

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on : 13.12.2019

Pronounced on: 27.05.2020

+

ARB P. 494/2019

RAJESH GUPTA

..... PETITIONER

Through: Mr. Sanjay Goswami, Advocate

versus

SMT. MOHIT LATA SUNDA & ORS.

..... RESPONDENTS

Through: Mr. Shashank Garg, Mr. Tariq Khan
and Ms. Aastha Jain, Advocates for R-3

+

O.M.P. (I) 3/2019

RAJESH GUPTA

..... PETITIONER

Through: Mr. Sanjay Goswami, Advocate

versus

SMT. MOHIT LATA SUNDA & ORS.

..... RESPONDENTS

Through: Mr. Shashank Garg, Mr. Tariq Khan
and Ms. Aastha Jain, Advocates for R-3

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Arbitration Pet. 494/2019 has been filed by the Petitioner under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of an Arbitrator to adjudicate the disputes between the parties.

2. The brief facts as stated by the Petitioner are that Respondent No. 1 claiming herself to be legal heir of Late Shri Jiwan Lal Sunda and also claiming to have inherited 1/3rd undivided share in Property No. W-34, Greater Kailash-2, New Delhi, measuring about 964 sq. yds. approached the Petitioner through an Estate agent and expressed her desire to sell her 1/3rd undivided share in the property. It was also represented that Late Shri Sunda and his wife Shrimati Savitri Sunda had died intestate, without executing any Will.

3. Petitioner was also informed that Respondent No. 1 had filed a partition Suit with respect to the said property against the other two legal heirs, being her brother Shri Bharat Bhushan Sunda and sister Shrimati Hemlata Trehan. As per Respondent No. 1 the two siblings had already given their consent to the property being partitioned and Respondent No. 1 being entitled to 1/3rd undivided share.

4. Petitioner states that on the above premise, Petitioner entered into an Agreement to Sell dated 14.05.2018 with Respondent No. 1 qua her 1/3rd undivided share in the said property. Out of the total agreed sale consideration of Rs. 7.75 crores, Petitioner, under the Agreement to Sell, paid part consideration of Rs. 31,00,000/-, by way of a cheque, bearing No. 013199, dated 11.05.2018, drawn on RBL Bank, Rajouri Garden, New Delhi.

5. The Agreement to Sell was duly witnessed by one Shri Shiv Kumar resident of Greater Kailash-2, Delhi and one Shri Dheeraj

Kumar, resident of Jharkhand, who had claimed to be legal advisors of Respondent No. 1.

6. As per the terms of the Agreement dated 14.05.2018, the balance consideration was payable to Respondent No. 1 only upon fulfillment of certain mandatory conditions, which were spelled out in para 3 of the Agreement and are as under:-

“3.1 That before final payment the Vendor shall complete the following Compulsory Requirements at her own cost and expenses:-

a) Get the No Objection I Affidavits/ Disclaimer from all her legal heirs, inter-alia for the confirmation that they have no right in the said property and also for confirmation of the present transaction.

b) Apply for and obtain Surviving Member Certificate of the Estate of late Shri Jiwan Lal Sunda from the office of the Deputy Commissioner, New Delhi, inter-alia for the confirmation that he is survived by only three Legal Heirs i.e. the Vendor and her brother Shri Bharat Bhushan Sunda and her sister Mrs. Hemlata Trehan.

c) Get the said property mutated in the names the Vendor and her sister and brother, in the records of South Delhi Municipal Corporation.

d) Obtain Compromise Decree in the pending partition suit, in view of the above compromise. It is clarified that any/ all stamp duty, as may be required to be paid, in preparation of the decree sheet shall be borne and paid by the Vendor and her brother and sister as the case may be.

e) Provide upto date payment receipt of House Tax, Water and Electricity charges.

f) Right and authority to the Vendee to issue a public notice, in Delhi/ Jharkhand in any newspaper(s) at the Vendee's own cost, inviting claim(s), if any, from the General Public, to ascertain the title of the Vendor. That in case any claims/ objections/ lien are raised by any third party regarding the title of the said property then the same shall be settled by the Vendor at her own cost and expenses, before the date of final payment.”

