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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 439/2018

M/S. GREEN BUILDERS & PROMOTERS PRIVATE LIMITED

..... Petitioner

Through: Mr. Siddhesh Kotwal with
Mr. Raghunatha Sethupathy & Mr.
Gagan Narang, Advs.

versus

SHRI RAMESH & OTHERS

..... Respondents

Through: Mr. Umesh Kaushik, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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12.10.2018

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Collaboration Agreement dated 09.11.2012 executed between the parties. The said Collaboration Agreement contains an Arbitration Agreement in form of Clause 31 thereof which is reproduced hereinbelow:-

“31. All disputes arising out of or in connection with this agreement shall be resolved by mutual discussions between the owners and developer within 15 (fifteen) days of the said dispute arising, failing which, such disputes shall be referred to conciliation in terms of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactments thereof. If the conciliation proceedings fails to resolve the disputes, then the disputes, will be referred for arbitration to a mutually agreed sole arbitrators, will be a condition precedent to any

action under this agreement. This agreement shall be subject to the exclusive jurisdiction of Court of Gurgaon to the specific exclusion of all other courts and the venue for arbitration shall be at New Delhi alone. The arbitrator will be required to give a reasoned award within a period of 4 (four) months of entering the references.”

2. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement vide its notice dated 30.12.2016 and proposed the name of an Arbitrator. The respondents, however, vide reply dated 03.02.2017 disputed the claims of the petitioner and consequently the Arbitration Agreement.
3. The petitioner thereafter filed a petition under Section 11 of the Act before the High Court of Punjab and Haryana being Arb. Case no. 33/2017. The High Court of Punjab and Haryana vide its order dated 07.10.2017 dismissed the petition for lack of territorial jurisdiction. It was held that Clause 31 of the Collaboration Agreement provides for “Seat” of arbitration to be at Delhi thereby conferring exclusive jurisdiction on this Court. The petitioner thereafter filed the present petition before this Court.
4. Learned counsel for the respondents submits that the petition is premature in nature inasmuch as the petitioner has not undertaken conciliation proceedings before filing the present petition. It is further contended by the counsel for the respondents that the claim of the petitioner would be barred by Law of Limitation. He further contends that the petitioner has placed reliance on a Supplementary Agreement allegedly executed between the parties on 29.04.2013, which is a unregistered agreement. He submits that this is a forged document.

5. The learned counsel for the respondents further submits that for the purposes of entering into a proper agreement, the petitioner needs to have its office in Haryana, which it does not have. Infact, the petitioner does not have any office at the given address. Lastly it is submitted that the Arbitration Agreement between the parties envisaged appointment of an Arbitrator by mutual consent of the parties, which is a condition precedent and therefore, this becomes a contingent Contract.
6. I have considered the submissions made by the counsel for the respondents. The existence of the Arbitration Agreement in form of Clause 31 of the Collaboration Agreement is not denied by the respondents. It is not denied that the petitioner had duly invoked the Arbitration Agreement vide its notice dated 30.12.2016 proposing a name of an Arbitrator which was refused by the respondents vide its reply dated 03.02.2017.
7. It is correct that in terms of the Arbitration Agreement, the petitioner was to invoke the conciliation proceedings under the Act before invoking the Arbitration Agreement, however, the learned counsel for the respondents himself submits that no usefully purpose would be achieved by such conciliation proceedings as the claim of the petitioner is not maintainable at all. In view of the submission of the respondents and looking into the history of this litigation, I see no reason for first sending the parties to conciliation and thereafter calling upon them to initiate the arbitration proceedings. Such conciliation proceedings would be a non starter from the very beginning. Section 62 of the Act provides that for initiation of

conciliation proceedings a party would give a written invitation of conciliation to the other party. If the other party rejects the invitation, there will be no conciliation proceedings. In this case the submission of the counsel for the respondents itself indicates the refusal of the respondents to such conciliation proceedings.

8. As far as the plea of non-signing of the Supplementary Agreement or the same being an un-registered document, as the arbitration is being invoked on the basis of the Arbitration Agreement contained in the Collaboration Agreement executed between the parties and since it is a document not denied by the respondents, I see no impediment in appointing an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the said Collaboration Agreement. In such arbitration proceeding the genuineness and the other submissions of the respondents on the Supplementary Agreement shall also be considered by the Arbitrator on the appreciation of evidence led by the parties on this issue.
9. As far as the plea of the respondents that the claim of the petitioner is barred by Law of Limitation, again this is a question to be determined by the Arbitrator and not by this Court while exercising its power under Section 11 of the Act. Infact, Section 11(6)(A) of the Act bars such a scrutiny of the claim of the petitioner by this Court. At this stage the scrutiny is confined only to the existence of the Arbitration Agreement and due invocation thereof by the petitioner and not on the merits of the claim raised by the petitioner.
10. As far as the plea of the petitioner not having a registered office in the State of Haryana or not being available at the given address, in my

view, the same cannot have effect on the Arbitration Agreement between the parties which is an Agreement severable from the main agreement. It is not the contention of the learned counsel for the respondents that even for the Arbitration Agreement to be binding, the petitioner was to have its registered office only in the State of Haryana.

11. The plea of the counsel for the respondents that the Arbitrator can be appointed only by mutual consent of the parties and not otherwise, is stated to be rejected. The petitioner in terms of the Arbitration Agreement had proposed the name of the Arbitrator to the respondents. The respondents denied the same and therefore, the parties could not come to a mutual settlement on the name of the Arbitrator to be appointed. In terms of the Arbitration Agreement, therefore, procedure for appointment of an Arbitrator had failed and the petitioner has filed this petition under Section 11 of the Act seeking appointment of an Arbitrator. The same is, therefore, maintainable and it is for this Court to appoint an Arbitrator.
12. In view of the above, I see no impediment in appointing an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Collaboration Agreement.
13. I accordingly appoint **Mr.Pradeep Chaddha**, Retd. District & Sessions Judge, Delhi (R/o37/29, East Patel Nagar, New Delhi-110008, Mobile: 9910384665) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above mentioned agreement. The Arbitrator shall give a disclosure under Section 12 of the Act before proceeding with the reference.

14. The petition is allowed in the above terms and with no order as to cost.

NAVIN CHAWLA, J

OCTOBER 12, 2018/rv