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

Date of decision: 28th February, 2018

+ ARB.P. 163/2018 & I.A. No.2933/2018
+ ARB.P. 166/2018 & I.A. No.2940/2018
+ ARB.P. 167/2018 & I.A. No.2951/2018

PARASRAMIKA HOLDINGS PVT LTD. Petitioner
MILI MARKETING PVT.LTD Petitioner
MORAN PLANTATION PVT.LTD Petitioner

Through: Mr.Gopal Jain, Sr. Adv. with
Ms.Prashanti Pasupuleti,
Mr.B.M.Shashank, Advs

versus

AMBIENCE PRIVATE LTD Respondent
Through: Ms.Tannya Sharma, Adv

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.2933/2018 (Exemption) in Arb.P.163/2018

IA No.2940/2018 (Exemption) in Arb.P.166/2018

IA No.2951/2018 (Exemption) in Arb.P.167/2018

Allowed, subject to all just exceptions.

ARB.P.163/2018

ARB.P.166/2018

ARB.P.167/2018

1. These petitions under Section 11 of the Arbitration & Conciliation

Act, 1996 (hereinafter referred to as the 'Act') have been filed by the petitioner(s) praying for the appointment of a Sole Arbitrator preferably who is a qualified Architect from the School of Planning & Architecture or any other reputed architecture school.

2. The disputes between the parties are in relation to the Allotment Letter/Apartment Buyer Agreement dated 27.10.2009 and the Conveyance Deed dated 26.09.2014. The petitioner(s) claims that they have been allotted lesser area than what was provided for in the said Agreement.

3. The Arbitration Agreement between the parties is in form of Clause 6.16 of the Apartment Buyer's Agreement executed between the parties and reproduced herein below:

"6.16 Settlement and Arbitration:

6.16.1. The parties hereto have agreed that all disputes and/or differences between any two or more of the Purchaser/s Applicants, Allottees, Apartment Owners, Association of Apartment Owners and/or the Company in any manner connected herewith or arising herefrom shall be referred to the independent and sole arbitration of an Arbitral Tribunal (Tribunal) appointed by the Board of Directors of the Company, whose decision will be final and binding on the parties to the reference. The arbitration will be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or enactment thereto for the time being in force.

6.16.1.1. The Tribunal shall have summary powers.

6.16.1.2. The Tribunal shall be entitled to lay down its own procedure.

6.16.1.3. It will not be obligatory on the part of the Tribunal to follow the principles of the Indian Evidence Act or the procedures laid down under the Civil

Procedure Code unless enjoined on him by any statute of law for the time being in force.

6.16.1.4. *The Tribunal shall be entitled to give interim awards and directions, which shall be binding on the parties.*

6.16.1.5. *The Tribunal shall pass a speaking award.”*

4. As would be apparent from the reading of the Arbitration Agreement, the disputes are to be referred to an independent and sole Arbitrator appointed by the Board of Directors of the respondent. One of the challenges in the present petition is that the Board of Directors of the respondent cannot appoint an Arbitrator in view of the judgment of the Supreme Court in **TRF Ltd. v. Energo Engineering Projects Limited**, (2017) 8 SCC 377. The said contention has already been rejected by me by way of a detailed order dated 21.02.2018 passed in O.M.P. (T) (COMM.) 101/2017, titled **Bhayana Builders Pvt Ltd v. Oriental Structural Engineers Pvt Ltd**.

5. Certain disputes having arisen between the parties, the respondent had appointed Justice K.K. Lahoti, Retired Acting Chief Justice of Madhya Pradesh High Court, as a Sole Arbitrator to adjudicate the same vide its request notice dated 22.09.2017.

6. The petitioner(s) on the other hand, filed civil suit(s) before this Court. On application(s) under Section 8 of the Act being filed by the respondent, this Court vide its order dated 15.01.2018 allowed the said application(s) and referred the parties to arbitration in accordance with Section 8(1) of the Act.

7. After passing of the above order, the respondent appointed Justice

K.K. Lahoti as an Arbitrator vide its letter dated 27.01.2018 for adjudicating the disputes raised by the petitioner(s) in the Civil Suit(s) filed by them.

