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

Date of Decision: 26th August, 2021

\+ O.M.P. (COMM) 251/2021 & I.As. I.A. 10720-721/2021

LUXURY FARMS PRIVATE LIMITED ..... Petitioner

Through: Mr. Atul Ahlawat, Advocate.

versus

OSIAN'S CONNOISSEURS OF ART PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Kapil Gupta, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter, **'the Act'***] filed by the Petitioner [Claimant before the Arbitral Tribunal] seeks setting aside of the impugned Arbitral Award dated 17th January, 2020 [*hereinafter, **'Award'***] passed by the learned Sole Arbitrator, qua award of counter claim for a sum of Rs. 1,00,00,000/- along with interest in case of default, in favour of the Respondent No. 1 - Osian's Connoisseurs of Art Pvt. Ltd.

BRIEF FACTS

2. The facts giving rise to the present petition are summarized

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hereinbelow: -

2.1 Petitioner and Respondent No. 1 executed an Agreement for sale of five pieces of artwork on 15th December, 2009 with a buy-back clause [*hereinafter,* ***'Sale Agreement'***]. Petitioner invoked the right to re-sell qua three paintings under the said Agreement.

2.2 This led to execution of Second Agreement titled - 'Artwork Loan Agreement' dated 16th January, 2013 between the Petitioner and Respondent No. 1 wherein Respondent No. 2 stood as a guarantor for the payment obligations of Respondent No. 1. This Agreement pertained to sale of three paintings through an auction to be conducted by Respondent No. 1 on 09th February, 2013 and contained an arbitration clause.

2.3 Disputes arose between the parties, constraining the Petitioner to file a Petition under Section 9 of the Act[1] wherein this Court on 05th June, 2013, restrained the Respondents from selling or transferring the Artwork – *'The Killing of Safdar Hashmi'* by Manjit Bawa, to any other person other than the original purchaser. Later, the Court was informed that the said Artwork stood returned to the Petitioner[2].

2.4 Thereafter on a Petition under Section 11 of the Act[3], a Sole Arbitrator was appointed for adjudication of disputes qua Artwork Loan Agreement dated 16th January, 2013.

2.5 Before the learned Sole Arbitrator, Petitioner made a claim for recovery of Rs. 1,56,10,000/- along with interest. Respondent filed its Statement of Defence along with a counter claim for an amount of Rs.

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[1] Vide Order dated 05th June, 2013 in O.M.P. 587/2013.
[2] *Vide* Order dated 14th March, 2014 in ARB.P. 43/2014 and O.M.P. 587/2013.
[3] *Vide* Order dated 27th May, 2014 in ARB.P. 43/2014.

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3,19,77,617/- towards Petitioner's failure to furnish Form-C.

2.6 On 14th May, 2016, the learned Arbitrator rejected the application filed by the Respondent under Section 16 of the Act holding the claim for set-off/ counter claim to be non-arbitrable. Thereafter, proceedings before the learned Arbitrator were adjourned as the counsel for the Petitioner [Claimant therein] informed the learned Arbitrator that parties were trying to amicably resolve their disputes.

2.7 In the meantime parties entered into an amicable settlement duly recorded in the Memorandum of Understanding dated 15th June, 2016 [*hereinafter,* ***'MoU'***]. However, few months later, on 14th October, 2016, Petitioner terminated the aforenoted MoU, alleging that the Respondent had committed a default in the payment of instalment due on 05th October, 2016.

2.8 The MoU was, however, not brought to the notice of the learned Sole Arbitrator until 19th September, 2016, when an e-mail was sent by the counsel for the Petitioner intimating that a settlement has been entered into. Thereafter, the MoU was filed by Respondent No. 1 before the learned Sole Arbitrator for the first time, on 01st September, 2018.

