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

+ ARB.P. 835/2018

+ ARB.P. 836/2018

YASHPAL & SONS

..... Petitioner

ANURADHA BHATIA

..... Petitioner

Through: Mr.Kirti Uppal, Sr. Adv. with
Ms.Aastha Dhawan and Mr.Ali
R.Osmani, Advs.

versus

ARDEE INFRASTRUCTURE PVT. LTD.

..... Respondent

Through: Mr.Ashok Chhabra, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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21.01.2019

1. These petitions have been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') by the petitioner(s) relying upon the Arbitration Clause contained in Memorandum(s) of Understanding dated 07.04.2003 executed between the petitioner(s) and the respondent. Simultaneously with the said Agreement(s), the parties had also executed the Flat Buyers Agreement(s). The said Flat Buyers Agreement(s) does not contain any Arbitration Agreement between the parties.

2. The petitioner(s) had earlier invoked the Arbitration Agreement contained in the MOUs and filed Arbitration Petition Nos.239/2011 and 240/2011 seeking appointment of an Arbitrator. This Court by its order

dated 09.01.2012 appointed an Arbitrator *inter-alia* holding as under:

“6. This Court finds no merit in the preliminary objection raised by the Respondent as to the maintainability of the two petitions under Section 11 of the Act. The MoU dated 7th April 2003 is certainly in the nature of a document which brings about a legal relationship between the parties in terms of Section 7 (1) of the Act. As held in Bird Information Systems Private Limited v. M/s. Go Airlines (India) Private Limited, the MOU would constitute a binding agreement which contains the arbitration clause. This Court also negatives the submission of the Respondent that the MOU stood superseded by the FBA. Both the documents were executed on the same date. While the FBA spelt out the conditions under which the possession of the flats in question would be handed over to the Petitioners, the MoU referred to the FBA and spelt out the modalities for payment of the sale consideration for the flats by transfer of the Petitioners lands and the payment of rental compensation of Rs. 3,75,000/- per month by the Respondent to each Petitioner. The MoU expressly refers to the FBA.”

3. The said arbitration proceedings resulted in an Arbitral Award dated 13.10.2015. The challenge to the same are pending adjudication before this Court.

4. During the pendency of the said petitions, the petitioner(s) invoked the Arbitration Agreement afresh by notice dated 05.09.2018 claiming possession of the space booked by them in terms of the Flat Buyers Agreement(s). The respondent by its reply dated 27.09.2018 in Arb.P. 835/2018 (in Arb.P. 836/2018 respondent did not reply to petitioner's notice dated 05.09.2018), however, denied the request of the petitioner(s) for appointment of an Arbitrator *inter-alia* contending therein that the Flat

Buyers Agreement(s) is a nullity and in any case, does not contain an Arbitration Agreement.

5. Learned counsel for the respondent reiterated the above plea of the respondent. He submits that the Flat Buyers Agreement(s) does not make any reference to the authority of the person who has purportedly signed the Flat Buyer Agreement(s) on behalf of the respondent. He further submits that consideration mentioned in the Agreement has not been paid by the petitioner(s) and therefore, this Agreement(s) cannot be enforced. He further submits that in any case, the claim of the petitioner(s) for possession of the space would fall within the ambit and scope of the Flat Buyers Agreement(s) which does not contain an Arbitration Agreement(s).

6. Learned counsel for the respondent further submits that this Court would lack territorial jurisdiction to adjudicate the present disputes inasmuch as the property(s) in question is situated at Gurgaon (Haryana). Relying upon the judgment of the Supreme Court in ***Himangni Enterprises v. Kamaljeet Singh Ahluwalia***, VIII (2017) SLT 87, he submits that rights of the parties that are governed by the Transfer of Property Act would have to be adjudicated through civil suit and not through arbitration. He further places reliance on the judgment of the Supreme Court in ***Velugubanti Hari Babu v. Parvathini Narasimha Rao and Anr.*** (2016) 14 SCC 126, to contend that this Court, while exercising its power under Section 11 of the Act, has to necessarily consider the question of legality, validity and genuineness of the Arbitration Agreement(s).

7. I have considered the objections raised by the learned counsel for the respondent, however, find no merit in the same. This Court in its order dated 09.01.2012 referred hereinabove had clearly stated that the Flat

Buyers Agreement(s) and MOUs were executed on the same date, with one not superseding the other but in fact both coexisting. The MOU(s) also makes a reference to the Flat Buyers Agreement(s) and payment of consideration under the Flat Buyers Agreement(s) by way of transfer of certain lands from the petitioner(s) to the respondent. Whether the Flat Buyer Agreement(s) has been executed on behalf of the respondent by a duly authorized person would be an issue to be considered by the Arbitrator. Equally, whether the consideration for the flats had in fact passed from the petitioner(s) to the respondent would again be a dispute to be adjudicated by the Arbitrator, and cannot be a ground for refusing appointment of an Arbitrator at this stage.

8. As far as the plea of lack of territorial jurisdiction is concerned, the learned senior counsel for the petitioner(s) has rightly relied upon the Clause 41 of the Flat Buyers Agreement(s) which confers the jurisdiction in this Court. He further submits that the Agreement(s) in question was executed at Delhi; the Arbitrator in the earlier round was also appointed by this Court; and the proceedings had also been held at Delhi. He submits that therefore, this Court would have the jurisdiction to appoint an Arbitrator. I am in agreement with the submission made by the learned senior counsel for the petitioner(s). This Court having already appointed the Arbitrator for adjudicating the disputes earlier raised by the petitioner, would have the jurisdiction to entertain the present petition(s).

9. In *Himangni Enterprises* (supra), the Supreme Court was considering the issue of a dispute between a landlord and a tenant. In these facts it was held that a dispute relating to the rights of the party governed by the Transfer of Property Act, would require adjudication by a Civil Court and

not by the Arbitrator. In the present case(s), the dispute is of petitioner(s) seeking possession of the space booked by them. I do not see any reason why the same is not arbitrable. Therefore, the judgment of *Himangni Enterprises* (supra) would have no application to the facts of the present case.

10. I therefore, see no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties.

11. I appoint **Justice Manmohan Sarin**, Former Chief Justice of Jammu & Kashmir High Court (D-130, Panchsheel Enclave, New Delhi-110017 Ph. 9818000210) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties. The Arbitrator shall consider this to be a case of appointment in two separate references.

12. Arbitrator shall give disclosure under Section 12 of the Act before proceeding with the references.

13. The arbitration proceedings shall be held under the aegis of the Delhi International Arbitration Centre (DIAC) and the rules of the DIAC as to procedure and fee shall be applicable.

14. The petitions are allowed in the above terms with no order as to cost.

Dasti.

NAVIN CHAWLA, J

JANUARY 21, 2019/Arya