

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

% **Date of order : 15th March, 2023**

+ **ARB.P. 283/2023 & I.A. 5064/2023**

GTM BUILDERS AND PROMOTERS PVT. LTD. Petitioner

Through: Mr. Ashish Kumar, Advocate

versus

SNEH DEVELOPMENT PVT LTD

..... Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter “the Arbitration Act”) has been filed on behalf of the petitioner seeking the following reliefs:-

“a) appoint a sole arbitrator to adjudicate upon the disputes arising out of agreement dated 10.03.2005 executed between the parties;

b)Any other relief which this Hon'ble Court may be pleased to grant in the present facts and circumstances.”

2. The petitioner is a construction company that launched its Project, GTM Residency Tower No.11, New Valley View Estate, Gurgaon, for construction of a group housing society on a part of the plot admeasuring 22 Acres 3 Kanal 14 Marlas in Gwal Pahari, Gurgaon, Haryana (hereinafter “the Project”). The respondent is a company engaged in the business of construction that takes up projects on a turnkey basis.

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3. The parties entered into an Agreement dated 10th March 2005 with the object of constructing the Project. However, during the course of the Project being carried out certain disputes arose amongst the parties.

4. This Court, in the previous round of litigation, vide Order dated 6th January 2010 appointed a Sole Arbitrator to adjudicate the said disputes who passed the Award dated 1st August 2015. The said Award came to be challenged by the petitioner under Section 34 of the Arbitration Act. The said challenge under OMP (COMM) 10/2016 was decided partly setting aside the Award dated 3rd July 2018, which was subsequently revised on 5th July 2019.

5. Apart from the said challenges, certain homebuyers in the Project instituted complaints against the petitioner before the State Consumer Disputes Redressal Commission alleging delay in completion of Project and handing over of possession of the flats. In the complaint proceedings, the State Consumer Disputes Redressal Commission, vide its Order dated 29th October 2013 concluded that there was no delay on the part of the petitioner in handing over possession to the home buyers.

6. Aggrieved by the Order dated 29th October 2013, some of the homebuyers preferred an appeal before the National Consumer Disputes Redressal Commission, New Delhi (hereinafter "NCDRC"). In the said appeals, the NCDRC held the petitioner liable for the delay in handing over the possession to the buyers and directed the petitioner to pay compensation to the home buyers therein @ Rs. 5 per sq. ft. per month.

7. It is the case of the petitioner that the respondent, by the virtue of an indemnity bond as well as an undertaking, was responsible for paying the

petitioner to the extent of any harm or loss that may be suffered in the course of the Project. The petitioner sent a Notice dated 27th December 2022 to the respondent communicating its claims and that in case of non-compliance, the petitioner would take necessary actions for appointment of the arbitrator to adjudicate the claims of the petitioner. Therefore, the petitioner is before this Court seeking the aforementioned prayers.

8. The learned counsel appearing on behalf of the petitioner submitted that the NCDRC has erroneously held the petitioner liable for the delay caused in handing over of possession and payment of the compensation thereof.

9. It is submitted that the respondent, by way of an undertaking dated 31st August 2007, had specifically undertaken that in the event the petitioner suffers any loss which includes interest or harm on account of the respondent or due to any act/omission of the respondent, the respondent shall pay the petitioner to the extent of the harm and loss suffered.

10. It is further submitted that in another undertaking cum indemnity bond dated 25th March 2008, the respondent had agreed indemnify petitioner against any loss, harm or injury which may be caused to the petitioner on account of delay in construction and subsequent completion of the project.

11. The learned counsel for the petitioner submitted that the petitioner sent the Notice dated 27th December 2022 to the respondent thereby putting the respondent to the notice of the petitioner's claims and also stating therein that in case the respondent fails to take action within 15 days of the Notice, the petitioner would take steps for appointment of an arbitrator. However, no response has been received on behalf of the respondent on the

said Notice.

12. It is further stated that the petitioner has been burdened with the obligation to pay compensation to the home buyers @ Rs. 5 per sq. ft. per month from 1st January 2010 due to the respondent's delays and default. Hence, by virtue of the indemnities and undertakings executed by the respondent in favour of the petitioner, the petitioner is liable to recover such amount from the respondent.