2.9 Nonetheless, the claim of the Petitioner was dismissed for non-prosecution and non-deposit of the arbitral fees *vide* Order of the learned Arbitrator dated 30th July, 2018 and the proceedings continued qua counter claim. The relevant portion of the said order, as reproduced in the impugned Award, reads as under: -

> *"This matter was referred to the Tribunal by the order of the Hon'ble Delhi High Court dated 27.05.2011. Due to the time taken by the parties to find pleadings and effect a settlement accommodation was given by the Tribunal from time to time. I have been informed today that a MOU was executed between the parties on 15.06.16. However, the said MOU was not*

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communicated to the Tribunal. In the proceeding before the Tribunal on 01.08.2017, the claimant appeared through proxy counsel but none of the parties deposited any fees. On 21.08.2017, the claimant did not appear nor did it deposit any Arbitral fees. Consequently, the matter was adjourned sine die and has been listed today at the behest of an application moved by the Respondent for revival of the Arbitral proceedings in spite of the communication dated 25.07.2018 no one is present on behalf of the claimant. <u>Consequently, the claim stands dismissed not only for non prosecution but also the failure of the claimant to deposit any Arbitral fees. Now only the counter claim shall be entertained and will be treated as the claim.”</u>

[Emphasis supplied]

2.10 Then after 2 ½ years, on 01st September, 2018, the Respondent filed an application under Section 23(3) of the Act, seeking revival of the arbitration proceedings and also amendment of the counter claim. This amendment was premised on non-fulfillment of obligations under the MoU dated 15th June, 2016. Along with the application, the Respondent placed on record the MoU. It was averred that the Petitioner [Claimant therein], despite receiving a substantial amount of Rs. 1 Crore under the MoU from the Respondent has breached the terms thereof.

2.11 On 13th November, 2018, the learned Arbitrator heard the arguments on the amendment application and reserved orders. In the procedural order of the said date, the learned Arbitrator also made certain observations regarding conduct of the parties to the following effect: -

“The Application for Amendment of the Counter Claim dated 01.09.2018 filed by the Respondent/Counter Claimant was heard today and the order is reserved.

The Counsel for the Claimant on instructions from the Authorised representative of the Claimant Mr. Ravi Panchal, stated that in case the application for the amendment of the Counter Claim filed by the Respondent/Counter Claimant is dismissed by this Tribunal, the Claimant will not raise any plea regarding the maintainability of any civil suit/proceedings which may be filed by the Respondent/Counter Claimant

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on the basis of the pleas raised in the counter claim/ application for amendment to the Counter Claim.

It is regrettable that none of the parties informed the Tribunal promptly that the matter was settled by the MOU dated 15.06.2016 which superseded all previous agreements/understandings between the parties.

In fact the then counsel for the Claimant Mr. Rohit Puri, for the reasons best known to him sought adjournments on 25.08.2016 and 20.09.2016 on the ground of the parties trying to settle the matter, instead of informing the Tribunal that the matter was settled and MOU dated 15.06.2016 was entered into.

He informed this Tribunal about the settlement only on 19.09.2016 by an email that the settlement has been entered into; however the MOU was never filed before the Tribunal. The MOU was filed before the Tribunal for the first time by the Respondent on 01.09.2018 alongwith the Application for amendment of the Counter Claim."

2.12 The Petitioner preferred an application seeking setting aside of the amended counter claims on 29th June, 2019. The learned Tribunal *vide* Order dated 23rd July, 2019, directed that the said pleas would be heard during the final arguments.

2.13 On 17th April, 2019, the learned Arbitrator taking note of the clauses of the MoU, observed that the arbitration proceedings were still pending and accordingly, allowed the Respondent to amend its counter claim.

2.14 The learned Tribunal then proceeded to adjudicate the terms of reference and passed the impugned Award. The impugned Award rejects the counter claim qua relief of '*Form-C in respect of the Artwork sold by the Respondent No. 1'* and allowed only the counter claim (which was introduced by way of amendment) for an amount of Rs. 1 Crore, which has been directed to be paid by the Petitioner to Respondent No. 1.

