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

+ **ARB.P. 88/2021**

JAI PRAKASH JAISWAL

..... Petitioner

Through: **Mr. Nishant Das, Advocate.**

versus

RATAN SHARMA

..... Respondent

Through: **Mr. Abhinav Hansaria,**
Advocate for R-1.
Mr. Digambara Mishra,
Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

O R D E R (O R A L)

% **20.09.2021**

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). This is a petition seeking reference of the disputes between the parties to arbitration.

2. Initially, Respondent No.1 was the only respondent in this petition. Subsequently, however, at request of learned counsel for the petitioner, granted by this Court, the memo of parties was amended and Respondent No.2 was added as a party.

3. Mr. Mishra, learned counsel for Respondent No.2 submits, at the outset, that no notice under Section 21 of the 1996 Act, was ever issued to him or received by him.

4. It is clear, from a reading of Section 21 of the 1996 Act that arbitral proceedings can commence against a party only on the date when the party is in receipt of a notice issued to it under the said provision. If there is no notice under Section 21, no arbitral proceedings can commence against a party. Without issuing such notice, therefore, a petition under Section 11, for appointment of an Arbitrator, to refer the dispute, would not be maintainable. In the absence of any notice to Respondent No.2, therefore, no reference of any dispute between the petitioner and Respondent No.2 to arbitration could be made. Nor could Respondent No.2 be impleaded in any arbitral proceedings before an Arbitrator appointed by this Court at the instance of the petitioner.

5. Mr. Das, learned counsel for the petitioner relies on the Judgment of a coordinate Single Bench of this Court in *Alupro Building Systems Pvt Ltd v. Ozone Overseas Pvt Ltd*¹. The said decision, in fact, underscores the afore-noted legal position, and as well as mandate of Section 21 of the 1996 Act.

6. On this position being brought to his notice, Mr. Das states that he is willing to delete Respondent No.2 from the array of parties.

7. Accordingly, Respondent No.2 shall stand deleted from the array of parties. It is made clear that this Court has not expressed any opinion regarding the issue of whether Respondent No.2 is or is not a

¹ (2017) 162 DRJ 412

necessary party in the arbitral proceedings. The petitioner is deleting Respondent No.2 at its own risk.

8. The present petition, therefore, survives only against Respondent No.1.

9. Respondent No.1 has already stated, on the last date of hearing, that he has no objection to dispute being referred to arbitration.

10. The dispute between the parties arises from a Memorandum of Understanding (MoU), dated 9th October, 2018, which provides for arbitration as the mode for resolution of disputes and fixes the seat of arbitration at New Delhi, though exclusive jurisdiction, in respect of the clauses in the MoU has been provided elsewhere. Following the law laid down by the Supreme Court in **BGS SGS Soma JV v. NHPC**² as well as by this Court in **CARS24 Services Pvt Ltd v. Cyber Approach Workspace LLP**³, this Court would be possessed of jurisdiction to entertain and decide the present petition.

11. The notice invoking arbitration, dated 19th November, 2020 addressed by the petitioner to Respondent No.1, *prima facie* make out an arbitral dispute between the parties. Mr. Hansaria, learned counsel for the respondent submits that respondent would also have a counter claim against the petitioner. Mr. Das submits that the claim of the petitioner would be in the nature of liquidated damages, which are yet to be quantified.

² (2020) 4 SCC 234

³ 2020 SCC OnLine Del 1720

12. Thereof, I appoint Mr.Rakesh Kumar Dudeja, Advocate (Cell No.: 9810147798 and E-mail ID : dudejarakesh@gmail.com), as the Arbitrator, to arbitrate on the aforesaid disputes between the parties.

13. The Arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act or as otherwise agreed upon by the Arbitrator in consultation with the parties.

14. The Arbitrator would also furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

15. It is made clear that this Court has expressed no opinion whatsoever on the merits of the claims of either party against each other and all issues of fact and law would remain open, to be agitated by the parties before the learned Arbitrator.

16. Mr. Mishra, at this stage, points out that his client was a party to the MoU.

17. To this submission, the contention of Mr. Das is that he is not seeking any reliefs against Respondent No.2.

18. *Prima facie*, if Respondent No.2 was a party to the MoU, the question of whether the petitioner would maintain a claim only against Respondent No.1 to the exclusion of Respondent No.2 may be open to debate. Nonetheless, as the petitioner has consciously chosen at its

own risk not to seek an arbitration of dispute against Respondent No.2, nothing further is required to be stated in this regard.

19. Needless to say, if Respondent No.2 is desirous to implead itself in the arbitral proceedings it is at liberty to do so in accordance with law.

20. The petition stands disposed of in the aforesaid terms.

C.HARI SHANKAR, J

SEPTEMBER 20, 2021

Hd/ss

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