

\$~15

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

Date of Decision: 07th October, 2021

+ **ARB.P. 591/2020**

**CANNES PROPERTY MANAGEMENT SERVICES PRIVATE
LIMITED**

..... Petitioner

Through: Ms. Kanika Agnihotri and Mr. Rohan
Anand, Advocates.

versus

ALLAHABAD BANK

..... Respondent

Through: Mr. Ashish Rana and Mr. Anurag Kr.
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] seeks appointment of a Sole Arbitrator for adjudication of disputes arising from and in relation to Maintenance Agreement dated 2nd March, 2012.

2. The parties to the aforementioned Maintenance Agreement are the Petitioner [*hereinafter referred to as 'Cannes'*], and one Surya Vinayaka Industries Limited [*hereinafter referred to as 'Surya'*], which is a not party to the present proceedings. The Petitioner has instead preferred to proceed against Allahabad Bank - the Respondent herein [*hereinafter referred to as*

the '**Bank**'] - a non-signatory to the afore-noted Maintenance Agreement. Thus, the short controversy that arises for determination is whether the arbitration agreement contained in the Maintenance Agreement binds the Bank or not.

3. In order to resolve the aforenoted quandry, a brief narration of facts, to the extent necessary for deciding the present petition, is set out below.

The Maintenance Agreement:

3.1. By way of a Sale Deed dated 23rd December 2010, Surya purchased a commercial unit bearing Private No. Anchor-I at ground floor and first floor admeasuring 61212 sq. ft. (approx.) in TDI Mall, Kundli, Sonapat, Haryana - owned, developed and sold by TDI Infrastructure Ltd. [*hereinafter referred to as 'suit property'*].

3.2. The said Mall requires maintenance of various services and facilities, for which, TDI Infrastructure Limited appointed Cannes as the maintenance agency. Surya as the owner of a unit in the mall, entered into the Maintenance Agreement.

3.3 The afore-noted agreement, *inter alia*, contains an arbitration clause.

How did Allahabad Bank come into the picture?

3.4. The Bank granted finance facilities to Surya for purchase of the suit property – the same was then mortgaged in favour of the Bank. Surya's failure to pay its dues to the Bank resulted in initiation of proceedings under SARFAESI Act, 2002, pursuant whereto, the Bank itself purchased the

mortgaged property in an e-auction conducted by it. To this effect, a sale certificate dated 4th January, 2014 was issued in favour of the Bank.

CANNES'S CONTENTIONS

4. Ms. Kanika Agnihotri, counsel for Cannes, argues that the Bank stepped into the shoes of Surya, as a subsequent owner of the suit property, and is thus a party to the arbitration agreement which is embodied in the Maintenance Agreement.

4.1. The Bank stepped into the shoes of Surya

4.1.1. Surya had mortgaged the suit property in favour of the Bank in order to secure loan for payment of sale consideration. Upon Surya's default in repayment, the suit property was purchased by Bank on 4th January, 2014. The auction notice duly stipulated that the suit property was being offered on 'as is where is' basis. In addition, Clause 2, titled 'Inspection of Property & title related Documents', contained a sub-clause 2.2, stated as under:

"2.2. The intending parties may inspect the photocopies of the title deeds and other property related documents at Allahabad Bank, Zonal Office, Parliament Street, New Delhi or Consultants"

The above conditions, considered together with the fact that the suit property was mortgaged with the Bank itself, is a conclusive proof of Bank's awareness of the stipulations, contracts, agreements and conditions pertaining to the suit property. The Maintenance Agreement was executed prior to purchase of the suit property by the Bank, and was within its knowledge. It is unfathomable that Bank remained unbeknownst to the Maintenance Agreement even after purchasing the property in e-auction

conducted by it. The Bank has stepped into the shoes of Surya in respect of suit property, thereby assuming all rights and contentions in relation to the suit property.

4.1.2. It is settled law that when a party steps into the shoes of another party with respect to an existing contract/agreement, all rights and liabilities that arise thereunder accrue in favour of the party standing in. In support of this contention, reliance is placed upon the following judgments:

- (i) ***Blue Star Ltd. v. Bhasin Infotech & Infrastructure Pvt. Ltd.***¹,
- (ii) ***Kotak Mahindra Bank v. Mr. S. Nagabhushan & Ors.***²,
- (iii) ***Rajesh Gupta v. Smt. Mohit Lata Sunda & Ors.***³,
- (iv) ***DLF Power Ltd. v. Mangalore Refinery & Petrochemicals Ltd.***⁴

4.2. Existence of an agreement is evident from Bank's conduct

4.2.1. Clause 7 of the Sale Deed dated 23rd December 2010 contains a reference to a sub-contract viz. the Maintenance Agreement. Further, the Maintenance Agreement also refers to the Sale Deed dated 23rd December 2010, which leads to the undisputable conclusion that the Bank had entered into both contracts with prior knowledge and due consent. Thus, the existence of arbitration agreement between the parties be inferred by the conduct of parties.