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ARGUMENTS ADVANCED

3. Mr. Atul Ahlawat, counsel for the Petitioner impugns the aforesaid Award, in so far as the learned Arbitrator has allowed the counter claim of the Respondent No. 1 qua payment of Rs. 1 Crore by the Petitioner. His arguments are summarized as follows: -

3.1 The learned Arbitrator has granted relief on the basis of an Agreement which was not subject matter of arbitration before it. The impugned Award is thus, in violation of the public policy of India and deserves to be set aside;

3.2 The Artwork Loan Agreement dated 16th January, 2013, which was the subject matter of arbitration, was superseded by way of the MoU dated 15th June, 2016. Therefore, the arbitration proceedings did not survive as the MoU superseded/ novated the earlier Sale Agreement and did not contain an arbitration clause;

3.3 The impugned Award is in violation of Section 28 (3) of the Act which mandates the Arbitral Tribunal to adjudicate disputes in terms of the contract entered into between the parties. The learned Arbitrator has overlooked the pleadings, the express terms of the contract, and the documents placed on record and exceeded the scope of reference;

3.4 The learned Arbitrator failed to take into consideration its earlier Order dated 13th November, 2018 wherein, he had expressed his doubt regarding maintainability of the application under Section 23 (3) of the Act. The learned Arbitrator has also exceeded its jurisdiction in making observations with respect to conduct of the parties', consequent upon signing the MoU. The said MoU was terminated on 14th October, 2016 due

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to failure on part of the Respondent in making scheduled payments on time and therefore, the Petitioner was well-within its right to proceed for termination. The learned Arbitrator, therefore, wrongly held that the Petitioner unduly retained the painting and was liable to pay Rs. 1 Crore to Respondent No. 1. Such findings could not have been rendered as the learned Arbitrator was not examining the disputes under the MoU dated 15th June, 2016;

3.5 The learned Arbitrator failed to take note of case laws cited by the Petitioner to contend that, in absence of an arbitration clause in MoU, the proceedings could not have been adjudicated in terms thereof. The same were as follows: -

i. ***M.R. Engineers & Contractors Put. Ltd v. Som Datt Builders Ltd.***[4]**,**

ii. ***Elite Engineering and Construction (Hyderabad) Private Limited v. TechTrans Construction India Private Ltd.***[5]**,**

iii. ***Inox Wind Ltd. v. Thermocables Ltd.***[6]**,**

iv. ***Jindal Stainless Limited v. Damco India Private Limited***[7]**.**

ANALYSIS

The Three Agreements

4. The Court has considered the submissions advanced by Mr. Ahlawat. The parties to the present arbitration had entered into 3 different agreements at different points of time. Under the First Agreement dated 15th December, 2009 [*being* – the Sale Agreement], Petitioner agreed to purchase

[4] (2009) 7 SCC 696.
[5] (2018) 4 SCC 281.
[6] (2018) 2 SCC 519.
[7] 2016 SCC Online Del 6368.

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five pieces of artwork/ paintings from Respondent No. 1. This Agreement contained a buy-back clause, whereby the Petitioner could exercise its right to re-sell all or any of the paintings to Respondent No. 1 within a period of 3 years. Petitioner exercised its right to re-sell by sending two notices dated 14th May, 2012 and 14th June, 2012 for three paintings (out of the total five pieces of artwork/ paintings) purchased by them. In response to the said notices, parties entered into the Second Agreement [*being* - the Artwork Loan Agreement] dated 16th January, 2013 which contained an arbitration clause. Accordingly, the arbitral proceedings were initiated. During the pendency of said proceedings the parties entered into the Third Agreement [*being* - the MoU] dated 15th June, 2016.

