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Reserved on 30.09.2020

Delivered on 22.10.2020

Court No. - 10
Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 143 of 2019
Applicant :- M/S Wise Industrial Park Ltd.
Opposite Party :- Uttar Pradesh State Industrial Development Corporation Ltd. And Another
Counsel for Applicant :- Gunjan Jadwani
Counsel for Opposite Party :- Anadi Krishna Narayana,Swapnil Kumar

Hon'ble Rohit Ranjan Agarwal,J.

1. Heard Sri Anurag Khanna, learned Senior Counsel, assisted by Ms. Gunjan Jadwani, learned counsel for the applicant and Sri Swapnil Kumar, Advocate along with Sri Sudhanshu Kumar, learned counsel for the respondents.

2. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed for the appointment of arbitrator invoking the arbitration clause, as provided in the Promoter's Agreement dated 19.07.1993.

3. Facts in brief, of the case which is admitted to both the parties are, that State of Uttar Pradesh acquired 800 acres of land at Masuri Gulaoti Industrial Area comprising of Village Dehra, Amapur, Lodha, Raoli, Shekhupura, Khichra, Pargana Dasna, Tehsil Hapur, District Ghaziabad. The land so acquired was conveyed to Uttar Pradesh State Industrial Development Corporation Limited (for short “UPSIDC”) for the purpose of industrial development.

4. UPSIDC decided to set up and develop an “Agro Industrial Park” in financial collaboration with the company associated with the said sector on 400 acres of land out of total acquired land.

5. On 19.07.1993, respondent no. 1, UPSIDC entered into a

Promoter's Agreement with one M/s. Western India Industrial Technologies Limited (for short “WIITL”). According to the agreement, 400 acres of land was to be developed by engaging in financial collaboration with the co-promoter WIITL. As per the agreement, UPSIDC and WIITL agreed to form a public limited company within three months of the signing of the agreement. On 30.08.1993, a joint venture company in the name of Western India Industrial Park Limited (for short “WIIPL”) was formed. The equity participation of WIITL and UPSIDC was in the ratio of 89% and 11%, respectively.

6. Thereafter, on 15.05.1995 WIITL executed a deed of assignment, assigning all its rights over 89% of equity held by it in WIIPL in favour of one M/s. Western India Services and Estate Limited (for short “WISEL”). A supplementary agreement was executed on 24.01.1996 between UPSIDC and WISEL, replacing the name of WIITL with WISEL as co-promoter, while all the terms and conditions of the Promoter's Agreement remained the same and equity participation of WISEL and UPSIDC stood as 89% and 11%, respectively. While these, change of name of co-promoter was going on, the Regional Manager of the UPSIDC entered into a license agreement with the joint venture company WIIPL for setting up Agro Industrial Park on 400 acres of land. This agreement was followed by a supplementary license agreement executed on 09.02.1998 between UPSIDC and the joint venture company WIIPL to modify certain terms in the original lease agreement. On 15.04.1998, name of the joint venture company WIIPL was changed to Wise Infrastructure Limited. This name was again changed on 25.06.1998 and was renamed as “Wise Industrial Park Limited” (for short “WIPL”).

7. Certificate of incorporation was issued by Registrar of Companies, Kanpur on 30.06.1998. In the meantime, in pursuance of Promoter's Agreement as well as license agreement and supplementary license agreement, a registered lease deed was executed between UPSIDC and

petitioner company on 11.03.1998 for 133.33 acres of land. Secondly, lease deed for the same area i.e. 133.33 acres of land was executed between UPSIDC and the petitioner company on 30.03.1999, thus, a total of 266.66 acres of land was leased out in favour of petitioner company by UPSIDC through two lease deeds of 1998 and 1999, out of the total area of 400 acres, and the vacant possession was delivered to the joint venture company on 26.03.1998 and 06.03.2000.

8. After the transfer of first and second phase of land, petitioner company was required to make payment for transfer of third phase of 133.33 acres of land on or before 30.03.2000, as the petitioner could not make payment the allotment of third phase was cancelled on 23.03.2001.

9. It appears that there was some outstanding demand pending against the petitioner company which was raised by UPSIDC but was not paid.

