



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

% Date of Reserve: 14th September, 2022
Date of Decision: 10th October, 2022

+ **ARB.P. 1050/2021**

1. **ANSAL PROPERTIES & INFRASTRUCTURE LTD.**
Erstwhile Ansal Township & Land
Development Ltd.
115, Ansal Bhawan, 16 K.G Marg, New
Delhi 110001.
2. **PRIME MAXI PROMOTION SERVICES PVT. LTD.**
Unit No. Half Mezzanine No. 2
15 East of Kailash, Community Centre,
Sandhya Deep Building
New Delhi 110065.

..... Petitioners

Through: Mr. Gautam Khazanchi, Mr.
Shubham Jain and Ms. Sukanya Joshi,
Advocates.

versus

1. **DOWAGER MAHARANIS RESIDENTIAL
ACCOMMODATION WELFARE & AMENITIES TRUST**
Umaid Bhawan Palace, Jodhpur 342-006
(Through its Managing Trustee, H H
Maharaja Sh. Gaj Singh Ji)
2. **AMBIENCE HOSPITALITY MANAGEMENT PRIVATE
LIMITED,**
The Palms Town & Country Club,
Sushant Lok Phase 1,
Sector 43, Next to Park Plaza Hotel,



Gurgaon, Haryana- 12200 I

..... Respondents

Through: Mr. Pranaya Goyal, Mr. Chiranjivi
Sharma and Mr. Madhav Ved,
Advocates for Respondent No.1.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

1. A petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") has been filed on behalf of the petitioner for appointment of Sole Arbitrator for adjudication of the disputes between the parties.
2. The case of the petitioner is that respondent No.1 had approached petitioner No.1 for commercial development of the property known as "Rai-Ka-Bagh Palace" located in Jodhpur, Rajasthan as an ethnic Heritage Shopping Mall and Commercial Centre. On 06th December, 2004 a Memorandum of Understanding (MOU) was signed between petitioner No.1 and respondent No.1 at New Delhi. According to the MOU, the respondent No.1 was responsible to obtain clearances with regard to change in land use to commercial use and a Hotel. Pursuant thereto a Collaboration Agreement dated 01st February, 2005 was entered into between petitioner No.1 and respondent No.1. The possession was handed over to petitioner No.1 on 12th April, 2005 after which petitioner deployed guards and caretakers on the property for its upkeep. The work of dismantling etc. was started but the



project could not move forward as respondent No.1 was unable to get the land use changed from residential to commercial.

3. After approximately five years on 04th April, 2010 a Joint Venture Agreement(JVA) was entered into between respondent No.1, respondent, 2, and petitioner No.2 while petitioner No.1 was the confirming party. It was provided in the Collaboration Agreement that if the condition precedent was not satisfied or waived within nine months of JV Agreement, the parties had a right to terminate the Agreement and upon such termination, the Collaboration Agreement dated 01st February, 2005 would bind the parties. Vide Addendum to the JV Agreement dated 04th April, 2010, the time period of nine months was extended to additional twelve months. Further, Article 15.12 of the JV Agreement provided for resolution of disputes through arbitration.

4. It is asserted that petitioners along with respondent No.2 complied with all the obligations under the Joint Venture Agreement. They carried out the repairs, maintenance and restoration. The land was also surveyed by the petitioners and respondent No.2. However, time and again the respondent No.1 failed to fulfil its obligations in terms of the Agreement. The change in land use Certificate was finally obtained on 07th March, 2014 after tireless efforts of petitioners and respondent No.2. The petitioners incurred an expenditure of Rs.5 crores including but not limited to various repairs and other works carried out in execution of the JV Agreement. However, respondent No.1 failed to fulfil its various obligations as envisaged in the JV Agreement.

5. The petitioners have asserted that the respondent No.1 for reasons best known to it, started looking for ways to wriggle out of the obligation



and deliberately not cooperate with the petitioners with an intent to ensure that the Agreement is forfeited. This is evident from the letter dated 24th October, 2016 issued on behalf of respondent No.1 illegally revoking possession of the property on baseless and fraudulent grounds. Thereafter, the respondent No.1 vide communication dated 01st February, 2017 repeated its illegal claims. On 02nd February, 2017 the petitioners and their security guards were illegally evicted from the property. Civil Suit No.29/2018 titled '*Ansal Properties & Infrastructure Limited Company v Dowagarh Maharanis Residential Accomodation Welfare and Amenities Trust*' was filed before Commercial Court, Jaipur, Rajasthan seeking possession of the suit property. An application under Section 8 of the Arbitration & Conciliation Act, 1996 was filed which was allowed vide Order dated 12th April, 2018 and petitioner No.1 was allowed to initiate arbitration proceedings for settlement of the disputes arising out of the JV Agreement dated 04th April, 2010.

