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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 5/2016

REALTECH INFRASTRUCTURE LIMITED Petitioner
Through: Mr. Jayant K. Mehta with Mr. Saurabh
Dev Karan Singh, Mr. Abhijeet Shrivastava and
Mr. Shaurya S. Kuthiala, Advocates.

versus

SMART HOUSING PVT LIMITED & ORS Respondents
Through: Mr. Rahul Malhotra with Mr. Tanuj
Arora, Advocates for R-1 & 3.
None for R-2.

CORAM: JUSTICE S.MURALIDHAR

ORDER

13.02.2017

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1. It is stated that Respondent No. 2, Saransh Developers Private Limited, has been served as per the amended memo of parties filed by the Petitioner. Learned counsel appearing for Respondent Nos. 1 and 3 states that he has no instructions to appear on behalf of Respondent No. 2. Since no one is appearing on behalf of Respondent No. 2 despite service it is set *ex parte*.

2. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of a sole Arbitrator to adjudicate the disputes between the parties arising out of a Cancellation Agreement dated 16th April, 2008 and a subsequent Agreement dated 21st April, 2008.

3. It is pointed out by learned counsel for Respondent Nos. 1 and 3 that as far as Respondent No. 3, Umang Realtech Private Limited, is concerned, it is not a party to the Cancellation Agreement dated 16th April, 2008 or the Agreement dated 21st April, 2008.

4. While Mr. Jayant K. Mehta, learned counsel appearing for the Petitioner does not dispute that the aforementioned two agreements do not bear the signature of Respondent No. 3, he submits that in a Share Purchase Agreement ('SPA') of the same date i.e., 21st April, 2008 entered into between Respondent No. 1 and 2 and two other persons i.e., Mr. Akash Gupta and Mr. Rohit Malhotra, it was clarified that Saransh Leasing and Finance Limited ('SLF') shall mean "includes any nominee/affiliate" of SLF as specified in the SPA. He submits that Respondent No. 3 which was earlier known as M/s. Uppal Housing Private Limited (UHPL) is, admittedly, an affiliate of SLF and by virtue of the clauses in the SPA dated 21st April, 2008, Respondent No. 3 is also a necessary and proper party to the arbitration proceedings.

5. The above submission is resisted by learned counsel for Respondent No. 3 who points out that apart from the fact that Respondent No. 3 is not a party to any of the agreements between the parties, the requirement of Section 7 (4) read with Section 7 (5) of the Act is not fulfilled.

6. The above submissions have been considered. There is no manner of doubt that Respondent No. 3 is not a party to the agreements containing an arbitration clause. In the circumstances, it requires to be examined if such an agreement can be inferred in terms of Section 7 (4) read with Section 7 (5)

of the Act, the relevant portions of which read as under:

“7 (4) An arbitration agreement is in writing if it is contained in -

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

7. A reference is made by Mr. Mehta to the correspondence exchanged between the Petitioner and UHPL and the fact that a demand was raised on UHPL for money. Mr. Mehta points out that even in the reply filed by Respondent No. 3, there is no denial of such letter. He also points out that there is in fact an assignment by SLF in favour of Respondent No. 3, which has not been not denied.

8. In the same reply of Respondent No. 3, where the receipt of demand made on UHPL is not denied, it is urged that there is no arbitration agreement between the Petitioner and Respondent No. 3. For the purpose of Section 7 (4) read with Section 7 (5) of the Act, it is incumbent on the Petitioner to demonstrate how by virtue of the correspondence exchanged the existence of arbitration agreement between the Petitioner and Respondent No.3 can be inferred. Unfortunately, in the correspondence pointed out to the Court,

there is no reference as such to an arbitration agreement between the parties. It is not possible therefore to infer the existence of an arbitration agreement between the Petitioner on the other hand and Respondent No.3 on the other. The mere fact that the Petitioner may have raised a demand on the affiliate of Respondent No. 3 cannot also lead to such inference. It is accordingly held that the relief sought against Respondent No. 3 in this petition cannot be granted.

9. A plea of limitation raised by learned counsel for Respondent Nos. 1 and 3. In reply, Mr. Mehta points out that the cause of action for making the demand against Respondent Nos. 1 and 2 arose only after completion of the project in 2014. In the considered view of the Court, the question of limitation can be examined by the Arbitrator. The Court declines to express any opinion on the above contention of Respondents 1 and 2.

10. Consequently, the Court directs that the disputes between the Petitioner and Respondent Nos. 1 & 2, including their claims and counter-claims, shall be referred to arbitration. It is clarified that Respondent No. 3 will not be a party to the said arbitration proceedings. The arbitration shall be by a Sole Arbitrator and shall take place under the aegis of the Delhi International Arbitration Centre ('DAC').

11. The parties will appear before the DAC on 6th March, 2017 at 11:00 am for further steps

12. The petition is disposed of. Order be given *dasti*. A copy of this order be

sent to the Additional Coordinator DAC forthwith.

S.MURALIDHAR, J

FEBRUARY 13, 2017

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