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

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Date of decision: 13.11.2019

+ ARB.P. 585/2019

MS. RITIKA DIWAN & ANR. Petitioners

Through: Mr. Shivam Sharma, Advocate

versus

M/S SUPERTECH LIMITED Respondents

Through: Mr. Rudresh, Advocate

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

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

"48. That all or any disputes arising from or out of or touching upon or in relation to the terms or formation of this provisional Allotment or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments, modifications or re-enactment thereof for the time being in force. A sole arbitrator, appointed by the Developer shall hold the arbitration proceedings at New Delhi. The decision of the Sole Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the Parties. The Allottee(s) hereby confirms that he/she shall have

no objection to such appointment and proceedings of arbitration.

49. That all the terms and conditions of the provisional allotment shall be governed by and construed in accordance with the laws of India. Subject to arbitration clause, that the Courts at New Delhi alone shall have the jurisdiction in all matters arising out of or touching upon or concerning this provisional allotment.”

2. Reply has been filed by the respondent. Learned counsel appearing for the respondent submits that the petition is not maintainable as there is no existing arbitral dispute between the parties. The petitioners had approached the respondent in April 2015 to invest in a property being developed as a part of the project “Cape Town” situated at GH-01/A, Sector 74, District Gautambudh Nagar, U.P. The total consideration was Rs. 60,61,741/-. A tripartite agreement dated 02.05.2015 was executed between the parties and India Bulls Housing Finance Limited. The subvention plan was reduced in writing into an MOU dated 04.05.2015. Respondent paid the EMI for 36 months and when in May 2018, the project was near completion, petitioner desired to transfer the booking to another project “HUES”. The allotment letter was subsequently terminated and the transfer of funds was made from one unit to another. As per the respondent, the funds were transferred to the new project but the petitioner has delayed completion of the formalities.

3. Learned counsel points out that the petitioners are seeking to invoke the Arbitration Clause in the allotment letter, which stands terminated and under which all rights of the petitioner have been waived. Thus, there is no arbitrable dispute pending under the said Arbitration Clause. The argument

is also that once the allotment letter has been terminated, the arbitration agreement has also ceased to exist.

4. Respondent submits that petitioners have themselves given an affidavit wherein a request was made to the respondent to transfer the funds to another unit in the project “Hues”. It is also stated in the affidavit that the petitioners waived their right, claim, title and interest in the property in the “Cape Town” project. The contention is that having waived their rights in the earlier project and given an affidavit of undertaking, the petitioners have settled the dispute finally and nothing survives for this Court to appoint an Arbitrator.

5. The next argument of the respondent is that even assuming that there is any alleged failure of the respondent to comply with its obligations with respect to the second project, no cause of action has accrued as the transfer of funds has taken place only in July 2018 and from this perspective, the petition is pre-mature.

6. Responding to the arguments of the respondent, the petitioners in rejoinder submit that the arbitration agreement between the parties is valid and subsisting. Respondent has failed to carry out its obligations under the allotment letter. Despite promising to transfer the apartment in favour of the petitioners in the new project “HUES”, respondent has taken no action and has even failed to reimburse the pre-EMI amount paid by the petitioners to M/s. India Bulls Pvt. Limited. A legal notice dated 13.07.2019 has also been served on the respondent. Vide email dated 03.10.2019, the respondent has called upon the petitioners to verify the booking details so that the agreement could be processed. In reply, the petitioners have categorically informed the

respondent that they are no longer interested in the apartment and only seek refund of the amount with interest. It is contended by the counsel that the disputes with regard to the transfer of the apartment and refund of the EMI amount have arisen between the parties and should be referred to arbitration for adjudication. The cause of action has definitely arisen as the respondent has neither transferred the apartment nor has refunded the money. It is argued that in any case, whether the allotment letter is validly terminated or not, is a question to be decided by the Arbitrator.

