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

Decided on: 2nd June 2023

\+ **O.M.P.(COMM) 190/2019**

B.L. KASHYAP AND SONS LTD. ..... Petitioner

Through: Mr. Ashish Dholakia, Senior Advocate with Mr. Gautam Bajaj, Mr. Akash Panwar, Mr. Rohan Chawla & Mr. Arpit Singh, Advocates. [M:-9899655157]

versus

MIST AVENUE PRIVATE LTD. ..... Respondents

Through: Mr. Anil Kr. Airi, Senior Advocate with Mr. Ravi Krishan Chandna, Ms. Sadhana Sharma, Mr. Mudit Ruhella & Mr. Aman Dahiya, Advocates.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"], the petitioner seeks setting aside of an award dated 07.01.2019, rendered by a learned sole arbitrator in disputes raised by the petitioner under

an undated Construction Contract entered into between the parties in August, 2014[1] [hereinafter, "the 2014 Contract"].

Facts

2. The 2014 Contract was for civil and structural works for a project known as "MIST" situated in Sector 143B, Noida, Uttar Pradesh. The estimated value of the contract was approximately ₹229 crores, which was to be executed on a Bill of Quantities [hereinafter, "BOQ"]/item rate basis. It contained an arbitration clause [Clause 20], which reads as follows:-

> *"20. ARBITRATION & DISPUTE RESOLUTION:*
>
> *The Owner and the Contractor shall make all possible efforts to amicably sort out and resolve all matters of disputes and differences, which might directly or indirectly arise under, out of, in connection with, or in relation to this Agreement. Any dispute, difference or question that is not resolved through joint discussions shall be referred to the sole arbitrator to be appointed by the parties by mutual consent within 30 days of the raising of an arbitrable dispute by any of the party The arbitration proceedings shall be held in New Delhi, in English language and in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the rules made there under, as statutorily amended, modified, replaced, substituted or re-numbered from time to time."*

3. It appears that certain disputes arose between the parties, which were resolved mutually, and the terms recorded in a Memorandum of Understanding dated 08.10.2015 [hereinafter, "the MoU"]. Admittedly, the MoU does not contain an arbitration clause at all. The central dispute between the parties is as to whether the arbitration agreement contained in the 2014 Contract survived the execution of the MoU.

[1] The copy of the agreement placed on record states that it was executed in August 2014, but the pleadings and the impugned award give the date as November, 2014.

4. The learned arbitrator has come to the conclusion that the MoU constitutes novation of the 2014 Contract and the tribunal does not have the jurisdiction to entertain disputes under the arbitration clause contained in the 2014 Contract.

5. As the question in the present petition turns upon the contents of the MoU, the relevant clauses thereof are reproduced below:-

> **"***WHEREAS by the virtue of the construction agreement executed at Noida in the month of November 2014 on the certificate No. IN-DL85721631158550M between the 1st & 2nd parties herein, the 2nd party awarded the mix use project known as "MIST" situated at Plot no. 1, Sector 143B Nodia, UP as "Work Site" Or "Project" to 1st party.*
>
> *WHEREAS both the parties herein abide by the terms & conditions of the said agreement and the 1st party herein starts its construction activities/working in accordance of the covenants of the aforementioned construction agreement.*
>
> *WHEREAS during the construction of the work awarded by the 2nd Party, the 1st Party faced certain issues in executing their part of the contractual agreement due to which the work got delayed and could not be completed substantially, therefore, the 1 & 2nd Parties herein resolved their issues in the meeting held on 30th September 2015 and decided to record the minutes of meeting* ***and to cancel the above said "construction agreement" executed between them****.*
>
> *Now, both the parties have settled the issues amicably and terms & conditions of the same are reduced to writing as mentioned hereunder:*
>
> *NOW THIS MEMORANDUM OF UNDERSTANDING WITNESSETH AS FOLLOWS:*
>
> *Reference of the various meetings on the subject matter, and final meeting on 30th September 2015 ,we record our final understanding agreed as under:*
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> ***1. The "Construction Agreement" between the parties will stand fully satisfied towards both the parties upon the contractor handing over all the assets and consumables as listed in the enclosed list except Batching Plants, Crane, other small machines but limited to enclosed list and Mist Avenue (P) Ltd., paying the final settled dues under the said contract as per agreed schedule mentioned herein under:***