10. Petitioner company subleased its developed land measuring about 40 acres to M/s. Hindustan Coca Cola Bottling Ltd., 1 acre to Meeta Deep Fridge and 5 acres to Mode Attire. As the petitioner company was in need of money, it availed loan from one Global Trust Bank (now amalgamated with Oriental Bank of Commerce) and mortgaged 133 acres of land which was transferred in the first phase. However, 46 acres of land was discharged from mortgage when it was subleased. Another 100 acres out of second phase of transfer of 133.33 acres of land, was mortgaged to Global Trust Bank, thus a total of 188.33 acres of land remained with the Global Trust Bank out of allotted 266.66 acres of land for the development of Agro Industrial Park.

11. As there was default in repayment of loan to the Bank, a notice under Section 13(2) of the Securitisation and Enforcement of Financial Assets and Enforcement of Security Interest Act, 2002 was issued. Thereafter, possession of the land was taken over by Global Trust Bank in November, 2002.

12. The Bank initiated recovery proceedings and filed Original Application No. 37/2004, Global Trust Bank Ltd. vs. Wise Infrastructure Ltd. and Original Application No. 38 of 2004, Global Trust Bank Ltd. vs. Wise Infrastructure Park Ltd. and others, before the Debts Recovery Tribunal- II, Delhi, in which UPSIDC was impleaded as one of the defendants.

13. In the meantime, as the company had not commenced/ completed the development work on 266.66 acres of land, UPSIDC cancelled the lease deed of the first and second transfer and intimated the same to the petitioner company on 11.11.2002.

14. However, according to petitioners, the notice as well as the intimation regarding cancellation of the lease deed was never received by them and it was for the first time they came to know from the written statement filed by UPSIDC i.e. respondent no. 1 before Debts Recovery Tribunal at Delhi in recovery proceedings initiated by Global Trust Bank.

15. As per petitioner company, they had tried to negotiate and settle the matter with respondent no. 1 but the same failed and they were compelled to file a writ petition before this Court bearing Writ Petition No. 4411 of 2017 with the following prayer:-

> *"(a) Issue a writ, order direction in the nature of mandamus, directing the UPSIC to function within terms and conditions of the promoter's agreement dated 19.07.1993 and not to interfere in any manner, with the lease property of the Petitioner and to restore the lease deeds dated 31.03.1998 and 11.03.1999 executed in favour of the Petitioner;.*
>
> *(b) Issue a writ, order or direction in the nature of mandamus directing the UPSIDC to decide the representation of the Petitioner and till then no third-party rights may be created over the property in dispute."*

16. This writ petition has been filed for the restoration of the lease deed executed in the year 1998 and 1999, meaning thereby that cancellation order of the lease deed be set aside.

17. The Division Bench of this Court on 31.01.2017 dismissed the writ petition and granted liberty to petitioner to avail any of the remedies available in law. The order of the Division Bench is extracted hereasunder:-

> *"Heard Sri Anurag Khanna, learned Senior Counsel for the petitioner and Sri Arvind Srivastava, learned counsel for UPSIDC.*
>
> *This writ petition prays for mandamus directing the UPSIDC to proceed in terms of agreement dated 19th July, 1993 and to take such steps so as to restore the lease deeds dated 31st March, 1998 and 11th March, 1999. The second relief claimed is for deciding the representation which is in the shape of an offer for negotiation in order to settle any rights that the petitioner may claiming as against the lease rights earlier offered by the UPSIDC.*
>
> *We are not inclined to entertain this cause of action as the nature of the relief prayed for is in the shape of a specific performance which is being raised on the ground as if there is some obligation cast on the UPSIDC to accept the request of the petitioner. If such a request has to be made or there is any dispute arising therefrom, then the remedy is by way of an arbitration or by an internal negotiation with the UPSIDC itself for which the petitioner appears to have moved a representation.*
>
> *The writ petition is, accordingly, dismissed with liberty to the petitioner to avail of any of the aforesaid remedies, in accordance with law."*

18. After the dismissal of writ petition, petitioner company on 14.10.2019 sent a notice invoking the arbitration clause pursuant to the Promoter's Agreement dated 19.07.1993.

