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

Date of decision: 13th April, 2023

+ **ARB.P. 1448/2022**

AKSHAY TALWAR & ANR.

..... Petitioners

Through: Mr.Samyak Jain, Adv.

versus

ANIL SETH & ANR.

..... Respondents

Through: Dr.Amit George & Mr.Aakash,
Advs. for R-1.

Mr.Pulkit Aggarwal, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Agreement to Sell dated 17.06.2019/07.08.2019 with respect to the built-up entire first floor without terrace/roof rights, and 1/4th car parking space/share in stilt parking area (below ground floor) of the property bearing No.3310/B, Ranjeet Nagar, New Delhi-110008 (referred to as "subject property"), which admittedly belongs to the respondents.

2. The Arbitration Agreement between the parties is contained in Clause 10 of the Agreement to Sell.

3. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement vide notice dated 06.09.2022. The

respondents, however, vide reply dated 28.09.2022, refused appointment of an Arbitrator, forcing the petitioner to file the present petition.

4. The learned counsels for the respondents submit that the Agreement to Sell relied upon by the petitioner is a fabricated document. In support of this submission, they state that the cheques that have been mentioned in the Agreement to Sell as a mode of payment of part-sale consideration were, in fact, given to the respondents by the builder- M/s Mega Construction Company Pvt. Ltd. under the Collaboration Agreement-cum-Agreement to Sell dated 29.05.2019 executed by the respondents with the said builder.

5. They further submit that the petitioner was, in fact, a nominee of the builder and, as the builder has failed to discharge its obligations under the Collaboration Agreement, in terms of Clause 17 of the Collaboration Agreement, the petitioner presently has no rights to enforce against the respondents. They submit that the respondents are already in arbitration with the said builder for adjudication of the disputes that have arisen between the said parties under the Collaboration Agreement. The petitioner has to necessarily await the outcome of such arbitration proceedings. They submit that the claim of the petitioner for arbitration is, therefore, premature.

6. The learned counsels for the respondents further submit that the purported Agreement to Sell being not properly stamped, reference to arbitration, in any case, cannot be made unless the said document is properly stamped on its impounding.

7. They further submit that this Court by an order dated 29.04.2022 passed in O.M.P.(I) (COMM.) 135/2022 titled **Anil Seth & Anr. v. M/s**

Mega Construction Company & Ors, has restrained the builder from parting with possession or creating any third-party rights, title or interest in any portion of the subject property till further orders. The petitioner being the nominee of the builder is equally bound by the said *interim* order.

8. In support of their objections, they place reliance on the judgments of the Supreme Court in **NTPC Ltd. v. SPML Infra Ltd.**, 2023 SCC OnLine SC 389; **Indian Oil Corporation Limited v. NCC Limited**, (2023) 2 SCC 539; and **Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra and Another**, (2012) 2 SCC 144.

9. On the other hand, the learned counsel for the petitioner submits that the denial of the respondents for arbitration is *mala fide*. He submits that the respondents have admittedly executed a Sale Deed dated 13.12.2019 transferring the ground floor of the subject property to the petitioner herein. The cheques which have been mentioned as constituting part of sale consideration in the Sale Deed are also mentioned in the Collaboration Agreement between the respondents and the builder as having been handed over by the builder to the respondents under the Collaboration Agreement. He submits that, therefore, the cheques which have been taken from the petitioner have been shown *inter se* between the builder and the respondents in the Collaboration Agreement to which the petitioner is not bound and cannot be prejudiced.

10. The learned counsel for the petitioner further submits that the petitioner is not a nominee of the builder and has an independent rights against the respondents under the Agreement to Sell. He submits that, in fact, the petitioner has also been handed over the physical possession of

the first floor of the subject property, which is the subject-matter of the Agreement to Sell. He submits that the petitioner is, therefore, also not bound by Clause 17 of the Collaboration Agreement on which the respondents have placed reliance. He submits that, in any case, the submissions of the respondents being disputed, can best be adjudicated upon by the learned Sole Arbitrator and not by this Court at this stage of appointment of a Sole Arbitrator under Section 11 of the Act.

11. As far as the handing over of the possession of the first floor is concerned, the learned counsels for the respondents submit that the possession has been handed over to the petitioner by the builder and is, in fact, in violation of the *interim* order passed by this Court.