7. After the parties executed the Agreement to Sell, Petitioner, desirous of purchasing the entire property, on the same terms, entered into two separate Agreements to Sell with the siblings of Respondent No. 1. The Agreement entered into with the sister of Respondent No. 1 is dated 28.05.2018 and the one with the brother is dated 25.05.2018. After the Agreements had been executed and signed, Respondent No. 1 informed the Petitioner that she had earlier entered into another Agreement with respect to her share in the property, with one Shri Ranjan Gupta on 20.08.2012 and had received part consideration. However, Shri Gupta was willing to cancel the said Agreement.

8. Having entered into the three Agreements to Sell, Petitioner, left with no other option, facilitated Respondent No. 1 to enter into a Deed of Cancellation of the Agreement, with Shri Ranjan Gupta and paid to him on behalf of Respondent No. 1, a sum of Rs. 15 lakhs, as part consideration for cancellation. The payment was made by way of a Pay Order dated 06.06.2018, drawn on RBL Bank Ltd., with an understanding that further consideration of Rs. 50 lakhs shall be paid by the Petitioner on behalf of Respondent

No. 1, out of the sale consideration payable to Respondent No. 1 by the Petitioner. This payment was to be made after Respondent No. 1 executed the Sale Deed of her share in favour of the Petitioner.

9. Realizing that Respondent No. 1 had entered into an Agreement to Sell with the Petitioner without disclosing the pre-existing Agreement with Mr. Gupta, the Petitioner in order to secure himself, issued a Public Notice on 20.08.2018 in a Newspaper, inviting objections to the sale of share of the Respondent No. 1 in her property. Soon after the Notice was issued, Petitioner's lawyer, received an objection from Respondent No. 3, claiming that Respondent No. 3 had entered into an earlier Agreement to purchase the entire property from Respondent No. 1. Respondent No. 3 claimed that the Agreement was entered into on behalf of Respondent No. 1 by her son, Amit Sunda, Respondent No. 2 herein, acting as her Attorney.

10. After the receipt of the said objection, Petitioner also received a copy of a stay order dated 03.08.2018, passed by an Arbitrator in Arbitration Proceedings pending between Respondent No.3 and Respondent Nos.1 and 2, regarding his claim for specific performance of the Agreement to sell with respect to the entire property.

11. Soon thereafter Petitioner sent a legal notice to Respondent No. 1 and Respondent No. 2 on 10.08.2018, as well as to the other two siblings of Respondent No. 1, with whom the Petitioner had separate Agreements to Sell. Respondent No. 1 informed the

Petitioner that she was taking steps to have the stay order vacated before the Arbitrator.

12. In the meantime, Petitioner also came to know that an FIR had been registered against the Respondents and some others in Jharkhand at the instance of the siblings of Respondent No.1, claiming that the Will and NOC relied upon by Respondent No. 3, as the basis of his Agreement with Respondent No. 1, were forged and fabricated documents. Respondent No. 1 when approached in this regard maintained that the documents relied upon by Respondent No. 3 were forged and she had never authorized her son, Respondent No. 2, to enter into any Agreement with Respondent No. 3. She also informed the Petitioner that an application had been filed before the Arbitrator, challenging his appointment.

13. Petitioner, then filed a Criminal Complaint against the Respondents on 12.02.2019, followed by a second complaint on 01.05.2019 and the same has been referred to the Economic Offences Wing, Crime Branch, Delhi Police. In the meantime, a substitute Arbitrator was appointed in the proceedings initiated by Respondent No.3, but Respondent No. 1 kept assuring the Petitioner that they shall execute a Sale Deed in favour of the Petitioner.

14. Petitioner, while awaiting the outcome of the Arbitration Proceedings, discovered from the website of the GNCTD of Delhi that a Sale Deed had already been executed in favour of Respondent No. 3 by Respondent No. 1 and the Sale Deed dated

11.04.2019 had been registered in favour of Respondent No. 3 in the office of Sub-Registrar, Hauz Khas. The witness on the Sale Deed was none other than Mr. Ranjan Gupta, who had entered into an MOU for cancellation of the Agreement and had received Rs. 15 lakhs from the Petitioner. Respondent No. 3 withdrew his Arbitration Proceedings after the execution of the Sale Deed.