19. Sri Anurag Khanna, learned Senior Advocate submitted that all the four agreements i.e. Promoter's Agreement dated 19.07.1993, licence agreement dated 24.05.1995, lease deed dated 11.03.1998 and second lease deed dated 30.03.1999 were entered to achieve the object of setting up Agro Industrial Park and all the agreements contained reference of Promoter's Agreement which is the main agreement.

20. He invited the attention of the Court to Clause 33 of Promoter's Agreement wherein provision for arbitration is provided. It was further contended that the dispute between the parties is covered within the ambit

and extent of arbitration clause no. 33 of the Promoter's Agreement. Reliance was placed upon decision of Apex Court in case of ***Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and others, 1999 (5) SCC 651***.

21. The second limb of argument was that while dismissing the Writ Petition No. 4411 of 2017, this Court on 31.01.2017 had observed that remedy available to petitioner was either by the way of arbitration or by internal negotiation with UPSIDC itself and the Court had given liberty to avail the remedies in accordance with law.

22. Sri Khanna submitted that the Court itself accepted the existence of dispute and it was for respondent no. 1 to have either actually resolved the dispute or should have appointed the arbitrator once the arbitration clause was invoked. Reliance was placed upon decision of Supreme Court in case of ***Ameet Lalchand Shah and others vs. Rishabh Enterprises and another, 2018 (15) SCC 678***.

23. The third point canvassed by Senior Counsel was that petition under Section 11 of the Act is not affected by the provisions of Limitation Act. Reliance was placed upon decision of Apex Court rendered on 27.11.2019 in ***Special Leave Petition (C) No. 11476 of 2018, M/s. Uttarakhand Purv Sainik Kalyan Nigam Ltd. vs. Northern Coal Field Ltd.,*** wherein the Apex Court had considered that after 2015 amendment and incorporation of Section 11(6A), the only scope of examination is now confined to existence of arbitration agreement at Section 11 stage and nothing more. He further submitted that all the issues regarding limitation would be decided by arbitrator in view of provisions of Section 16 and the same cannot be decided at the pre-reference stage.

24. Lastly, it was contended that notice invoking arbitration dated 14.10.2019 is sufficient for the appointment of arbitrator in accordance with arbitration agreement dated 19.07.1993.

25. Per contra, Sri Swapnil Kumar, learned counsel appearing for respondents submitted that as per Promoter's Agreement breach of terms and conditions is governed by Clause 29.3 and not Clause 33 which is an arbitration clause. Thus, dispute, if any, regarding breach of terms and conditions by any party has to be resolved in terms of Clause 29.3.

26. Sri Swapnil Kumar invited the attention of the Court to Clause 34 of the Promoter's Agreement which categorically states and specifies the period during which the said agreement shall remain in force. According to Clause 34 the agreement was to remain in force for 12 years from the date of signing and was renewable for further period by mutual consent as the agreement was signed on 19.07.1993, it came to an end on 18.07.2005 as it was only for a period of 12 years and was never extended beyond the said date.

27. It was also contended that lease deed was cancelled in the year 2002, and if for the sake of argument it is accepted that petitioner came to know about the said fact through written statements then too more than 15 years have elapsed and the Promoter's Agreement is not in existence.

28. According to Sri Kumar petitioner is aware of the fact that the agreement was for only 12 years and no effort was made to renew the same nor any notice or intimation was given by petitioner to extend the same. The present petition for arbitration is nothing but an attempt to give life to a dead claim. Reliance has been placed upon a decision of Apex Court in the case of ***Duro Felguera, S.A. vs. Gangavaram Port Ltd., 2017 (9) SCC 729***.

29. Heard learned counsel for the parties and perused the material on record.

30. Before adverting to decide the controversy, it would be relevant to have a glance of Section 2(b) and Section 7 of the Act.

31. Section 2(b) provides for “arbitration agreement”, which means an agreement referred to in Section 7.

Section 7

> *"**7. Arbitration agreement.**- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in*
>
> > *(a) a document signed by the parties;*
> >
> > *(b) an exchange of letters, telex, telegrams or other means of telecommunication 1[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.*
>
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."*

32. From the conjoint reading of above provision, it culls out that arbitration agreement means an agreement by which parties submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of their relationship whether contractual or not.

