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

% *Judgment Reserved on: 9th March, 2022*
Judgment Delivered on: 22nd April, 2022

\+ **ARB.P. 1124/2021**

VISTRAT REAL ESTATES PRIVATE LIMITED .... Petitioner
Represented by: Ms Ranjana Roy Gawai, Advocate.

versus

ASIAN HOTELS NORTH LTD ..... Respondent
Represented by: Mr Sidhant Kumar and Ms Manyaa Chandhok, Advocates.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

JUDGMENT:

1. By this petition, the petitioner seeks appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short 'the Act').

2. According to the petitioner, the petitioner purchased the ground 7th, 8th, 9th, 10th, 11th and 12th floors of New Tower, Bhikaji Cama Place, R. K. Puram, New Delhi along with the respective car parking areas at the Hyatt Complex from the respondent vide four registered Sale Deeds dated 12th May, 2014 (in short the Agreements) along with perpetual right to use car parking area.

3. The petitioner transferred and assigned all rights and title in the premises to IndusInd Bank Limited along with perpetual right to use car parking area. Thereafter, the petitioner sought refund of the security deposit of ₹15 Crores deposited by the petitioner pursuant to Refundable

Security Deposit Agreement entered into between the petitioner and the respondent. Since, the claim of the petitioner now is in terms of the Refundable Security Deposit Agreements dated 12th May, 2014, Clause 7 whereof provides for an arbitration, the petitioner invoked arbitration and thereafter filed the present petition.

4. According to the petitioner on the disputes arising, petitioner issued a demand notice vide the letter dated 3rd July, 2021, which was not responded by the respondent and, thereafter, the petitioner issued notice dated 25th August, 2021 giving 30 days time for resolution of the disputes failing which the invocation of the arbitration in terms of the Agreements. Even this notice dated 25th August, 2021 was not replied by the respondent.

5. Clause 7 of the Refundable Security Deposit Agreements between the parties reads as under:

> *"7. If the dispute is not resolved though such discussion within 30 (thirty) days after one Party has served a written notice on the other Party requesting the commencement of discussions, then such dispute shall be referred at the request in writing of any Party to the dispute to binding arbitration in accordance with Arbitration and Conciliation Act, 1996 of India, as amended from time to time by a sole arbitrator to be mutually appointed by the Parties. All arbitration proceedings shall be conducted in the English language and the place of arbitration shall be New Delhi.*
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> *<u>Costs:</u> The costs and expenses of the arbitration, including, without limitation, the fees of the arbitrator shall be borne equally by each Party and each Part shall pay its own fees, disbursements and other charges of its counsel, except for the fees and costs in respect of the arbitrator which shall be borne equally by the Parties. The arbitrator shall have the power to award interest on any sum awarded pursuant to the arbitration proceedings and such sum would carry interest, if awarded, until the actual payment of such amounts."*

6. Though no reply affidavit has been filed to this petition despite time having been granted, the claim of the respondent before this Court is that in view of the third party intervention as the property has been sold off by the petitioner to some other party and the respondent has to take the refundable security deposit money from the said third party, the so called dispute cannot be referred to arbitration as the third party is not a signatory to the Refundable Security Deposit Agreements, Clause 7 whereof provides for reference of disputes to arbitration.

7. Clauses 2 and 3 of the Refundable Security Deposit Agreements between the petitioner and respondent read as under:

> *"2. Subject to clause 3 herein below, the amount of Refundable Security Deposit shall be refunded by AHNL to Vistrat within 07 days from the date on which Vistrat transfers the title of the Said Property to any third party along with transferable perpetual right to use of the Car Parking Area. Unless transfer of both the floors of the Said Property along with right to use Car Parking Area does not take place, AHNL shall continue to hold the Refundable Security Deposit. Delayed payment shall carry simple interest of 2 percent per month with half yearly rest.*
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> *3. It shall be the responsibility and liability of the Vistrat to ensure that at the time of sale of the Said Property along with the transfer of perpetual right to use of the Car Parking Area to any third party, such third party shall provide the Refundable Security Deposit Rs.60,00,000/- (Rupees Sixty Lakhs Only) in its name to AHNL before the Refundable Security Deposit provided by Vistrat herein is refunded to Vistrat by AHNL."*

8. Thus the contention of learned counsel for the respondent before this Court is that the petitioner has sold off the property to the third party and in terms of Clauses 2 and 3, though the third party is to give a refundable security to the respondent, the same has not been given thus in

the disputes raised by the petitioner, since the rights of a third party, who is not a party to the agreement are also involved and hence no Arbitrator can be appointed to adjudicate the disputes arising between the parties in terms of Clause 7 of Agreements.