15. Petitioner thereafter decided to invoke the Arbitration Agreement. Apprehending that the Respondents on coming to know that Petitioner had unearthed the fraud, may, in order to defeat the rights of the Petitioner, create Third Party rights in the property and sell or transfer the same, filed a petition under Section 9 of the Act being O.M.P. (I) No. 3 of 2019. Vide order dated 13.05.2019, this Court restrained the Respondents from, in any manner, creating Third Party rights in or parting with possession of the property in question. Respondent Nos. 1 and 2 did not appear. Respondent No. 3 has filed his reply. Interim order is continuing and the petition is being disposed of by this common judgment.

16. Petitioner through notice dated 22.05.2019 invoked the Arbitration Agreement between the parties, but the Respondents failed to consent to any of the three names suggested by the Petitioner. Hence, the present petition was filed.

17. The Arbitration Clause No. 14 in the Agreement to Sell dated 14.05.2018 is as under:-

"14. That the parties had agreed to attempt in good faith to resolve any disputes/ differences or claim arising out of or in relation to this Agreement through

mutual discussion. In case, it is not resolved within 30 days from the date of receipt of the written notice (setting out dispute or claim), by the other party, the complaining party may issue a notice of reference, invoking settlement of such dispute through sole arbitration. Any disputes relating to construction, managing, scope, operation or effect of this agreement or the validity or the breach thereof be referred to and finally and conclusively settled by mutually appointed sole arbitration, in accordance with law in effect in India governing the arbitration. The place of arbitration shall be at New Delhi."

18. Learned counsel for the Petitioner submits that the Sale Deed executed between the Respondents is a fraudulent document and the witness of the Sale Deed was none other than Mr. Ranjan Gupta, who had entered into an MOU for cancellation of his Agreement, at an earlier point of time. Respondent No.3 had prior knowledge that Respondent Nos. 1 and 2 had entered into an Agreement to Sell with the Petitioner and thus, the Sale Deed is a void document and is liable to be set aside. Petitioner claiming under a prior Agreement, has a right to seek specific performance of his Agreement against all the Respondents. Respondent No. 3 having stepped into the shoes of Respondent No. 1, is an Assignee and thus, even though he is not a party to the Agreement to Sell, is bound by the Arbitration Agreement in the Agreement to Sell. Under the Specific Relief Act, 1963, Petitioner is entitled to seek specific performance of the Agreement against Respondent No. 3 also.

19. It is next contended that Respondent No. 3 is also a party in the petition filed by the Petitioner under Section 9 of the Act being O.M.P. (I) 3/2019, wherein Court has restrained the Respondents, from creating third party rights in or parting with possession of the property, in question, in any manner, whatsoever.

20. Respondent No. 3 has filed a reply opposing the petition. As a preliminary submission, it is argued by learned counsel that Respondent No.3 is neither a party nor a signatory to the Agreement between the Petitioner and Respondent No. 1 and therefore, the Arbitration Agreement cannot be invoked against him. The present petition is thus not maintainable qua Respondent No.3. Respondent No. 3 cannot be made to step into the shoes of Respondent No. 1, since the present dispute is between the Petitioner and Respondent Nos. 1 & 2 and there is no cause of action against Respondent No. 3.

21. It is contended that a petition under Section 11(5) of the Act is maintainable only against a 'party' to an Arbitration Agreement. 'Party' as defined in Section 2(1)(h) in the Act means a party to an Arbitration Agreement and thus, it cannot be said that the Arbitration Agreement can be invoked against Respondent No. 3. The present Arbitration Agreement is not an 'Agreement' between the Petitioner and Respondent No. 3, by a plain reading of Section 7 of the Act. Learned counsel has placed reliance on a judgment of the Supreme Court in ***Firm Ashok Traders v. Gurumukh Das Saluja, AIR 2004 SC 1433*** for the proposition that 'party' means party to an Arbitration Agreement only. For the same proposition,

learned counsel also relies on the judgment in the case of ***Shoney Sanil v. Coastal Foundations (P) Ltd., AIR 2006 Ker 206***. It is argued that Respondent No.3 is a non-signatory and a stranger to the Agreement dated 14.05.2018. It is a settled law that only signatories to the Arbitration Agreement can be made parties as held by the Supreme Court in ***Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar & Anr., (2011) 11 SCC 375***. Relevant para of the judgment reads as under:

