

M/S Idbi Trusteeship Services Limited vs Ozone Properties Private Limited & Ors. on 7 April, 2025

Author: Manoj Kumar Ohri

Bench: Manoj Kumar Ohri

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on : 21.
Pronounced on : 07.

+ ARB.P. 433/2024

M/S IDBI TRUSTEESHIP SERVICES LIMITEDPetitioner
Through: Mr. Jayant Mehta, Sr. Advocate with
Mr.Angad Verma, Mr. Prashant
Kumar, Ms.Nikita, Mr.Kevin and
Ms.Tina, Advocates
versus

OZONE PROPERTIES PRIVATE LIMITED & ORS.....Respondents
Through: Mr. Debopriyo Moulik, Advocate for
Respondent nos. 1 and 2.
Mr. Trideep Pais, Sr. Advocate with
Mr. Vidur Bhatia, Mr. Anshul and
Ms. Saloni Ambastha, Advocates for
Respondent no.3

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The instant petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the „A&C Act), seeking constitution of Arbitral Tribunal (hereafter, referred to as „AT) comprising of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The dispute arises out of a Master Agreement dated 26.04.2023 which was executed between the Petitioner and Respondents No.1 and 2. Clause 3.2 of the agreement contains an arbitration clause as per which the place of arbitration is New Delhi.

3. Master Agreement came to be executed to record terms and conditions of repayment of a loan that the Respondent No.1 and 2 had availed of from the Petitioner under a Debenture Trust Deed ("DTD") dated 09.03.2020. Earlier, Respondent No.1 had borrowed a sum of Rs.75 Crores from the Petitioner in the form of 7,50,000 redeemable, optionally convertible debentures having a face value

of Rs.1000/- each. Parties thereafter entered into a DTD whereby terms and conditions on which debentures were allotted to the Petitioner was recorded.

4. Respondent No.1 was unable to redeem the debenture within the 13 months redemption period. Petitioner granted two extensions for redemption however, Respondent No.1 failed to redeem. Third extension sought by the Respondent No.1 on 05.07.2022 was denied by the Petitioner who instead issued a demand and recall notice dated 16.08.2022, recalling the loan.

5. Subsequently, in order to apparently repay the loan, Respondent No.1 expressed its desire to liquidate one of its projects named 'Ozone Manay Tech Park' situated at Bangalore and the property 'Ozone Techno Park' at Tamil Nadu, which was owned by Platinum Holdings Ltd, a wholly owned subsidiary of True Living Ltd, which in turn is a wholly owned subsidiary of Respondent No 1. Respondent No.3 agreed to purchase the above project for a sum Rs. 835.5 crores.

6. Thereafter, the abovementioned Master Agreement came to be signed, setting out the manner and terms and conditions of repayment of Rs.75 Crores loan by the Respondent No.1 and fulfillment of certain other obligations. Petitioner had agreed to the sale of the Project by the Respondent No.1, as part of the repayment plan. Consequently, Respondent No.1 issued two request letters dated 26.04.2023, seeking Petitioner's "no- objection" to transfer/sell the Project, which was responded by the Petitioner granting its "in-principle" "no objection" to the transfer of shares of the Respondent No.1 Company to the prospective transferee, for transfer of the properties to the Respondent No.3, the intended transferee.

7. As per the Petitioner, the no objection was contingent upon the re- payment of loan in two tranches of Rs.62.50 Crores and Rs.12.50 Crores. First NOC was granted on 27.04.2023 at the time of payment of first tranche of Rs.62.50 Crores, made by the Respondent. However, the final NOC was withheld by the Petitioner since the Respondent failed to pay the second and final tranche of Rs.12.50 Crores. As per the Petitioner, despite various reminders, the second tranche of payment was not made and the Respondents No.1 and 2 and they also failed to create additional security for the loan as per the undertaking dated 28.04.2023.

8. The Petitioner invoked arbitration vide notice dated 26.04.2023. Respondent No.3 has denied the said notice in their response dated 08.12.2023 contending that they are not a party to the Master Agreement.

