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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 24.09.2019

+ ARB.P. 416/2019

M/S MAKRO

..... Petitioner

Through: Ms. Ritika Jhurani, Mr. Dinesh
Sharma, Mr. Naman Saraswat Ms.
Jipsa Rawat, Advocates

versus

M/S THE NEW INDIA ASSURANCE CO.
LTD. & ANR.

..... Respondents

Through: Mr. Pankaj Seth, Advocate

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 ('Act') for appointment of an Arbitrator. The arbitration clause between the parties reads as under:

"10. Arbitration and Disclaimer : If any dispute or difference shall arise as to the quantum to be paid under the Policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration the same shall be referred to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be

appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided if the Company has disputed or not accepted liability under or in respect of this Policy. "It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that award by such arbitrators or umpire of the amount of the loss or damage shall be first obtained." It is also hereby expressly agreed and declared that if the Company shall disclaim liability to the Insured for any claim herein under, and such claim shall not, within 12 calendar months from the date of such disclaimer have been made the subject matter of a suit in a Court of Law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder. "

2. Learned counsel appearing for the respondent has filed the reply and has objected to the present petition on the ground that the petitioner had received the claim amount from the respondents towards full and final settlement of its claim and cannot invoke the arbitration clause as no dispute survives between the parties. It is further averred in the reply that the petitioner has failed to plead and establish any fraud/coercion/ undue influence by the respondent at the time of full and final settlement by the petitioner.

3. Learned counsel for the respondent submits that in view of the full and final settlement, the Arbitration Clause cannot be invoked in terms of the judgment of the Apex Court in United India Insurance Co. Limited vs. Antique Art Exports Private Limited, (2019) 5

SCALE 419. The relevant para of the judgment relied upon by the respondent is as under:-

“20. The submission of the learned counsel for the respondent that after insertion of sub-section (6-A) to Section 11 of the Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate of the Court is to examine the factum of existence of an arbitration and relied on the judgment in Duro Felguera, S.A. v. Gangavaram Port Ltd. [(2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.”

4. I have examined the pleadings of the parties and heard the learned counsels.

5. The only objection raised by the respondent to the appointment of the Arbitrator is that the petitioner without any fraud/undue influence/coercion had settled the matter with the respondent and this

was a full and final settlement. There is no denial or dispute to the existence of the Arbitration Agreement between the parties. In a recent judgment by the Apex Court in the case of M/s. Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman, (Civil Appeal No.7023/2019 decided on 05.09.2019) has overruled the judgment in the case of United India Insurance (supra) and has held that the defence of full and final settlement of a claim will not be considered by the Court while examining the petition under Section 11(6) of the Act. The Apex Court has held that all that needs to be seen at the time of deciding Section 11(6) of the Act is the existence of the Arbitration Agreement and no more and nothing else. The relevant paras of the judgment are extracted hereunder: -

“10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) – see paras 48 & 59.

11) We, therefore, overrule the judgment in United India Insurance Company Limited (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above.”

6. In view of the said judgment of the Apex Court, the objection raised by the petitioner to the present petition cannot be sustained.

7. At this stage, learned counsel for the respondents submits that he has no objection to the appointment of a Sole Arbitrator, but his right to file an application under Section 16 of the Act be kept open.

8. With the consent of the parties, Mr. Amrit Pal Gambhir, Advocate, is appointed as sole Arbitrator to adjudicate the disputes between the parties.

9. The rights and contentions of the parties on the merits of the disputes as well as right of respondents to file an application under Section 16 of the Act is kept open.

10. The Arbitrator shall give a disclosure before entering upon reference. Fee of the Arbitrator shall be fixed as per the Fourth Schedule of the Act as mutually decided by the parties.

11. The address and mobile number of the learned Arbitrator is as under:

Mr. Amrit Pal Gambhir, Advocate
C-101, Ground Floor, Part-I,
New Delhi-110048.
Mobile No. 9810082347

12. Copy of this order be sent to the learned Arbitrator.

13. The petition is disposed of in the above terms.

JYOTI SINGH, J

SEPTEMBER 24, 2019

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