“The existence of the arbitration agreement between the parties to the petition under Section 11 of the Act and existence of dispute(s) to be referred to arbitration are conditions precedent for appointing an arbitrator under Section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim/ demand against the other party to the arbitration agreement and the other party refuses/ denies such claim or demand. If a party to an arbitration agreement, files a petition under Section 11 of the Act impleading the other party to the arbitration agreement as also a non-party to the arbitration agreement as the respondents, and the court merely appoints an arbitrator without deleting or excluding the non-party, the effect would be that all parties to the petition under Section 11 of the Act (including the non-party to arbitration agreement) will be parties to the arbitration. This will be contrary to the contract and the law. If a person who is not a party to the arbitration agreement is impleaded as a party to the petition under Section 11 of the Act, the court should either delete such party from the array of parties, or when appointing an arbitrator make it clear that the

arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement."

22. Without prejudice to the above, learned counsel argues that Respondent No.3 had no knowledge of the existence of the alleged Agreement dated 14.05.2018. The Public Notice dated 20.07.2018 does not mention the name of the Petitioner. Respondent No.3 had only replied to the Public Notice in good faith and had categorically stated that he had a prior Agreement to Sell with Respondent No.1 and had already initiated Arbitration Proceedings, on account of breach of the Terms of the Agreement by her. Petitioner never responded to the reply of Respondent No.3. It is further argued that the Petitioner has already taken recourse to criminal proceedings against Respondent No.3, alleging fraud, cheating and forgery. Supreme Court in the case of **A. Ayyasamy v. A. Paramasivam (2016) 10 SCC 386**, has held that serious allegations of fraud are not arbitrable and even on this ground, there cannot be a reference to Arbitration.

23. Learned counsel further argues that Respondent No.3 is a bonafide purchaser of the property and has a Sale Deed in his favour, having paid due consideration to Respondent No.1, through Demand Drafts, the details of which are mentioned in the Reply. It is further argued that Respondent No.3 had invoked Arbitration against Respondent No.1 & 2. Initially they had filed an application challenging the jurisdiction of the Arbitrator and had denied the execution of the documents in favour of Respondent

No.3, such as the Will and the NOC, however, subsequently, being aware of the truth, they have unconditionally withdrawn the application and admitted the execution of the Agreement to Sell in favour of Respondent No.3, on 04.01.2014. It is thus submitted by learned counsel that the present petition be dismissed as not maintainable against Respondent No.3.

24. Learned counsel for the Petitioner in rejoinder reiterates the submissions made earlier and refutes the submissions made by Respondent No.3. It is argued that Respondent No.3 has stepped into the shoes of Respondent Nos.1 and 2 as their Assignee, more particularly, as the Sale Deed was executed after the Public Notice was issued by the Petitioner. Learned counsel has placed reliance on the judgment of the **Rajasthan High Court in Aerens Goldsouk International Ltd. Co. v. Samit Kavadia and Ors. (2008 (2) Arb. LR 545 (Rajasthan))** for the proposition that once a party steps into the shoes of the original party to an Arbitration Agreement, it becomes an Assignee and the Arbitration Agreement binds not only the original party, but also the Assignee. Reliance is also placed on the judgment of a Division Bench of this Court in **Nirmala Jain & Ors. v. Jasbir Singh & Ors., 2019 (256) DLT 186**, for the proposition that factors such as commonality and composite nature of transactions between a party and a non-party or commonality of subject matter are instances where participation of non-parties to an Arbitration Agreement is permissible. Reliance is also placed on a judgment of this Court in **A.D. Chawla v. Navrang Pictures 1974 RLR 417**, where it was held that when a party steps into the shoes

of the original party, either by succession or operation of testamentary instruments or by an act of the party, it must be bound by it and in case any dispute arises between the original party with regard to its rights and obligations under the Agreement, the assignee or the transferee would be bound by the terms of the Agreement as also by the Arbitration Clause, that may be incorporated in the said Agreement.

25. I have heard learned counsels for the parties and examined their contentions.

26. Law on the scope of examination under Section 11(5) of the Act, by a Court is no longer *res integra*. Supreme Court in the case of ***DuroFelguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729*** and ***Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714*** has clearly held that after the insertion of Sub-Section (6A) in Section 11 of the Act, the scope of examination by the Court is only restricted to examining the existence of an Arbitration Agreement between the parties. Relevant part of the judgment in ***DuroFelguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729*** (*supra*) reads as under:-

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) 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.”