A) Total dues towards contract payable by "Mist" the 2nd Party settled at Rs. 132 lacs on full and final basis *towards 1st party herein other than all taxes payable like VAT, Service Tax, labourCess Etc.,*

B The above amount to be paid as per following schedule by the 2nd Party herein,

(i) Rs. 17,00,000/- (Rupees Seventeen Lacs) on or before 10th October 2015. The 2nd party shall also pay Rs. 35,00,000/- (Rupees Thirty Five Lacs) per week starting 12th of October till such time the total amount is paid as agreed above.

C)The 1st Party i.e. BLK will have no dues upon receiving Rs. 132 lacs, provided all payments are paid in the agreed time frame, any default in the payment terms as agreed upon for the closed contract and 1st Party i.e. BLK shall be paid all dues, losses etc for the closed contract eligible on demand failing which BLK can file any legal measures against the 2nd party i.e. the MIST.

2. That the 2nd Party herein i.e. the "MIST" declare and agreed that the Rs. 132 Lacs(One hundred and Thirty Two lacs) is legally dis-chargeable amount to be paid to the 1st party i.e. BLK within mentioned time frame herein.

3. ***The parties herein agreed to cancel the "Construction agreement"*** *bearing certificate no. IN-DL85721631158550M AND executed in the month of November 2014 at Noida as aforementioned and* ***new contract/agreement to be entered for cost plus basis*** *and the 2nd party i.e. the MIST to pay Rs. 150 lacs advance under the new contract in agreed installments. This advance of Rs. 150 lacs shall be paid after the above dues under the old contract are fully paid, in installment of Rs.35,00,000/- (Rupees Thirty Five lacs) per week. The new contract of cost plus Taxes would be signed and closed before the 15th October 2015 upon which all the Terms Recorded here in respect thereof will get reflected in the new contract.*

**** **** ****

8. Both the parties and their representatives, successors, agents will be bound by the terms & Conditions of this MOU.

*9. This MOU shall be governed by and construed in accordance with the laws of India. The parties mutually agree to the exclusive jurisdiction of High court of Delhi.***"**[2]

[2] Emphasis supplied.

The MoU was also accompanied by an annexure entitled, "*List of Assets Paid for*".

6. It is the contention of the petitioner that the respondent did not pay the sums payable under the MoU, as a result of which it was entitled to claim its dues under the 2014 Contract. Consequently, the petitioner invoked the arbitration clause contained in the 2014 Contract, by a letter dated 27.07.2016, and the learned arbitrator was appointed pursuant to order dated 28.07.2017, passed by this Court in proceedings under Section 11 of the Act.

7. The petitioner lodged seven claims before the learned arbitrator, amounting to ₹35,17,69,185/-. The respondent raised a preliminary objection as to the arbitrability of the disputes on the basis of the execution of the MoU. It also contended that the respondent had, in fact, paid an excess amount of ₹32,83,865/- to the petitioner, which it was entitled to claim.

8. The learned arbitrator, by an order dated 15.10.2018, framed six issues, of which the following two issues were decided as preliminary issues:-

> *"4. What is the impact of Memorandum of Understanding dated 08.10.15 entered into between the parties; whether it amounts to novation of the contract dated November, 2014? OPR*
>
> *5. Whether the arbitration tribunal has no jurisdiction in the matter in view of the execution of the MoU dated 08.10.2015? OPR"*

9. The learned arbitrator came to the conclusion that the MoU crystallized the liability of the respondent at ₹132 lakhs, subject to the petitioner handing over the assets and consumables, mentioned in the

annexure thereto, to the respondent. Noting that a sum of ₹67,86,200/- was paid by the respondent to the petitioner [which was not disclosed in the statement of claims], the learned arbitrator came to the conclusion that, even upon the petitioner's case that the MoU was not fully complied with, it would not lead to the conclusion that the arbitration clause contained in the 2014 Contract stood revived. As the parties moved from a BoQ/item rate basis of payment in the 2014 Contract to a "*cost plus"* basis in the MoU, the learned arbitrator found that there could be no question of "*revival*" of the 2014 Contract, even if the MoU's terms were breached. In coming to this conclusion, he relied upon the judgment of the Supreme Court in *Young Achievers vs. IMS Learning Resources Pvt. Ltd.*[3] and the judgment of this Court in *Ansal Housing & Construction Ltd. vs. Samyak Projects Pvt. Ltd.*[4]

