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

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+ **O.M.P. 1475/2014**

RUSKIN TITUS INDIA PVT LTD

..... Petitioner

Through: Mr. Tanuj Khurana, Mr. Yash Mehta
Mr. P. Chaitanuyashil, Advocates.

versus

MANGAL MURIT EXIM(P) LTD & ANR

..... Respondent

Through: Mr. Vinay Gupta, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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18.10.2016

IA No. 23003 of 2014

1. Since the present application has already been disposed of, it need not be shown in the cause list.

IA No. 8886 of 2015

2. This application does not survive since no execution proceeding has been filed.

3. The application is disposed of.

O.M.P. 1475/2014

4. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') has been filed by Ruskin Titus India Pvt. Ltd. against an Award dated 11th September, 2014 passed by the sole Arbitrator. The brief facts are that the Petitioner was earlier known as Caryaire Air System Components

Pvt. Ltd. which took on lease premises No. 347-E, Udyog Kendra Extension-II, Ecotech-III, Udyog Vihar Industrial Area, Gautam Budh Nagar, Greater Noida-UP from the Respondent by way a lease dated 29th June, 2009. The said lease contained Clause 20 having arbitration clause which read as under:

“20. In case of any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be settled through friendly consultations between both the parties. In the event that no settlement is reached within 30 day from the date of notification by either party to the other that it intends to submit a dispute, controversy or claim to arbitration then such dispute, controversy or claim shall be finally settled by arbitration. The place of arbitration shall be New Delhi. The language of the arbitration shall be English language.”

5. It requires to be noticed at this stage that the above clause did not envisage the unilateral appointment of an Arbitrator by either of the parties. According to the Petitioner, after the premises was handed over to it, it started paying monthly rent as agreed between the parties. The dispute appears to have arisen between the parties on the construction of a wall in the security office in the premises. The Respondent wrote a letter on 1st October, 2013 asking the Petitioner to vacate the guard room so that the wall could be constructed. The Petitioner then replied by email dated 5th December, 2013 informing that it had vacated the premises and sought refund of the security deposit of Rs.15,60,000. It was further stated that the security charges for the guards deployed would be on the account of the Respondent till such time the possession of the vacated premises is taken, failing which the security guard arrangement would be terminated.

6. A legal notice dated 21st January 2014 was sent by the Respondent to the Petitioner where *inter alia* it called upon the Petitioner to pay a sum of Rs.9,95,496 towards the arrears of rent, failing which the Respondent would be left with no option but to refer the matter to arbitration. In the said notice, the Respondent appointed one Mr. Anil Kumar Mittal, Advocate as Arbitrator. This was followed by another notice dated 28th February, 2014, where the same demand was reiterated.

7. It appears that the Arbitrator so appointed entered upon reference and issued notice for fixing the hearing on 19th July, 2014. The Petitioner through its counsel made a request on that date for an adjournment to enable the Petitioner to approach the High Court seeking appointment of an Arbitrator under Section 11 of the Act.

8. In the impugned Award dated 11th September, 2014, the learned Arbitrator notes in para 8 as under:

“On 19/07/2014, Shri Girish Bansal, Director and A.R. appeared on behalf of the Claimant company. Shri Gaurav Malik, Advocate on behalf of Shri Tanuj Khurana, counsel for the Respondent company called me on my cellphone at 5.16 pm from landline no. 011-41009958 and again requested for an adjournment on the ground that the Respondent Company was contemplating moving to the Hon’ble High Court of Delhi against the arbitration proceedings. The said request of the Respondent Company was allowed in the interest of justice and the matter was adjourned to 01/08/2014 for 5 p.m. for filing of written statement by the Respondent Company and finalization of arbitration fees, expenses etc.”

9. What is not clear from the above paragraph is whether the learned Arbitrator communicated to the Petitioner that the matter had been

adjourned to 1st August, 2014 at 5 pm.

10. In the meanwhile, the Petitioner filed a petition under Section 11 of the Act being OMP No. 786 of 2014 in this Court. The said petition was dismissed as withdrawn with liberty to the Petitioner to file a petition before the appropriate forum.

11. In para 9 of the impugned Award the learned Arbitrator notes as under:

"9. Again on 01/08/2014 Shri Girish Bansal, Director and A.R. appeared on behalf of the Claimant Company but none appeared on behalf of the Respondent Company. The Respondent Company did not cause its appearance despite various previous opportunities and failed to file its Written Statement against the claim and the Respondent Company was, therefore proceeded *ex-parte* on 01/08/2014. The Claimant company was directed to file *ex-parte* evidence by way of affidavit and the arbitration fees was also fixed at Rs. 50,000/- and the further at Rs.5,000 per hearing. IN the absence of Respondent Company, the entire fees was directed to be borne by the Claimant company with liberty to recover half of the legal costs incurred during the proceedings from the Respondent company as per law and the matter was adjourned to 23/08/2014 for 5pm."

12. What is clear from the above para is that on 1st August, 2014, none appeared for the Respondent. It is seen that the learned Arbitrator decided to proceed *ex parte* against the Petitioner herein on that date i.e., 1st August 2014, and thereafter passed the *ex parte* Award which is the subject matter of challenge in this petition.