8. The petitioner(s) aggrieved of such appointment have filed the present petition(s) claiming that the Sole Arbitrator appointed by the respondent would be ineligible to act as an Arbitrator in terms of Section 12(1) read with the Fifth Schedule of the Act. The petitioner(s), as noted above, also challenge the unilateral appointment of the Sole Arbitrator by the respondent.

9. In view of the judgement of this Court in O.M.P. (T) (COMM.) 101/2017, titled *Bhayana Builders Pvt Ltd v. Oriental Structural Engineers Pvt Ltd.*, this Court finds no merit in the contention of the petitioner that the respondent, though has been vested with the power to appoint the Sole Arbitrator in terms of the Arbitration Agreement, cannot appoint such Arbitrator and that such Arbitrator can be appointed only with the concurrence of the petitioner.

10. As far as the objection of the petitioner(s) with respect to the Sole Arbitrator being not eligible to continue with the said appointment in view of Fifth Schedule of the Act, Supreme Court in *HRD Corporation v. Gail (India) Ltd.*, MANU/SC/1066/2017 has clearly drawn a distinction between challenge to the authority of the Arbitrator under the Fifth and the Seventh Schedule of the Act and held that where the challenge is based on the grounds stated in the Fifth Schedule, the remedy of the party aggrieved is to challenge the Arbitrator in the arbitration proceedings itself under Section 13 of the Act and if such a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the Arbitrator, the Tribunal must continue the arbitration proceedings under Section 13(4) of the

Act and make an Award. It is only after such Award is made, that the party challenging the Arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the Arbitral Award in accordance with Section 34 of the Act on the aforesaid grounds. In view of the above, petitioner's challenge to the arbitrator cannot be decided by this Court at this stage and in these petitions under Section 11 of the Act.

11. It is submitted by learned senior counsel for the petitioner(s) that the Sole Arbitrator had earlier been appointed by the respondent in relation to respondent's claim for maintenance charges. As far as the claim of the petitioner(s) is concerned, the same being in relation to the claim that lesser area has been allotted by the respondent to the petitioner (s), it required special knowledge of architectural drawing and therefore, this Court in exercise of its power under Section 11 of the Act, should appoint a Sole Arbitrator ignoring the appointment made by the respondent. I am unable to agree with this submission of the petitioner(s) as well. The Arbitration Agreement between the parties does not prescribe any special qualification for the Sole Arbitrator who may be appointed by the respondent depending upon the particular nature of dispute that arises between the parties. Therefore, it cannot be said that the Arbitrator appointed by the respondent is not in terms of the Arbitration Agreement or that his appointment is void.

12. In **Aravali Power Company Pvt. Ltd. v. Era Infra Engineering Ltd.**, MANU/SC/1139/2017, relying upon the earlier judgment of the Supreme Court in **Indian Oil Corporation Limited and Ors. v. Raja Trasport Private Limited**, (2009) 8 SCC 520, the Supreme Court has held as under:

“Thus, as laid down in sub-para (v) of para 48, unless the cause of action for invoking jurisdiction Under Clauses (a), (b) or (c) of Sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power

Under Sub-section (6) of Section 11.”

13. In the present case, as the respondent has appointed the Arbitrator in terms of the Arbitration Agreement, this Court would not have the jurisdiction to entertain the present petition under Section 11 of the Act.

14. Learned senior counsel for the petitioner(s), relying upon the judgment of the Supreme Court in *Dolphin Drilling Limited v. Oil and Natural Gas Corporation Limited*, (2010) 3 SCC 267 and the judgment dated 29.04.2016 passed by this Court in Arb. P. No.677/2015 titled *Assignia-VIL JV v.Rail Vikas Nigam Limited*, submitted that the Arbitration Agreement cannot be said to be a one-time measure and can be invoked as and when disputes arise between the parties. There is no quarrel with the said proposition in law, however, in the present case, once the respondent has appointed the Arbitrator even for the subsequent disputes raised by the petitioner(s), this Court would not have the jurisdiction under Section 11 of the Act to interfere with such appointment or to appoint a fresh Arbitrator for adjudicating the said disputes.

15. In view of the above, I find no merit in the present petition(s) and the same are accordingly dismissed with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 28, 2018/Arya