33. In the present dispute admittedly a Promoter's Agreement was executed between the parties on 19.07.1993. Three clauses of the said Promoter's Agreement are relevant in deciding the present controversy which are Clause 29.3, Clause 33 and Clause 34, and are extracted hereasunder:-

> *"**29.3** In case the parties commit breach of any of the terms and conditions and stipulations herein contained to be observed and performed by them, the aggrieved party shall be at liberty to give notice in writing to the other party to set right or rectify the breach or omission complained of within 30 days of receipt of notice failing which the aggrieved party may seek the relief of specific performance from the competent court of law.*
>
> ***33.** All differences of disputes with the parties hereto on any clause or matter herein contained or their respective rights, claims, or liabilities hereunder or otherwise, whatsoever in*

> *relation to or rising out this agreement shall be referred to arbitration by two arbitrators (one to be appointed by each party) who shall before proceeding with the reference appoint an umpire by mutual consent and each arbitrator shall be governed by the Indian Arbitration Act, 1940 or in modification or re-enactment thereof for the time being in force. The venue of the arbitration shall be Kanpur or New Delhi if agreed to in writing between the parties hereto.*
>
> ***34.** This agreement shall be in force for a period of 12 years from the date of its signing and shall be renewable for a further period by mutual consent."*

34. Clause 29.3 is in relation to breach of terms and conditions of the agreement by either of the parties and the aggrieved party having an option to give notice to the other side for rectifying such breach or omission and if the same is not carried out within 30 days, the party may seek a relief of specific performance from the competent court.

35. Likewise, Clause 33 provides that in case of dispute between the parties the same shall be referred to the arbitration. Lastly, clause 34 provides period of existence of the agreement which is 12 years from the time of signing of the same and if it is not extended or renewed, the same coming to an end on 18.07.2005 by efflux of time.

36. From the pleading of parties as well as their oral and written submissions, it transpires that both parties are adverting to the Promoter's Agreement executed on 19.07.1993, but no averment in the pleading or in oral submission was made as to whether the agreement was ever extended or renewed at the instance of either of the parties. It is not in dispute that originally Promoter's Agreement was executed on 19.07.1993 and a joint venture company was formed for the development of Agro Industrial Park. Out of 400 acres of land, 266.66 acres of land was allotted to petitioner company and possession was handed over in the year 1998 through first transfer, and in the year 1999 through second transfer. Uptil this point of time there was no dispute and it was only when the petitioner company failed to repay the amount and was not able to carry out the obligation of making payment for the third transfer that firstly in the year 2001, the allotment of the third phase of transfer of 133.33 acres of land

was cancelled and, thereafter, in the year 2002, the lease deed of the earlier first and second transfer was cancelled due to the fact that work was not completed.

37. During this period, petitioner company who had taken loan from Global Trust Bank had been litigating with the Bank and the possession of the land was taken over by the Bank some times in November, 2002.

38. According to petitioner company itself they came to know about the cancellation of the lease deed during the proceedings initiated by the Bank before the Debts Recovery Tribunal, but they did not challenge the said cancellation of lease deed and it was for the first time in the year 2017 after a lapse of about 12 years, they approached this Court through Writ Petition No. 4411 of 2017, which was dismissed on 31.10.2017, leaving it open to petitioner to pursue the remedy so available under law.

39. The argument of learned Senior Counsel, Sri Khanna to the extent that the Court had cast obligation upon UPSIDC to decide the representation which they have failed to do so and thus an arbitrator should be appointed by the Court, cannot be accepted, as the said writ petition was filed with a prayer for restoring the lease deed dated 31.01.1998 and 11.03.1999, meaning thereby that the said lease deed was cancelled and the Court had refused to interfere and had dismissed the writ petition.

40. The petitioner company again after lapse of two years on 14.10.2019 gave notice to respondents invoking the arbitration clause 33 as per Promoter's Agreement dated 19.07.1993. The question which crops up for consideration is as to whether an agreement which is executed between the parties for stipulated period (as time being essence of the contract) with a provision for renewal at the instance of parties came to an end on the expiry of such period, and renewal not being sought or initiated at the instance of either of the parties, can be the basis for invoking the arbitration agreement.