13. Learned counsel submitted that the cause of action for filing the present petition arose on 28th September 2022 when the NCDRC directed the petitioner herein to pay compensation to the homebuyers, which was caused solely due to the delays, laches, breaches, actions and omissions of the respondent. It is also submitted that the Agreement dated 10th March 2005 consists of an Arbitration Clause under Clause 16, which states that any dispute arising out of the Agreement shall be resolved amicably. Since, the provision has been made under the Agreement to resolve the disputes through arbitration, the aforesaid claim of recovery can only be decided by an arbitral tribunal.

14. Heard the learned counsel for the petitioner. The record pertaining to the claim of the petitioner has also been perused.

15. The petitioner, by way of the instant petition, claims that there are disputes of arbitral nature between the parties and therefore, prays that an arbitrator may be appointed for adjudication and resolution of such disputes. The petitioner has invoked Section 11(6) of the Arbitration Act for the appointment of an arbitrator. The provision is reproduced hereunder:-

“11. Appointment of arbitrators.-

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(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

16. When read with the reference of facts of the instant case, a reading of the bare language of the provision reveals that under Section 11(6) of the Arbitration Act, if a party seeks to approach a Court for the appointment of an arbitrator, there must be an appointment procedure agreed upon by the parties on which a party has failed to act. In the instant case, the petitioner has relied upon Clause 16 of the Agreement dated 10th March 2005 to submit that there was an agreed procedure amongst the parties for appointment of an arbitrator in case any disputes arise between the parties. The said Clause is reproduced hereunder for better appreciation of the contention on behalf of the petitioner:-

“16. ARBITRATION

Any dispute arising of this Agreement shall be resolved amicable. Disputes shall be referred to Mr. Tushar Kumar of “GTM” and Mr. Hardeep Singh Lamba of “SNEH” for resolution. If any disputes remain unresolved it will be referred for adjudication to the sole arbitrator to be appointed by mutual consent of Mr.

Tushar Kumar and Mr. Hardeep Singh Lamba.”

17. The Clause explicitly states that any dispute arising out of the Agreement shall be resolved amicably and be referred to the concerned persons of the respective companies. The keywords to be considered here are “*dispute arising out of this Agreement*”. It is, hence, a crucial and indispensable requirement, before seeking the intervention the Court and subsequently of an arbitrator, that the disputes between the parties must be arising out of the Agreement. The Agreement between the parties pertains to the Project of construction of GTM Residency Tower No.11, New Valley View Estate, Gurgaon, a group housing society on a part of the plot in Gwal Pahari, Gurgaon. Whereas, the petitioner is seeking reference to an arbitral tribunal for a dispute which is neither related to the completion of the Project nor has stemmed from the said Project.

18. It is evident from a bare perusal of the petition that the petitioner is seeking recovery of costs that the petitioner has been directed to pay as compensation to the homebuyers who had approached the NCDRC against the delayed handover of possession under the Project. The petitioner has alleged that the respondent had undertaken to provide for any losses incurred by the petitioner during the course of the Project as well as upon its completion. The petitioner has appended the said undertakings given by the respondent. The undertaking dated 31st August 2007, is reproduced hereunder:-

“(a) That the Executant shall not claim any extra amount from the Company over and above Rs. 15.25 Crore till the completion of the project and successfully handed over the same to the customers (including an amount of Rs. 1.25 Crore

as escalation).

(b) The Executant shall complete the project in all respect by 31st May, 2008.

(c) The executant shall submit the completion schedule based on the Company's payment plan.

NOW the Executant hereby undertakes and confirms that the Executant shall not claim any amount agreed as above and if the Executant failed to comply with the above mentioned terms and the Company suffer any loss which includes interest or harm on account of any act or omission at the behest of the Executant shall pay the Company, to the extent of harm and loss."

