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

Pronounced on: 04.03.2024

\+   **ARB.P. 293/2023**

MR JOHANN CLIVE RODRIGUES & ANR ..... Petitioners

Through: Mr. Ravinder Singh, Ms. Raveesha Gupta, Mr. Amav Dasgupta and Mr. Dhruv Goel, Advs.

versus

M/S SUNWORLD RESIDENCY PRIVATE LIMITED ..... Respondent

Through: Mr. Anshum Jain, Adv.

\+   **ARB.P. 297/2023**

VIPIN KAPOORIA ..... Petitioner

Through: Mr. Ravinder Singh, Ms. Raveesha Gupta, Mr. Amav Dasgupta and Mr.Dhruv Goel, Advs.

versus

M/S SUNWORLD RESIDENCY PRIVATE LIMITED ..... Respondent

Through: Mr. Anshum Jain, Adv.

\+   **ARB.P. 298/2023**

MR. SRINIVAS BADRI NARAYANAN ..... Petitioner

Through: Mr. Ravinder Singh, Ms. Raveesha Gupta, Mr. Amav Dasgupta and Mr. Dhruv Goel, Advs.

versus

M/S SUNWORLD RESIDENCY PRIVATE LIMITED..... Respondent

Through: Mr. Anshum Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petitions under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') have been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

Factual Matrix

2. Briefly stated, the facts in ARB. P. 293/2023 are that the petitioners have purchased a flat bearing No. 1506, 15th Floor, Tower T 01 in the respondent's project titled as "Sunworld Arista" situated at Plot No. GH-1C, Sector-168, Noida. For the said purpose, the parties have entered into a Builder Buyer Agreement dated 30.04.2015.

3. The said Builder Buyer Agreement contains an arbitration clause as under:

> *"72) All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion and mediation before CREDAI failing which the same shall be adjudicated upon and settled though Arbitration by the sole Arbitrator. The arbitration shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being in force. The Arbitration proceedings shall be held at an appropriate location in New Delhi or at Noida by the Sole Arbitrator who shall be appointed by the Director of the developer and whose decision shall be final and binding upon the Parties. The Allottee shall not raise any objection on the appointment of sole Arbitrator by the Developer. The Allottee hereby confirms and agrees that he/she shall have no objection to this appointment even if the person so appointed as the sole Arbitrator, is an employee or advocate of the Developer or is otherwise connected to the Developer and the Allottee confirms that notwithstanding such*

relationship/connection, the Allottee shall have no doubts or objections to the independence or impartiality of the said sole Arbitrator merely on aforesaid grounds. The fee shall be shared equally between the parties. The arbitrator so appointed shall decide the issue between the parties as per the terms of the present agreement."

4. On the same date two more agreements in respect of the same flat were executed - (i) Supplementary Agreement dated 30.04.2015, executed between the petitioners and respondent, whereunder, *inter alia,* the respondent undertook to pay the entire pre-emi interest on the bank loan amount taken by the petitioners directly to the bank on behalf of the petitioners for a period of 24 months from the date of disbursement of the loan amount. Further, the petitioners had an option to cancel the apartment booking on completion of 24 months from the first date of disbursement of the bank loan amount. Further, on exercising the option to cancel the booking, the respondent was obligated to refund the entire booking amount along with certain additional funds, and was also to settle the bank loan amount with the concerned bank directly, and (ii) Tripartite Agreement dated 30.04.2015, executed between the petitioners, respondent and concerned bank, whereunder *inter alia* the bank had sanctioned the bank loan amount in favour of petitioners for purchase of the aforesaid flat.

5. The petitioners have exercised their option to seek cancellation of the booking in terms of the Supplementary Agreement and sent a letter dated 17.01.2017 to the respondent. However, the respondent is stated to have not honoured their commitments. Consequently, disputes have arisen between the parties and the petitioner invoked arbitration vide notice dated 19.10.2022. No reply thereto is stated to have been sent by the respondent.

6. The facts and disputes in the other two petitions are similar and the

same are not being repeated for sake of brevity.

Submission of the Parties

7. Learned counsel for the respondent has submitted that the claims of the petitioners are *ex facie* time barred. It is submitted that the cause of action for filing the present petitions arose on 07.01.2017, 20.09.2016, and 06.03.2017 in ARB. P. 293/2023, ARB. P. 297/2023, and ARB. P. 298/2023 respectively, when the letter/email seeking cancellation of booking was made by the petitioners. It is submitted that the notice invoking arbitration has been sent by the petitioners in October/November of 2022 i.e. with a delay of almost 5/6 years, and thus the claims are hopelessly time barred. Reliance has also been placed on the decisions in ***BSNL v. Nortel Networks (India) (P)Ltd.***[1] and ***B & T AG v. Ministry of Defence***[2] to contend that the period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, and the notice invoking arbitration should be sent within 3 years when the cause of action first arose.