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

*

*

*

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

27. Relevant portion of the judgment in **Mayavati Trading (P) Ltd.** (*supra*) is 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 [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) 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 in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59”

28. Insofar as the Agreement to Sell between the Petitioner and Respondent No.1 is concerned, there is an Arbitration Clause in existence, which has been alluded to above. Respondent Nos. 1 & 2 were proceeded ex-parte and thus it is deemed that there is no dispute to the existence of an Arbitration Agreement between them and the Petitioner.

29. Respondent No. 3 has vehemently contested the petition and therefore, the contentions raised need to be examined.

30. Before adverting to the factual situation in the matter, it is necessary to traverse the law with respect to a ‘non-party’ and a ‘non-signatory’ to an Arbitration Agreement in the context of an Assignee / transferee. Learned counsel for the Petitioner has relied upon the judgment of the Rajasthan High Court in *Aerens (supra)* and in my view, the said judgment squarely covers the present case, and is also very close on the facts of the present case. In the said

case, Respondent No. 6 had purchased the property in question, after publication of Notice in the Newspaper by the Petitioner, that the Petitioner had purchased the land in question through an Agreement to Sell. On the strength of an Arbitration Agreement, Petitioner therein filed an application under Section 11(5) of the Act for appointment of an Arbitrator and impleaded the original seller as well as Respondent No.6. Respondent No.6 resisted the petition on the ground that it was not a party to the Arbitration Agreement and was a bonafide purchaser of the land from Respondent No.1 & 2. Relying on the judgment of the Supreme Court in ***S. Chattanatha Karayalar v. Central Bank of India Ltd.*** ***AIR 1965 SC 1856***, the Court held as under:

“26. Undeniably the respondent No. 6 purchased the property in question after publication of notice in the newspapers. Therefore it will be deemed that the respondent No. 6 had knowledge about the MOU and the agreement to sell between the petitioner company and the respondent No. 1 and 2. Since the respondent No. 6 stepped in the shoes of respondents No. 1 and 2, it cannot now say that they are not bound by the Arbitration agreement entered between the petitioner and the respondents No. 1 and 2. In the ultimate analysis I find that it is a fit case for appointment of arbitrator under Section 11(6) of the Act.”

31. In the case of ***Nirmala Jain (supra)***, the Division Bench of this Court in an Appeal under Section 37 of the Act, was examining judgment by the learned Single Judge under Section 9 of the Act, permitting impleadment of a third party to the Arbitration

Agreement. The Division Bench referred to the various judgments of the Supreme Court with respect to the doctrine of non-signatory and non-parties to an Arbitration Agreement, to refer a few, ***Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. &Ors., 2013(1) SCC 641, Cheran Properties Limited v. Kasturi and Sons Limited, 2018 SCC Online (SC) 431***. The Court also considered Section 7 of the Arbitration Act and the concept of ‘parties to arbitration’ and held as under:

“10. In Cheran Properties (supra), this very aspect was emphasized and the Court held factors such as commonality and composite nature of transactions between a party and a non-party or commonality of subject matter as instances where participation of non-parties to an arbitration agreement is permissible. Here too, the commonality of subject matter needs to be highlighted. Though the applicant third party was made aware of the arbitration proceedings in this case, he remained sanguine perhaps hoping that the arbitral proceedings would end fast. Given that the Sale Certificate attained finality and even appeal preferred by the borrowers, i.e. the applicants was rejected in 2012 and the further circumstance that the auction purchaser deposited the amounts towards the sale of the property as far back as In 2007, this Court is of the opinion that there is no basic infirmity or serious error in the approach of the learned Single Judge as regards impleadment.”

