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

% ***Date of decision:* 10.10.2017**

+ **ARB.P. 89/2017**

ERA INFRA ENGINEERING LIMITED Petitioner
Through Mr.Manoj K.Singh, Mr.Nilava
Bandhopadhyay and Mr.Rahul
Pandey, Advs.

versus
CENTRAL PARK ESTATE PVT LTD Respondent
Through Ms.Sadhana Sharma, Adv. for R-1
Mr.Ravi K.Chandna and Ms.Bindiya
L.Airi, Advs. for the proposed
respondent

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. Present petition is filed under section 11 of the Arbitration and Conciliation Act 1996 seeking to appoint an independent Arbitrator to adjudicate the disputes between the parties. The case of the petitioner is that on 7.2.2008 the respondent issued an invitation for bids for construction and development of Central Park II, Sector-48, Sohna Road, Gurgaon (Haryana) Subsequently on 11.3.2008 a Letter of Intent was issued by the respondent. A formal Contract Agreement (work order) was entered into between the parties on 26.03.2008. On 11.6.2013 the petitioner is stated to have submitted its final bill to the respondent amounting to Rs.64,55,26,207/-. The bill is said to have been disputed. It is urged that the petitioner also approached the Chief Executive Officer for settlement of claims vide letter dated 31.3.2016. As the Chief Executive Officer was unable to resolve the

disputes/claims the arbitration clause was invoked by a communication dated 19.7.2016.

2. Reliance is placed on the arbitration clause, which is clause 7.46 (c) of the MOU, which reads as follows:-

“7.46 DISPUTES, SETTLEMENTS AND ARBITRATION:

(a).....

(b).....

(c) All disputes and difference whatsoever, which shall at any time hereafter arise between the Parties hereto, touching or concerning this Agreement or its interpretation or effect or as to the rights, duties, obligations and liabilities of the Parties hereto or either of them under or by virtue of this Agreement or otherwise as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement shall be referred to the Arbitration in accordance with the provisions of Arbitration and Conciliation Act 1996. The Parties agree that the reference of the disputes and difference between the Parties would be made to the Sole Arbitration, to be appointed by the Owner.”

3. The respondent has taken an objection to the present petition. It is their case that there is no privity of contract between the parties and that the respondent is not a party to the Agreement in question. It is urged that the contract in question was actually executed between the petitioner and M/s.Sweta Estates Pvt. Ltd and that the respondent was only the Project Manager and Attorney of the said M/s.Sweta Estates Pvt. Ltd. Hence, the respondent has urged that there is no arbitration agreement between the petitioner and the respondent.

4. Keeping in mind the above objections of the respondent the petitioner has filed an application being IA No.7822/2017 for impleadment of the said

M/s.Sweta Estates Pvt. Ltd. M/s.Sweta Estates Pvt. Ltd has filed their reply. In the reply the said M/s.Sweta Estates Pvt. Ltd states that the Contract Agreement dated 10.4.2008 was executed between the said M/s.Sweta Estates Pvt. Ltd and the petitioner and that the respondent was only an attorney holder. It also stated that coming to know about the present petition and the disputes raised by the petitioner, the said M/s.Sweta Estates Pvt. Ltd has already appointed Shri Prithvi Singh Gumber as the Sole Arbitrator on 14.02.2017 and that the petitioner has joined the arbitration proceedings which are pending adjudication. Based on the above, it is urged that the present petition is misplaced.

5. I have heard learned counsel for the parties.

6. Learned counsel for the respondent has reiterated the submissions that the respondent is merely a Project Manager and Attorney of M/s.Sweta Estates Pvt. Ltd. He relies upon the Agreement dated 11.3.2008 to point out that the respondent has clearly stated in the Agreement that they are acting for and on behalf of M/s.Sweta Estates Pvt. Ltd. Hence, it is urged that there is no arbitration agreement between the parties. It is urged that disputes are actually between the petitioner and M/s.Sweta Estates Pvt. Ltd.

7. Learned counsel for M/s.Sweta Estates Pvt. Ltd. insisted that in compliance of the arbitration clause the Arbitrator stands appointed and hence the present petition in any case is infructuous. He reiterates that the petitioner has joined the arbitration proceedings.

8. Some facts are noteworthy. The notice of invocation of arbitration was sent by the petitioner on 19.7.2016. The respondent does not deny receipt of this notice of invocation. There is no reply given by the respondent in any manner whatsoever pleading that the notice has been sent

to a wrong entity or that as power of attorney holders of M/s.Sweta Estates Pvt. Ltd they do not have any authority to accept the notice on its behalf.