7. Having heard the learned counsels for the parties, this Court is of the view that arbitrable disputes have arisen between the parties. It is undisputed that an allotment letter was issued by the respondent in favour of the petitioners for allotment of an apartment in the project “Cape Town”. For certain reasons the said project could not be completed and it was agreed that the apartment would be allotted in a new project “Hues”. It is undisputed again that under the tripartite agreement, EMIs have been paid towards the sale consideration of the apartment by the petitioner to the finance company. Both parties are ad idem that the apartment was to be finally allotted to the petitioners in the new project “Hues” whether the transfer of the apartment from the initial project was on account of the request of the petitioner constrained by circumstances or was an offer by the respondent being unable to complete the initial project is a question which would be adjudicated by the Arbitral Tribunal. Similarly, the question whether the breach or the failure to act and allot the apartment in the two projects was of the respondent or not is in the domain of the Arbitral Tribunal. Under Section 11(6) of the Act, what the Court has to examine is the existence of an

Arbitration Agreement between the parties. This is clearly stated in Section 11(6A) of the Act which reads as under:

“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.”

8. In a recent judgment the Apex Court while deciding the case of **M/s. Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman**, (Civil Appeal No.7023/2019 on 05.09.2019 has held as under:

“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.”

9. Argument of the respondent that the allotment letter having been terminated, the Arbitration Clause no longer exists between the parties has, no merit. Suffice would it be to state that petitioners had been allocated the apartment in project “Cape Town” under the allotment letter dated 29.04.2015. The project could not be completed and for reasons which are yet to be adjudicated, the parties agreed that an apartment would be allocated

to the petitioners in another project “Hues”. There is thus an arbitrable dispute with respect to the allotment letter and the right of the petitioners to refund of the amount for non-allotment of the apartment in either of the two projects. In this context, the Arbitration Clause in the allotment letter dated 29.04.2015 would definitely subsist and is binding between the parties. It is thus not open to the respondent to contend that there is no arbitration agreement and hence the petitioners should be left without the remedy of seeking adjudication of their disputes.

10. Another argument raised by the respondent is that having given an affidavit of undertaking, the petitioners have waived their rights to the allotment under the allotment letter dated 29.04.2015 as well as to claim allocation of the apartment in the project “Cape Town” and as also refund for the apartment in the second project. The respondent contends that there is full and final settlement in accord by the petitioners and therefore in view of the judgment of the Apex Court in *United India Insurance Co. Limited vs. Antique Art Exports Private Limited*, (2019) 5 SCALE 419, the Arbitrator cannot be appointed under Section 11(6) of the Act. This argument only deserves to be rejected for two reasons. Firstly, the judgment in *United India Insurance (supra)* stands overruled by the judgment of the Apex Court in *M/s. Mayawati (supra)* and therefore, the issue of full accord and satisfaction would be decided by the Arbitral Tribunal and this cannot be a ground to dismiss the petition under Section 11(6) of the Act. Secondly, this argument overlooks the prime argument of the petitioners that as per the subvention scheme under which the apartment was booked, the respondent was liable to pay the interest component/pre-EMI to M/s. India Bulls till 10.07.2018. This payment was for the loan taken for the apartment and was

the sine qua non of the arrangement between the parties. Since the possession of the apartment was considerably delayed, the said amount became due and payable till possession of the apartment. To give effect to this arrangement, the respondent had agreed that the petitioners would initially pay the said amount to India Bulls and the same would be reimbursed by the respondents. This dispute also thus is an arbitrable dispute and it cannot be contended that no cause of action has arisen for the petitioner to seek appointment of an Arbitrator.

11. In my view, therefore, the present petition deserves to be allowed.
12. At this stage, learned counsel for the respondent 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.
13. With the consent of the parties, Ms. Rajni Anand, Advocate, is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
14. The address and mobile number of the learned Arbitrator is as under:

Ms. Rajni Anand, Advocate,
79, RPS Colony, Sheikh Sarai,
Phase-I, New Delhi-110017
Mobile Nos. 9891593401, 9560257450.

15. 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.
16. The Arbitrator shall give a disclosure before entering upon reference.
17. Fee of the Arbitrator shall be fixed as per the Fourth Schedule of the Act as mutually decided by the parties.

18. Copy of this order be sent to the learned Arbitrator.
19. The petition is disposed of in the above terms.

JYOTI SINGH, J

NOVEMBER 13, 2019

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