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

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Date of decision: 27.01.2020

+ ARB.P. 432/2019

M/S. UNIQUE REALITY PVT. LTD. Petitioner

Through Mr. Dhan Mohan, Ms. Tanu B.
Mishra, Mr. Ravi Mishra and Ms.
Mahima Gautam, Advocates.

versus

M/S. R C INFRA DEVELOPERS & ANR. Respondents

Through Mr. Mayank Sapre and Mr.
Amanpreet Singh Rahi, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') for appointment of the Sole Arbitrator.
2. An agreement dated 05.09.2017 was executed between the petitioner and the respondents. According to the petitioner, the said agreement contains an Arbitration Clause which is extracted hereinunder:-

"Any disputes or arbitration in relation to this contract are subject to New Delhi, India jurisdiction. In the event of any dispute or differences arising between the parties hereto either touching or concerning the construction, meaning or effect of this MOU or the respective rights and liabilities of the parties hereto, or their enforcement there under, it shall be first settled amicably through discussions between the parties and if not resolved then otherwise referred to the arbitration of a Sole Arbitrator

if agreed upon, failing which to the sole Arbitrator as appointed by the court in accordance with the provisions of the Arbitration and Conciliation, Act 1996. The draft given herein above is strictly for your information only and should not be disclosed to any other party, without our prior consent".

3. Certain disputes having arisen between the parties. The petitioner invoked the Arbitration Clause by notice dated 20.04.2019.

4. The respondent sent its reply to the notice but the parties could not reach a consensus on the name of the Arbitrator to be appointed between the parties and hence this petition was filed.

5. Learned counsel for the respondents submits that the contract dated 05.09.2017 stood superseded and novated by an agreement dated 14.02.2019, which did not contain an Arbitration Clause. Since, the very existence of the Arbitration Agreement is being disputed, the present petition under Section 11(6) of the Act is not maintainable before this Court. Learned counsel for the respondents relies on the judgment in the case of ***Zenith Drugs & Allied Agencies Pvt. Ltd. Represented by its Managing Director, Uday Krishna Paul vs. M/s Nicholas Piramal India Ltd., 2019 Lawsuit (SCF) 1384*** to contend that the contract having been superseded by a subsequent contract which does not have an Arbitration Clause, this petition cannot be allowed.

6. Learned counsel for the petitioner, however, has drawn the attention of this Court to the notice sent by the petitioner invoking Arbitration and the reply sent thereto by the respondents. A perusal of the reply shows that the existence and validity of the Arbitration Agreement was never disputed. It was never the stand in the reply of the respondents that the said agreement

stood superseded or novated by any subsequent agreement. In fact, a reading of the reply clearly reveals that the only dispute between the parties at the stage was regarding the consensus on the name of the Arbitrator to be appointed between the parties.

7. Relevant paras of the reply are extracted hereinunder:-

3. That as per the agreement my client is entitled to 45% profit sharing ratio.

4. That your client have not made any effort to resolve the dispute amicably and as per records of my client, my client has paid Rs. 3.2 Crore through RTGS and Rs. 1.8 Crore through cash.

8. That my client is further not in consensus to the name proposed by you to act as Arbitrator and therefore, he does not accepts the name of Ms. Harkamal Jeet Kaur, Advocate.

10. That the names suggested by my client to act as Arbitrator are:

a) Hon'ble Mr. Justice K.S. Rakhra (Retd.)

*Address: 2/146, VishveshKhand, GomtiNagar, Lucknow
Mobile No. 9415215968*

b) Hon'ble Mr. Justice Rajendra Prasad Tripathi (Retd.)

*Address: 2/169, Vikas Nagar, Lucknow
Mobile No. 9415490304*

8. Thus, it is clear that the respondents never disputed the existence or validity of the Arbitration Agreement. On the contrary, the respondents had agreed to subject themselves to Arbitration proceeding by suggesting names of their nominee Arbitrator.

9. In my view, the argument raised cannot help the respondent. This is

merely an afterthought in the reply, once the present petition has been filed.

10. This Court under Section 11(6) of the Act is only required to examine the existence and validity of an Arbitration Agreement. This is clearly the mandate of Section 11(6A) of the Act.

11. In the recent judgment passed by Supreme Court in ***Mayavti Trading Pvt.Ltd. Vs. Pradyut Deb Burman 2019 SCC OnLine SC 1164*** the Supreme Court has clearly held that the role of the High court in examining the petition under Section 11(6) of the Act will be confined to the examination of the existence and validity of the agreement.

12. Relevant para of the judgment is extracted hereinunder:-

“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.”
Thus in my view the present petition deserves to be allowed.”

13. Learned counsel for the respondents also takes an objection to the present petition on the ground that after receiving the reply to the notice of invocation, the petitioner has filed a Civil Suit bearing No. 891/2019 and thereafter is now estopped from filing the present petition. In my view, the

said objections cannot be sustained. Only because the petitioner had resorted to a wrong remedy earlier cannot be a ground to hold that the present petition is not maintainable. It is a settled law that if the parties are governed by an arbitration agreement, civil suit cannot be the remedy.

14. In view of the above, in my opinion, the present petition deserves to be allowed.

15. I hereby appoint, Ms. Justice Indermeet Kaur, former Judge of this Court, as a Sole Arbitrator to adjudicate the disputes between the parties.

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

Ms. Justice Indermeet Kaur (Retd.)
AB-84, Shahjahan Road,
New Delhi-110003
Mobile: 9910384614

17. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

18. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

19. The petition is allowed in the aforesaid terms.

I.A. 17520/2019

In view of the above, the present application is dismissed as not pressed.

JYOTI SINGH, J

JANUARY 27, 2020

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