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

Reserved on: 19.02.2019
Pronounced on: 27.03.2019

\+ **FAO (OS) (COMM) 205/2018 & C.M. APPL.35734-35736/2018**
BHASIN INFOTECH & INFRASTRUCTURE PVT. LTD.
..... Appellant
Through : Sh. Sandeep Sharma, Sh. Ravinder Singh, Ms. Raveesha Gupta, Sh. Lakshay Virmani and Sh. Rishabh Surana, Advocates.

versus

AHMAD MAIN AND ANR. ..... Respondents
Through : Sh. Kshitij Sharda and Sh. Shubhanker Sharda, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

MR. JUSTICE S. RAVINDRA BHAT
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1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "the Act") impugns the dismissal of the appellant's petition under Section 34 of the Act. The petition had questioned an arbitral award dated 27.01.2018 of a Sole Arbitrator adjudicating the disputes between the parties in relation to the Letter of Allotment dated 22.12.2009.

2. The facts are that by a letter of allotment dated 22.12.2009, the appellant (hereafter "Bhasin") agreed to allot to the respondents commercial shop bearing No. 104 on LG floor with an approximate Super Area of 705.09 sq. ft. in the shopping mall known as 'Grand Venezia' at Greater

Noida, constructed by Bhasin on Plot No. SH-3, Site-IV, Industrial Area, Surajpur, Greater Noida (UP). The respondents had paid an amount of ₹ 55 lacs to Bhasin towards the sale consideration of ₹ 1,05,76,350/- and agreed to pay balance consideration and other additional charges/IFMS @ ₹ 500/- per sq. ft. on offer of possession of the unit, calculated on the basis of super area. Simultaneously, with the execution of the above Letter of Allotment, the parties executed a Memorandum of Understanding (MOU) the same day (22.10.2009), whereby Bhasin agreed to pay to the respondents a sum of ₹ 55,000/- per month till handing over of the possession of the shop, as monthly return. By a letter dated 15.07.2015 Bhasin called upon the respondents to pay ₹ 58,10,151/- towards balance payment for allotment. They expressed their readiness and willingness to make the payments after adjusting the amount of ₹ 11,55,000/- towards unpaid assured return amount calculated till August, 2015, by two e-mails. Bhasin, by letter dated 03.08.2015, called upon the respondents to pay the demanded amount within 15 days of the said letter, failing which it threatened to cancel the allotment. The ensuing disputes led to the filing of an application under Section 9 of the Act [OMP(I) No. 477/2015] before this Court. On 02.09.2015, this court, after noting that parties would explore the possibility of an amicable settlement, recorded the undertaking on behalf of Bhasin that no precipitative action shall be taken by it against the shop in question. As the disputes could not be settled, on application under Section 11 they were referred to arbitration. The arbitration proceedings, resulted in the award dated 27.01.2018. The learned single judge dismissed the petition filed by Bhasin.

3. Mr. Sharma, appearing for Bhasin argued that on the date of pronouncement, it had filed an application under Section 12 read with Section 13 of the Act calling upon the Sole Arbitrator to withdraw himself as the Arbitrator. The application was filed because Bhasin claimed knowledge that the Arbitrator had appeared in some other connected petition (being Arbitration Petition No. 467/2017 titled *Golden Chariot Recreations Pvt. Ltd. v. Bewealthy Properties Pvt. Ltd. & Ors.*), in which Bhasin's three Group Companies were respondents. It was submitted that in view thereof, Entry No. 21 of the Fifth Schedule to the Act was attracted giving rise to justifiable doubts on the independence and impartiality of the Sole Arbitrator.

4. Apart from this, the second ground urged was that the disputes were not arbitrable because the arbitration clause was not part of the allotment letter; despite objection, the sole arbitrator ruled otherwise. Since the parties had not entered into an arbitration agreement, the tribunal's award was entirely without jurisdiction.