41. After the amendment in the year 2015 Sub-section (6A) to Section 11 was inserted w.e.f. 23.10.2015, which reads as under:-

> *"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

42. The said provision provides for the existence of an arbitration agreement and the intention of legislature is clear that the Court should and need only look into one aspect and that is existence of an arbitration agreement. The Apex Court in case of ***Duro Felguera, S.A.*** (supra) held as under:-

> *"**48.** Section 11(6-A) added by the 2015 Amendment, reads as follows:*
>
> > *"**11. (6-A)** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*
> >
> > *(emphasis supplied)*
>
> *From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect- the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple - it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.*
>
> ***59.** The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in **SBP and Co. v. Patel Enggg. Ltd. (2005) 8 SCC 618** and **National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267**. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6-A) ought to be respected."*

43. In case of ***M/S Mayavti Trading Pvt. Ltd. vs. Pradyut Deb Burman, Civil Appeal No. 7023 of 2019***, decided on 05.09.2019, relying upon decision of **Duro Felguera, S.A.** (supra), the Apex Court held as

under:-

> *"**10.** This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning containing in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of and arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment **Duro Felguera, S.A.** (supra)- see paras 48 and 59."*

44. The legislative intent has been clearly dealt in the decision of the Apex Court referred above and by insertion of Section 11(6A) examination is confined only to the **existence** of arbitration agreement and nothing more has to be seen by the Court in proceedings under Section 11(6) for the appointment of arbitrator.

45. In the present case, the moot question which arises is whether the arbitration agreement i.e. arbitration clause provided in the Promoter's Agreement is in existence or not. The word "existence" has been defined in the Advanced Law Lexicon, III Vol. 2005, which is as under:-

> *"**Existence.** Created life; living beings in general (as) "fellow-feeling with all forms of existence" (Carlyle) Being; the fact or state of existing."*

46. Existence means, which has life or which exists. In the present context, existence of arbitration agreement means existence of an agreement which is capable of execution. As from the reading of Clause 34, it emerges that the promoter's agreement was executed between the parties for a period of 12 years from the date of signing, meaning thereby that its life came to an end on 18.07.2005. It is also not in dispute that this agreement was ever extended or renewed by either of the parties. Thus, in view of amended provisions of Section 11(6A) as well as the decision of the Apex Court the Promoter's Agreement in question has outlived its life and was not in existence after 18.07.2005. The petitioner company though had remedy under various provisions of law in getting the lease deed restored, while one such attempt having failed in Writ Petition No. 4411 of 2017, the invoking of arbitration clause 33 of the Promoter's

Agreement is in respect of an agreement which is not in existence as per Section 11(6A) of the Act.

47. The argument made by learned counsel for petitioner to the extent that there exists dispute between the parties which can only be resolved through arbitration clause 33 of the Promoter's Agreement and petition under Section 11 of the Act is not affected by provisions of Limitation Act, cannot be accepted in the facts and circumstances of the present case, as Clause 34 of the Promoter's Agreement itself categorically provides the life of the agreement which is 12 years, unless and until extended or renewed. As it is evident from the pleading as well as the argument that the said agreement was never extended beyond 12 years and the life of the agreement came to an end on 18.07.2005. Thus, petitioner cannot rely upon the provisions of the agreement which is not in force between the parties as time was the essence of contract. The amended provision categorically provided for the enforcement of arbitration proceedings only in case of existence of arbitration agreement.

48. The Apex Court while dealing with 2015 Amendment, is of the constant view that the Court should and need only look into one aspect and that is the existence of arbitration agreement. Reliance placed by learned counsel for petitioner on the decision of the Apex Court in case of ***Ameet Lalchand Shah and others*** (supra) is not applicable in the present case as the arbitration agreement had come to an end 14 years prior to the invocation of the same.

49. Likewise, reliance placed upon decision in case of ***M/s. Uttarakhand Purv Sainik Kalyan Nigam Ltd.*** (supra) also does not come to rescue of the petitioner and the Apex Court in Para 9.9 has held as under:-

> *"**9.9.** The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or "Compétence de la recognized", implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to*

minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'."

50. In the case of ***P. Manohar Reddy and Bros. vs. Maharashtra Krishna Valley Development Corporation and others, (2009) 2 SCC 494***, while dealing with a situation where arbitration clause although part of contract, need not in all situation perish with coming to an end of the contract. The Court evolved the state of separability of arbitration clause. Relevant paras 27 and 28 are extracted hereasunder:

*"**27.** An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to an end of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in Article 16(1). The Indian law - The Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach in Article 16 (1)(b), which reads as under:-*

"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."*
>
> *(Emphasis supplied).*

Modern laws on arbitration confirm the concept.