13. There are two main grounds of challenge. The first is that the Respondent could not have unilaterally appointed an Arbitrator. Reliance has been placed on ***Dharma Pratishthanam v. Madhok Construction (P)***

Ltd., (2005) 9 SCC 686 to urge that the entire proceedings consequent upon such unilateral appointment of an Arbitrator stands vitiated in law. Secondly, it is submitted that there is a violation of the principles of natural justice since the learned Arbitrator unfairly set the Respondent *ex parte* on 1st August, 2014, without in fact noticing that the said date was never communicated to the Petitioner. It is only when the Petitioner was served with a certified copy of the Award dated 11th September, 2014 on 15th September, 2014 that the Petitioner became aware of the proceedings having taken place on 1st August, 2014 and thereafter. The procedure adopted is unfair and vitiates the consequential Award in terms of the law explained in *Hindustan Petroleum Corporation Ltd. v. Indwell Constructions Ltd., 2010(3) ALT 569*.

14. Learned counsel for the Respondent refers to Section 4 of the Act which talks of waiver by a party of the right to object to the arbitral proceedings. According to him, the Petitioner participated in the proceedings on 19th July, 2014 and the fact that the matter had been adjourned to 1st August, 2014 by the learned Arbitrator was known to the Petitioner. It is stated that since the Petitioner did not in fact object to the appointment of learned Arbitrator by the Respondent, it cannot be heard to raise any such objection at this stage. Secondly, on the basis of the decisions in *Anil Jain v. Madhunam Appliances (P) Ltd 1997(2) Arb.LR 325* and *State of Uttar Pradesh v. Combined Chemicals Co.P.Ltd. (2011) 2 SCC 151*, it is urged that it was for the Petitioner to have followed up the matter and found out what the next date of hearing was. According to the learned counsel for the Respondent, it was not obligatory for the Arbitrator to keep informing the party of the next

date of hearing. Reliance is also placed on the decisions in ***Bharat Sanchar Nigam Ltd. v. Motorola India Pvt. Ltd. 2008 (12) SCALE*** and ***S.N. Malhotra v. Airport Authority of India 2008(3) RAJ 589 (Del)***.

15. In the first place, the Court would like to observe that Clause 20 of the lease deed does not permit either of the party to unilaterally appoint an Arbitrator. It envisages appointment of Arbitrator only upon agreement between the parties. There is no scope for interpreting Clause 20 in any other manner.

16. The Court is also unable to agree with the learned counsel for the Respondent that by appearing before the Arbitrator on 19th July, 2014 and seeking an adjournment on the ground that it was filing a petition under Section 11 of the Act before the High Court, the Petitioner had accepted the jurisdiction of the learned Arbitrator and participated in the proceedings thereby waiving its right under Section 4 of the Act. It is plain that the adjournment was sought only because the Petitioner had an objection to the unilateral appointment of the Arbitrator.

17. Further, the Petitioner followed up such objection by filing a petition being OMP 786 of 2014 in this Court. That petition was dismissed as withdrawn on 23rd July, 2014 permitting the Petitioner to raise the objection at the appropriate stage. In these circumstances, it cannot be said that the Petitioner had waived its right to object to the Arbitrator by appearing in the arbitral proceedings on 19th July, 2014. The Court, therefore, finds merit in the contention of the learned counsel for the Petitioner on the basis of the law explained in the ***Dharma Pratishthanam v. Madhok Construction (P)***

*Ltd.(supra)*that in the absence of any acquiescence or consent by the Petitioner to the appointment of the Arbitrator, the entire proceedings stand vitiated on account of the unilateral appointment of the Arbitrator by the Respondent.

18. As regards the unfairness of the procedure adopted by the learned Arbitrator, the Court finds that there is nothing on record to indicate that the learned Arbitrator communicated to the Petitioner that the hearing after 19th July, 2014 was fixed at 5 pm on 1st August, 2014. It was incumbent upon the Arbitrator to have communicated the next date to the Petitioner. The Court is unable to agree with the learned counsel for the Respondent that the Petitioner was not diligent in following up the matter with the learned Arbitrator. The decisions relied upon by the counsel for the Respondent are distinguishable on facts. This is not a case where despite several opportunities, the Petitioner failed to appear before the Arbitrator.

19. For the aforementioned reasons, the Court is satisfied that the impugned Award is unsustainable in law and deserves to be set aside. However, the Court is also of the view that the Respondent cannot be left without a remedy and that its claims against the Petitioner and any counter-claim that the Petitioner may have against the Respondent should be adjudicated in terms of the arbitration clause.

20. Consequently, the Court proposes that Mr. N.P. Kaushik, a former Additional District Judge (Mobile No. 9910384663) be appointed as sole Arbitrator to adjudicate the disputes between the parties including their claims and counter-claims. The requirements of the Arbitration and

Conciliation Act, 1996 as amended with effect from 23rd October, 2015 shall be first complied with by Mr Kaushik and the necessary disclosures in terms of Section 11 (8) read with Section 12 (1) of the Act shall be made by him to the DAC which will then communicate it to the parties. Subject to compliance with the above direction, Mr Kaushik will act as Arbitrator and enter upon reference. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre ('DIAC'). The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules.

21. The petition is disposed of in the above terms. A copy of this order be communicated to Mr N P Kaushik as well as the Additional Coordinator, DIAC forthwith.

S. MURALIDHAR, J

OCTOBER 18, 2016
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