The Dispute

5. As per Clause 7 of the Artwork Loan Agreement dated 16th January, 2013, Respondent No. 1 was authorised to display and sell the specified artworks/ paintings through auction at a price not less than Rs. 3,11,10,000/- (Rupees Three Crore Eleven Lacs and Ten Thousand Only) including CST @ 2%. The sale proceeds were agreed to be paid directly to the Petitioner, not later than 30 days of the auction. The Buyer's premium, as per the industry practice, was to go to Respondent No. l. It was further agreed that if the said artworks/ paintings fetch a lower price at the auction, then the Respondents shall pay the differential amount to the Petitioner before 05th March, 2013.

6. In accordance with the Artwork Loan Agreement, the Respondent

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No. 2 handed over a post-dated cheque [*hereinafter,* ***'PDC'***] amounting to Rs. 3,11,10,000/- to the Petitioner, with an understanding that in case the Artworks were not returned by 10th February, 2013, Petitioner would be at liberty to present the said cheque for encashment. Respondent No. 1, *vide* its e-mail dated 10th February, 2013 informed the Petitioner that the total sale proceeds from the sale were Rs. 2,26,80,000/-; therefore, they were liable to pay the differential amount of Rs. 84,30,000/- to the Petitioner. Respondent No. 1 requested the Petitioner to handover the PDC against delivery of the Artworks, however, the same was not acceded to by the Petitioner since the Respondent had not paid the differential amount. Respondents then via e-mail dated 04th March, 2013, claimed that the PDC was issued as a security for the Artworks and since the same was not returned, they have issued stop payment instructions to their banker. The Petitioner *vide* an e-mail dated 07th March, 2013 requested Respondent No. 1 to deliver the Artworks within a period of 7 days along with payment of the differential amount, through a demand draft. Since the Respondents have allegedly failed to pay the balance amount of Rs 1,56,10,000/-, Petitioner presented the aforementioned cheque for encashment, which was dishonoured.

The Legal Proceeding

7. In this background, the Petitioner moved an application under Section 9 of the Act, wherein this Court *vide* its Order dated 14th March, 2014[8], recorded that Respondent No. 1 had returned the painting, titled as - *'The Killing of Safdar Hashmi'* by Manjit Bawa, to the Petitioner. In the ensuing arbitration, Petitioner filed its Statement of Claim on 25th

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[8] In ARB.P. 43/2014 and O.M.P. 587/2013.

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November, 2014, claiming an award for a sum of Rs. 1,56,10,000/- (Rupees One Crore Fifty Six Lacs and Ten Thousand Only) against the delivery of the above Artwork, along with 18% interest. Respondents filed its Statement of Defence and counter claim for Rs. 3,19,77,617/- (Rupees Three Crore Nineteen Lacs Seventy Seven Thousand Six Hundred and Seventeen Only) contending that on account of Petitioner's deliberate omission in supplying the Form-C, Respondent No. 1 had to incur a tax liability of the said amount as claimed, and the same must be set-off against their claims.

8. The Petitioner's claim was dismissed on account of non-prosecution. In the proceedings which were continuing only in respect of counter claims, parties entered into the MoU dated 15th June, 2016. Thereunder, Respondent No. 1 agreed to purchase the artwork namely, *'The Killing of Safdar Hashmi'* by Manjit Bawa, from the Petitioner for Rs. 1,75,00,000/- including DVAT @12.5 %. The Respondent was to make the 1st instalment of Rs. 25,00,000/- as a non-refundable instalment to be paid/ simultaneously upon execution of the said MoU. On receipt, the Petitioner was to handover the Form-C to the Respondent as referred in Para 5 of the said MoU. The remaining Rs. 1.5 Crores were to be paid *vide* six equal instalments of Rs. 25 Lacs, each to be paid between 05th July, 2016 to 05th December, 2016. Respondent paid a sum of Rs. 1,00,00,000/- to the Petitioner out of the total consideration of Rs. 1,75,00,000/-. However, Petitioner terminated the MoU alleging that Respondent defaulted in making the 4th instalment due on 05th October, 2016. As a result, presently the Petitioner has the painting as well as Rs. 1 Crore received under the MoU.