32. With regard to the argument of the Petitioner that Respondent No. 3 has stepped into the shoes of Respondent No. 1 and is her assignee, it would be useful to refer to a judgment of this

Court in **A.D. Chawla** (*supra*), the relevant para of which reads as under:

“7 It has been pointed out above that the agreement was entered into between the petitioner on the one hand and respondents No. 1 and 2 on the other, who were described as "borrowers", and according to the recital in the agreement, the said expression "unless repugnant to the context or meaning thereof, shall include their heirs, executors, legal representatives, assigns and all the persons deriving title under them," The intention of the aforesaid recital, which is well known in the annals of drafting of conveyancing, is not only to bind the parties to the agreement but all those who, either by operation of law or by the act of the parties concerned, step into the shoes of the parties. This could be either on the death of a party in which case the agreement would bind the heirs, executors and administrators as the case may be i. e., persons who on the death of a party represent the estate. This is based on a fiction of law that even though a person may die a physical death, he is not extinct in law until his various rights and obligations have been finally dealt with and the legal personality of such a person is deemed to continue in the form of his heirs executors and legal representatives who continue to represent the deceased as it were until the rights and obligations of the deceased are determined, discharged or released as the case may be. Similarly, an agreement would bind those who claim under a party by virtue of an act of the party where for example a party may assign all his rights or obligations under an agreement to another by various modes known to law and such persons, therefore, would be bound by such an agreement as assigns or persons deriving title through the party who was its executor. In each case, it is necessary that the party who seeks to take advantage of such an

agreement or who is sought to be bound by it, must in law have stepped into the shoes of the original party either by succession, operation of testamentary instrument or by the act of the party during his life time. It is, however, necessary that the party who claims to take advantage of the agreement or is sought to be bound by it, must have been an assignee or a transferee of all rights or obligations under the agreement and a person who may have acquired any claim or property, forming subject matter of the agreement, or who may have acted as an agent or representative of such a party in relation to any such claim or property without having agreed to be bound by the terms of the agreement could not be said to have stepped into the shoes of the party and if any dispute arises between the original party with regard to their right and obligation under the agreement the transferee of such rights or benefit could not by virtue merely of such transfer, possibly be bound by the terms of the aforesaid agreement or by any arbitration clause that such an agreement may incorporate. This' is so because by merely acting for a party to the agreement in relation to any property or by purchasing any claim or property in relation to which an agreement may had been entered into between two parties, the transferee or the person acting for a party could not be said in law to have stepped into the shoes of the party so as to be bound by the agreement or to be entitled to take advantage of it."

33. I may also allude to certain paragraphs from 'Russel on Arbitration, 24th Edition', in the context of binding effect of an Arbitration Agreement on an 'assignee' of the original party:

"Rights of assignees - Where there is a valid assignment of a contract containing an arbitration agreement the assignee will be bound by the

arbitration agreement. He may invoke the arbitration agreement to pursue a claim but will also be subject to the arbitration agreement in the event of a claim by the other party. The assignee is not limited to commencing arbitration proceedings following the assignment, but may also join existing proceedings. References under Pt.1 of the Arbitration Act, 1996 to a party to an arbitration agreement include any person, such as an assignee, claiming through or under a party to the agreement.”

34. The Court of Appeal in case of ***Shayler v. Woolf (1946) 2 ALL England Law Reports 54***, held that the Arbitration Clause is assignable in its nature, unless the nature of the contract is such that it is incapable of assignment. Once the contract is assigned by a party in favour of another party, benefit of the contract is now vested in the assignee and he is entitled to sue upon it. The said judgment was quoted with approval by the Supreme Court in the case of ***Khardah Company Limited v. Raymon & Company (India) Private Limited, AIR 1962 SC 1810*** and it was held that Arbitration Clause does not take away the right of a party to a contract to assign it, if it is otherwise assignable. The Calcutta High Court in the case of ***M/s. Hindustan Steel Works Construction Pipe Co. v. M/s. Bharat Spun Pipe Company, AIR 1975 Calcutta 8***, held that existence of an Arbitration Clause *per se* does not render the contract assignable or non-assignable. Relying on all the above judgments, the Bombay High Court in the case of ***DLF Power Limited v. Mangalore Refinery & Petrochemicals Limited, Arb. P. No. 509/2011, decided on 20.07.2016***, dealing

with the issue of assignment of a contract and an Arbitration Clause as well as Section 7 of the Act held as under:

“73. Insofar as the submission of the learned senior counsel for the respondent that there was a separate arbitration agreement recorded between the petitioner and the successors and thus the petitioner could not have invoked the arbitration agreement in the contracts dated 16th April, 1997 is concerned, a perusal of the record indicates that the petitioner has not invoked arbitration agreement recorded in the agreement between the petitioner and the successors but has invoked arbitration agreement recorded in the contracts dated 16th April, 1997 on the premise that the said contracts stood assigned in favour of the petitioner and the petitioner having stepped in the shoes of the assignors.

