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

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Date of decision: 23.01.2023

+ **ARB.P. 1148/2022**

**ALTF SPACES PRIVATE LIMITED THROUGH ITS
AUTHORIZED REPRESENTATIVE MS URVI Petitioner**

**Through: Mr. Abhay Pratap Singh, Adv.
versus**

**HOMESTORE18 THROUGH ITS PROPRIETOR MR BHARAT
SHARMA Respondent**

Through:

**CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA**

SACHIN DATTA, J. (ORAL)

1. None appears for the respondent, despite service. Even on the last date of hearing, there was no appearance on the part of the respondent.
2. The present petition seeks appointment of a Sole Arbitrator to adjudicate the disputes between the parties. It is contended that the respondent approached the petitioner to avail its services i.e. use of co-working spaces and other ancillary services such as internet connection, data security, assets security and surveillance, firewall, furniture, maintenance, electricity and power back-up, etc. at its premises referred to in the petition.
3. It is submitted that the petitioner accepted the membership application, after the respondent duly filled and submitted the petitioner's company's 'Joining Form', agreeing to utilize 44 seats in one team room in

the aforementioned premises from 10.03.2022, on the prescribed terms and conditions stipulated therein.

4. The “Terms of Use” which were in a hyperlink contained in the “Joining Form”, were agreed upon by the respondent while submitting the said ‘Joining Form’. The said “Terms of Use” contain an arbitration clause in the following terms:

“20. Governing Law and Jurisdiction

The Agreement and Terms of Use shall be governed by, and construed in accordance with, laws of India. The Courts at New Delhi shall have the exclusive jurisdiction to entertain any dispute arising out of or in any manner concerning the Agreement and Terms of Use to the exclusion of the other Courts.

21. Arbitration

- *Notwithstanding anything contained in the Agreement or the Terms of Use, any dispute arising out of or in connection with the Agreement or Terms of Use shall be sought to be resolved and settled amicably within 30 (thirty) days of such dispute arising, failing which the dispute shall be referred to and finally resolved by a sole arbitrator. The Parties agree that in the event of a dispute which needs to be resolved by arbitration, the arbitrator shall be appointed by Alf F, provided that there shall be no conflict of interest for the chosen arbitrator with either party. The cost of the arbitration shall be borne equally by the Parties. The provisions of the Arbitration and Conciliation Act, 1996 shall remain applicable.*
- *All proceedings in any such arbitration shall be conducted in English. The seat of the arbitration proceedings shall be in Delhi and the award of the arbitrator shall be final and binding on the Parties.”*

5. Learned counsel for the petitioner relies upon the following judgments to contend that the arbitration clause contained in the “Terms of Use”, electronically submitted and agreed upon by the respondent, can be validly invoked by the petitioner:

(i) Shakti Bhog Foods Ltd. Vs. Kola Shipping Ltd. 2008 SCC OnLine SC 1447;

(ii) *Trimex International FZE Limited, Dubai vs. Vedanta Aluminum Limited, India*, 2010 SCC On Line SC 214;

(iii) *Vidya Drolia and Ors., vs. Durga Trading Corporation*, in Civil Appeal No.2402/2019 (SC);

(iv) *Oyo Hotels and Homes Private Limited vs. Ace Hospitality and Allied Services & Anr.* In Arb.P. 66/2021 (DHC); and

(v) *Ingram Micro India Pvt. Ltd. vs. Mohit Raghuram Hegde Proprietor Creative Infotech*, in Commercial Arbitration Application No.235/2021 (BHC).

6. In *Oyo Hotels* (Supra), it has been held by this court as under:

“2. By the said agreement, the petitioner claims to have agreed to provide marketing and operational consulting services to the respondents’ hotel (Ace Inn, Kanakapura Rd, Karnataka- 562109). Mr. Advait Ghosh, learned counsel for the petitioner, submits that the MOCA was digitally signed by the respondent on 13.03.2019. He relies upon Clause 15 thereof (at page 12 of petitioner’s list of documents) to submit that the MOCA was to be governed by the Terms and Conditions published on the petitioner’s website. The Terms and Conditions published on the petitioner’s website have also been placed on record. Clause 14 of the said Terms and Conditions incorporate a dispute resolution clause which provides for arbitration, which would be conducted in New Delhi. The same clause vests exclusive jurisdiction and adjudication of disputes under the MOCA with the courts in New Delhi.

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8. Having heard learned counsel for the parties, I am of the view that a prima facie case of existence of arbitration agreement has been made out warranting reference to arbitration, leaving all the rights and contentions raised by Ms. Thashmitha open for consideration of the learned arbitrator. The judgments of the Supreme Court inter alia in *Vidya Drolia and Others vs. Durga Trading Corporation* (2021) 2 SCC 1 [paragraphs 146 to 154] hold that the Court, at the stage of a petition under Section 11 of the Act, is required to examine prima facie that an arbitration agreement exists between the parties. In fact, the Supreme Court has made it clear that in the event of any doubt, the parties may be referred to arbitration leaving it open to the arbitrator to adjudicate all questions including those of existence of arbitration agreement and the arbitrability of the disputes raised therein.”

7. Further, the Bombay High Court in the case of **Ingram Micro India Pvt. Ltd. (supra)**, while dealing with a similar case, involving an arbitration agreement contained in the “Terms of Use”, agreed to by the parties while submitting an online form, held as under:

“23. ... If this be the factual position and placing of purchase orders and raising of invoices itself is on the basis of the contract as entered between the parties, the contract being the respondent agreeing to the terms and conditions as specified by the applicant in the KYC form as filled by the respondent, under which the respondent has agreed and accepted the terms and conditions of sales, as published on the applicant’s website which interalia contained an arbitration clause under Clause 10 which stood accepted by the respondent, the moment the respondent signed the declaration accepting the sales terms and conditions. It would be required to be observed that such actions on the part of the parties which recognizes elements of contemporary “e-business” certainly are required to be given a due meaning.

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27. Insofar as the jurisdiction of this Court to appoint an arbitral tribunal by exercising powers under section 11(6) read with sub-section (6A) of the Act are concerned, the principles of law in that regard as laid down in the decision of the Supreme Court in Duro Felguera, S.A. versus Gangavaram Port Limited, reported in (2017) 9 SCC 729, M/s. Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman, (2019) 8 SCC 714, certainly become applicable. Applying such principles the endeavour of the Court would be to examine whether an arbitration agreement exists between the parties. It is quite clear to me and as noted above, that there is sufficient documentary material to discern that there exists an arbitration agreement between the parties, namely, that the respondent subscribing to the KYC and agreeing to the “terms and conditions of sales” on the website of the applicant to be the pre-condition for any transaction with the applicant can be entered. ...”

8. Accordingly, a Sole Arbitrator is liable to be appointed to adjudicate the disputes between the parties. It is rightly contended by learned counsel for the petitioner that in terms of the judgment of Supreme Court in **Perkins Eastman Architects DPC vs. HSCC (India) Ltd.** AIR 2020 SC 59, an

independent Sole Arbitrator is required to be appointed. Since the seat of arbitration is Delhi, this court has jurisdiction to appoint the arbitrator.

9. Accordingly, Ms. Gayatri Verma, Advocate (Mob. No.9971786665) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

10. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the Arbitration and Conciliation Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

11. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the Arbitration and Conciliation Act, 1996; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

12. The parties shall share the arbitrator's fee and arbitral costs, equally.

13. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

14. Needless to say, nothing in this order shall be construed as an expression of opinion on the merits of the contentions of the parties.

15. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

JANUARY 23, 2023/cl