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

+ **ARB.P. 222/2016**

SMT. PRIYANKA GUPTA & ANR. Petitioners

Through : Mr Sanjay Goel and Ms Kanika
Srivastava, Advocates.

versus

TDI INFRACORP (INDIA) LIMITED Respondent

Through : Mr N. Mahabir and Mr P.C. Arya,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **20.09.2016**

1. The petitioners have filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator.
2. It is not in dispute that the petitioners had entered into a 'Buyer's Agreement' with the respondent for purchase of a flat in a development scheme known as 'Waterside Floor', in TDI LakeGrove City at Kundli, Sonapat, Haryana, which was being developed by the respondent.
3. Certain disputes have arisen between the parties in relation to the said agreement and, therefore, the petitioners sent a notice dated 01.02.2016 calling for constitution of the Arbitral Tribunal for adjudication of the said disputes. According to the respondent, the said notice was not received by it. The petitioners thereafter, filed the present petition on 08.04.2016 with an advance copy to the respondent. After the petition had been filed, the respondent, by a letter dated 15.04.2016, appointed an Arbitrator for

adjudication of the disputes.

4. The learned counsel appearing for the respondent raised two objections. First, that the letter of invocation dated 01.02.2016 was not in accordance with the Arbitration Agreement; and second, that the Arbitration Agreement expressly provided that the Managing Director of respondent would appoint the Arbitrator and, therefore, the present petition ought to be dismissed.

5. The learned counsel appearing for the petitioners countered the aforesaid submissions and submitted that the notice dated 01.02.2016 was served upon the respondent by speed post and was delivered. He has also handed over a photocopy of the delivery report which indicates that the said notice was delivered to the respondent. He further submits that the respondent had only proceeded to act only after the present petition had been filed and in view of the decision of the Supreme Court in **Datar Switchgear Ltd v. Tata Finance Ltd and Anr.:** (2000) 8 SCC 151, the respondent had forfeited its right to appoint an arbitrator.

6. I have heard the learned counsel for the parties.

7. At the outset it is necessary to refer to the arbitration clause, which is set out below:-

“53. Any dispute, controversy, or claim arising between the parties to this Agreement out of or relating to this agreement, including their respective rights and obligations contained herein, or the breach, termination, or invalidity of this Agreement, or relating to interpretation of any provisions herein, such differences or disputes or matters shall be submitted for arbitration to

a sole Arbitrator appointed by the Managing Director of the Company who shall decide the same in accordance with the Arbitration and Conciliation Act, 1996 and any other statutory modifications or re-enactment thereof. The language to be used in the arbitration shall be English. The arbitration proceedings shall be held in Delhi. Each party further agrees that it shall not commence or maintain any suit for legal proceeding concerning a dispute hereunder until such dispute has been finally settled in accordance with the arbitration procedure provided for herein.”

8. In view of the Arbitration Agreement between the parties, the petitioners had sent a notice dated 01.02.2016. Although, the receipt of the said notice is disputed, however, the petitioners have handed over a copy of the tracking report of speed post which indicates that the item in question was delivered to the respondent on 05.02.2016 at 17:40 hours.

9. Further, even if it is assumed that the said notice has somehow escaped the attention of the respondent, there is no credible explanation as to why the respondent had on its own decided to appoint an Arbitrator on 15.04.2016. The only explanation given by the learned counsel for the respondent is that the demands for payment made by the respondent earlier had not been honoured and, therefore, the respondent had invoked the arbitration clause. In my view, the said explanation is not credible. First and foremost, for the reason that admittedly no prior notice was issued by the respondent informing the petitioners about the intention to appoint an arbitrator, on the petitioners failing to pay the alleged outstanding.

10. Secondly, the arbitrator was appointed by the respondent only after the petitioners had filed the present petition and after an advance copy of the

petition had been served on the respondent.

11. It is correct that the letter dated 01.02.2016 was not in terms of the arbitration clause in as much as the petitioners had sought constitution of an Arbitral Tribunal of three members whereas the arbitration clause contemplated the disputes to be adjudicated by a sole arbitrator. However, the petitioners had clearly evinced their intention for resolution of the disputes by arbitration. It was always open for the respondent to respond to the said notice by acceding to appoint an arbitrator but as it stands, the respondent did not take any action till the present petition was filed. As stated earlier, the respondent's contention that it has not received the letter dated 01.02.2016 is difficult to accept.

12. In the circumstances, I consider it necessary to appoint a sole Arbitrator to adjudicate the disputes between the parties. Accordingly, it is directed that a sole Arbitrator be appointed under the Rules of the Delhi International Arbitration Centre (DIAC). The representatives of the parties shall appear before the Co-ordinator, DIAC on 04.10.2016 at 02:15 PM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

13. The petition is disposed of.

14. *Dasti.*

VIBHU BAKHRU, J

SEPTEMBER 20, 2016
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