8. Learned counsel for the respondent further submitted that ARB. P. 293/2023, is also barred by principles of *res judicata.* It is submitted that the petitioners had initially approached the Tiz Harazi Courts, seeking relief on the same course of action and on the same set of agreements; however, the said suit was dismissed in default and for non-prosecution. The restoration application is also stated to be dismissed in default. It is submitted that the said petition was filed after the said development; however the petitioners have failed to disclose these facts in the petition.

[1] (2021) 5 SCC 738
[2] 2023 SCC OnLine SC 657

9. *Per contra*, learned counsel for the petitioners has submitted that limitation is a mixed question of facts and law and the respondent would be at liberty to agitate the same before the arbitrator. It is submitted that, in any case, the claims made by the petitioners are not time barred. Further, it is submitted that the period from 15.03.2020 to 28.02.2022 shall be excluded for the purpose of calculation of the period of limitation.

Analysis and Findings

10. I have heard the parties and perused the record.

11. Limitation is normally a mixed question of fact and law, and would normally lie within the domain of the arbitral tribunal. In ***BSNL*** (supra), it has been held as under:

> *"47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."*

12. In the present case, I do not find the disputes to be *ex facie* time-barred. A dispute arises where there is a claim by one party and a denial and repudiation of the claim by another party. *Prima facie*, mere act on the part of the petitioners in sending the cancellation letters/e-mails would not, by itself, result in dispute/s between the parties. The respondent has not averred or placed on record any document to show as to when the claims of the petitioners were denied. Thus, the question as to the date/s on which dispute/s arose between the parties, requires an in depth factual examination, and is best left to be considered by a duly constituted arbitral tribunal.

13. Further, in terms of the judgment of the Supreme Court in ***Geo Miller***

& Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.[3], the period during which the parties were *bona fide* negotiating towards an amicable settlement can be excluded for the purpose of computing the period of limitation for reference to arbitration under the A&C Act. Relevant extract of the said decision is as under:

> *"28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim."*

14. Therefore, another issue that would need to be considered is as to the point of time at which the "breaking point" of negotiation reached, in terms of ***Geo Miller*** (supra). It is noticed in ARB. P 293/2023, the respondent did not deny the claim of the petitioners and rather entered into a "Retention Cum Novation Agreement" dated 18.12.2019, which novated the Supplementary Agreement dated 30.04.2015. However, the Supplementary Agreement got revived since the respondent failed to adhere to the timelines of the said "Retention Cum Novation Agreement". In ARB. P 298/2023, the respondent again has not denied the claim of the petitioner rather has sent a

[3] (2020) 14 SCC 643

letter dated 03.04.2017 seeking extension of Supplementary Agreement for one year. Furthermore, the benefit of the order dated 10.01.2022 passed by the Supreme Court in Suo Motu Writ Petition (Civil) No. 3/2020 is also available to the petitioners. This order came for interpretation before this court in ***Sudhanshu Bhardwaj v. AIR India Ltd.***[4], wherein it has been held that *"the entire period from 15.03.2020 to 28.02.2022 is required to be excluded in computing the period of limitation. It follows that the period of limitation would stop running on 15.03.2020 and would start running again on 01.03.2022."* Therefore, the present petitions cannot be said to fall in the category of "deadwood".

15. There is also no merit in the contention of the respondent that ARB. P. 293/2023, is barred by the principles of *res judicata*. In the said petition, the suit filed by the petitioners was dismissed in default and for non-prosecution. It is well settled that for *res judicata* to apply, the suit should have been decided on merits. Where the suit is dismissed by the trial court for default of the plaintiff's appearance, the decision, not being on the merits, would not operate as *res judicata* in a subsequent suit[5]. In any case, the issue involved in the present proceedings is confined to the examination as to the existence of an arbitration agreement. Whether or not the claim/s are barred or not, is an aspect that can be considered by a duly constituted arbitral tribunal.

16. Learned counsel for the respondent has further contended that the Builder Buyers Agreements are insufficiently stamped and thus the arbitration agreement contained therein is not enforceable till the main

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[4] 2023 SCC OnLine Del 8177

[5] See: Prem Kishore v. Brahm Prakash, 2023 SCC OnLine SC 356

agreements are duly stamped. However, the said objection is no longer tenable in view of the decision of the Supreme Court in ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***.[6]

17. In view of the aforesaid, there is no impediment in appointing an independent sole arbitrator to adjudicate the dispute between the parties, as mandated in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***.[7]

18. Accordingly, Ms. Shilpa Ohri, Advocate, (Mobile No. 9871900539) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

19. It is made clear that the reference in each of these petitions shall be independent even though the Arbitrator shall be entitled to hold common hearing/s for the sake of convenience.

20. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law. It is made clear that the observations made hereinabove are only for the purpose of deciding the present petition/s and shall not preclude the respondents from taking jurisdictional objections.

21. 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 A&C Act.

22. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

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[6] 2023 SCC OnLine SC 1666.

[7] (2020) 20 SCC 760

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

24. 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.

25. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

26. The present petitions stand disposed of in the above terms.

MARCH 04, 2024/hg **SACHIN DATTA, J**