Submissions of learned counsel for the parties

10. Mr. Ashish Dholakia, learned Senior Counsel for the petitioner, submitted that the interpretation of the contracts in the impugned award is arbitrary and perverse, rendering the award manifestly illegal. He submitted that Clause 1 of the MoU states that the 2014 Contract will stand satisfied only upon fulfillment of the conditions enumerated thereunder, and the respondent had admittedly not made full payment of the sum of ₹132 lakhs, mentioned in sub-clause A thereof. Relying upon Clause 1(C) of the MoU, Mr. Dholakia submitted that, in such circumstances, the petitioner was entitled to claim all dues under the

[3] (2013) 10 SCC 535.
[4] 2018 SCC OnLine Del 12866.

2014 Contract, and to *"file any legal measures"* for this purpose. He further argued that Clause 3 of the MoU contemplated execution of a new contract on cost plus basis, which was not done. Therefore, he submitted that the claims placed before the learned arbitrator were under the 2014 Contract - not under the MoU - and were thus correctly agitated by way of arbitral proceedings. According to Mr. Dholakia, the observations in the impugned award have the effect of taking away the petitioner's right to make claims for its dues and losses under the 2014 Contract, contrary to the express terms of Clause 1(C) of the MoU.

11. Factually, Mr. Dholakia submitted that, even after the execution of the MoU, the petitioner continued to raise running account bills under the 2014 Contract, which has been explained away by the learned arbitrator as being in anticipation of the new contract between the parties. He contended that the aforesaid explanation does not bear scrutiny, particularly in the context of a wholesale rejection of the arbitral claims without evidence on the issue of arbitrability.

12. According to Mr. Dholakia, the learned arbitrator missed the conditional nature of cancellation of the 2014 Contract. He distinguished the judgment in *Young Achievers*[5] also on this basis, arguing that no future relationship between the parties was contemplated therein. Learned Senior Counsel cited judgments of the Supreme Court in *Union of India vs. Kishorilal Gupta & Bros.*[6] and

[5] Supra (note 3).
[6] AIR 1959 SC 1362.

Lata Construction vs. Rameshchandra Ramniklal Shah (Dr)[7] to support his contention that the 2014 Contract did not stand novated by the MoU, and the arbitration clause survived the execution thereof.

13. Mr. Anil Kr. Airi, learned Senior Counsel for the respondent, on the other hand, submitted that the learned arbitrator's interpretation of the 2014 Contract and the MoU is a plausible interpretation, which does not call for interference of the Court under Section 34 of the Act. He submitted that Clause 1(C) of the MoU only permits the petitioner to make claims due to it under the 2014 Contract, but does not revive the 2014 Contract or resurrect the arbitration clause.

14. Mr. Airi submitted that, upon a proper reading of MoU, it is clear that the parties arrived at a settlement by which the 2014 Contract was "*cancelled*" or "*closed*". As far as the fulfillment of the conditions mentioned in Clause 1 of the MoU are concerned, he submitted that reciprocal conditions were placed upon both the parties and the respondent's failure to make full payment thereunder is due to the petitioner not having handed over the consumables mentioned in the annexure to the MoU.

15. Mr. Airi relied upon the judgments in *Nathani Steels Ltd. vs. Associated Constructions*[8] and *Damodar Valley Corporation vs. K.K. Kar*[9] to submit that in light of the settlement arrived at between the parties in the MoU, it was not open to the petitioner to invoke the arbitration clause and seek performance of the terms of the 2014 Contract.

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[7] (2000) 1 SCC 586.
[8] 1995 Supp (3) SCC 324.
[9] (1974) 1 SCC 141.

Analysis

I. Novation of the 2014 Contract

16. In the context of these submissions, the first task before the Court is to examine the judgments which deal with the question of whether an arbitration clause survives a supervening agreement between the parties.

