

**In The High Court at Calcutta
Original Civil Jurisdiction
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

**AP NO.72 OF 2023
Tantia Constructions Limited
VS.
Mather and Platt Pumps Limited and another**

For the petitioner	:	Mr. Swatarup Banerjee, Mr. Sariful Haque, Mr. Hareram Singh
For the respondents	:	Mr. Jishnu Chowdhury, Mr. Aritra Basu, Mr. Ritoban Sarkar, Mr. Debanjan Ghosh
Hearing concluded on	:	10.05.2023
Judgment on	:	17.05.2023

The Court:

1. The petitioner has filed the present application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) for reference of a dispute which has arisen between the parties in connection with a Memorandum of Understanding (in brief, the “MOU”) and connected Joint Venture Agreement (for short, “JVA”), both dated February 3, 2014.
2. As per Clause 16 of the MOU, both parties shall make efforts to settle the disputes or differences amicably if any. If disputes are not resolved through amicable settlement, the same shall be referred to the sole arbitrator mutually selected by both the parties. The decision of the arbitrator shall be final and binding on both the parties. Arbitration

proceeding shall be conducted in accordance with the 1996 Act (the year wrongly mentioned in the agreement as “1998”) and the venues of arbitration shall be in Kolkata.

3. There is no contention in principle that disputes, which are otherwise arbitrable, have arisen between the parties within the purview of the arbitration clause. However, the respondents contend that the arbitration clause in the JVA dated February 3, 2014 is no longer existent in view of Clause 10.1 of a subsequent agreement dated November 29, 2018 entered into between the parties on the self-same joint venture. The said clause reads as follows:

“ 10.1 The Agreement represents the entire understanding of the parties with respect to the subject matter contained herein and supersedes all prior discussions, understandings and agreements between the Parties with respect thereto any and all agreements, representations, and contracts made or dated prior hereto (whether written or oral) concerning the subject matter hereof.”

4. Learned counsel for the respondents places reliance on Section 62 of the Indian Contract Act, 1872 which provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.
5. In the present case, it is argued, the subsequent agreement dated November 29, 2018 specifically supersedes all previous agreements, discussions, understandings, etc. including the first JVA dated February 2, 2014. Hence, the arbitration clause in the JVA cannot be enforced.

6. Learned counsel appearing for the petitioner argues that the alteration to the JVA does not amount to novation of the same.
7. Moreover, it is contended that the agreement dated November 29, 2018 has to be read as being intrinsically interlinked with the JVA. A still-subsequent document, captioned as “Amendment To Joint Venture Agreement (For Joint and Several Liability of Joint Venture Partner)” is relied on by the petitioner to argue that even in the same, which was executed between the parties subsequent to the November 29, 2018 agreement, the JVA and the connected Joint Venture Declaration have been relied on. This indicates that all the three documents referred to above as Joint Venture agreements or amendment thereto, are part and parcel of the same joint venture. Hence, the arbitration clause in the initial MOU covers disputes arising out of all.
8. Learned counsel for the petitioner cites *Choloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and Others* [(2013) 1 SCC 641] and *Ameet Lalchand Shah and Others Vs. Rishabh Enterprises and Another* [(2018) 15 SCC 678] in support of the proposition that where various agreements constitute a composite transaction, the court can refer the disputes to arbitration existing between the signatory or non-signatory parties if all ancillary agreements between the parties are relatable to a principal agreement and performance of one agreement is so intrinsically interlinked with the others that they are incapable of being performed without performance of the others or severed from the rest.

9. Citing such proposition, it is argued that the parties here are on a still better footing, since the present parties were signatories to all the documents.
10. Learned counsel for the petitioner also relies on *Sanjiv Prakash Vs. Seema Kukreja and Others*, reported at (2021) 9 SCC 732, where it was held that a disputed question of novation of the agreement containing the arbitration clause is non-determinable by the court at the stage of reference under Section 11 of the 1996 Act.
11. Learned counsel for the respondents submits that, unlike in *Chloro Controls (supra)*, here the different agreements were entered into on different dates and the 2018 documents explicitly supersedes the 2014 MOU. Moreover, in the said report, the same transaction was broken up into separate agreements under different heads, but pertained to the same main project.
12. Unlike *Ameet Lalchand Shah (supra)*, here the JVA or the MOU were not the mother/principal agreements. The subsequent agreements were entered into independently and the clear language of the 2018 agreement superseded all prior discussions, understandings and agreements, written or oral, on the subject matter, including the 2014 JVA and MOU, the latter of which contained the arbitration clause.
13. Learned counsel for the respondents also seeks to distinguish the judgment of *Sanjiv Prakash (supra)* on facts.
14. Upon hearing learned counsel, the first question which begs consideration is the true purport of the expression “alter” in Section 62 of the Contract Act. Applying the doctrine of *noscitur a sociis*, the term “alter” is to be attributed the meaning derived from the previous

expressions used in the Section for similar action. The other two expressions are “substitute a new contract for it” and “rescind”. In the caption of the section, the terms “novation”, “rescission” and “alteration” have been used in the same breath. Construed in such perspective, “alter” cannot mean a minor or cosmetic change but must be a change hitting at the root of the contract, altering the essentials of the earlier contract to bring forth a novated agreement for all practical purposes. Even the illustrations to Section 62 exemplify such view.

