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

Date of decision: 07th December, 2018

+ **O.M.P.(T) 3/2018**

SANT KUMAR AGARWAL

..... Petitioner

Through: Mr.Prakhar Bhatnagar & Mr.Mohit
Tyagi, Advs.

versus

BHASIN INFOTECH & INFRASTRUCTURE PVT. LTD.

..... Respondent

Through: Mr.Lokesh Bhola, Mr.Karan
Grover & Ms.Harshita Agarwal,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No. 12838/2018

This application has been filed by the petitioner seeking modification of order dated 04.09.2018 whereby this Court had recorded the statement made by the learned counsel for the respondent that all further arbitration proceedings against the respondent company have been stayed by the Supreme Court. The appellant/petitioner submits that this statement was incorrect.

The learned counsel for the respondent submits that the above statement was made due to inadvertence and was a *bona fide* mistake. He admits that there is no order staying such arbitration proceedings against the respondent company.

Recording the above statement made by the learned counsel for the respondent, the application is disposed of.

O.M.P.(T) 3/2018 & IA No. 6654/2018

1. This petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking termination of the mandate of the Sole Arbitrator appointed by the respondent to adjudicate the disputes that have arisen between the parties in relation to the Allotment Letter/Agreement dated 29.10.2007 whereby the respondent had allotted a shop in favour of the petitioner in its upcoming shopping mall "Grand Venezia" situated at Plot No. SH-3, Site-IV, Industrial Area, Surajpur, Greater Noida, UP.

2. The learned counsel for the petitioner submits that the last payment made by the petitioner to the respondent towards allotment of the shop was in the year 2008. Thereafter, due to defaults of the respondent, the petitioner decided not to take this shop and infact, abandoned its claim over the said shop. The respondent, on the other hand continued raising demands of installments on the petitioner, which the petitioner refused to pay. The respondent, thereafter, initiated the arbitration proceedings on 19.01.2018 by invoking the Arbitration Agreement and appointed a Sole Arbitrator.

3. The learned counsel for the petitioner submits that the claim of the respondent is *ex facie* barred by Law of Limitation and therefore, the mandate of the Arbitrator deserves to be terminated. He places reliance on the judgment of this Court in ***Sharma Enterprises v. National Building Construction Corporation Ltd. & Anr.***, 153 (2008) DLT 594.

4. I have considered the submission made by the learned counsel for the petitioner, however, find no merit in the same. Sub-Section 1 of Section 14 of the Act is reproduced hereinunder:-

“14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if -

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.”

5. The plea of the petitioner that the claim of the respondent would be barred by Law of Limitation is one on the merits of the claim. This does not make the Arbitrator *de jure* or *de facto* unable to perform “his functions” as an Arbitrator.

6. The learned counsel for the respondent has also drawn my attention to the consumer complaint filed by the petitioner before the National Consumer Disputes Redressal Commission in the year 2018 *inter alia* making a claim for refund of the amount paid by the petitioner to the respondent for the above mentioned shop alongwith interest at the

rate of 24% per annum from the date of booking of the shop. He submits that the petitioner cannot, therefore, maintain its objection of limitation.

7. I need not go into the issue of limitation at this stage. In my opinion this issue has to be determined by the Arbitrator alone, may be on an application under Section 16 of the Act filed by the petitioner. However, certainly this issue cannot be determined in an application under Section 14 of the Act. The judgment of this Court in ***Sharma Enterprises*** (Supra) can be of no assistance to the petitioner. In the said case the Court found that there was no doubt at that the claim filed by the party was dead and long barred by limitation. This cannot be said in the present case for the petitioner himself has filed a consumer complaint in the year 2018.

8. Further, the said judgment was passed prior to the amendment in the Act by way of Arbitration and Conciliation (Amendment) Act, 2015, which has specifically introduced Section 11(6A) to the Act, which reproduced as under:-

“11 (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement. “

9. This Court, in its judgment in ***Sharma Enterprises*** (supra) had relied upon the provisions of Section 11 of the Act prior to its amendment, where, as the law then standing was, the Court in exercise of its powers under Section 11 of the Act could refuse appointment of an

Arbitrator where the claims are *ex facie* barred by law of limitation or long dead. In ***Duro Felguera, S.A v. Gangavaram Port Limited***, (2017) 9 SCC 729, the Supreme Court has clarified that with the introduction of Section 11 (6A) of the Act, these questions cannot be determined by the Court while exercising its powers under Section 11 of the Act. The only issue to be considered by the Court while exercising its powers under Section 11 of the Act would be confined to the examination to the existence of an Arbitration Agreement. Existence of the Arbitration Agreement is not denied by the petitioner in the present case.

10. In view of the above, I find no merit in the present petition and the same is dismissed leaving it open for the petitioner to agitate all objections that it may have against the arbitration proceedings in form of an appropriate application before the Arbitrator. It is made clear that this order shall not bind or influence the Arbitrator in any manner.

11. There shall be no order as to cost.

NAVIN CHAWLA, J

DECEMBER 07, 2018/rv