17. On this question, the learned arbitrator referred to the judgment in *Young Achievers*[10], wherein the Supreme Court in held as follows:-

> *"5. We are of the view* ***that survival of the arbitration clause, as sought by the appellant in the agreements dated 1-4-2007 and 1-4-2010 has to be seen in the light of the terms and conditions of the new agreement dated 1-2-2011****. An arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/novated by a later agreement. The agreement dated 1-4-2010 contained the following arbitration clause:*
>
> > *"****20.Arbitration****.—All disputes and questions whatsoever which may arise, either during the substance (sic subsistence) of this agreement or afterwards, between the parties shall be referred to the arbitration of the Managing Director of IMS Learning Resources (P) Ltd. or his nominee and such arbitration shall be in the English language at Mumbai. The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment thereof for the time being in force and award or awards of such arbitrator shall be binding on all the parties to the said dispute."*
>
> *6.* ***We have now to examine terms of the subsequent agreement titled "Exit Paper" dated 1-2-2011. It is the common case of the parties that the exit paper/agreement entered into between the parties does not contain any arbitration clause****. It is useful to extract the relevant portion of the exit paper, which is as follows:*
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> **** **** ****

[10] Supra (note 3).

> *7. The exit paper would clearly indicate that it is a mutually agreed document containing comprehensive terms and conditions which admittedly does not contain an arbitration clause. We are of the view that the High Court is right in taking the view that the case on hand, is not a case involving assertion by the respondent of accord a satisfaction in respect of the earlier contracts dated 1-4-2007 and 1-4-2010. If that be so, it could have referred to the arbitrator in terms of those two agreements going by the dictum in Union of India v. Kishorilal Gupta and Bros. This Court in Kishorilal Gupta case examined the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract.* ***The principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. But where the dispute is whether such contract is void ab intio, the arbitration clause cannot operate on those disputes****, for its operative force depends upon the existence of the contract and its validity. The various other observations were made by this Court in the abovementioned judgment in respect of "settlement of disputes arising under the original contract, including the dispute as to the breach of the contract and its consequences." The principle laid down by the House of Lords in Heyman v. Darwins Ltd. was also relied on by this Court for its conclusion. The collective bargaining principle laid down by the US Supreme Court in Nolde Bros. case would not apply to the facts of the present case.*
>
> *8. We may indicate that* ***so far as the present case is concerned, parties have entered into a fresh contract contained in the exit paper which does not even indicate any disputes arising under the original contract or about the settlement thereof, it is nothing but a pure and simple novation of the original contract by mutual consent****. Above being the factual and legal position, we find no error in the view taken by the High Court. The appeal, therefore, lacks merit and stands dismissed, with no order as to costs."*[11]

18. Mr. Dholakia sought to distinguish this judgment on the basis of the decision rendered in *Kishorilal Gupta*[12], which is also referred to in *Young Achievers.*[13] In *Kishorilal Gupta*[14], the Court made a

[11] Emphasis supplied.
[12] Supra (note 6).
[13] Supra (note 3).
[14] Supra (note 6).

distinction between a contract which stands finally determined only on payment of the agreed amount, and a contract which stands determined on the date of settlement. The Court held as follows: -

> *"10. The following principles relevant to the present case emerge from the aforesaid discussion : (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2**) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract**; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) **though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder**; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; **in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes**.*
>
> *11. We have held that the three contracts were settled and the third settlement contract was in substitution of the three contracts; and, after its execution, all the earlier contracts were extinguished and the arbitration clause contained therein also perished along with them. We have also held that the new contract was not a conditional one and after its execution the parties should work out their rights only under its terms. In this view, the judgment of the High Court is correct. This appeal fails and is dismissed with costs."*[15]

19. Mr. Dholakia submitted that a proper interpretation of the terms of the MoU place the present case in the first category –where the

[15] Emphasis supplied.

settlement was conditional and the arbitration clause thereof stood revived upon non-fulfillment of the conditions in the settlement.

20. In *Lata Construction*[16], also relied upon by Mr. Dholakia, the Supreme Court was concerned with a contract which stipulated that an amount was to be paid by a specific date, failing which one of the parties would be entitled to recover the full amount claimed originally. The Court came to the conclusion that, in these circumstances, the original agreement remained enforceable if the payment under the second contract was not made.