9. During the course of submissions, while learned counsel for Respondents No.1 and 2, on instructions, states that the answering Respondents have no objection if the matter is referred to arbitration, however, learned Senior Counsel for Respondent No.3 has vehemently opposed the reference to arbitration and contended that not even a prima facie case has been made out to refer Respondent No.3 to arbitration. It is contended that Respondent No.2 has neither signed the Master Agreement nor any other Deed.

10. Mr. Jayant Mehta, learned Senior Counsel for the Petitioner contends that the impleadment of Respondent No.3 is necessary and vital for the adjudication of the present dispute. It is submitted

that as per clause 7.4 of the DTD, prior written consent was required to be obtained by the Respondent No.1 from the Petitioner before dealing with the shareholdings (100%) held in True Living Pvt. Ltd and Platinum Holdings. It is further submitted that though the Respondent No.3 is not a signatory to the Master Agreement, it is integral to the execution of the said agreement. Reliance is placed on Recital E, which notes that the Respondent No.1 was in talks with Respondent No.3 (the buyer) for purchase of the two properties. Reliance is also placed on clause 1.1 of the Master Agreement, to contend that a part of the sale consideration was to be mandatorily utilized for payment which was due from Respondent No.1 under the DTD and if the same was not done, the Agreement would have been vitiated. It is further submitted that this obligation to repay the Petitioner is also noted in the letters of the Respondent No.1 dated 26.04.2023.

It is next submitted that upon enquiry made by the Petitioner regarding the balance amount, it was informed by the Respondent No.1 that the delay was purely attributable to the Respondent No.3 who failed to close the transaction on time. On occurrence of „Event of Default , the Petitioner issued a notice dated 19.10.2023 to Respondent Nos.1 and 2 as well as to Respondent No.3 which clearly mentioned that upon failure to make balance payment, Respondent No.3 would be impleaded as a party to the legal proceedings.

Lastly, it is submitted that Respondent No.3 though not a party to any of the Agreements executed between Petitioner and Respondent Nos.1 and 2, it was clearly a beneficiary. Further, it could not have bought the shares of the holding company which held the properties without the approval of Petitioner in whose favour there had been a pledge of shares. Respondent No.3, being a beneficiary, is actually a veritable party to the transaction. In support of submission, reliance is placed on decisions of the Supreme Court in Cox and Kings Private Limited v. SAP India Private Limited & Anr¹ and Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors.²

11. Mr. Pais, learned Senior Counsel for Respondent No.3 on the other hand submits that Respondent No.3 is not a signatory either to the DTD, or to the Master Agreement which contains the arbitration clause nor a veritable party. He further submits that the Respondent No.3 has not signed a single letter to the Petitioner. Moreover, it is further contended that Respondent No.3 has purchased the two properties after the Master Agreement was signed and the first two „Event of Default notices given by the Petitioner were not addressed to the Respondent No.3, which itself would show that the Petitioner is now suddenly involving it in the dispute which is clearly an afterthought.

It is further contended that the Respondent No.3 entered into two Share Purchase Agreements dated 15.04.2023. SPA-1 was entered into with Respondent No.1 for purchase of its shares and consequently the Ozone Manay Tech Park property for Rs. 305 Crores. Similarly, SPA-2 was entered into with Platinum Holdings for the purchase of Ozone Techno Park for Rs. 462.50 Crores and in either SPAs, no payments were to be made by the Respondent No.3 to the Petitioner, let alone any instalment payment of Rs.62.50 Crores or Rs.12.50 Crores.

(2024) 4 SCC 1 2024 SCC OnLine SC 259 It is contended that admittedly, the first tranche of payment was made to the Petitioner consequent to which it had issued a final objection letter dated

11.05.2023 which clearly notes that the Petitioner had released the pledge(s)/charge(s) over the shares and accorded their no-objection for the transfer of the shares and the properties in favour of the Respondent No.2. Thus, it is argued that the transaction had achieved finality and any role attributable to Respondent No.3 came to an end with it. It is submitted that the non-payment of the second tranche does not affect the rights of the Respondent No.3. As per clause 1.10 of the Master Agreement, in case of breach, the Petitioner had the right to proceed only against the Respondent No.2 and to the extent of identified properties i.e. 14 units in Aqua II project and not the properties in question. It is submitted that Respondent No.3 can at best be a witness as a garnishee. Reliance is placed on Cox and Kings (Supra), Ajay Madhusudan Patel (Supra) and Indraprastha Power Generation Co. Ltd. v. Hero Solar Energy (P) Ltd.³

12. In rejoinder, it is argued that the balance payment of Rs.12.5 Crores was actually to be received by the Respondent No.1 from Respondent No.3, as is evident from Respondent No.1's email to the Petitioner dated 16.06.2023. It is further submitted that the reliance on the decision in Indraprastha Power Generation Co. (Supra) is misplaced and the same can be distinguished on facts.