28. *The United States Supreme Court in the recent judgment in Buckeye Check Cashing, Inc. v. Cardegna, 546 US 460 (2005) acknowledged that the separability rule permits a court "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." The Court, referring to its earlier judgments in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395 (1966), and Southland Corp. v. Keating, 465 U. S. 1 (1984), inter alia, held :-*

> *"Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."*

But this must be distinguished from the situation where the claim itself was to be raised during the subsistence of a contract so as to invoke the arbitration agreement would not apply."

51. In ***Hema Khattar and another vs. Shiv Khera, (2017) 7 SCC 716***, the Apex Court dealing with a situation where the arbitration clause contained in agreement was waived by mutual consent of the parties the Court held that arbitration clause would continue to be operative. Relevant para 35 is extracted hereasunder:-

> *"**35.** In **P. Anand Gajapathi Raju & Others vs. P.V.G. Raju (2000) 4 SCC 539**, it was held as under:(SCC p. 542, para 5)-*
>
> *"5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:*
>
> *(1) there is an arbitration agreement;*
>
> *(2) a party to the agreement brings an action in the court against the other party;*
>
> *(3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;*
>
> *(4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute."*
>
> *In view of the above, where an agreement is terminated by one*

> *party on account of the breach committed by the other, particularly, in a case where the clause is framed in wide and general terms, merely because agreement has come to an end by its termination by mutual consent, the arbitration clause does not get perished nor is rendered inoperative. This Court, in the case of* ***P. Anand Gajapathi Raju*** *(supra), has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that in an agreement between the parties before the civil court, if there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.*

52. Thus, the above decisions referred clearly distinguishes the situation, that claim must be raised during subsistence of contract, and further if the agreement exists it cannot be waived by mutual consent. Thus, both the decisions lead to the concept of existence of agreement.

53. After the 2015 Amendment of the Act, the only thing left with the Court to see was existence of arbitration agreement for referring the dispute to arbitrator. This amendment got approval of the Court in case of ***Duro Felguera, S.A.*** (supra), ***M/S Mayavti Trading Pvt. Ltd.*** (supra) and ***M/s. Uttarakhand Purv Sainik Kalyan Nigam Ltd.*** (supra) but the instant case is totally on different footing, and the facts of the case are totally distinguishable from the facts and issue in decision cited above, as in the present case Clause 34 which is part of the Promoter's Agreement categorically provides for the period for which the agreement was to remain in force i.e. 12 years, from the date of signing of the agreement. Undisputedly, the agreement was signed on 19.07.1993 and it was never extended or renewed and came to an end on 18.07.2005. No doubt clause 33 is an arbitration clause providing for dispute to be settled through arbitration, but the same cannot be read in isolation and this arbitration agreement has to be in existence as per Clause 11(6A) on the date when the said arbitration clause is invoked and the matter is referred to arbitration.

54. It was on 14.10.2019 that the petitioner had invoked Clause 33 for

the appointment of arbitrator i.e. more than 14 years after the promoter's agreement came to an end. Once the agreement is not in force (existence), none of its provisions can be invoked as the entire agreement has come to an end by efflux of time.

55. No doubt it is true that Court at pre-reference stage has to only look into the existence of arbitration agreement, no more no less. But in the present case, the agreement itself has come to an end in the year 2005 and after a lapse of 14 years petitioner cannot be permitted to invoke one of its clauses for the appointment of arbitrator.

56. Having considered the rival submissions and material on record, I find that the case of petitioner does not fall under Section 11(6) of the Arbitration Act for the appointment of arbitrator in pursuance to the Promoter's Agreement dated 19.07.1993, as the 2015 Amendment provides in Section 11(6A) for the existence of the arbitration agreement and there being no arbitration agreement in existence at the time of making of the application as the said Promoter's Agreement which is relied upon had come to an end on 18.07.2005, as per Clause 34 of the said agreement.

57. Petition has no force and is ***dismissed***.

58. Parties to bear their own costs.

Order Date :- 22.10.2020
V.S.Singh