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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P. (T) (COMM.) 108/2021, I.A. 14218/2021 & I.A.
14219/2021

JJ RESTAURANTS GURGAON LLP Petitioner

Through: Mr. Yatin Grover, Adv.

versus

AMBIENCE DEVELOPERS AND INFRASTRUCTURE LTD
..... Respondent

Through: Ms. Kittu Bajaj, Adv.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR
ORDER (O R A L)

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17.12.2021

1. This petition seeks termination of the mandate of the learned arbitrator *in seisin* of the disputes between the parties and for a declaration that the arbitral proceedings are invalid.

2. The proceedings before the learned arbitrator arise out of an agreement dated 6th March, 2019, executed between the petitioner and the respondent, which contains the following arbitration clause:

“39. Any dispute or difference between the parties hereto concerning the construction, interpretation or application arising out of this agreement or otherwise any issues concerning the lease/ license /occupation /use of the premises shall be referred to the sole arbitrator to be appointed by the Ambience. Any decision of the arbitrator shall be final and binding on the parties.”

3. Mr. Grover, learned Counsel for the petitioner, points out that the afore-extracted clause was unenforceable in law in view of Section 12(5) of the Arbitration and Conciliation Act, 1996, (“the 1996 Act”), read with the judgments of the Supreme Court in *TRF Limited v. Energo Engg. Projects Ltd.*¹, *Perkins Eastman Architects DPCC v. HSCC (India) Ltd.*², *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*³, and *Haryana Space Application Centre v. Pan India Consultants Pvt Ltd.*⁴ There can be no cavil with this proposition, as an arbitration clause which confers exclusive authority on one of the parties to the agreement to appoint the arbitrator is not enforceable in law.

4. Consequent to disputes arising between the parties, three communications were exchanged. The respondent wrote to the petitioner on 23rd February, 2021, to which the petitioner responded on 24th February, 2021. The respondent further again wrote to the petitioner on 9th March, 2021. These documents have been placed on record, and none of them invoked the arbitration clause between the parties. They do not, therefore, satisfy the requirements of Section 21 of the 1996 Act.

5. Following these communications, on 19th March, 2021, the respondent addressed the following communication to the petitioner:

“Hon’ble Mr. D.S. Paweriya,
Retired Addl. District & Session Judge

¹ (2017) 8 SCC 377

² 2019 SCC OnLine SC 1517

³ (2019) 5 SCC 755

⁴ (2021) 3 SCC 103

101, Saket Courts, New Delhi

Sir,

On behalf of my client, M/s Ambience Developers & Infrastructure Pvt. Ltd. , having regd office at L-4, Green Park Extn., New Delhi , I hereby request you as under:

1. That an agreement was executed between our client M/s Ambience Developers & Infrastructure Pvt. Ltd. and M/s. JJ Restaurants, Gurgaon, LLP encompassing the following arbitration clause at Sr. No.39:

“Any dispute or difference between the parties hereto concerning the construction, interpretation or application arising out of this Agreement or otherwise any issues concerning the Lease / License/ Occupation / Use of the premises shall be referred to the sole arbitrator to be appointed by Ambience. Any decision of the arbitrator shall be final and binding on the parties.”

Copy of the agreement dated 06.03.2019 imbuing the said arbitration clause is annexed herewith.

2. That certain disputes have arisen between the parties under the said agreement and M/s Ambience Developers & Infrastructure Pvt. Ltd. have invoked the arbitration clause of the aforesaid agreement.

3. That our client has complied with all the essential pre-requisites envisaged in the agreement, The Board of Directors of our client ,in terms of the Arbitration Clause , vide Board Resolution dated 10.03.21, have appointed/nominated you as the Sole Arbitrator, to decide the disputes between the parties.

4. We request you to give the declaration under Section 12 of the Arbitration & Conciliation Act 1996, enter into reference and do the needful.”

6. Para 2 of the afore-extracted letter states that the respondent had invoked the arbitration clause in the agreement between the parties.

This is, on its face, not correct as there is no earlier communication by

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which the respondent invoking the arbitration clause. Though, in the communication dated 9th March, 2021, the respondent did state that in default of the petitioner complying with the respondent's demands, the respondent would take civil action against the petitioner, this cannot be treated as invocation of the arbitration clause within the meaning of Section 21 of the 1996 Act.

7. It is pursuant to the aforesaid notice dated 19th March, 2021 that the learned arbitrator has entered on reference and that the proceedings have commenced.

8. Mr. Grover, learned Counsel for the petitioner, submits that, apart from all the other issues, these proceedings are void ab initio, as they are not preceded by the requisite notice under Section 21 of the 1996 Act. As already noted above, this submission is correct.

9. After some arguments, Ms. Kittoo Bajaj, learned Counsel for the respondent, agrees to setting aside of these proceedings, *ab initio*, with liberty to the respondent to issue a notice to the petitioner under Section 21 of the 1996 Act.

10. Reserving liberty to the respondent as aforesaid, in accordance with law, the present petition is allowed. The arbitral proceedings presently pending before the arbitrator who entered reference consequent to the notice dated 19th March, 2021, are set aside. The mandate of the arbitrator stands terminated.

11. This shall not inhibit the respondents from re-initiating arbitral proceedings in accordance with law, preceded, if necessary, by a notice under Section 21 of the 1996 Act.

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

C.HARI SHANKAR, J

DECEMBER 17, 2021
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