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

+ **ARB.P. 453/2017 and IA Nos. 8258/2017 & 964/2018**

NAVEEN KANDHARI & ANR.

..... Petitioners

Through: Mr S. K. Dubey and Mr Rajmangal
Kumar, Advocates.

versus

JAI MAHAL HOTELS PVT. LTD.

..... Respondent

Through: Mr D. D. Singh and Ms Seerat Deep
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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21.05.2018

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that a sole arbitrator be appointed to adjudicate the disputes that have arisen in connection with the Operating Agreement dated 08.09.2000 (hereafter 'the Operating Agreement') entered into between the respondent and Mr Surender Kumar Kandhari (since deceased). The petitioners are the sons and legal heirs of late Sh. Surender Kumar Kandhari.

2. The Operating Agreement includes an arbitration clause, which is set out below:-

“19.1 ARBITRATION

Any dispute or difference arising between the parties hereto regarding the construction, meaning or effect or obligation of the parties hereto under this agreement or any clause thereof or matter .or thing herein contained or as to rights and liabilities of the parties hereto shall be referred to arbitration of the Arbitrator to be appointed by the parties hereto in accordance with the provisions of the Indian Arbitration Act 1940 or any statutory modification or re-enactment thereof for the time being in force.

19.2 The Arbitration and all legal proceedings shall be conducted and carried on in Delhi.”

3. Sh. Surender Kumar Kandhari and the respondent also entered into a supplementary agreement on 06.11.2004 (hereafter ‘the Supplemental Agreement’), whereby the Operating Agreement was modified to the extent as agreed thereunder. It is relevant to state that the Supplemental Agreement also expressly provided that “*All other terms and conditions of the said Operating Agreement shall remain unchanged, valid and binding on the parties hereto, save and except to the extent as modified hereinabove*”.

4. There is no dispute that the arbitration clause, as contained in the Operating Agreement, is valid and binding on the parties.

5. The respondent has opposed the present petition solely on the ground that the respondent has already appointed an arbitrator and, therefore, the present petition is not maintainable.

6. Mr D.D. Singh, learned counsel appearing for the respondent could

not dispute that the appointment made by the respondent was contrary to the terms of the arbitration clause. However, he submitted that the petitioners had acquiesced in such appointment. He further contended that since the arbitrator had been appointed, the present petition was not maintainable. He relied upon the decision of the Supreme Court in ***Antrix Corporation Limited v. Devas Multimedia P. Ltd.***: (2014) 11 SCC 560 in support of his contention that once an arbitrator had been appointed, his appointment could not be questioned in the subsequent proceedings initiated for appointment of an arbitrator. He submitted that the petitioners may be entitled to challenge the appointment of the arbitrator but it could not do so in a petition under Section 11 of the Act.

7. Mr Dubey, learned counsel appearing for the petitioners submitted that the petitioners had not concurred in the appointment of an arbitrator and, therefore, unilateral appointment of any person as an arbitrator by the respondent, was *non est* and of no consequence.

8. I have heard the learned counsel for the parties.

9. The undisputed facts are that the respondent had sent a letter dated 13.04.2016 to the petitioners calling upon them to handover possession of the immovable property, as specified in the said letter, to enable the respondent to proceed with the project contemplated under the Operating Agreement. The petitioners responded by a letter dated 03.05.2016 disputing the statements made in the letter dated 13.04.2016 and further calling upon the respondent to honour its commitments under the said Operating Agreement as modified by the Supplemental Agreement.

10. Thereafter, on 15.06.2016, the respondent caused another notice to be issued by its Advocate demanding the possession of the property in question failing which the return of a sum of ₹3 crores paid by the respondent under the Operating Agreement. The petitioners responded to the said notice by a letter dated 13.08.2016.

11. Thereafter, the respondent sent a letter dated 06.06.2017 invoking the arbitration clause and further stating that it had appointed Mr A.P. Dhamija, Advocate as an arbitrator in accordance with Clause 19. 1 of the Operating Agreement. This was followed by another letter dated 14.06.2017 sent by Mr A.P. Dhamija stating that he has been appointed as the sole arbitrator to decide the disputes between the parties and further calling upon the parties to be present before him on 29.06.2017 to finalise the procedure to be adopted for deciding the disputes.

12. On 22.06.2017, the petitioners (through their advocate) responded to the respondent's letter dated 06.06.2017 clearly stating that the nomination of Mr A.P. Dhamija as an arbitrator was unacceptable and contrary to the intent of Clause 19.1 of the Operating Agreement.