21. Mr. Airi, on the other hand, relied upon the decision of the Supreme Court in *Nathani Steels Ltd.*[17], wherein it was held that a party cannot invoke an arbitration clause after having entered into a settlement of their contractual disputes as:-

> *"3…once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause…"*

22. Mr. Airi also relied upon *Damodar Valley Corporation*[18], wherein the Court relied upon the judgment in *Kishorilal Gupta*[19], and held as follows:-

> *"7. The contention that has been canvassed before us is that as there has been a full and final settlement under the contract, the rights and obligations under the contract do not subsist and consequently the arbitration clause also perishes along with the settlement. If so, the dispute whether there has or has not been a*

[16] Supra (note 7).
[17] Supra (note 8).
[18] Supra (note 9).
[19] Supra (note 6).

settlement cannot be the subject of an arbitration. There is, in our view, a basic fallacy underlying this submission. A contract is the creature of an agreement between the parties and where the parties under the terms of the contract agree to incorporate an arbitration clause, that clause stands apart from the rights and obligations under that contract, as it has been incorporated with the object of providing a machinery for the settlement of disputes arising in relation to or in connection with that contract. The questions of unilateral repudiation of the rights and obligations under the contract or of a full and final settlement of the contract relate to the performance or discharge of the contract. Far from putting an end to the arbitration clause, they fall within the purview of it. A repudiation by one party alone does not terminate the contract. It takes two to end it, and hence it follows that as the contract subsists for the determination of the rights and obligations of the parties, the arbitration clause also survives. This is not a case where the plea is that the contract is void, illegal or fraudulent etc. in which case, the entire contract along with the arbitration clause is non est, or voidable. As the contract is an outcome of the agreement between the parties it is equally open to the parties thereto to agree to bring it to an end or to treat it as if it never existed. ***It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such a way that it cannot subsist. In all these cases, since the entire contract is put an end to, the arbitration clause, which is a part of it, also perishes along with it****. Section 62 of the Contract Act incorporates this principle when it provides that if the parties to a contract agree to substitute a new contract or to rescind or alter it, the original contract need not be performed. Where, therefore, the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration, that dispute cannot be referred to the arbitration as the arbitration clause itself would perish if the averment is found to be valid. As the very jurisdiction of the arbitrator is dependent upon the existence of the arbitration clause under which he is appointed, the parties have no right to invoke a clause which perishes with the contract."*[20]

23. For the purposes of the present case, the following principles emerge from these authorities:

[20] Emphasis supplied.

a. An arbitration clause contained in an agreement which is *void ab initio* cannot be enforced as the contract itself never legally came into existence.
b. A validly executed contract can also be extinguished by a subsequent agreement between the parties.
c. If the original contract remains in existence, for the purposes of disputes in connection with issues of repudiation, frustration, breach, etc., the arbitration clause contained therein continues to operate for those purposes.
d. Where the new contract constitutes a wholesale novation of the original contract, the arbitration clause would also stand extinguished by virtue of the new agreement.

24. An application of these principles requires an interpretation of the subsequent agreement between the parties- in this case, the MoU- to determine whether the arbitration clause in the original agreement remains enforceable.

II. Does the impugned award call for interference on this account?

25. The learned arbitrator's interpretation of the MoU is encapsulated in the following paragraphs of the impugned award:-

> *"17. Not only the terms and conditions of the MOU were reduced into writing and agreed to between the parties with their free consent but the MOU was also acted upon and consequent to that, indisputably a payment of Rs. 67,86,200 was made to the claimant which fact was concealed by the claimant in the Statement of Claim. When specifically inquired from the claimant's counsel as to why this fact was suppressed and as to how the payment of Rs. 67,86,200 would be accounted for, there was no clear answer. True, the respondent was under legal obligation to pay Rs. 132 lakhs pursuant*

to the terms and conditions of the MOU which he undeniably failed to pay. The respondent has given its own reasons for the non-payment of the remaining amount which is disputed by the claimant. Apparently, if the claimant was aggrieved by the non-payment of the remaining amount out of Rs. 132 lakhs, remedy to recover it was provided under the MOU itself. Clause C of the MOU categorically stated "The 1st Party i.e. BLK will have no dues upon receiving Rs. 132 lacs, provided all payments are paid in the agreed time frame, any default in the payment terms as agreed upon for the closed contract and 1st Party i.e. BLK shall be paid all dues, losses etc for the closed contract eligible on demand failing which BLK can file any ***legal measures*** *against the 2nd party i.e. the MIST."*