6. The petitioner vide Letter dated 12th April, 2018 issued Notice invoking arbitration under Clause 15.12 of JV Agreement to respondent No.1 for proposing the name of the Sole Arbitrator. The respondent no.1 informed the petitioners through letter dated 16th April, 2021 that they were in the process of issuing requisite instructions. Another Notice dated 05th May, 2021 was issued by the petitioners to respondent No.1 to which no response was received. A letter dated 12th May, 2021 was received on behalf of respondent No.1 raising frivolous objections but the Arbitration Clause was not disputed. However, it rejected the request for arbitration and refused to nominate any arbitrator. Hence, the present petition has been filed for appointment of the Sole Arbitrator.



7. The **respondent No.1 in its detailed reply** has opposed the petition by claiming the same to be malafide on account of suppression of material facts and being hopelessly barred by time. It is claimed that the petitioner's purported claims stood expired in April, 2020 prior to the purported invocation of the Arbitration Clause and the present petition is, therefore, not maintainable. Moreover, non-arbitrable disputes have been raised which lie solely within the jurisdiction of National Company Law Tribunal (NCLT). Also, the claim raised is beyond the Arbitration Agreement since the possession has been claimed despite the fact that the possession of the suit property vested with the Joint Venture Company incorporated in accordance with the Agreement. Furthermore, the petitioners have concealed the factum of modification of the Dispute Resolution Clause under the JV Agreement as petitioner No.1 had expressly sought modification by requesting respondent No.1 to opt out of arbitration. However, petitioners have now filed this petition ignoring the objections raised by respondent No.1 in its reply to the Arbitration Notice. It is further claimed that the invocation Notice is bad in law and contrary to the terms of the JV Agreement.

8. **On merits**, it is admitted that the MoU was entered into between petitioner No.1 and respondent No.1 on 06th December, 2004. It is also not disputed that the said MoU could not be executed due to situations beyond the control of the parties. However, due to their keenness, petitioner No.2, respondent No.1 and respondent No.2 entered into Joint Venture Agreement on 04th April, 2010 for renovation and development of the suit property. They agreed to subscribe shares of Joint Venture Company in the name of Palace Hotels India Pvt. Ltd. for carrying out the development work. The



petitioner No.1 was only the confirming party to the Joint Venture Agreement and had no rights/ obligations under the JV Agreement. Consequently, the shareholding of the Joint Venture Company that is Palace Hotels India Pvt. Ltd. was divided between petitioner No.2 and respondent No.2 and respondent No.1 in the ratio of 25:25:50. The petitioner No.1 has no shareholding in the entities. It is further asserted that respondent No.1 handed over the subject property only as a custodian/shareholder of Palace Hotels. In fact, pursuant to JV Agreement, Company agreed to take the subject property on lease from respondent No.1 Trust. Further, it is the Company's representatives who are authorized to make necessary applications to Jodhpur Nagar Nigam for Food and other Licences for the subject property. The Board Resolution dated 26th March, 2011 recorded resolutions pertaining to the applications to Jodhpur Nagar Nigam. An Addendum to the Joint Venture was executed on 07th June, 2011 whereby extending the time for fulfilling the conditions precedent of JV Agreement.

9. The respondent has asserted that the petitioners and respondent No.2 failed to discharge the responsibilities under the JV Agreement, despite several requests and draft of business plan, the development of the property being made by respondent No.1. Accordingly letter dated 09th February, 2015 was addressed to petitioners and respondent No.2 again requesting for draft business plans. Various correspondences over a period of time were exchanged between the parties in this regard. Eventually a clear impasse occurred in respect of subject properties and a Notice dated 01st February, 2017 was served by respondent No.1 to the petitioners and respondent No.2 to refrain from further using the subject property and also clarified that the



security guards would not be allowed entry and access to the ten rooms reserved in the subject property.

10. Petitioner No.1 admittedly filed the Civil Suit, but in view of the objection taken under Section 8 Arbitration & Conciliation Act,1996, the suit was dismissed with liberty to the petitioner no.1 to invoke arbitration. It is claimed that immediately thereafter the respondent No.2 gave a Notice dated 20th April, 2018 of termination of JV Agreement to be effective from 30th April, 2018. The respondent No.1 indicated its intention to settle, but the petitioners and respondent No.2 did not participate in the Settlement Meetings.

