

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

% **Date of order : 14th February, 2023**

+ **ARB.P.1227/2022**

MR SAT NARAIN GUPTA Petitioner
Through: Mr.Govind K. Rishi and Mr.Rohit
Taneja, Advocates
versus

MR SUNIL MITTAL & ANR. Respondents
Through: Mr.R.V. Prabhat, Advocate

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The present petition has been filed by the petitioner under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act, 1996") seeking appointment of an Arbitrator for redressal of disputes arising between the parties, pertaining to the Memorandum of Family Settlement (hereinafter referred to as "MoU") dated 31st May, 2020.

Facts of the Case

2. The parties desired to redevelop/reconstruct the property bearing No. 39B/77, Punjabi Bagh West, Near ISKON Temple, New Delhi-110026, i.e., the subject property, and thus entered into a Collaboration Agreement with a Builder on 31st May, 2020.

3. Prior to the reconstruction of the subject property, the petitioner was the owner and occupant of the first floor, while the respondents were co-owners of the ground floor. The petitioner and the respondents signed an MoU on 31st May, 2020 to document and adhere by the provisions guiding the redevelopment of the subject property.

4. According to the aforementioned MoU, it was agreed that the Builder will construct a stilt parking, ground floor, first floor, second floor and third floor over the subject property at his own costs and expenses and in exchange will retain the second floor of the newly constructed building and would pay a sum of Rs. 25,00,000/- to the parties, equally.

5. According to clause 1.b of the MoU, it was also agreed that the stilt parking would be shared by all inhabitants, the petitioner would own the ground level and 50% of the first floor, and the respondents would own the third floor with terrace and 50% of the first floor.

6. According to clause 1.e of the MoU between the petitioner and the respondents, the petitioner will sell/convey/transfer the 50% of his ownership and interest in the first floor of the newly constructed building over the property by the Builder, which shall be in joint ownership as mentioned above, to the respondents, upon receipt of mutually agreed consideration of Rs. 67,50,000/- from the respondents plus Rs. 12,50,000/- from the Builder. That as per agreed terms in the said clause, the agreed amount was payable on or before, the Builder completed the construction and furnished the building, to the satisfaction of the petitioner and the respondents.

7. Furthermore, clause 1.d of the MoU stipulates that the respondents cannot take ownership of the first floor until the requirement outlined in clause 1.e is met, and that the first floor cannot be utilised or enjoyed in any way by the respondents or anyone acting on their behalf. It was expressly agreed that the first floor would remain locked until the absolute conformity with clause 1.e. as mentioned above is achieved.

Submissions on behalf of the Petitioner

8. It has been submitted on behalf of the petitioner that post re-construction of the building, in accordance with the collaboration agreement dated 31st May, 2020, the respondents have egregiously failed to comply with the conditions of the MoU dated 31st May, 2022 and have willfully neglected to pay the agreed-upon consideration as per clause 1.e of the MoU.

9. It is further submitted on behalf of the petitioner that in contravention of clause 1.d of the MoU, not only the respondents have violated the conditions of the MoU, but also are illegally and violently attempting to seize ownership of the first floor of the newly constructed building.

10. It is submitted on behalf of the petitioner that respondents being under legal and contractual obligation to discharge the liability of Rs. 1,67,50,000/- along with interest on outstanding amount, the petitioner issued a notice dated 8th September, 2022 to discharge the aforementioned liability within 7 days, commencing from the receipt of the notice.

11. It is further submitted on behalf of the petitioner that the petitioner being aggrieved by the illegal act of the respondents was constrained to invoke the arbitration clause, i.e., clause 5 of the MoU, in accordance

with Section 21 of the Act, 1996 vide the same notice dated 8th December, 2022, which is reproduced hereunder:

"5. That this understanding has taken place at New Delhi and parties agree that in event of any dispute arising out of the present agreement, it shall be adjudicated by arbitration by sole arbitrator, at Delhi International Arbitration Centre, appointed by the court of relevant jurisdiction and language will be English and governing laws will be of Indian Arbitration and Conciliation act. Courts at Delhi shall have the exclusive jurisdiction."

12. It is submitted on behalf of the petitioner that in their reply dated 19th September, 2022, the respondents denied all of the petitioner's claims despite having received the aforementioned notice.

13. It is submitted on behalf of the petitioner that respondents' non-compliance with the agreed terms and conditions of the MoU is wholly arbitrary, fraudulent, unjust, unfair, irrational, and contrary to the spirit of the MoU.

Submissions on behalf of the Respondent

14. Learned counsel appearing on behalf of the respondent submits that the petitioner has filed the current petition prematurely, since the cause of action has not yet occurred.

15. It has been submitted on behalf of the respondent that the Builder has previously filed a petition under Section 11 of the Act, 1996, **ARB. P. No. 103/2022** captioned as "Rajesh Gupta vs. Sat Narain Gupta & Ors.", in which the petitioner herein is also defined as respondent no. 1. It has been further submitted that the matter was resolved vide order dated 30th March, 2022. This Court referred the case to DIAC for appointment of

arbitrator. However, neither the Builder, nor the petitioner has paid the necessary fees for the appointment of an arbitrator before DIAC.

