



\$~26

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 136/2024 & I.A. 2384/2024**

MAMTA JAIN & ANR. Petitioners
Through: Mr. Vivek Sharma, Ms. Mamta
Gautam and Mr. Aditya Jain,
Advocates.

versus

ROAD MASTER AUTOTECH PVT. LTD Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

% **ORDER**
01.02.2024

By way of the present petition filed under section 11(6)(a) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioners seek appointment of a Sole Arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent, relying upon the arbitration agreement contained in clause 24 of C&F Agreement dated 01.01.2022 ('Agreement').

2. At the threshold, it is noticed that the Agreement contains an arbitration agreement in clause 24, which contemplates the appointment of a Sole Arbitrator, with the 'seat' and 'venue' of arbitration being at Delhi; with the further stipulation that the courts of law at Delhi would have exclusive jurisdiction over the matter.
3. It is however also noticed that the arbitration provision stipulates that the Sole Arbitrator would be appointed by the respondent (unilaterally); and also that, as per the record, the petitioners have not



issued to the respondent any notice invoking arbitration as required under section 21 of the A&C Act.

4. Upon being queried on the aforesaid two aspects, learned counsel appearing for the petitioners submits, that since, in view of the decision of the Supreme Court in *Perkins Eastman Architect DPC & Anr. vs. HSCC (India) Ltd.*,¹ the stipulation in the arbitration agreement which entitles the respondent to unilaterally appoint the Sole Arbitrator, is invalid and illegal, the entire procedure for appointment of an arbitrator is rendered void; by reason thereof, the petitioners were under no obligation to issue any notice under section 21 of the A&C Act calling upon the respondent to agree to the appointment of a Sole Arbitrator. Counsel further argues that notice dated 30.01.2023 issued by the petitioners, whereby they have raised their demand upon the respondent based on the disputes that have arisen between them, is sufficient compliance of the requirements of section 21 of the A&C Act.
5. However, in *Dheeraj Rastogi vs. Dnata International Pvt. Ltd.*,² this court has already taken a view on the aforesaid aspects, in the context of a similarly worded arbitration clause, which also provided for appointment of a Sole Arbitrator unilaterally by one of the parties. In *Dheeraj Rastogi*, this court has held that though, in view of the decision of the Supreme Court in *Perkins Eastman* (supra), the portion of the arbitration clause that contemplates unilateral

¹ (2020) 20 SCC 760

² 2022 SCC OnLine Del 3208



appointment of an arbitrator is rendered inoperable, unenforceable and of no-consequence, that does not render the entire arbitration clause invalid; and only the inoperable portion of the arbitration clause is required to be severed, while the essential agreement to arbitrate would remain valid and enforceable.

6. Furthermore, in *Dheeraj Rastogi* (supra), this court has also endorsed the view taken by a Co-ordinate Bench of this court in *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*,³ that it is the mandatory requirement of law that for purposes of maintaining a petition under section 11(6) of the A&C Act, the party seeking appointment must necessarily have issued a notice to the opposing party, calling upon the latter to agree to such appointment; and the invoking party must necessarily have given to the opposing party at least 30 days to respond to such notice. This court has observed that only if the opposing party refuses or fails to respond to the invocation notice despite lapse of 30 day period, would the invoking party be entitled to move the court under section 11 of the A&C Act.
7. In other words, in *Dheeraj Rastogi* (supra), this court has held for the petition under section 11(6) to be maintainable, it is necessary to show that the opposing party has failed to agree to refer the disputes to arbitration, either by rejecting such request in response to the invocation notice or by having omitted to respond to such notice.
8. Following the above view taken by this court, and absent any invocation notice under section 21 of the A&C Act in the present

³ 2017 SCC OnLine Del 7228



case, this court is of the view that the present petition under section 11(6) of the A&C Act is not maintainable.

9. The petition is accordingly dismissed.
10. Pending applications, if any, also stand disposed-of.
11. Needless to say that should the petitioners choose to issue a notice under section 21 of the A&C Act to the respondents, the remedy of arbitration would subsist for them, in accordance with law.

ANUP JAIRAM BHAMBHANI, J

FEBRUARY 1, 2024

V.Rawat/ak