75. Insofar as the submission of the learned senior counsel for the respondent that for the purpose of invoking arbitration agreement, the petitioner had to demonstrate that the arbitration agreement within the meaning of section 7 had existed between the parties is concerned, there is no dispute that the arbitration agreement existed between the respondent herein and DLF Industrial Limited. In my view, since the petitioner has stepped in the shoes of the said DLF Industrial Limited and DLF Universal Limited, the said two contracts entered into between the said DLF Industrial Limited and the respondent including the arbitration agreement recorded therein stood assigned in favour of the petitioner.

76 . In my view, there is no substance in the submission of the learned senior counsel for the respondent that even if the two contracts were assigned in favour of the petitioner, the arbitration agreement forming part of

such contracts was not assigned. The judgments relied upon by the learned senior counsel for the respondent interpreting section 16 of the Arbitration & Conciliation Act, 1996 are not relevant to decide whether arbitration agreement can be assigned or not. Under section 16 of the Arbitration & Conciliation Act, 1996, it is provided that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It is provided that the arbitral tribunal has power to rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose, the arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Merely because a party has appointed an arbitrator or has participated in the appointment of an arbitrator, he is not precluded from raising a plea of jurisdiction in the arbitral proceedings. The scheme of section 16 permitting a party to raise such an objection of jurisdiction though he had participated in the appointment of an arbitrator in an arbitration, without intervention of the Court is totally different and is limited only for that purpose. In my view, the judgments interpreting section 16 of the Arbitration Act would not apply in case of an assignment of a contract including arbitration agreement.”

35. When the facts of the present case are examined, it is clear that before the execution of the Sale Deed, between the Respondents on 11.04.2019, Respondent No. 3 was fully aware of the Agreement to Sell dated 14.05.2018, between the Petitioner and Respondent No. 1 and his rights in the property. Respondent No. 3 had even responded to the Public Notice issued by the Petitioner.

Respondent No. 3 has thus stepped into the shoes of Respondent No. 1 in respect of her 1/3rd undivided share in the property in question and is an 'Assignee' of Respondent No. 1. Following the judgment in case of *Aerens (supra)* the Arbitration Agreement between Petitioner and Respondent No. 1 would bind Respondent No. 3. Thus, in my view, this is a fit case for appointment of an Arbitrator under Section 11 (6) of the Act.

36. Parties have leveled allegations of fraud against each other with respect to the execution of the various Agreements. It is settled law that this issue cannot be decided by this Court and is in the domain of the Arbitral Tribunal, in view of the judgments of the Supreme Court in *Ameet Lalchand Shah and others v. Rishabh Enterprises and Another (2018) 15 SCC 678* and *A. Ayyasamy (supra)*. Under Section 11 of the Act, it is not open to this Court to go beyond the examination of the existence of the Arbitration Agreement. All other contentions of the respective parties are left open to be decided by the Tribunal, if so raised.

37. I, accordingly, appoint Ms. Lalit Mohini Bhat, Advocate as Sole Arbitrator to adjudicate the disputes between the parties.

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

Ms. Lalit Mohini Bhat, Advocate
C-47, Basement, Nizamuddin East
New Delhi-110013
Mob.: 9910155009

39. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.
40. Fee of the Arbitrator shall be as per Fourth Schedule of the Act.
41. Copy of the order be sent to the learned Arbitrator for information.

O.M.P. (I) 3/2019

42. The interim order passed by this Court on 13.05.2019 restraining the Respondents from, in any manner, creating third party rights in or parting with possession of the property in question would continue till the same is modified or vacated by the Arbitral Tribunal. The Tribunal as and when constituted would be at liberty to continue or modify or vacate the said order as and when called upon to do so by any of the parties herein. It is made clear that this Court has not expressed any opinion on the merits of the case and the narration in the judgment is only for the purpose of appointing the Arbitrator and deciding *prima facie* the continuance or otherwise of the interim order granted by the Court on 13.05.2019.

43. Both petitions are disposed of in the above terms.

JYOTI SINGH, J

MAY 27th, 2020 /yo/rd