- 15.** Scrutinizing the subsequent agreement dated November 29, 2018 closely, certain features of the same stand out in the present context.
- 16.** First, the said agreement refers to the initial JVA and a supplementary JVA dated December 4, 2014 recording the office address of the JV and the contract value of “the work”. It is stated that the petitioner TANTIA “was to perform the following works” as specified therein. However, it was “yet to perform” some of the activities in compliance with its “obligation”. The 2018 agreement relied on by the respondents further goes on to mention that the petitioner foregoes its right to receive any payment, if any, which it was “yet to receive from the JV” pursuant to the invoices raised for the “work done”. It also acknowledged that it shall not initiate any proceedings for the recovery of the amount which it had waived in view of the clause. All such factors unerringly indicate that it was referring to the JVA and the MOU, which were the genesis of the entire “obligations” and “the work” to be done.

- 17.** Secondly, Clause 10.1 spoke about supersession of the entire understanding, prior discussions, agreements etc. “concerning the subject matter hereof”. The subject matter thereof was not the origination of the joint venture project but an alteration of the ratio of participation in the joint venture itself. Thereby, the petitioner waived certain rights and conferred them on the respondents, *but all flowing from the original joint venture, of which the parent agreements were the JVA of 2014 and the connected MOU.*
- 18.** A third aspect of the matter is required to be considered as well. In its supplementary affidavit, the petitioner has annexed another agreement dated January 31, 2019, which is even subsequent to the 2018 document cited by the respondent. Notably, the said 2019 document provides, in Clause 7 thereof, as follows:
- “7.** *This Agreement form for joint and several liability is an integral part of the Joint Venture Declaration and Contract awarded to the partnership.”*
- 19.** Thus, it can be seen that an agreement entered into between the parties even after the 2018 document again refers to the JVA and connected Declaration/MOU, which presupposes the continuance of the MOU containing the arbitration clause till after the 2018 document.
- 20.** The JVA mentions in Clause 6 of the same that the Agreement to form it (the MOU) is entered on the same day. Clause 7 says that the said Agreement form for joint and several liability is an integral part of the Joint Venture Declaration and will be finalized in case the Contract is

awarded to the partnership/legal entity prior to the signature thereof. Hence, the JVA and the MOU are integral parts of each other.

- 21.** All the subsequent agreements and documents, copies of which have been annexed to the pleadings and relied on by both parties, pertain to the Joint Venture entered into by the parties by virtue of the MOU and JVA dated February 3, 2014.
- 22.** Thus, for a proper and complete adjudication of any dispute arising in connection with the Joint Venture, it is essential that all the connected documents, which are parts of the same transaction, are to be looked into. The cause of action as pleaded in the invocation under Section 21 of the 1996 Act dated January, 4, 2023, reiterating the invocation dated November 25, 2022, pertains to the entire dispute, which cannot be segregated into separate agreements.
- 23.** All the agreements-in-question and the components of the dispute are intrinsically and inextricably interlinked with each other, as contemplated in *Chloro Control (supra)*. The Supreme Court, in the said case, went so far as to hold that even the fact that a party to the arbitration agreement was non-signatory to one or other agreement may not be of much significance.
- 24.** Although there may be subtle differences between the language and purport of the different agreements of *Chloro Control (supra)*, *Ameet Lalchand Shah (supra)* and the present case, the principles laid down in the said judgments are equally binding in the facts of the instant *lis*.
- 25.** Applying the test laid down in *Sanjiv Prakash (supra)*, following *Vidya Drolia Vs. Durga Trading Corpn. [(2021) 2 SCC 1]* and *Duro Felguera,*

S.A. Vs. Gangavaram Port Ltd. [(2017) 9 SCC 729, there cannot be any manner of doubt that detailed arguments on whether the MOU containing the arbitration clause in the present case has or has not been novated cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. Such an inquiry would lead to detailed interpretation of all the connected documents as well as appreciation of detailed evidence, which is entirely beyond the limited domain of a court referring the dispute to arbitration under Section 11 of the 1996 Act, particularly in view of sub-sections (6) and (6A) thereof.

- 26.** Hence, the objection taken by the respondents is turned down.
- 27.** The disputes, being otherwise arbitrable and falling within the purview of the arbitration clause, ought to be referred to arbitration under Section 11 of the 1996 Act, as there does not appear to be any amicable resolution between the parties.
- 28.** Accordingly, A.P. No. 72 of 2023 is allowed, thereby appointing Justice Indira Banerjee, a former Judge of the Supreme Court of India (Mobile No. 9560808777), as the sole arbitrator to resolve the disputes between the parties, subject to obtaining her consent under Section 12 of the Arbitration and Conciliation Act, 1996.

(Sabyasachi Bhattacharyya, J.)