¹ 2021 SCC OnLine Del 3900.

² 2018 SCC OnLine Del 6832, at paras 11-17.

³ On 27th May 2020 in Arb. P. 494/2019 by this Court, at paras 30-35.

⁴ 2016 SCC OnLine Bom 5069, at paras 74-77.

4.2.2. The Bank, vide reply dated 23rd March 2017 made in response to Cannes's legal notice dated 28th February 2017, never disputed existence of the Maintenance Agreement. Arguendo, if Bank had no knowledge of Maintenance Agreement, its conduct, established through its letters dated 28th January 2014 and 15th February 2014, demonstrates the existence of an arbitration agreement.

4.2.3. Bank never denied its liability to pay maintenance charges owed to Cannes; however, *vide* letters dated 28th January 2014 and 15th February 2014, they merely disputed liability in respect of period for which maintenance charges were claimed. Thus, the Bank has acquiesced to the existence and applicability of the Maintenance Agreement. Furthermore, conduct of the Bank also establishes that there is an 'implied renewal/consent' to the said Maintenance Agreement. The Bank has been continuously accepting services from Cannes with respect to the said property. As on date, there are about 80 operational and running shops in the Mall - which are receiving maintenance services from Cannes.

4.2.4. No separate Maintenance Agreement is necessary to be executed with respect to the properties in the said mall. The properties in the mall have to be maintained by one maintenance agency only. The charges towards Common Area Maintenance cannot be charged differently by different maintenance agencies in respect of the said Mall.

4.2.5. In order to establish the existence of a contract/agreement, *inter se* communications become pivotal. In this regard, reliance was placed upon the following judgments:

- (i) *Visa International Limited v. Continental Resources (USA) Ltd.*,⁵
- (ii) *Unissi (India) Private Ltd. v. Post Graduate Institute of Medical Education and Research.*⁶

4.3. Even a non-signatory to a contract may be held to be a party

4.3.1. A non-signatory to a contract can also be made liable for rights and obligations arising from a contract. It has been held in a catena of judgments that merely being a non-signatory does not absolve a party of its rights, contentions and liabilities arising under a contract. Reliance is placed upon Sale Deed dated 23rd December 2010 to submit that the same refers to successors and permitted assigns. Clause 7 thereof makes a specific reference to the Maintenance Agreement between the parties and binds the purchaser to the Maintenance Agreement. The Maintenance Agreement too makes a specific reference to the Sale Deed. Clause 20 of the Maintenance Agreement relates to arbitration as the dispute resolution mechanism between the parties. Hence, the Bank is party to the arbitration agreement.

4.3.2. In this regard, reliance was placed upon the following judgments:

- (i) *Blue Star (supra).*
- (ii) *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc.*⁷

4.4. Limitation - Limited intervention of courts in Section 11 of the Act

⁵ (2009) 2 SCC 55 at para 16.

⁶ (2009) 1 SCC 107 at paras 15-19.

⁷ (2013) 1 SCC 641.

The cause of action to file the present petition remains a continuing one, considering that the Bank has been a constant recipient of services being offered by Cannes. The plea of limitation raised by the Bank cannot be examined in the present proceedings considering the limited scope of jurisdiction of the Court in a Section 11 of the Arbitration and Conciliation Act, 1996 ('the Act'). The question of limitation, if any, ought to be decided by the Arbitral Tribunal. In this regard, reliance was placed upon the following judgments:

- (i) ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited***,⁸
- (ii) ***Rajesh Gupta*** (*supra*) at para 26-27.

BANK'S CONTENTIONS

5. Mr. Ashish Rana, counsel for the Bank, on the other hand, submits that the present petition is not maintainable, for the following reasons:

5.1. There is no contractual relation between the parties. The Maintenance Agreement is between Surya and one M/s. Colliers Property Management Services Pvt. Ltd. – the Bank is not party to this agreement. The Bank is merely an auction purchaser of the property, and has stepped in subsequent to the execution of the Maintenance Agreement. There, thus, is no arbitration agreement between the parties.