(Emphasis given)

18. ***The 'legal measure' did not specify that the previous contract 'canceled' hitherto would automatically revive and come into operation. There was no specific mention that the parties would get their disputes under the MOU settled through arbitration****. The claimant did not resort to any other 'legal measures' except filing the petition under section 11 (6) of the Act.* ***There is express understanding incorporated in the MOU whereby both the parties had categorically agreed to "cancel" the previous original agreement****. It was a conscious decision by the parties. Before the execution of MOU several meetings had taken place between them on the subject and in the final meeting on 30th Sept 2015 the terms and conditions of this MOU were agreed to. It is crystal clear that the parties had entered into the MOU after detailed negotiations and deliberations; both parties had sufficient time to understand the ramifications of the settlement.* ***Since certain issues had arisen between the parties due to which the work under the original contract got delayed and could not be completed substantially, both parties decided to give go by to it and resolved to crystallize the liability of the respondent for the work done by the claimant as detailed in the Annexure for 'the list of assets paid for' and all these assets were to remain with the respondent****.*

19. ***The MOU specifically records the words "canceled", "closed contract", "new contract" indicating intention of the parties to abandon the previous original contract****. The MOU further records that a* ***new contract/agreement****, would be executed on 'Cost Plus' basis and the second party i.e. the respondent would pay Rs. 150 lakhs in advance under the new contract in installments. The terms recorded in the MOU were to be reflected in the new contract which was to be signed and closed before 15th Oct 2015. It is not in controversy that no such new contract came into existence. The claimant did not divulge as to what steps were taken by it after 15th*

Oct 2015 to make the respondent abide by his promise to enter into a new contract.

(Emphasis given)

*20. Since terms and conditions of the previous original contract were not capable to be performed by the claimant due to various reasons, it led to the, execution of MOU dated 08.10.15**; it clearly demonstrates intention of the parties to 'cancel' the previous contract**; abide by the terms and conditions of the MOU and thereafter to execute a fresh/new contract. **The parties thus had intentionally brought an end to the previous contract. It is inconceivable to infer that the parties intended its revival on failure of the respondent to make the complete payment as described in the MOU. The fact that the MOU did not provide for the survival of arbitration clause, unequivocally indicates that the parties had given up the terms of the old contract including the arbitration clause. The MOU dated 08.10.15 does not whisper about settlement of any dispute arising under the original contract through arbitration. Needless to say execution of MOU is. a pure novation of the original contract by mutual consent of the partie**s. Settled position is that where a contract containing an arbitration clause is substituted by another contract, the arbitration clause perishes with the original contract unless there is anything in the new contract to show that the parties intended the arbitration clause in the original contract to survive."*[21]

26. After citing the judgments in *Young Achievers*[22] and *Ansal*[23], the learned arbitrator held as follows:-

*"27. It can safely be concluded that the original contract between the parties had come to an end on execution of the MOU. **Once there is a full and final settlement in respect of all the disputes, in relation to a matter covered under the arbitration clause in the contract, such disputes or differences do not remain to be an arbitrable dispute and the arbitration clause can't be invoked**. If this is permitted, the sanctity of the contract and the settlement also being a contract is wholly lost. It is not open to the claimant unilaterally to treat the settlement in the MOU as non-est and proceed to invoke the arbitration clause in the original contract. The arbitration clause in the contract will cease to have effect when the contract stood discharged as a result of settlement. **Though the original contract was validly executed, the parties decided to put an end to it as if it never existed and substituted a***

[21] Emphasis supplied.
[22] Supra (note 3).
[23] Supra (note 4).