13. The petitioners also sent a letter dated 22.06.2017 to Shri A.P Damija stating that his nomination is without the consent of the petitioners and requesting him not to enter upon the reference.

14. Despite the aforesaid communication, Mr Damija purportedly held a hearing on 29.06.2017 and, on that occasion, fixed a schedule for filing the pleadings as well as the arbitral fees.

15. In the meanwhile, on 28.06.2017, the petitioners sent a letter (through their advocate) to Mr A.P. Dhamija, stating that since the parties have not agreed to appoint him as the sole arbitrator, therefore, his direction to appear on 29.06.2017 is unlawful and unwarranted and in violation of the provisions of the Act.

16. Thereafter, on 06.07.2007, Mr A.P. Dhamija sent a letter, *inter alia*, stating that any grievance with regard to his jurisdiction would necessarily have to be raised before him by filing an appropriate application under Section 16 of the Act.

17. The petitioners filed the present petition in the aforesaid backdrop.

18. A plain reading of the arbitration clause as set out above indicates that an arbitrator was required to be appointed by the parties. Thus, the unilateral appointment of Mr A.P. Dhamija as an arbitrator is contrary to the arbitration clause and without authority. It is also relevant to note that the respondent had invoked the arbitration clause by its letter dated 06.06.2016 and unilaterally declared that it had appointed Mr A.P. Dhamija, Advocate as an arbitrator.

19. The said appointment, being contrary to the terms of the arbitration agreement, cannot be considered as an appointment at all. It is for all intents and purposes *non est*. Mr A.P. Dhamija has no authority to act as an arbitrator; his actions are plainly of no consequence.

20. Mr Singh had earnestly contended that the petitioners had waived their right to object to such appointment, as they had no objections prior to

Mr A.P. Dhamija entering upon reference. This contention is bereft of any merit, as the petitioners have repeatedly objected to the said unilateral appointment and, further, had declined to participate in any proceedings before Mr A.P. Dhamija.

21. The contention that the present petition is not maintainable is also unmerited. On receipt of the letter dated 06.06.2017, the petitioners had also suggested the name of a former judge of this Court to be appointed as the arbitrator. However, it is apparent that the parties have been unable to concur on such appointment. Thus, the petitioner has the right to approach this Court for appointment of an arbitrator.

22. The reliance placed by Mr D.P. Singh on the decision of **Antrix Corporation Limited v. Devas Multimedia P. Ltd.** (*supra*) is misplaced. In that case, the arbitration clause between the parties provided that the disputes would be referred to the senior management of both parties for an amicable resolution failing which the same would be referred to an Arbitral Tribunal comprising of three members. The parties therein had also agreed that the arbitration shall be conducted in accordance with the rules and procedure of International Chamber of Commerce (ICC) or UNCITRAL. The petitioner's grievance was that the respondent had nominated an arbitrator and made a request for arbitration to the ICC International Court of Arbitration for constitution of the arbitral tribunal in accordance with the ICC Rules. It is in the aforesaid context that the Supreme Court held that once the respondent had invoked the arbitration clause and had appointed its nominee and had requested the ICC for constitution of the arbitral tribunal, the same could not be questioned in another proceeding under Section 11(6)

of the Act, which would only be applicable if the parties failed to act in terms of the procedure agreed upon them and, in that case, since one of the parties had invoked the arbitration under the ICC Rules, it could not be invoked again.

23. In the present case, the arbitration clause does not provide for any procedure for appointment of any arbitrator and, therefore, the parties are required to agree on an appointment within 30 days from the receipt of request by one party from another party to agree on such appointment and failing such agreement, an arbitrator is required to be appointed under Section 11(5) of the Act. The respondent has simply proceeded to name an arbitrator. Such appointment is clearly *non est* and, therefore, must be ignored.

24. Since, the parties have been unable to agree on an appointment of an arbitrator, it is necessary that an arbitrator be appointed to adjudicate the disputes between the parties. Accordingly, Justice M.L. Mehta, Retd. Judge, Delhi High Court (Mobile No. 9910384620) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act.

25. This Court is also of the view that the conduct of the respondent is not *bonafide*, as considerable judicial time has been spent on account of the respondent insisting on proceeding with the arbitration before Mr A.P. Dhamija, Advocate. This is a fit case where the respondent ought to be called upon to pay costs. Accordingly, the respondent is directed to pay cost

quantified at ₹25,000/-. The said cost will be deposited with the Delhi High Court Legal Services Committee within a period of two weeks from today.

26. The petition and all pending applications are disposed of in the aforesaid terms.

MAY 21, 2018
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VIBHU BAKHRU, J



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