliation Act 1996 and whose Award shall be final and binding on the parties to the dispute/s. The seat of Arbitration shall be Mumbai.

20. Jurisdiction

This Agreement of Joint Venture is executed at Mumbai and Courts in Mumbai alone will have the exclusive jurisdiction over this Agreement to the exclusion of all other courts and the Agreement shall be set to and construed in accordance with the laws of India.”

6. The petitioner has filed this petition seeking reliance upon the arbitration and jurisdiction clause contained in the CA. On the issue of maintainability of the petition before this court, with reference to the clauses contained in the CA, it is plainly clear that the petition is maintainable in light of the arbitration clause, indicating that the parties agreed for the seat of arbitration to be Delhi.

The courts in Delhi would thus exercise supervisory jurisdiction over arbitration and be competent to entertain the present petition.

7. This brings us to the contention of the Respondent that the JVA is subsisting, and thus the dispute urged by the Petitioner should be adjudicated in terms of the JVA; for which, the court should ascertain jurisdiction in terms of the clauses contained therein. Although the CA is indeed interlinked with the JVA, one cannot lose sight of the fact that parties have mutually agreed to cancel the JVA. At this stage, the Court is primarily concerned with the existence of an arbitration agreement. On this issue, there can be no dispute, as execution of the CA is a matter of record, and is duly admitted by the parties.

8. After a plain reading of the CA, one notices that the commercial arrangement as encapsulated in the JVA stood terminated and superseded by the CA. In the recitals, it is recorded that pursuant to meetings to settle accounts with each other, the parties have agreed to cancel the JVA with effect from 1st April, 2017 on mutually agreed terms as recorded in the CA. The CA then categorically records that all rights and obligations/liabilities under the JVA have been cancelled. Furthermore, Clause 13 of the CA stipulates that the Agreement sets forth the entire agreement and understanding between the Parties relating to the subject matter therein and supersedes “*any and all prior discussions, communications, negotiations, understanding, agreements, or contracts, whether written or oral*”. Thus, in the *prima facie* opinion of the court, the CA does indeed record that the JVA has been cancelled by the parties by mutual agreement.

9. Under the CA, the Respondent was to refund the entire capital contribution made by the Petitioner in the Joint Venture, which, as on 31st March, 2017, was Rs. 3,31,75,659/-. The said amount was agreed to be refunded by the Respondent to the Petitioner by 30th September, 2017, along with interest @ 18% p.a. from 01st April, 2017 till the date of payment, and in case the payment was not made by 30th September, 2017 then interest @ 24% p.a. was to be applicable from the said date. There is no dispute that the aforesaid amount has not been paid, as the same is also admitted by the Respondent in para 4 of its reply to the present petition. This breach, in essence, is the dispute raised by the Petitioner, which, *prima facie*, arises under the terms of the CA. The contention of the Respondent that non-payment of the aforesaid amount resurrects the JVA or renders it to become valid and subsisting is, in the *prima facie* opinion of the court, not tenable in light of the express provisions of the CA. In any event, at this stage, the Court does not have to delve into the effect of non-payment of the amount. Whether the termination of the JVA is contingent on the performance by the Respondent of its obligations as contained in the CA, is a question that would have to be raised during arbitration. This court shall also not be drawn into the controversy of whether the obligation under the CA has been fulfilled or not, or which party is responsible for the breach. Such questions relating to merits of the dispute cannot be articulated in the present proceedings.

10. Since the court finds the disputes to be arbitrable under the CA, which vests the seat of arbitration with the courts in Delhi, the present petition is held to be maintainable on this account.

11. Additionally it is seen that the parties have consciously included Clause 9 (the arbitration clause) and clause 12 (the jurisdiction clause) in the CA which

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puts the seat of arbitration and the exclusive jurisdiction in matters of dispute, at Delhi. This is a significant departure from the arbitration and jurisdiction clauses in the JVA, which had provided for the same at Mumbai. Thus, the parties have, in express written terms, agreed to shift the seat of arbitration from Mumbai to Delhi. Nonetheless, the jurisdiction clause under the JVA would also not preclude this Court from appointing the Arbitral Tribunal for adjudication of disputes that have apparently arisen under the CA. It is also noted that the judgments relied upon by the Respondent on the proposition and concept of seat of arbitration have no relevance in the present matter.

12. In view of the foregoing, the present petition deserves to be allowed. At this stage, the counsel for the Petitioner submits that though the arbitration clause contained in the CA provides for a three-member Arbitral Tribunal, however, in order to bring down the cost of arbitration, a Sole Arbitrator be appointed. The counsel for the Respondent, on instructions and without prejudice to its rights and contentions, submits that he is agreeable to the said suggestion.

13. Accordingly, Hon'ble Ms. Justice Pratibha Rani, Former Judge of this Court [Contact No.: 9910384626], is appointed as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties arising out of the CA.

14. The parties are directed to appear before the learned Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

15. The learned Arbitrator will be entitled to charge her fee in terms of the provisions of the Fourth Schedule appended to the Act.

16. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the learned Arbitrator in accordance with law.

17. The present petition is allowed and stands disposed of.

SANJEEV NARULA, J

JULY 16, 2021



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