5. The learned Single Judge's finding on the first point are as follows:

> *"9. The Arbitrator had been appointed by this Court on 4th November, 2016. The parties had made their final arguments before the Sole Arbitrator on 13th December, 2017. On a request being made on behalf of the petitioner for deferment of pronouncement of the Award on the ground of the petitioner wanting to explore the possibility of an amicable settlement, the Arbitrator fixed the date of pronouncement of the Award as 27th January, 2018. It is only on 27th January, 2018 that the application under Sections 12 and 13 of the Act seems to have been filed before the Arbitrator. Apart from the fact that the apprehension/doubt on the impartiality or independence of the Sole Arbitrator being expressed by the petitioner is too remote in the present case, I find that the above sequence of events*

would show that this application was filed merely to somehow delay the culmination of the arbitral proceedings into an Award and was mala fide in nature. It is not the case of the petitioner that the Arbitrator was aware of the relationship between the petitioner herein and the respondents in Arbitration Petition No. 467/2017. Even otherwise, from the Impugned Arbitral Award or other proceedings in the arbitration, it could not be shown by the petitioner if such bias/impartiality or lack of independence was evident in any manner.

10. In HRD Corporation (Marcus Oil and Chemical Division v. GAIL (India) Ltd. (Formerly Gas Authority of India Ltd.) 2017 SCC Online SC 1024, the Supreme Court has considered the distinction between the Fifth and Seventh Schedule of the Act and has held that while the Seventh Schedule covers situations which are more serious being non-waivable, the Fifth Schedule lists situations that may give rise to doubts as to the Arbitrator's impartiality or independence. The two Schedules to the Act are to be construed in the light of the general principles contained therein that every Arbitrator shall be independent and impartial towards the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the Arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedule.

11. In the present case, the only allegation made against the Sole Arbitrator being based on Entry No. 21 of the Fifth Schedule, the same therefore, is not an absolute bar or disqualification for the Arbitrator.

12. Having considered the allegations made, even on facts, the same cannot give rise to even an iota of doubt against the impartiality or independence of the Arbitrator in question."

6. It is not - and for that matter, cannot be - disputed that the group companies of the appellant Bhasin were represented by counsel, when the arbitrator appeared on behalf of the petitioner in Arbitration Petition No. 467/2017. The circumstances set out in Entry 21 to the Fifth Schedule, states as follows:

> ***"Previous services for one of the parties or other involvement in the case***
>
> *20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.*
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> *21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter. "*

Section 13, which sets out the challenge procedure, to the extent it is relevant, states as follows:

> ***"13. Challenge procedure.***
> *1. Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*
> *2. Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in subsection (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.*
> *3. Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge."*

7. This court agrees with the findings of the learned Single Judge. It is not as if every relationship becomes suspect; the party concerned has to prove that the relationship leads to justifiable apprehension about bias. In this case, the arbitrator appeared in a proceeding under Section 11; more fundamentally, the hearings in the arbitration had been concluded before that. Bhasin was aware of this, and does not appear to have articulated the objection immediately. It did not act, in any case, within the time prescribed by law, in Section 13(2). In these circumstances, the mere circumstance that Bhasin pointed out this fact on the day the matter was scheduled for pronouncement of award, does not in any other manner vitiate it. Having lost the opportunity of objecting with the relevant material, within the time prescribed, Bhasin could not, on 27.01.2018, complain that the arbitral tribunal was not entitled to publish the award.

8. As to the second issue, i.e the lack of an arbitration clause, we notice that the learned Single Judge dealt with this aspect and found as follows:

> *"17. I have considered the submissions made by the learned senior counsel for the petitioner, however, I find no merit in the same. The MOU dated 22nd December, 2009 clearly makes a reference to the allotment of shop No. 104 as allotted in the Letter of Allotment dated 22nd December, 2009. It further refers to the sale consideration, the advance received by the petitioner towards such allotment and the balance sale consideration payable by the respondents. The two documents, therefore, form part of one single transaction between the parties. The Arbitration Agreement between the parties, as noted above, is contained in clause 44(b) of the Letter of Allotment and is reproduced hereinbelow:*

"44(b) All or any disputes arising out of or touching upon or in relation to the terms of this provisional Allotment Letter including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitrator shall be appointed by the Company. The arbitration proceedings shall be held at an appropriate location in Delhi/New Delhi. The Courts at Delhi alone shall have jurisdiction in all matters arising out of/touching and/or in connection to this letter."