> ***new contract to it, solely governing their rights and liabilities****. In such a situation, the original contract is extinguished by the substituted one, the arbitration clause of the original one perishes with it."*[24]

27. While examining these findings of the learned arbitrator, it must be remembered that interference by Courts with arbitral awards on the ground of patent illegality is permitted only in limited circumstances. On questions of contractual interpretation, the findings of the arbitral tribunal, being the domestic tribunal of choice, are generally to be respected, unless they are found to be irrational or perverse, in the sense that the interpretation is so implausible that no reasonable person could have arrived at it. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*[25], the Supreme Court held as follows:-

> *"40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders*[26]*, namely, that* ***the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take****. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A)."*[27]

28. It bears emphasis that, in the context of arbitral awards, it is not sufficient to show that the arbitrator committed an error if the matter falls within the jurisdiction of the learned arbitrator. The Court is mandated to adopt a circumspect approach, and to uphold an award, so long as the findings of the learned arbitrator pass the plausibility

[24] Emphasis supplied.
[25] (2019) 15 SCC 131.
[26] *Associate Builders vs. DDA* [(2015) 3 SCC 49].
[27] Emphasis supplied.

test. In *Delhi Airport Metro Express (P) Ltd. v. DMRC*[28], the Supreme Court laid down this principle thus:-

> *"28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts.* ***There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award****. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart,* ***several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions****.*
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> *29. Patent illegality should be illegality which goes to the root of the matter. In other words,* ***every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality****". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as* ***Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would****, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are*

[28] (2022) 1 SCC 131.

perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."[29]

29. The same approach is evident from the recent judgment of the Supreme Court in *UHL Power Co. Ltd. v. State of H.P.*[30].

"18. It has also been held time and again by this Court that ***if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other****. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd*[31]*., the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus :*

"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter ***without there being a possibility of alternative interpretation which may sustain the arbitral award****. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."*

22. In the instant case, we are of the view that the interpretation of the relevant clauses of the implementation agreement, as arrived at by the learned sole arbitrator, are both, possible and plausible. ***Merely because another view could have been taken, can hardly be a ground for the learned Single Judge to have interfered with the arbitral award****. In the given facts and circumstances of the case, the appellate court has rightly held that the learned Single Judge exceeded his jurisdiction in interfering with the award by questioning the interpretation given to the relevant clauses of the*

[29] Emphasis supplied.
[30] (2022) 4 SCC 116.
[31] (2019) 20 SCC 1.

implementation agreement, as the reasons given are backed by logic."[32]

30. Viewed from this perspective, I am unable to accept Mr. Dholakia's submissions that the impugned award suffers from patent illegality. The question of whether the 2014 Contract stands novated by the MoU is itself a question of contractual interpretation. This Court, under Section 34 of the Act, is not required to accord its own interpretation to the contractual documents, but only to assess whether the provisions are capable of the interpretation placed upon them in the impugned award.

31. The learned arbitrator has placed an interpretation upon the terms of the MoU which, in my view, is plausible. Clause 1 of the MoU records the terms upon which the 2014 Contract *"will stand fully satisfied towards both the parties".* However, this does not lead to an invariable conclusion that the 2014 Contract would stand revived, if those terms were not fulfilled. The last recital speaks of the parties' decision to *"to cancel the above said 'construction agreement'.* Clause 1(C) of the MoU, relied upon by the petitioner itself, refers to it as *"the closed contract".* Clause 3 thereof incorporates an agreement between the parties to "*cancel*" the 2014 Contract, without reference to the conditions enumerated in Clause 1, *albeit* in contemplation of a new contract. There is no express or clearly implicit provision that the 2014 Contract would stand revived on account of any breach of the terms contained in Clause 1 of the MoU.

[32] Emphasis supplied.

32. The conclusion of the learned arbitrator that the MoU constituted a novation of the 2014 Contract is, therefore, unimpeachable within the limited jurisdiction of the Court under Section 34 of the Act.

33. Having regard to the above discussion, I do not consider it necessary to enter into the allegations and counter allegations between the parties regarding compliance with the terms of the MoU. Suffice it to say that the impugned award only holds that the arbitration agreement in the 2014 Contract perished upon execution of the MoU, and does not render any conclusive findings upon the rights and obligations of the parties under the MoU, including Clause 1(C) thereof.

Conclusion

34. In view of the aforesaid, I do not find any ground for interference with the impugned award under Section 34 of the Act. The petition is, therefore, dismissed.

35. There will be no order as to costs.

PRATEEK JALAN, J

JUNE 02, 2023
'pv'/Ananya