13 I have heard learned counsel for the parties and gone through the records.

14. On the question of referring non-signatories for arbitration, while exercising jurisdiction under Section 11 of the A&C Act, this court is 2024 SCC OnLine Del 6080 required to enquire about the existence of the arbitration agreement, which is a sine qua non for referring the parties for arbitration. This conclusion, court should be able to reach with minimal enquiry without a detailed analysis. Whether on the principles laid down in Cox and Kings (Supra), a non-signatory can be said to be party to an arbitration agreement, will require a detailed enquiry, which may not be legally appropriate for this court in this jurisdiction to be involved with. The detailed and comprehensive enquiry is best suited to be conducted by the Arbitral Tribunal. For the purpose of this case, this Court is only required to look into as to whether Respondent No.3, a non-signatory, is a veritable party for referring it to arbitration.

15. The essence of the dispute involves the Petitioner seeking repayment of Rs.12.50 Crores allegedly due to it under the DTD and Master Agreement from the Respondent No.1. Though the Master Agreement notes Respondent No.3 as the "buyer", it appears that the actual undertaking to repay the Outstanding Amounts under the DTD to the Petitioner has been given by the Respondent No.1 in clause 1.6 of the Master Agreement. No document or other communication by the Respondent No.3 has been shown where it admits or acknowledges any liability to pay the Petitioner. No direct communication has been shown to have taken place between the Petitioner and Respondent No.3 except the Last „Event of Default notice. The email dated 16.06.2023 from Respondent No.1 blaming Respondent No.3 for the delay in payment of the balance amount will not by itself, without any action on its part to acknowledge that it was responsible for the repayment to the Petitioner, be sufficient to rope in Respondent No.3.

16. The Respondent No. 3 has entered into two SPAs dated 15.04.2023 for acquiring the above noted two properties, namely 'Ozone Manay Tech Park' in Bangalore and 'Ozone Techno Park' in Chennai. Petitioner is not party to either of these SPAs which has been entered between the Respondents. The

obligation of the Respondent No.3 to pay under these SPAs is to the selling shareholders and not the Petitioner. Therefore, there is no written document which records that Respondent No.3 would be directly liable for repayment to the Petitioner. Thus, on a prima facie consideration of facts and circumstances, Respondent No.3 cannot be said to be a veritable party and is thus not referred to arbitration.

17. The allegations and counter allegations qua the alleged breach of the Master Agreement by Respondent No.1 and 2 and the consequences of non- payment of balance amount by them need not be looked into by the Court at the stage of a petition under Section 11 of the A&C Act. These issues would require arbitral adjudication and are best put forth before the AT.

18. Since Respondent No.1 and 2 have consented to arbitration, considering the facts and circumstances, this court deems it apposite to refer the matter to the Arbitral Tribunal comprising of a Sole Arbitrator. Accordingly, the present Petition is disposed of with the following directions:

i) The disputes between the parties under the said agreement are referred to the Arbitral Tribunal comprising of a Sole Arbitrator.

ii) Ms. Justice Rekha Palli, Former Judge of High Court of Delhi, (Mob: 9810012120) is appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties uninfluenced by any observation made in this order.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the „DIAC). The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators Fees) Rules, 2018 or as the parties may agree.

iv) The learned Arbitrator shall furnish a declaration in terms of Section 12 of the A&C Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including on the existence and validity of the Arbitration agreement, arbitrability of any of the claim/counter claim, any other preliminary objection, need and legality of interim relief, as well as contentions on merits of the dispute by either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned Arbitrator within four weeks from today.

MANOJ KUMAR OHRI (JUDGE) APRIL 07, 2025 ry