18. A reading of the above would show that all disputes 'in relation to' the terms of the Allotment Letter and the 'respective rights and obligations of the parties' were agreed to be settled through arbitration. In Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors. MANU/SC/0803/2012 : (2013) 1 SCC 641, the Supreme Court had held that the parties may execute different agreements but all with one primary object in mind. In such circumstances, the performance of any one of such agreements may be irrelevant without the performance and fulfilment of the principal or the mother agreement. In cases involving execution of such agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. In such cases, the Court would normally hold the parties to the bargain of Arbitration and not encourage its avoidance.

19. In the present case, the Sole Arbitrator has also considered this issue in detail and has held as under:-

"..... However, it is important to refer to and go through the various terms and conditions of the MoU as well as the letter of allotment to determine the intention of the parties as far as the aforesaid two documents are concerned. The MoU has been executed on 22.12.2009, which is the same date as that of the letter of allotment. In the opening parts of the MoU a reference is made to the application for allotment for the shop in question made by the Claimants to the Respondent and the Respondent's consent to the application-cum-terms and conditions. The facts about the size of the shop, location, total consideration as well as the advance money and receipts thereof are mentioned in the MoU. The liability to pay the balance amount has been stated to be based on the conditions as prescribed under application-cum-terms and conditions. The MoU further states that this balance amount shall be payable at the time of handing over the physical possession of the shop. It emerges clearly from a perusal of the MoU that at various points it refers to the terms and conditions of the allotment of the shop in question. These terms and conditions which are referred in the MoU are the terms and conditions which are enumerated in the allotment letter dated 22.12.2009. In this letter of allotment it has been clearly stated that the allotment is subject to the 'terms and conditions' contained in it. Interestingly, these terms and conditions of allotment also contain clause 44(b) i.e. the arbitration clause agreed between the parties. In addition to this, it is also noteworthy that there is no specific date of handing over the physical possession of the shop in question mentioned in either the letter of allotment or the MoU. Instead the Respondent has taken upon itself the obligation to pay Rs. 55,000/- per month to the Claimants as an assured monthly return till the possession of the shop is handed over to the Claimants.

Further, the arbitration clause is widely worded and encompasses all or any disputes arising out of or touching upon or in relation to the terms of the provisional allotment letter including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties. Even if

the MoU is treated to be an independent and separate document, it is quite apparent by reading the same that the said MoU is 'in relation to' the terms of the provisional allotment letter. The intention of the parties to inextricably connect the two documents is apparent by the use of the term 'in relation to' inasmuch as admittedly and undeniably the MoU is in relation to the terms of the provisional allotment letter, containing the arbitration agreement between the parties. The importance of the phrase 'in relation to' and application thereof has been discussed in detail by the Hon'ble Supreme Court of India in Thyssen Stahlunion GMBH v. Steel Authority of India Ltd. (1999) 9 SCC 334]."

9. This court is of the considered opinion that the findings of the learned Single Judge are sound and do not call for interference. In *K.S. Mian Feroz Shah v. Sohbat Khan and Ors.* AIR 1933 PC 178, it was observed that:

"6. The ground of the Judicial Commissioner's decision in respect of the mortgage of 12th March 1917, was that reading it with the lease of even date, and taking into account the fact that possession had remained all along with the mortgagor, Sohbat, and that there had been other similar transactions between the parties, the mortgage, despite its express terms, which undoubtedly entitled the appellant to possession, should be construed only as a simple mortgage. It is not disputed that at the date of the suit the lease to Sohbat was at an end, and that if the mortgage were, in fact, as well as in form, one with possession, the appellant would be entitled to succeed. Their Lordships find themselves unable to accept the view of the Judicial Commissioner as to the nature of the transaction evidenced by the two documents in question. It is not suggested that there is anything in the Act of 1900, before referred to, which would invalidate a possessory mortgage accompanied by a lease back to the mortgagor, nor do their Lordships think that there is anything in itself suspicions about such an arrangement. The mortgagee may well have preferred to leaves the cultivation of the land in the hands of the mortgagor, being entitled to take possession at any time if the provisions of the