12. I have considered the submissions made by the learned counsels for the parties.

13. It is not denied that the Agreement to Sell relied upon by the petitioner bears the signatures of the respondents. The submission of the respondents is that the cheques mentioned as part-sale consideration in the said Agreement to Sell were in fact handed over by the builder pursuant to the Collaboration Agreement that was executed between the respondents and the builder. On the other hand, as noted hereinabove, the petitioner has shown that they had handed over further cheques to the respondents pursuant to the sale transaction for the ground floor of the subject property, which also find mention in the Collaboration Agreement. Clearly, whether the cheques were given by the petitioner to the respondents under the Agreement to Sell or by the Builder to the respondents under the Collaboration Agreement are disputed questions of fact which would require the parties to lead their respective evidence.

This Court in exercise of its powers under Section 11 of the Act cannot enter into such vexatious question of facts. As long as the document, on which the signatures are not denied by the respondents, contains an Arbitration Agreement, it would be advisable to leave the parties to have their disputes adjudicated in arbitration.

14. The same is the position with respect to the submission of the learned counsels for the respondents that the petitioner is in fact a nominee of the builder. This submission is disputed by the petitioner. The Agreement to Sell, *prima facie*, does not indicate that the petitioner was acting as a nominee of the builder. In fact, the builder is not a party to the Agreement to Sell. In any case, whether the petitioner can be granted relief in the arbitration proceedings and, if so, what relief, are matters to be considered by the Arbitrator and not by this Court while appointing an Arbitrator for adjudicating the disputes that have arisen between the parties.

15. On the question of the Agreement to Sell not being properly stamped, the Supreme Court in its judgment in *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited and Others*, 2021 SCC OnLine SC 13, has referred the issue as to whether the bar contained in Section 35 of the Stamp Act would also render the arbitration agreement not duly stamped as non-existent or unenforceable, to a Constitution Bench. In *Intercontinental Hotels Group (India) Private Limited & Anr. v. Waterline Hotels Private Ltd.*, (2022) 7 SCC 662, the Supreme Court has held that as arbitrations are time sensitive, the Courts-until the larger Bench decides the above issue, should ensure that arbitrations are carried on, unless the issues before the Court patently indicates existence

of deadwood. Applying the above ratio, I am of the opinion that appointment of an arbitrator cannot be withheld pending the decision of the reference pending before the Constitution Bench of the Supreme Court. The petitioner, however, shall remain bound by any direction passed by the learned Arbitrator in regard to the Stamp Duty payable on the Agreement to Sell.

16. For the above reasons, the judgments relied upon by the learned counsels for the respondents shall also not have any application. In *NTPC Ltd.*(supra), the Supreme Court has observed that the referral Court, in order to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable, can enter into a limited scrutiny. It has been held that the Court is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. Even applying the above test, for the reasons stated hereinabove, it cannot be said that the dispute raised by the petitioner is so demonstrably non-arbitrable so as to reject the appointment of an Arbitrator. In my view, disputed questions of fact have arisen between the parties which are best to be adjudicated by the learned Arbitrator upon receiving evidence by the parties.

17. In *Indian Oil Corporation Limited* (supra), the Supreme Court has held that where the facts are very clear and glaring, and in view of the specific clauses in the Agreement binding the parties, the dispute is non-arbitrable or falls within the exception clause, the Court would refuse to appoint an Arbitrator. The present case does not fall in such limited exception to the appointment of an Arbitrator.

18. Similarly, the judgment of the Supreme Court in ***Bharat Rasiklal Ashra*** (supra), would have no application to the facts of the present case.

19. I am informed that an Arbitrator already stands appointed for adjudication of the disputes that have arisen between the respondents and the builder pursuant to the Collaboration Agreement. In my view, it would be advisable that the parties are referred to the same learned Sole Arbitrator.

20. Accordingly, I appoint Justice V.K. Jain (Retd. Judge of this Court) (Tel. No.9650116555) as the Sole Arbitrator.

21. The learned Arbitrator shall give a disclosure under Section 12 of the Act before proceeding with the reference.

22. The fee of the learned Arbitrator shall be governed by Schedule IV of the Act.

23. It is made clear that any observation made herein is only *prima facie* in nature and for the purposes of the present petition. The same shall not prejudice either of the parties in the arbitration proceedings.

24. The petition is allowed in the above terms.

NAVIN CHAWLA, J

APRIL 13, 2023/rv