5.2. Though Bank was a secured creditor of Surya and the mortgagee of the suit property since 04th January 2011, it was not aware of any Maintenance Agreement. Bank became owner of the property *vide*

⁸ (2020) 2 SCC 455 at paras 9-10.

registered Sale Certificate No. 265 registered on 21st April 2014. No agreement was executed subsequently between Cannes and the Bank. Therefore, invocation of arbitration as well as the present petition are misconceived and bad in law.

5.3. There is no substitution or assignment of the rights and obligations under the Maintenance agreement in favour of the Bank. Reliance is placed upon clause 15 of the Sale Deed which provides that the agreement shall not be changed or modified, except in writing, and signed by the parties. In the present case, there is no agreement signed between Cannes and the Bank modifying the agreement in question or accepting the agreement in question. The Bank in its reply dated 19th December 2018 clearly objected to the arbitration agreement.

5.4. Cannes's argument that the arbitration agreement gets incorporated by way of reference in the Sale Deed is also misplaced. The Sale Deed dated 23rd December 2010, in favour of Surya, was executed much prior to the Maintenance Agreement dated 2nd March 2012. Even otherwise, the Sale Deed dated 23rd December 2010 is a separate and independent document from the sale certificate dated 04th January 2014 through which the Bank derives its title. There is no co-relation with the Sale Deed dated 23rd December 2010. Further, the sale certificate dated 04th January 2014 clearly provides that *"the sale of the scheduled property was made free from all encumbrances known to the secured creditor."*

5.5. As early as 15th February 2014, Cannes was informed of the sale of the property under auction dated 23rd December 2013. In express terms

thereof, dues payable, including taxes and maintenance dues payable upto to 23rd December 2013, would have to borne by the previous owner i.e., Surya. Thus, the claims raised by Cannes in the instant petition are untenable *qua* the Bank.

5.6. Existence of an arbitral agreement is a *sine qua non* for invoking Section 11 of the Act. A bare perusal of Section 11 of the Act makes it evident that the procedure provided therein is to be followed by a party for getting an arbitral tribunal constituted only if there is an arbitration agreement. In absence thereof, the present petition must fail.

5.7. The alleged claims are also barred by limitation. The cause of action to make a claim first arose between December 2011 when Surya allegedly failed to pay some dues, if any. Three years' period thus expired in December 2014. Cannes has deliberately not provided any details of the accrual of cause of action in the petition; it has failed to demonstrate how the petition is within limitation. In the alternative, it is also argued that Maintenance Agreement stood terminated after one year as per Clause 1 contained therein, which reads as under –

“The CPMSPL shall provide operation/maintenance services as per the scope of operation/maintenance services as set out in clause (2) hereinafter initially for a period of 1(one) year w.e.f 01 Dec 2011 to be renewed owners, unless otherwise the work of providing operation/maintenance services is earlier handed over by the Developer to any other Assignee/Nominee, other body corporate or to association/body.”

Cannes has not even submitted to this Court any evidence or document, indicating renewal of Maintenance Agreement upon mutually agreed terms and conditions. Therefore, the Agreement upon which the instant Petition is

premised, is null and void and/or stands discharged. In support of this contention, reliance was placed upon the following judgment in ***BSNL v. Nortel Networks India Pvt. Ltd.***⁹

ANALYSIS

6. The Court has considered the contentions of both the counsel. Most of the crucial facts are not in dispute. Petitioner seeks reference of disputes to arbitration, in relation to an agreement to which the Bank is, undisputedly, not a signatory.

7. Ordinarily, arbitration as an alternate dispute resolution mechanism can bind (or be resorted to by) only such parties who have consented to the same. However, the Act does not provide for an arbitration agreement to be necessarily signed by the parties, nor does it postulate any particular form of arbitration agreement. The existence of an agreement to arbitrate can also be inferred from exchange of communications, and such other modes as laid down under the Act. Jurisprudence on the subject has developed over the years and the Supreme Court, subsequent to ***Sukankya Holdings v. Jayesh H. Pandya & Anr.***,¹⁰ has even, under exceptional circumstances, referred non-signatories to arbitration, by applying the doctrine of ‘group of companies’ or ‘inter-related and inter-connected agreement’.¹¹ However, for referring non-signatories to arbitration, intention of the parties is germane. Though the proposition canvassed by Cannes, as also propagated

⁹ 2021 SCC Online 207 at paras. 1, 2(e), 6, 17, 18, 19, 30, 37, 38, 39.

¹⁰ (2003) 5 SCC 531.