lease were not adhered to. Assuming this to have been one of the conditions upon which the mortgage was agreed to, the mere absence of a formal handing over of the land to the mortgagee, and a handing back by him to the mortgagor in the character of lessee, is, they think, of little significance. The reality of the transaction is, moreover, supported by the mutation in the Government records. Section 92, Evidence Act forbids the admission or consideration of evidence as to the intentions of the parties, or to contradict the express terms of the document : see Balkishen Dass v. Legge (1900) 22 All 149 and their Lordships think that no presumption can legitimately be drawn from the fact that there had been previous transactions between the parties of a similar character.

7. On the whole their Lordships are of opinion, that there is no reason to construe the mortgage as other than a possessory mortgage, as it clearly purports to be, and that the term of the lease having expired, the appellant is entitled to possession. They think therefore that the appeal by Mian Feroz Shah should' succeed : that the decree of the Judicial Commissioner, dated 8th March 1930, should be set aside : that in lieu-thereof a decree should be made giving the appellant possession as mortgagee of both the 1,011 kanals 8 marlas and the 140 kanals which he claims, with costs throughout against all the respondents: and that the appeal of Nawab Mohammad Akbar Khan should be dismissed, the appellant therein paying the costs of the respondent Mian Feroz Shah, before this Board. They will humbly advise His Majesty to this effect."

10. Treitel in Law of Contracts, 9th Edition, 1995, pages 175-176, states that a transaction such as a lease of immovable property can be made by more than one instrument and one single contract may be incorporated in more than one document. Referring to this, a Division Bench of the Delhi High Court in *Mercury Travels (India) Ltd. & Others v. Shri Mahabir Prasad and Anr.*, (2001) 89 DLT 440, observed that:

"27. Many transactions take place by the entry into a series of contracts, for example a sale of land involving an exchange of identical contracts, a sale and lease-back of property; an agreement of sale and a bill of sale and so on. In such cases, where the transaction is in truth one transaction all the contracts may be read together for the purpose of determining their legal effect. In Smith v. Chadwick, Jessel M.R. said:

"...when documents are actually contemporaneous, that is two deeds executed at the same moment,... or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are treated as one deed; and of course one deed between the same parties may be read to show the meaning of a sentence and may be equally read, although not contained in one deed but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose."

28. The rationale behind this principle was explained by Fletcher Moulton L.J. in Manks V. Whiteley as follows:

"...where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the

hypothetical operation of one of the deeds by itself without the others."

11. The judgment of the Supreme Court in *M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd.* 2009 (7) SCC 696 cited by learned counsel for Bhasin, lays down the conditions in which an arbitration clause contained in one document can be considered incorporated in another. That was a case in which the parties to the two documents were not the same, and the arbitration clause contained in the main contract was held inapt for the purposes of resolution of disputes under a sub-contract. In the present case, where the documents in question are contemporaneously executed between the same parties and part of the same transaction, this Court is of the opinion that the conditions laid down therein are fulfilled.

12. In view of the above authorities, it is held that as the subject matter of the MOU and the letter of allotment was identical, merely because one did not incorporate an arbitration clause whereas the other did, did not invalidate the arbitral proceedings for want of jurisdiction.

13. Learned counsel for Bhasin lastly argued that neither the MoU nor the letter of allotment were duly stamped or registered, and could, therefore, not have been taken into account by the arbitrator. He relied upon the judgment in *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd.* 2011 (14) SCC 66. From the record, it appears that this defence was neither taken before the arbitrator, nor argued before the learned Single Judge. This Court does not consider it appropriate to permit such a ground to be raised for the first time in an appeal against dismissal of a Section 34 petition. In any event, the *SMS Tea Estates (supra)* judgment pertains to the enforceability of

an arbitration agreement contained in an unregistered and unstamped agreement, which is not the question in the present case.

14. For the foregoing reasons, this appeal is without merit and, consequently, dismissed.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

MARCH 27, 2019