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The Challenge to the Impugned Award

9. In these circumstances, Respondent No. 1 sought refund of the amount of Rs. 1 Crore, by way of amendment of its counter claim. Thus, the short question that arises for consideration is whether on the execution of MoU, Respondent No. 1 [Counter claimant] could have continued with the arbitration proceedings. The learned Arbitrator has examined terms of the MoU and concluded that the same had not been implemented. In terms of Clause 2.7 of the MoU, all proceedings had to be withdrawn which were pending before this Court. Evidently, same was not done by the Petitioner. Further, the learned Arbitrator also took note of the fact that – the Petitioner had unjustly and unilaterally terminated the MoU, citing a default on the part of the Respondent; thus, unlawfully retained the painting and also an amount of Rs. 1 Crore, received under the MoU. The relevant portion of the findings of the learned Arbitrator, on this issue, are extracted hereinbelow: -

> *"39. The Respondent's case set up in its conclusion is that during the pendency of proceedings before this Tribunal, the parties entered into the MOU dated 15.06.2016. As per the terms of this MOU, the Respondent had agreed to pay a sum of Rs. 1,75,00,000/- through an initial instalment and 6 equal monthly instalments towards final settlement of all claims between the parties and upon payment of the final instalment, the Claimant was to hand over the 3rd piece of Artwork namely, "The killing of Safdar Hashmi". The Clause 2.4 of the MoU reads as under: -*
>
> > *"Clause 2.4- The remaining Rs. 150,00,000/- (INR One Crore Fifty Lakh) only shall be paid towards the full and final consideration of the artwork as mutually agreed to below: -*

Sr. No.	*Amount (Rs.)*	*Payable on or before*
1.	*25,00,000*	*05-07-2016*
2.	*25,00,000*	*05-08-2016*
3.	*25,00,000*	*05-09-2016*
4.	*25,00,000*	*05-10-2016*
5.	*25,00,000*	*05-11-2016*
6.	*25,00,000*	*05-12-2016*

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Total	*1,50,00,000*	

40. The Respondent had paid a sum of Rs. 1,00,00,000/- out of the sum of Rs. 1,75,00,000/- to the Claimant and due to some bank holidays, the 4th instalment which was due on 05.10.2016 got delayed. However, the Claimant agreed to receive the said 4th instalment in few days through demand draft and the same was prepared on 13.10.2016 but the Claimant refused to accept the demand draft thereby terminating the MoU on 14.10.2016. The Respondent even offered to pay the balance sum of Rs. 75,00,000/- towards the final settlement but the Claimant refused to accept the same.

41. In so far as the counter claim is concerned, it is important to read the following clauses of the settlement dated 15.06.2016: -

> *"Clause 2.7- Luxury Farms also undertakes, on receipt of the last instalment of the consideration, to withdraw any and all legal cases pending before the Arbitrators and/or Delhi High Court against Osian's and intimate all concerned in this regard.*
>
> *Clause 3.4- This Memorandum supersede all previous agreements, arrangements, understandings and assurances between the Parties and any amendments, modifications or replacements thereto in respect of the said painting."*

*42. The Claimant had cited the Supreme Court judgement, **M/s Young Achievers vs. IMS Learning Resources Pvt. Ltd** whereby it was stated that the arbitration clause does not survive if the agreement containing the arbitration clause is superseded. The relevant paragraphs of the judgement read as under: -*

> *"6. We are of the view that survival of the arbitration clause, sought by the appellant in the agreements dated 01.04.2007 and 01.04.2010 has to be seen in light of the terms and conditions of the new agreement dated 01.02.2011. An arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/ novated by a later agreement...*
>
> *8. .....This Court **in Kishorilal Gupta's case (supra)** 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"*

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43. The Respondent cited the Supreme Court judgement, ***National Agricultural Coop. Marketing Federation India Ltd. Vs. Gains Trading Ltd.*** *The relevant paragraph of the judgement is as under: -*