¹¹ ***MTNL v. Canara Bank and Ors.***, AIR 2019 SC 4449.

by the case laws relied upon by it for the same, is undisputed - that a non-signatory can be referred to arbitration in exceptional circumstances - but in the opinion of the court, the same has no application in the instant case. Cannes has not relied upon the doctrines referred above, but on the premise that the Bank is the successor to Surya, and thus a *de jure / de facto* party to the maintenance agreement. This plea is misconceived for the reasons elaborated hereinafter.

8. The suit property is subject matter of a Sale Deed dated 23rd December 2010, which was executed between TDI and Surya. Recital of this Sale Deed stipulated that Surya's successor would also be bound by the terms contained therein. No doubt, being the auction purchaser, the Bank is Surya's successor-in-interest *qua* the Sale Deed. This principle cannot extend to other agreements executed by Surya.

9. Cannes has argued that since the Sale Deed between TDI and Surya makes a reference to the Maintenance Agreement, combined with the fact that the Bank has admittedly stepped into the shoes of Surya, leads to the conclusion that such rights of the previous owner stands assigned to the new one. The Court is however unable to accept such an argument.

10. Replacing the owner of the property does not *ipso facto* lead to the conclusion that the Bank would also be bound by the Maintenance Agreement, which is a separate and a distinct agreement, executed between Surya and Cannes for availing CAM services for one unit in TDI Mall. Unarguably, the obligations and rights flowing from this agreement were distinct from those flowing from the Sale Deed, and cannot be jumbled together for the purpose of reading a privity of contract where there is none.

11. A party cannot be subjected to obligations of a contract to which it is not a party. A stranger or a third party cannot be bound if there is no assignment of contractual rights and liabilities. Certainly, the non-voluntary transfer of ownership from Surya to the Bank under SARFAESI proceedings does not result in assignment of contractual rights under the Maintenance Agreement. The burden of the liability acquired by Surya under a separate Maintenance Agreement, cannot be foisted on the Bank just because it has become the owner of the property. Surya's liability under the Maintenance Agreement is not attached to the immovable property, even if it was in relation thereto. A mere general reference in the erstwhile Sale Deed to the Maintenance Agreement is insufficient to bind the Bank to the arbitration agreement contained in the Maintenance Agreement.

12. The Maintenance Agreement in its recital, does provide that it shall also bind the parties' nominees, administrators, legal representatives and the assignee. Thus, the pertinent question is whether the Bank is an assignee under the Maintenance Agreement or not? There is no document on record to show that Surya had specifically assigned its rights and obligations, either *in rem* or specifically under the Maintenance Agreement, in favour of the Bank. In fact, Cannes also does not deny this fact. No averment has been made to any other document to urge that it would constitute as assignment of Surya's rights to the Bank under the Maintenance Agreement. The court is thus unable to assume the existence of any assignment of rights. In order to be bound by the terms of the agreement, including the arbitration clause, the assignment of such rights has to be necessarily shown, by way of make a binding agreement between the parties. This is a pre-requisite to bind the

Bank to arbitration.

13. While the Court agrees with the law laid down in the judgments relied upon by Cannes - that the Court has to be satisfied that the parties intended to have an arbitration agreement between them – this is not shown from the facts of the instant case. The judgments do not support Cannes' case. Moreover, the Bank's rights as a mortgagee of the property can also not be of any consequence for the purpose of reference to arbitration.

14. Ms. Agnihotri also stresses upon the correspondence of the parties, and particularly states that the legal notices exchanged between the parties evidence that the Bank has agreed to arbitration. However, upon perusal of the same, the Court is unable to infer such an agreement from such documents. The two letters relied upon by Cannes show that the Bank had informed Cannes about the purchase of the property in auction, and requested them to record the change of ownership in records. Besides, in the legal notice issued by Cannes to the Bank, there is a reference to a letter dated 8th January, 2014. Although the said letter is not on record, however, on perusal of the legal notice, it can be inferred that Bank intimated Cannes about the fact they have become the owner and stepped into the shoes of Surya as the owner of the property. This too does not lead to the conclusion that the Bank became a party to the arbitration agreement.

15. Mr. Rana has also pointed out that the Maintenance Agreement had expired by efflux of time. No steps have been shown to be taken by either party to form a fresh Maintenance Agreement between them, either. For these reasons too, the court remains unconvinced as to the maintainability of

the present petition.

16. Since the court is unable to infer any arbitration agreement between Cannes and the Bank, no need is felt to go into the question of the plea of limitation. The rights and contentions of the parties on this issue are left open.

17. In view of the foregoing, the Court does not find any merit in the present petition, and accordingly the same is dismissed.

OCTOBER 7, 2021

akansha

(corrected and released on 12th November, 2021)

SANJEEV NARULA, J