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

+ ARB.P. 413/2018

JAGDISH P. KHANNA Petitioner

Through: Mr.Anush Raajan, Adv.

versus

GEETA DHAWAN & ORS. Respondents

Through: Mr.Gopal Sankaranarayanan,
Mr.Satyajit Sarna & Ms.Pallavi
Srivastava, Advs. for R-1.
Mr.Harish Pandey, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% **16.08.2018**

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 a Sole Arbitrator relying upon Clause 7 of the Memorandum of Agreement dated 12.12.2000, which is the Arbitration Agreement between the parties.

The petitioner invoked the Arbitration Agreement vide its notice dated 05.03.2018. The respondent vide its reply dated 04.04.2018 refused to give its consent to the proposed Arbitrators suggested by the petitioner. The petitioner vide its notice dated 16.04.2018 gave rejoinder to the reply and thereafter filed the present petition.

The learned counsels for the respondents oppose the appointment of a Sole Arbitrator contending that the petitioner, in the petition is relying upon the Memorandum of Agreement and a document titled 'Declaration' both dated 12.12.2000 as forming part of one family settlement and in the 'Declaration' there is no arbitration agreement between the parties and

therefore, the parties cannot be referred to arbitration. It is further contended that the petitioner had filed an application under Section 9 of the Act on 19.05.2015 and therefore, should have invoked arbitration within a reasonable period therefrom which would have been, in any case, prior to the amendment of the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. It is submitted that incase the petitioner had invoked arbitration prior to the amendment, this Court would have had the jurisdiction to adjudicate on whether the disputes raised by the petitioner are live and within the period of limitation. The petitioner by invoking the arbitration agreement after the amendment, cannot denude this Court of that power. It is further contended that even post the amendment to the Act, this Court would have to consider the question of limitation as also whether the disputes are live between the parties and whether the disputes raised by the petitioner are arbitral in nature. In this regard reliance is placed on the judgment of the Supreme Court in ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and Others***, 2011 5 SCC 532.

I have considered the submission made by the counsels for the respondents, however, I find no merit in the same. The petitioner, before filing of the present petition, had filed an application under Section 9 of the Act. During the pendency of the said petition, this Court by its order dated 27.05.2016 had granted an opportunity to the petitioner to invoke the Arbitration Agreement. The petitioner, instead of invoking the Arbitration Agreement by way of notice, filed an application under Section 11 of the Act on 09.08.2016, which was finally disposed of by this Court vide its order dated 22.02.2018, with the petitioner submitting that it would issue a formal notice of invocation of Arbitration Agreement. Pursuant thereto the

petitioner invoked the arbitration agreement on 05.03.2018 and therefore, the provisions of the Amended Act would apply to the present proceedings. The respondents cannot be allowed to approbate and reprobate in the same breath. In the earlier proceedings, the respondents had taken an objection that the petition was not maintainable as the petitioner has not invoked the Arbitration Agreement before filing of the petition, while in the present petition they seek to contend that the Arbitration Agreement stood invoked even prior to the amendment to the Act. Such plea is therefore, liable to be rejected. In any case, the invocation of the arbitration agreement being relied upon by the petitioner is one issued after the amended Act and therefore, it would be the amended Act that would apply to the present proceedings.

As far as the arguments of the counsels for the respondents that the disputes raised by the petitioner would be barred by Law of Limitation or would not be covered under the Arbitration Agreement, in my opinion, these are matters to be considered by the Arbitral Tribunal on perusing the Statement of Claim filed by the petitioner before it. Section 11(6A) of the Act confines the examination of this Court only to the existence of an arbitration agreement.

In *Duro Felguera, S.A. vs. Gangavaram Port Ltd.*, (2017) 9 SCC 729, the Supreme Court has held as under:-

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) 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.”

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

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59. *The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. and Boghara Polyfab. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”*

In the present case, existence of the Arbitration Agreement in the Memorandum of Agreement is not denied by the respondents, therefore, the Court cannot refuse to appoint an Arbitrator by scrutinizing the merits of the defence of the respondents.

In this regard I may also note the other submission made by the counsels for the respondents, which is to the effect that the notice dated 05.03.2018 issued by the petitioner did not mention the disputes on which the arbitration is being sought, therefore, it was not a proper invocation of the Arbitration Agreement.

In my view the very plea taken by the respondents that the claim raised by the petitioner would fall beyond the scope of Memorandum of

Agreement and would be barred by Law of Limitation, shows that the respondents were well aware of the disputes that have arisen between the parties on which the petitioner is seeking arbitration. In fact, they are well aware of the disputes as the petitioner has already filed a petition under Section 9 of the Act and also a petition under Section 11 of the Act before filing the present petition. The respondents therefore, cannot plead ignorance of the disputes that have arisen between the parties.

In view of the above, I see no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties. As the named Arbitrators in arbitration agreement have already expired, I appoint **Hon'ble Ms. Justice G. Rohini**, (R/o No. 3-3-108/1538172, New Friend Colony, Phase-2, Attapur, Hyderguda, Hyderabad-500048, Mobile: 8527027027), Former Chief Justice of this Court, as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties.

All contentions of the respondents, including whether the claim raised by the petitioner is barred by Law of Limitation or does not fall within the scope of Memorandum of Agreement, shall be considered by the Arbitrator remaining uninfluenced by any observations made by this Court in this order.

The Arbitrator shall give to the parties her disclosure statement in terms of Section 12 of the Act before proceeding with the reference.

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

NAVIN CHAWLA, J

AUGUST 16, 2018/rv