11. It is admitted that in the Notice invoking Arbitration dated 02nd April, 2021 the petitioners had asserted that they are referring the disputes as stated in the suit, but for the first time Rs.5 crores were claimed for purported costs and expenses incurred in the subject property. Furthermore, the petitioners have intended to make out a case of possession of the property which is not contemplated in the JV Agreement. Moreover, in the Joint Venture Agreement petitioner No.1 is only a confirming party and has been expressly kept out of the Arbitration clause. Furthermore, the Agreement clearly stipulated that the Sole Arbitrator is to be appointed by all the parties, but the respondent No.2 has been conveniently kept out of this selection process as the arbitration Notice is only addressed to respondent No.1. Even otherwise, in terms of Arbitration Clause, where the parties are unable to appoint a mutually acceptable Sole Arbitrator, it is petitioner No.2 which has the right to nominate the Arbitrator along with respondent No.2, but the process has not been followed. The Notice of invocation is, therefore, bad in law.



12. It is also claimed that the claims raised vide Arbitration Notice are beyond the Joint Venture Agreement. The respondent has placed reliance on Food World vs. Indian Railways Catering and Tourism Corporation Ltd. 2021 SCC OnLine Delhi 4264 wherein it was observed that in cases where the Courts find the disputes are ex-facie not arbitrable, barred by limitation or are otherwise vexatious, frivolous or dishonest may not be referred to arbitration under Section 11 of the Act. Reference has also been made to the case of Vidya Drolia vs. Durga Trading Corporation 2021 (2) SCC 1, wherein it was observed that the Insolvency or intra Company disputes can be more efficiently and efficaciously addressed by the Centralized Forum and may be non-arbitrable being actions in rem. It is, therefore, submitted that the petition is liable to be dismissed.

13. Respondent No.2 was duly served on 27th December, 2021 despite which none has put in appearance on behalf of respondent No.2.

14. **Submissions heard.**

15. The first objection taken on behalf of the respondent is that the disputes are barred by Limitation. It is asserted that the Joint Venture Agreement is dated 04th April, 2010 and the disputes have arisen under the JV Agreement in the year 2017 in respect of which the Civil Suit was filed. The reliefs so agitated have now become barred by limitation.

16. The first aspect which may be considered is that Civil Suit No.29/2017 was filed by petitioner No.1, the confirming party against respondent No.1 in regard to certain disputes connected to JV Agreement which arose between them. An objection was taken by the respondent No.1 herein (who was the defendant) that the suit was not maintainable in view of Section 8 of the Arbitration & Conciliation Act, 1996. The application was



allowed and the suit was dismissed with the liberty to the confirming party/petitioner No.1 to agitate the claims by way of arbitration. Under Section 14 of the Limitation Act, the period before a Court which is not competent to determine the issue, has to be excluded for the purpose of calculation of limitation. Furthermore, it is a mix question of facts and law whether the various disputes which have been raised in the present proceedings are barred by limitation. In the case of Vidya Drolia (supra) it was observed that the question of limitation, is a mixed question of fact and law and only in very limited category of cases, where there is no vestige of doubt the claim is ex-facie time barred or that the dispute is non-arbitrable, the Court may decline to make a reference. If there is a slightest doubt, the rule is to refer the dispute to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the Arbitral Tribunal. Therefore, this point of limitation cannot be considered under Section 11 of the A&C Act, 1996 and may be agitated by the parties before the learned Sole Arbitrator.

17. The second objection agitated is that the dispute is not arbitrable as it is the NCLT which has the subject jurisdiction. However, the scope of proceedings under Insolvency & Bankruptcy Code, 2016 is specific essentially pertaining to the bankruptcy of a Company. In the present case, the disputes which have been raised do not come within the jurisdiction of NCLT and it cannot be said that the disputes herein are non-arbitrable.

18. The third challenge which has been made is that there is improper joinder of parties. It is claimed that petitioner No.1 as per the Joint Venture Agreement, was only a confirming party as is clearly evident from the definition of "Parties" in the opening paragraph of JV Agreement which



states that "*parties shall mean collectively Prime Maxi Promotion Services Pvt. Ltd., AHMPL and DOWAGER Trust and party means any one of them as relevant to the context but does not include the confirming party*" which is the petitioner No.1. It is claimed that since petitioner No.1 was only a confirming party, it was not bound by the terms of the Contract of the Joint Venture and therefore cannot be termed as a signatory and cannot claim the benefit of the Arbitration Clause as contained in Clause 15.12 of the Joint Venture Agreement.

19. *Sub-section (3) of Section 7 of the A&C Act* requires the Arbitration agreement to be in writing. *Sub-section (4) of Section 7 of the A&C Act* further provides that that an arbitration agreement is in writing if it is contained in:

- (a) a document signed by Signature parties;*
- (b) an exchange of letters, telex, telegrams or other means of telecommunication (including communication through electronic means), which provide a record of the agreement; or*
- (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

20. *Sub-section (5) of Section 7 of the A&C Act* also provides that a reference in a contract to a document containing the arbitration clause would also constitute an Arbitration Agreement if the contract is in writing and reference to the Arbitration Agreement is such so as to make the arbitration clause a part of the contract.