> *"6. The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. This position is now statutorily recognised. Sub- section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treat as an agreement independent of the other terms of the contract, and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is therefore liable to be rejected."*

44. It was stated in rebuttal by the Counsel for the Respondent/ Counter Claimant that the Claimant had not withdrawn all the proceedings from the High Court. This assertion has not been denied. Thus, it is evident that the settlement dated 15.06.2016 had not come into force as under Clause 2.7 of the settlement all proceedings had to be withdrawn from the Hon'ble Delhi High Court and therefore, the plea of the Claimant that the 2013 Agreement no longer subsisted cannot be accepted as it was the Claimant who unjustly refused to receive the 4th instalment for a sum of Rs. 25,00,000/- and unilaterally terminated the MoU by the letter dated 14.10.2016 citing default on behalf of the Respondent. The Claimant had not only retained the painting but also the sum of Rs. 1,00,00,000/- towards the purchase of the painting which it received under the 2016 settlement. The Claimant not having complied with his part of the 2016 settlement, by not withdrawing all proceedings in the Hon'ble High Court, cannot enjoy the benefits of the 2016 Settlement which never came fully into force. Consequently, this Tribunal constituted by the Hon'ble Delhi High Court continues to have jurisdiction to adjudicate the matter. Therefore, the retention of both the painting and sum of Rs. 1,00,00,000/- towards sale proceeds of the said painting received by the Claimant under the 2016 settlement cannot be countenanced and amounts to unjust enrichment.

45. In my view, the Claimant's refusal to accept the 4th instalment through demand draft on 13.10.2016 shows that the intention of the Claimant was

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never to honour the settlement so entered between the parties on hyper technical pleas. The averred delay in payment of the 4th instalment of Rs. 25,00,000/ was explained by the Respondent by giving cogent reasons such as bank holidays etc, in the email dated 19.10.2016. The relevant portion of the email dated 19.10.2016 sent by the Respondent to the Claimant is as under: -

> *"Hope you're doing well, this W.R.T. multiple call exchanges we had on 13th October 2016 when I've sent our staff person for delivering the Demand Draft of an amount 2,500,000/- in favour of Luxury Farms Pvt. Ltd. In lieu of PIC of an amount 2,500,000/- dated 5th October 2016.*
>
> *Even though our person has reached to deliver the said Demand Draft but as you've informed me that you are not in position to receive the Demand Draft as per the advice from your Legal Counsel so our person has to return back with the said Demand Draft without handling it over to you.*
>
> *I'd like to bring to your kind notice that I've spoken with you on 5th October 2016 morning and informed you that due to some bank processing related delays we'll be able to arrange the Demand Draft of Rs. 2,500,000/ in few days time and requested you to not go ahead for encashing the cheque of 2,500,000/- dated 5th October 2016 handed over to you earlier, which you've positively agreed for.*
>
> *As there were multiple banking holidays 8th, 9th, 11th and 12th October, so we could arrange the Demand Draft on 13th October Morning and I've called you up to check your availability for receiving the Demand Draft at your office and you've confirmed your availability for the same but after some time you've called me up saying that you can't accept the Demand Draft as per advice from your Legal Counsel.*
>
> *Technically it was a delay of just 3 working days and I've informed you in advance as well for the same but if required then we'd like to offer the Interest payment for the delay in the said payment.*
>
> *Would appreciate if you could revert with your feedback at the earliest, so then we can move forward accordingly"*

*46. **The M/s Young Achievers, IMS Learning Resources Pvt. Ltd.** cited by the Claimant does not apply and there is no supersession of Agreement dated 16.01.2013 because the 2016 Settlement never fully came into force owing to default of the Claimant itself. Consequently, the 2013 Agreement survives and the Tribunal has jurisdiction. In this view of the matter, the*

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judgement cited by the Respondent i.e. ***National Agricultural Coop. Marketing Federation India Ltd. Vs. Gains Trading Ltd*** *is not required to be considered.*

47. Thus, the conduct of the Claimant in retaining both the painting and the payment was unjust and illegal. In fact, since the terms of MoU dated 15.06.2016 were never fulfilled and the MoU was purportedly terminated by the Claimant on 14.10.2016 citing breach of terms on behalf of the Respondent, the 2013 agreement was never really superseded and continues to be in existence till date.