16. It has been submitted on behalf of the respondent that the consideration amount to be paid by the respondents pursuant to the MoU dated the 31st May, 2020 arises only when the construction according to bylaws is complete and the share from the petitioner can be transferred to the respondents herein through the registration process.

17. It is submitted on behalf of the respondent that the petition is premature and there is no basis for the appointment of an arbitrator at this stage. It is further submitted that section 11 of the Act, 1996 stipulates that the right to appoint an arbitrator may only be used when the parties have entered into a valid arbitration agreement. It is further submitted that in the absence of such an agreement, the appointment of an arbitrator would be superfluous and beyond the scope of the Court's jurisdiction. The petitioner cannot seek the appointment of an arbitrator if there is no cause of action and the time/event for exercising/invoking the arbitration clause in the MoU has not occurred. Since, the underlying disagreement depends on the fulfilment of another contract between the petitioner, respondents, and the Builder, this contract cannot be enforced in any way.

18. It is further submitted that according to Section 32 of the Indian Contract Act of 1872, such dependent contracts cannot be enforced until the event has occurred. In this instance, the Builder has not yet erected the structure in accordance with the parties' agreement. Unless that condition is met, the MoU does not require performance or payment to the petitioner. Without a contract, there could be no arbitration agreement that is enforceable.

19. It is submitted on behalf of the respondent that due to the fact that the arbitration clause is incorporated in a contract that is not enforceable until the earlier Builder contract is performed, any attempt to enforce the arbitration clause prior to the execution of the former Builder contract, would be premature and without merit. Therefore, the petition should be rejected being devoid of any merit.

20. In view of the submissions made above, learned counsel for the respondent submits that there is no basis for an arbitrator to be appointed on the petitioner's part. The petitioner has failed to offer any information on the nature of the issue that is to be referred to arbitration.

Findings and Analysis

21. Heard the learned counsel for the parties and perused the record.

22. In view of the arguments advanced by the parties, it is imperative to peruse Section 16 of the Act, 1996 which states that the arbitration clause in the contract must be evaluated separately from the other provisions of the contract in the event of a challenge to its existence or legality. The said provision is reproduced hereunder:

“16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence;

however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.”

(emphasis supplied)

23. Section 16(1) of the Act, 1996 makes it clear that the arbitration clause, which is a part of the contract, has to be treated as an agreement independent of the other terms of the contract while considering any objection regarding the existence or validity of the arbitration agreement. According to Section 16(1)(b), even if the Arbitral Tribunal rules that the contract is unlawful, the decision should not render the arbitration provision itself null and unenforceable as a matter of law. According to Section 16(1)(a) of the Act, 1996 an arbitration clause is presumed to exist and must be considered as an agreement apart from the rest of the contract. Despite a determination that the contract is invalid, the arbitration clause remains in effect under Section 16(1)(b) of the Act, 1996.

24. The interpretation of Section 16 of the Act, 1996 clearly establishes the law that the tribunal has the authority to rule on its own jurisdiction.

To that reason, a contract's arbitration clause is considered a separate agreement from the rest of the contract for all intents and purposes to the degree, that it survives the termination of the original contract, the doctrine of separability shields the arbitration agreement from any faults in the main contract.

25. In view of the settled law, it is evident that the arguments advanced by the respondent cannot come to its rescue. Since, the arbitration clause constitutes an independent agreement, therefore, this Court is inclined to allow the prayer made by the petitioner and refer the matter to the Delhi International Arbitration Centre for redressal of disputes between the parties. Hence, the following order:

ORDER

- (i) Since, both the parties have consented for appointment of sole arbitrator, the Delhi International Arbitration Centre is directed to appoint a sole arbitrator from the panel of arbitrators to adjudicate the disputes between the parties which have arisen under the MoU dated 31st May, 2020, under the aegis of the Delhi International Arbitration Centre;
- (ii) The arbitration shall be conducted under the Delhi International Arbitration Centre. The sole arbitrator shall ensure compliance of necessary disclosure under section 12(1) of the Arbitration and Conciliation Act, 1996;
- (iii) The fee of the appointed sole arbitrator shall be in accordance with the schedule of fees prescribed under the Delhi International Arbitration Centre (DIAC)

(Administrative Cost And Arbitrators Fees) Rules, 2018;

- (iv) All contentions of the parties are expressly kept open including any preliminary objections which may be raised by the parties before the sole arbitrator;
- (v) The parties shall appear before the Coordinator, Delhi International Arbitration Centre, New Delhi on 21st February, 2023.

26. A copy of the order be forwarded to Delhi International Arbitration Centre (DIAC) for information and necessary compliance.

27. With the aforesaid directions, the instant petition is disposed of in the aforesaid terms along with pending applications, if any.

28. The order be uploaded on the website forthwith.

FEBRUARY 14, 2023
SV/UG

CHANDRA DHARI SINGH, J

[Click here to check corrigendum, if any](#)