19. A reading of the undertaking reveals that the same was only to the effect that the respondent would not claim any such amount above and beyond which was decided by way of the Agreement between the parties and only where the Company of the petitioner suffered any loss due to the failure on the part of the respondent/executor to comply with the undertaking, the respondent would be liable to pay the Company. There is no undertaking to show that any kind of loss suffered by the petitioner would be covered under this undertaking. It is also significant to see that the loss so allegedly suffered by the petitioner, was in fact a penalty imposed upon it by the NCDRC on the ground of delay in handing over the possession to the homebuyers.

20. The petitioner has also referred to the Undertaking-cum-indemnity dated 25th March 2008, which has been perused by this Court, however, the same also do not, in any manner whatsoever, substantiate the claim of the petitioner that the respondent was liable to insure the petitioner in the instant case where it was found to be liable to compensate the claimants before the NCDRC.

21. Therefore, it is evident that the dispute which the petitioner has raised, for the adjudication of which it is seeking the appointment of an arbitrator, is in no manner arising out of the Agreement dated 10th March 2005 or even the undertakings signed and executed thereafter. Moreover, the petitioner has not furnished even a single intimation to the respondent calling upon the respondent to fulfil the alleged obligation set forth by the petitioner is payment of the compensation. Even otherwise if such an obligation arose between the parties, it certainly did not arise from the Agreement in question and was neither the subject matter of the disputes which may be referred for arbitration.

22. At this instance, it is deemed fit to refer to the judgment of the Hon'ble Supreme Court in ***DLF Home Developers Limited vs. Rajapura Homes Private Limited and Another***, 2021 SCC OnLine SC 781, wherein it was observed as under:-

“17. There is no gainsaying that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, by which Section 11 (6-A) was introduced, the earlier position of law as to the scope of interference by this Court at the stage of referral has been substantially restricted. It is also no more res integra that despite the subsequent omission of Section 11(6-A) by the Arbitration and Conciliation (Amendment) Act, 2019, the legislative intent behind thereto continues to be a guiding force for the Courts while examining an application under Section 11 of the Act.

18. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the

bare existence of an arbitration clause to cut the deadwood. A three-judge bench in Vidya Drolia (Supra), has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct ‘prima facie review’ at the stage of reference to weed out any frivolous or vexatious claims. In this context, the Court, speaking through Sanjiv Khanna, J. held that:

“154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the

court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

20. *To say it differently, this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act. Such a review, as already clarified by this Court, is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. Therefore, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.”*

23. Therefore, it is evident that while adjudicating a petition under Section 11(6) of the Arbitration Act, a Court shall endeavour to evaluate whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a *prima facie* arbitrable case. Moreover, it is also made clear by the Hon'ble Supreme Court that mere existence of an arbitration agreement or arbitration clause would not be sufficient to allow the prayer for reference to an arbitrator. Even in the presence of an arbitration agreement, the court may decline the reference or appointment of an arbitrator when the dispute does not correlate to the agreement.

24. In the instant matter, the petitioner has not invoked the arbitration clause pertaining to any issue or dispute arising out of the Agreement executed between the parties. Instead, the petitioner is seeking recovery in the guise of reference to an arbitrator from the respondent for a cost which

is neither arising out of the Agreement, nor is covered in the undertakings furnished by the respondent *qua* the amount involved in the Agreement.

25. Hence, the petitioner has failed to show that the dispute which has been sought to be referred to the arbitrator is *firstly*, a dispute arising out of the Agreement dated 10th March 2005, and *secondly*, the said dispute is arbitrable in nature.

26. Therefore, in light of the facts, circumstances, discussions in the foregoing paragraphs and the mandate of law laid down under the Arbitration Act and interpreted by the Hon'ble Supreme Court, this Court is of the view that the petitioner has failed to *prima facie* make out a case for the grant of the reliefs that have been prayed for by way of the instant petition. The dispute against which Section 11(6) is invoked is not an arbitrable dispute culminating from the Agreement between the parties but is merely arising out of compliance of an order passed by the NCDRC, therefore, does not warrant the indulgence of this Court.

27. Accordingly, the instant petition stands dismissed along with pending applications, if any, for being devoid of merit.

28. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 15, 2023

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Click here to check corrigendum, if any