21. The legislative intent in postulating that an Arbitration Agreement must be in writing is to ensure that the existence of the Agreement is not



brought into question. Undeniably, the rule is that a non-signatory cannot be compelled to arbitrate and there can be no assumption that the said party has acceded to arbitration. However, the said rule is not inflexible and surrounding circumstances and documents need to be considered to ascertain if there exists any document to conclude that the party had acceded to arbitration.

22. *In Cheran Properties Ltd. v. Kasturi & Sons Ltd.* (2018) 16 SCC 413 the Apex Court had observed: "*the evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.*" The Courts in different jurisdictions have evolved various principles on the basis of which, in certain exceptional circumstances non-signatories may be compelled to arbitrate.

23. The Apex Court in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.* (2013) 1 SCC 641 referred to two theories that could be applied to compel non-signatories to an arbitration agreement to arbitrate. These are:

- (i) *The first Theory is of Implied Consent*, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.
- (ii) The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture



relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

24. These twin tests have been laid down, which have been applied in various cases. In the present case, even if the confirming party was not bound by the terms of the Contract in the sense that there was no liability affixed for it under the Contract but the very fact that it has signed the JV Agreement containing the Arbitration Clause, implies that it consented to all the disputes being decided through arbitration and the implied consent to the arbitration clause can be inferred.

25. This aspect becomes significant from the intention of the parties as was reflected when an objection was taken about the non-maintainability of a suit under Section 8 of the Act, in the suit and the said application was allowed giving liberty to the petitioner no.1 to seek redressal of disputes through Arbitration. It is clearly evident that respondent No.1 had itself agitated about a binding arbitration agreement between petitioner No.1 and other parties when it took an objection about there being an existence of Arbitration Clause between the parties.

26. Undeniably the Joint Venture Agreement is signed by all the four parties to the present petition and the said Agreement contains a Clause 15.12 providing for resolution of the disputes through arbitration which is therefore, held to be binding on all the parties.

27. The last argument which has been taken is that Notice of Invocation of arbitration dated 02nd April, 2021 was addressed by the two petitioners in the present petition only to respondent No.1. The Notice was not addressed to respondent No.2 and the request for appointment of Sole Arbitrator was



also made solely to respondent No.1. From the bare perusal of Notice of Invocation it is evident that it was never served upon respondent No.2 nor was it asked to appoint the Arbitrator.

28. This argument though may seem to have some merit, but the close scrutiny of the Notice of Invocation dated 02nd April, 2021 shows that the copy of the Notice of Invocation was sent to respondent No.2 as well. The objective of a Notice of Invocation is essentially to put the parties to a Notice that any one or more of them intend to take their disputes to arbitration and that arbitrator for the purpose may be appointed. Even if the Notice was sent to respondent No.2 through CC, it cannot be said that respondent No.2 was not made aware of the intention of the petitioners to resolve their dispute through arbitration. Similar facts as in hand came up for consideration in Prasar Bharti vs. M/s Multi Channel (India) Ltd. 2005 (Supp) ArbLR 245, where the Notice of Invocation under Section 21 was addressed to Director General, the appointing body but the copy was endorsed to the respondent. In that context, it was observed that such Notice would be sufficient compliance of the provisions of Section 21.

29. In the present case as well the hyper technicality of the name of the respondent No.2 being not mentioned in the title but in a CC cannot be agitated to assert that respondent No.1 was not put to Notice about Invocation of Arbitration.

30. From the above discussion, it may be concluded that there exists an Arbitration Agreement between the parties and the arbitrable disputes have been raised, which may be agitated before the learned Arbitrator in terms of Clause 15.12 of Joint Venture Agreement.



31. For the aforesaid reasons, the petition allowed with the following directions:

- a) Hon'ble Ms. Justice Usha Mehra (Retired Judge) High Court of Delhi (Mobile No.9818421144) is appointed as learned Arbitrator.
- b) At the suggestion of learned Counsel for the parties, it is directed that the arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi.
- c) The learned Arbitrator is requested to make a declaration in terms of Section 12 of the Act prior to entering upon the reference.
- d) The remuneration of the learned Arbitrator will be computed in terms of Schedule IV of the Act or as agreed by the parties and the arbitrator.

32. The rights and contentions of the parties are left open, including any plea raised by the respondent as to the limitation, arbitrability of any particular claim or impleadment of a party which may be agitated before the learned Arbitrator. Any observations made herein are not an expression on merits.

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 10, 2022

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