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

+ **ARB.P. 796/2016**

**M/S SERENITY REAL ESTATE PRIVATE
LIMITED**

..... Petitioner

Through: Mr Vivek Malik and Mr Mukul
Thakur, Advocates.

versus

**BLUE COAST INFRASTRUCTURE DEVELOPMENT
PRIVATE LIMITED, & ANR.**

..... Respondents

Through: Mr Gaurav Mitra, Mr Prateek Malik,
Mr Adarsh Rai and Mr Rudra Nath,
Advocates.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER
28.02.2017**

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VIBHU BAKHRU, J

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen in connection with the Assured Return Agreement dated 10.05.2012 (hereafter 'the agreement') entered into between the parties.

2. The said agreement includes an arbitration clause, which is set out below:-

"19. That all disputes or differences arising between the Parties under or in relation to this Memorandum of

Understanding, shall be resolved by reference to Arbitration in accordance with the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be New Delhi only.”

3. In view of the disputes that had arisen between the parties, the petitioner sent a legal notice dated 17.09.2016 invoking the aforesaid arbitration clause and also proposing the name of Sh. Sumehar Bajaj to be appointed as an arbitrator. Respondent no.1 sent a letter dated 13.10.2016 in response to the petitioner’s letter dated 17.09.2016 referring to the arbitration clause contained in another agreement - ‘Space Agreement’ dated 10.05.2012. The arbitration clause contained in that agreement provided that the sole arbitrator was to be appointed by respondent no.1. Respondent no.1 claimed that the ‘Assured Return Agreement’ was only a supplementary agreement and the arbitration clause contained in the ‘Space Agreement’ dated 10.05.2012 would prevail over the arbitration clause as contained in the Assured Return Agreement dated 10.05.2012.

4. At this stage, it is also relevant to note that respondent no.1 in the letter dated 13.10.2016, sent in response to the petitioner's legal notice dated 17.09.2016, had unequivocally stated that the stage for appointment of the sole arbitrator had arisen and, therefore, the respondent would proceed to appoint the sole arbitrator within two weeks (i.e., within two weeks of 13.10.2016).

5. Admittedly, respondent no.1 did not appoint an arbitrator under the ‘Space Agreement’ as indicated by it. Further, it is also clear that the parties were unable to agree for appointment of an arbitrator under the Assured Return Agreement. Accordingly, the petitioner has filed the present petition

on 16.12.2016 praying that an arbitrator be appointed in relation to the Assured Return Agreement dated 10.05.2012.

6. Mr Gaurav Mitra, learned counsel appearing for the respondents did not dispute the Assured Return Agreement or the arbitration clause contained therein. He, however, contended that the Assured Return Agreement was only a supplementary agreement and the same must be read harmoniously with the 'Space Agreement'. He earnestly contended that respondent no.1 would have the right to appoint the sole arbitrator to adjudicate the disputes between the parties in respect of both the said agreements. He further submitted that in terms of the arbitration clause contained in the 'Space Agreement', respondent no.1 had proceeded to appoint an arbitrator on 09.02.2017.

7. I have heard the learned counsel for the respondent.

8. Clause 13 of the Assured Return Agreement, which was relied upon by the learned counsel for the respondents to contend that the arbitration clause in the Space Agreement would prevail over the Assured Return Agreement, reads as under:-

“13. That the parties have signed this Assured Return Agreement after reading and understanding all its contents and admit that this transaction is being entered into by them voluntarily and without any outside pressure, coercion and/or un-due influence. This Assured Return Agreement is a supplementary agreement between the Parties and is in continuance to the Space Agreement. The understanding and agreement of the Parties is embodied in both the aforesaid agreements. Further, any word or words, clauses, terms and conditions not defined herein shall have the same

meaning as ascribed to it in the Space Agreement and shall be construed in the same manner as construed in accordance with the Space Agreement This Agreement is co-terminus with the Space Agreement.”

[underlining for emphasis]

9. The said clause indicates that the Assured Return Agreement was entered into immediately after the ‘Space Agreement’ and was in continuance of the said agreement.

10. The Dispute Resolution clause contained in the Space Agreement, reads as under:

“F. DISPUTE RESOLUTION

1. Disputes – Amicable Settlement

The Parties shall use their respective reasonable endeavours to settle any Dispute amicably. If a Dispute is not resolved within sixty (60) days after written notice of a Dispute by one Party to the other Party.

2. Arbitration

All Disputes arising under this Agreement, which remain unresolved shall be referred to the Sole Arbitrator to be appointed by the First Party.

The decision(s) of the Arbitrator shall be final and binding on the Parties. The venue of arbitration shall be New Delhi. Arbitration clause shall survive the termination or expiry of this Agreement. The governing law of the arbitration shall be the laws of India Language of arbitration shall be English.”

11. It is apparent from the above that the arbitration clause in the Assured Return Agreement is materially different from the arbitration clause contained in the ‘Space Agreement’. Although the agreements are connected, the rights and obligations of the parties under the said agreements are not identical. Thus, it is difficult to accept the respondent’s

contention that the arbitration clause in the 'Space Agreement' would prevail over the arbitration clause in the later agreement.

12. As observed earlier, the arbitration clauses in the agreements are different. The petitioner had invoked only the arbitration clause as contained in the Assured Return Agreement and has filed the present petition for appointment of the arbitrator to adjudicate the disputes arising in connection with the Assured Return Agreement. In the circumstances, an arbitrator is required to be appointed by this court as neither the existence of the Assured Return Agreement nor the arbitration clause is disputed.

13. Mr Gaurav Mitra, learned counsel appearing for the respondents was pointedly asked whether the respondents would insist on maintaining that the disputes arising out of the 'Space Agreement' be adjudicated with the arbitrator appointed by the respondent; this would result in two proceedings by separate arbitrators since the petitioner was not willing to accept the arbitrator appointed by respondent no.1 in connection with the disputes under the 'Space Agreement' to act as the arbitrator to adjudicate the disputes in connection with the Assured Return Agreement. Mr Mitra fairly stated that the disputes may be interlinked and therefore it would be expedient if the disputes are referred to the same arbitrator.

14. As mentioned above, the petitioner has not invoked the arbitration clause under the 'Space Agreement' and the present petition is also limited for appointment of the arbitrator under the Assured Return Agreement. However, in view of the stand of the respondents that a common arbitrator may be appointed for adjudicating the disputes between the parties, it is directed that Ms Justice Manju Goel (Retd.) (Mobile No. + 91 9818000330)

a former Judge of this Court be appointed as a sole arbitrator to adjudicate the disputes that have arisen between the parties in relation to the Space Agreement as well as the Assured Return Agreement. This is subject to the arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12 (5) of the Act. The arbitrator shall fix the fees in consultation with the learned counsel for the parties.

15. The petition is disposed of.

FEBRUARY 28, 2017
pkv

VIBHU BAKHRU, J