9. What follows is that essentially the respondent and M/s.Sweta Estates Pvt. Ltd. are urging that for the purpose of carrying transactions with the petitioner, the respondent acted as the attorney of M/s.Sweta Estates Pvt. Ltd. However, for the purpose of present proceedings and on the issue of appointment of an arbitrator, it is sought to be urged that the respondent is not the attorney of M/s.Sweta Estates Pvt. Ltd.

10. This Court requested the counsel for the respondent and M/s.Sweta Estates Pvt. Ltd. to show the power of attorney executed by M/s.Sweta Estates Pvt. Ltd. in favour of the respondent. However, the court was informed that copy of the Power of Attorney has not been placed on record.

11. The pleas that the respondent was not authorised to accept any notice on behalf of M/s.Sweta Estates Pvt. Ltd. hence, cannot be accepted. The best document which was available with the respondent/M/s.Sweta Estates Pvt. Ltd. has been hidden from the Court. It is manifest that the respondent/M/s.Sweta Estates Pvt. Ltd. is trying to take advantage of technicalities to defeat the present petition.

12. Further the conduct of the respondent and M/s.Sweta Estates Pvt. Ltd. shows that the respondent even for the purpose of present proceedings has acted as the attorney of M/s.Sweta Estates Pvt. Ltd. The petitioner has sent a notice invoking the arbitration clause on 19.07.2016 that was sent to the respondent. Thereafter, the petitioner has filed the present petition on 21.01.2017. M/s.Sweta Estates Pvt. Ltd. based on these two events has appointed the arbitrator despite the fact that notice of invocation was not addressed to it and that it was not a party in the present petition. Hence, the

plea of the respondent and M/s.Sweta Estates Pvt. Ltd. cannot be accepted that the present petition is not maintainable as the said respondent is not a party to the arbitration agreement. The respondent is clearly the attorney holder of M/s.Sweta Estates Pvt. Ltd. and has acted for and on its behalf. The two of them, namely, the respondent and M/s.Sweta Estates Pvt. Ltd. have acted in tandem for the purpose of appointment of an arbitrator.

13. In my opinion, the respondent having always acted as an Attorney of M/s.Sweta Estates Pvt. Ltd. cannot now try and wriggle out claiming that it has no authority to act on behalf of M/s.Sweta Estates Pvt. Ltd. for the present purpose/proceedings.

14. I may also note that the petitioner has clarified that they have, at no stage, participated in the arbitration proceedings before the Arbitrator appointed by M/s.Sweta Estates Pvt. Ltd. Reliance is placed on a communication dated 14.4.2017 which was sent to the learned Arbitrator pointing out that the present petition is pending adjudication before this Court.

15. To avoid any technicality, it is in the interest of justice that the application filed by the petitioner under Order 1 Rule 10 CPC be allowed and the said M/s.Sweta Estates Pvt. Ltd. be also added as a party to the present petition as respondent No.2. I may also note that M/s.Sweta Estates Pvt. Ltd. is a necessary and proper party to the present petition.

16. The issue now comes as to whether respondent No.2 M/s.Sweta Estates Pvt. Ltd. could appoint an arbitrator after the petitioner had already filed the present petition under Section 11 of the Act before this court.

17. The present petition was filed on 21.1.2017. As per M/s.Sweta Estates Pvt. Ltd. the appointment of Arbitrator has taken place on 14.2.2017 after

the filing of the present petition. Notice of invocation of the arbitration clause took place on 19.02.2016 to respondent No.1 who was the attorney of M/s.Sweta Estates Pvt. Ltd. Accordingly, respondent/ M/s.Sweta Estates Pvt. Ltd. had lost their right to appoint an Arbitrator in view of the judgment of the Supreme Court in ***Datar Switchgears vs. Tata Finance Ltd., (2000) 8 SCC 151.***

18. Accordingly, I appoint Shri B.B.Gupta, Senior Advocate (Mobile No.9811348989) as a Sole Arbitrator to adjudicate the dispute between the parties. The Arbitration shall take place under the aegis of the Delhi International Arbitration Centre.

19. Petition stands disposed of. All pending applications, if any, also stand disposed of.

OCTOBER 10, 2017/n

JAYANT NATH, J.

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