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

+ O.M.P. (T) (COMM.) 4/2021 & I.A.381/2021, I.A. 382/2021

CHHAYA RAI & ANR.

..... Petitioners

Through: Mr. Avinash Trivedi, Ms.Ritika Trivedi, Mr.Ayush Shah and Mr.Anurag Kaushik, Advs.

Versus

KLJ DEVELOPERS PRIVATE LIMITED Respondent

Through: None

+ O.M.P. (T) (COMM.) 5/2021 & I.A.383/2021, I.A. 384/2021

ANJANI KUMAR RAI

..... Petitioner

Through: Mr. Avinash Trivedi, Ms.Ritika Trivedi, Mr.Ayush Shah and Mr.Anurag Kaushik, Advs.

versus

KLJ DEVELOPERS PRIVATE LIMITED Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

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13.05.2021

(Video-Conferencing)

1. The respondent has remained absent from these proceedings on the last three dates of hearing i.e. on 18th March, 2021, 3rd May, 2021 and 12th May, 2021. Today, too, there is no appearance on behalf of the respondent despite the matters having been passed over once and

taken up on second call.

2. Accordingly, the Court has heard Mr. Avinash Trivedi, learned Counsel for the petitioners and proceeds to dispose of the matters as the issue in controversy is short.

3. The facts in these two cases are similar. These petitions arise out of Flat Buyers Agreements dated 27th May, 2010 (in the case of OMP (T) (COMM) 5/2021) and 2nd May, 2013 (in the case of OMP (T) (COMM) 4/2021), executed between the petitioners and the respondent. Clause 32 of each of the agreements provides for resolution of disputes between the parties by arbitration, and is identically worded. It reads thus:

“32. Arbitration

All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms 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 shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Seller and whose decision shall be final and binding upon the Parties. The Buyer hereby confirms that he/she/it shall have no objection to this appointment even if the person so appointed, as the Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/Confirming Party and the Buyer shall have no doubts as to the independence or impartiality of the said Arbitrator.”

4. Disputes having arisen between the petitioners in these cases and the respondent, Mr. Sanjay Aggarwal, Advocate, was appointed by the respondent as Arbitrator *vide* letter dated 10th July, 2020 in each of these cases. Mr. Aggarwal has, thereafter, entered on reference.

5. The petitioners moved applications under Section 16 of the Arbitration & Conciliation Act, 1996 (the 1996 Act) before the learned Arbitrator, stating that he was *de jure* incapable of functioning as an arbitrator in view of Section 12(5) of the 1996 Act read with the Seventh Schedule thereto and the judgment of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***¹ and ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.***² The applications remaining undecided, the present petitions were moved before this Court.

6. In view of the pendency of the applications under Section 16, preferred before the learned Arbitrator by the petitioners, this Court deemed it appropriate to direct the learned Arbitrator, in the first instance, to adjudicate on the said applications, and so directed *vide* order dated 11th January, 2021.

7. It appears that the learned Arbitrator rejected the applications under Section 16 preferred by the present petitioners merely on the ground that the arbitral proceedings had been instituted on the request of the petitioners and that the petitioners were not questioning the

¹ 2019 SCC OnLine SC 1517

² (2019) 5 SCC 755

impartiality of the learned Arbitrator.

8. Clearly, these cannot constitute grounds to ignore the law laid down by the Supreme Court in *Bharat Broadband Network Ltd.*² and *Perkins Eastman Architects DPC*¹ or the mandate of Section 12(5) of the 1996 Act read with the Seventh Schedule thereto. The proviso to Section 12 (5) excepts the application thereof only in a case where the parties *consciously agree to waiver* of the application of Section 12(5). This Court has, in its judgment in *JMC Projects (India) Ltd. v. Indure Pvt. Ltd.*³ already held that such waiver has to be express, and cannot be deemed. There is, clearly, no such express waiver, by the petitioner, of its right under Section 12(5) of the 1996 Act. Equally, there is no express acquiescence, by the petitioner, to the authority of Mr. Aggarwal to function as the Arbitrator to arbitrate on the disputes between the petitioners and the respondent.

9. In *Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd.*⁴ the Supreme Court has reiterated the aforesaid position by observing that Section 12(5) is non-derogable and mandatory in nature.

10. In view of the aforesaid judicial authorities, as well as Section 12(5) of the 1996 Act read with the Seventh Schedule thereto, it is clear that the appointment of Mr. Sanjay Aggarwal as the Arbitrator, having been made in accordance with the one sided arbitration clause contained in the agreements between the parties, cannot sustain and has, therefore, necessarily to be set aside. Needless to say, this shall

³ MANU/DE/1609/2020

⁴ 2021 SCC OnLine SC 33

not reflect in any manner on the impartiality or otherwise of Mr. Aggarwal as an Arbitrator.

11. Accordingly, this Court holds that Mr. Sanjay Aggarwal is *de jure* incapable of functioning as an Arbitrator. His appointment as an Arbitrator accordingly stand set aside.

12. This Court appoints Saumya Tandon, Advocate (Cell: 9810907029) as the Arbitrator to arbitrate on the disputes between the parties. The arbitrator shall be entitled to continue the proceedings from the stage at which they are at present. The parties are permitted to file their statement of claims/statement of defence and counter claims in accordance with law.

13. The Arbitrator shall furnish the requisite disclosure under Section 12(2) of the 1996 Act within a period of one week from entering on the reference.

14. The Arbitrator shall also be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act.

15. These petitions stand disposed of in the aforesaid terms.

C. HARI SHANKAR, J.

MAY 13, 2021/kr