9. Learned counsel for the respondent relies upon the decision reported as (2003) 5 SCC 531 *Sukanya Holdings (P) Ltd. Vs. Jayesh Shah Pandya and Another* wherein it was held that if the claim vis-a-vis third party is integral to the dispute between the parties to the agreement, the same cannot be referred to arbitration. Supreme Supreme Court held :

> *"14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.*
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> *15. The relevant language used in Section 8 is: "in a matter which is the subject of an arbitration agreement". The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced — "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.*
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> *16. The next question which requires consideration is — even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the*

cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

10. The petitioner seeks reference to arbitration in terms of Clause 7 of the Agreements. However, Clauses 2 and 3 of the Agreements are also integral parts which provide that only on the third party providing the Refundable Security Deposit to the respondent, the petitioner can claim Refundable Security Deposit and the third party is neither a party to the agreement nor party to the present petition.

11. Hon'ble Supreme Court in the decision reported as (2013) 1 SCC 641 *Chrolo Controls India Private Ltd. Vs. Severn Trent Water Purification Inc. and Ors.* though dealing with an international arbitration under Section 45 of the Act, held that even third parties who are not signatories to the arbitration agreement can be joined in arbitration. It laid down categories where the third parties can be impleaded to the arbitration and held that the expression 'claiming through them' should be construed strictly. It was held as under:

"70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (2nd Edn.) by Sir Michael J. Mustill:

"1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence.

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73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute.

Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

74. In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple 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. The intention of the parties to refer all the disputes between all the parties to the Arbitral Tribunal is one of the determinative factors.

75. We may notice that this doctrine does not have universal acceptance. Some jurisdictions, for example, Switzerland, have refused to recognise the doctrine, while others have been equivocal. The doctrine has found favourable consideration in the United States and French jurisdictions. The US Supreme Court in Ruhrgas AG v. Marathon Oil Co. [143 L Ed 2d 760 : 526 US 574 (1999)] discussed this doctrine at some length and relied on more traditional principles, such as, the non-signatory being an alter ego, estoppel, agency and third-party beneficiaries to find jurisdiction over the non-signatories.

76. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-

signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

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103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:

103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

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107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that

when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration".

12. The decision in *Chrolo Controls* (supra) clearly holds that in exceptional cases applying the principle of "composite performance" or implied authority, even a third party who is not a signatory to the arbitration agreement can be joined in arbitration.

13. Hon'ble Supreme Court in *Vidya Drolia* (supra) further considering the issue as to who would decide the non-arbitrability of the claim held that there cannot be a straightforward universal answer. Reiterating the law laid down in *Shin Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd.* (2005) 7 SCC 234, it was held that the correct approach to the review of the arbitration agreement is restricted to prima facie finding that there exists an arbitration agreement that is not null and void, inoperative or incapable of being performed. The key rationale for holding that the courts' review of the arbitration agreement should be limited to a prima facie standard is the principle of competence-competence. Further, if the courts are empowered to fully scrutinise the arbitration agreement, an arbitral proceeding would have to be stayed until such time that the court seized of the matter renders a decision on the arbitration agreement. This would defeat the credo and ethos of the Arbitration and Conciliation Act which is to enable expeditious arbitration without avoidable intervention by the judicial authorities. The rule of priority in favour of the arbitrators is counterbalanced by the courts' power to review the existence and

validity of the arbitration agreement at the end of the arbitral process. It was further held that if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps the court may decide the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then the best course would be to allow the arbitrator to form a view in the matter.

14. Therefore, once a valid arbitration agreement exists between the parties, the issue whether the petitioner is entitled to any relief in the absence of a third party to the agreement or that third party is required to be impleaded in the proceedings, is covered by the Doctrine of Competence-Competence and it will be for the Arbitrator to decide the said issue. Thus, the issue whether in the absence of a third party, the petitioner can claim the refundable security deposit would be for the learned Arbitrator to determine.

15. In view of the discussion aforesaid, this Court finds no merit in the objection taken by the learned counsel for the respondent. Consequently, Justice Usha Mehra, a former Judge of this Court is requested to arbitrate the disputes between the parties.

16. The learned Arbitrator would be entitled to charge fees as per the Schedule IV of the Act or as agreed by the learned Arbitrator pursuant to the consent of the learned counsels for the parties.

17. The learned Arbitrator is requested to furnish the requisite disclosure under Section 12(2) of the Act within one week of entering into the reference.

18. The right of the respondent to file counter-claim and objections

before the learned Arbitrator in accordance with law is reserved.

19. Petition is disposed of.

20. Order be uploaded on the website of this Court.

MUKTA GUPTA
(JUDGE)

APRIL 22, 2022
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