48. ***In view of the Tribunal there seems to be merit in the counter claim of the Respondent as the Claimant not only retained the painting but also failed to return the sum of Rs. 1,00,00,000/-. Therefore, the same is allowed in favour of the Respondent and Claimant is directed to pay the said sum of Rs. 1,00,00,000/-. In the facts and circumstances of the present dispute, no interest is being awarded in favour of the Respondent****."*

10. The view taken by the learned Arbitrator cannot be faulted with. The terms of the MoU were indeed never fulfilled. The Petitioner did not comply with the conditions enumerated thereunder and withdraw the legal cases pending before either the Court/ or arbitral proceeding(s), as provided in Clause 2.7 of the MoU which stipulated – "*Luxury Farms also undertakes, on receipt of the last instalment of the consideration, to withdraw any and all legal cases pending before the Arbitrators and/ or Delhi High Court against Osian's and intimate all concerned in this regard*". On execution of the MoU, Petitioner did not apply to Arbitral Tribunal to say that subject matter of the proceedings has been satisfied or compromised. Instead, it terminated the MoU and consequently it stood discharged and ceased to operate. Thus, it cannot be held that the subject matter of the arbitration stood conclusively satisfied on the execution of MoU. The rights under the original Agreement were still available to

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Respondent No. 1 and it could legally claim enforcement thereof. The amended counter claim awarded to the Respondent clearly relates to disputes referred to arbitration, that were under adjudication. The awarded sum of Rs. 1,00,00,000/- owes its genesis to the Agreement, which was subject matter of arbitration proceedings. Thus, the impugned Award falls within the scope of the reference.

11. When the learned Arbitrator was informed that the MoU/ settlement, had failed, he proceeded to decide the disputes *vide* the Order dated 13th November, 2018. Since the reference was still pending before him, it was appropriate for him to take note of the facts that transpired subsequent to the execution of the MoU. The learned Arbitrator was not precluded from taking into consideration supervening facts and based his reasoning thereon. Therefore, non-existence of an arbitration agreement in the MoU is immaterial and thus, the case laws relied upon by the Petitioner to argue that the arbitration clause has to be specifically referred to in an agreement, is wholly inapplicable to facts of the case. The Court does not find any merit in the contention of the Petitioner that the learned Arbitrator has exceeded its scope of reference.

12. Further, the observations made in the procedural order are always tentative. Therefore, even if the learned Arbitrator had, in the procedural order dated 13th November, 2018, made certain comments regarding the conduct of the parties, it does not preclude him from taking a fresh view on consideration of the entire conspectus of the case.

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13. The Court also does not find merit in the contention that the learned Arbitrator has ignored the case laws citied by the Petitioner. The learned Arbitrator had taken note of the judgments cited by the Petitioner, as is evident from a reading of the impugned Award. Even if some case laws cited by it do not find mention, it does not render the Award to be invalid. Besides, the uncited case laws only supplement the proposition that was put forth by the Petitioner.

14. Lastly, the Court does not find merit in the contention of the Petitioner that the learned Arbitrator could not have made any observations regarding the conduct of the parties pertaining to the MoU. In order to come to a conclusion whether or not the MoU dated 15th June, 2016 had come into force, the learned Arbitrator had to necessarily examine the clauses of the MoU and also the conduct of the parties. Therefore, it was well-within the scope of the Tribunal to make such observations.

15. In view of the foregoing, the Court does not find any merit in the present petition and the same is dismissed along with pending applications.

SANJEEV NARULA, J

AUGUST 26, 2021

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(corrected and released on 6th October, 2021)

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