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

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Decided on: 22.01.2024.

+ ARB.P. 1245/2023

PRAVEEN KUMAR KAPOOR

..... Petitioner

Through: Mr. Ravin Rao, Mr. Jujhar Singh
& Mr. Bhushan Arora, Advocates.

versus

RAJ KUMAR JAIN AND ANR

..... Respondents

Through: Mr. Milan Verma & Mr. Aman
Sharma, Advocates with R-1 in
Person.**CORAM:****HON'BLE MR. JUSTICE PRATEEK JALAN****PRATEEK JALAN, J. (ORAL)**

1. The petitioner has filed this petition under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"] seeking appointment of an arbitrator to adjudicate disputes between the parties under an agreement dated 14.07.2017 entitled "Memorandum of Understanding (MoU)/Settlement Agreement" ["the MoU"].

2. By way of the MoU, the petitioner, on the one hand, and respondent Nos. 1 and 2, on the other hand, agreed that the respondent Nos. 1 and 2 would construct the third and fourth floor of an immovable property, on the terms and conditions mentioned therein. The petitioner owned the second floor of the said property, alongwith roof rights. The



petitioner was described as the “first party” and the respondents were collectively described as the “second party” in the said MoU. Mr. Ravin Rao, learned counsel for the petitioner, relies upon a dispute resolution clause incorporated in the MoU as clause 5, which reads as follows:

*“5. That the second party is bound to this agreement and the second party cannot sale the abovesaid property of the first party to anybody. **That in case any dispute arises between the parties then the dispute will be settled by noth the parties mutually or through mediator/arbitrator, appointed by both the parties.**”¹*

3. According to Mr. Rao, the respondents did not carry out the construction in time, but the petitioner was induced to make payment of a sum of ₹50 lakhs to them. The petitioner claims to have entered into a sale deed dated 14.07.2017 in favour of the respondents, by way of security for the aforesaid transaction. He also filed an application under Section 9 of the Act before the learned District Judge, Commercial Court-08, Central, Tis Hazari, Delhi Courts [O.M.P.(I)(COMM) 507/2023], in which the respondent was restrained from selling, alienating, transferring or creating third party interest in the third and fourth floor of the property [No. A-11/5149, Harphool Singh Building, Subzi Mandi, Clock Tower, Delhi- 110007]. The learned District Judge noted the submission on behalf of the respondents that the petition was barred by limitation. The respondents were granted liberty to take these objections before the learned arbitrator. Mr. Milan Verma, learned counsel for the respondent, states that the respondents’ appeal against the aforesaid order [FAO(COMM) 8/2024] is pending adjudication before the Division Bench of this Court, but the order of the learned Commercial Court has

¹ Emphasis supplied.



not been stayed.

4. In any event, the petitioner, through counsel, invoked the arbitration proceedings by a letter dated 08.07.2023, which failed to elicit a response. This has led to the present petition under Section 11 of the Act.

5. Mr. Verma takes three grounds to resist the appointment of an arbitrator:

- a. He submits that clause 5 of the MoU does not constitute an arbitration clause at all, as three modes of settlement are specified therein.
- b. He submits that the MoU dated 14.07.2017 specified a period of six months for completion of the work by the respondent and the period of limitation of three years had, therefore, lapsed prior to the invocation of arbitration on 08.07.2023.
- c. He submits that the sale deed dated 14.07.2017 executed by the petitioner in favour of the respondents, in fact, constitutes novation of the agreement and did not contain an arbitration clause.

6. I have heard learned counsel for the parties on each of these contentions.

7. As far as the first objection is concerned, I am of the view that the three modes of settlement provided therein were, indeed, alternative methods for resolution of the disputes between the parties, but an agreement had been arrived at with regard to each of the methods. In other words, the agreement does not require any further consensus between the parties to adopt any of the three modes of settlement. Mr. Verma cited the judgment of the Supreme Court in *Jagdish Chander vs.*



Ramesh Chander & Ors.,² to submit that the mere use of the word “arbitration” would not constitute an arbitration agreement, if the reference requires a further consent of the parties. The Supreme Court held that consensus *ad idem* as to the reference to arbitration is required, prior to appointment of an arbitrator. I am of the view that a proper reading of clause 5 shows that such consensus did exist. The clause extracted above shows that the parties agreed that any disputes “*will be settled*” by them “*mutually or through mediator/arbitrator, appointed by both the parties*”. This contemplates the availability of three modes of dispute resolution, i.e., mutual settlement, mediation and arbitration, all of which have been agreed between the parties. This is indicated *inter alia* by the use of the word “will”, as opposed to “can” or “may”, which in given circumstances, may have cast a shadow of doubt. Further agreement of the parties is contemplated, not with regard to amenability to any of the methods of dispute resolution, but with regard to the appointment of the mediator or arbitrator. It is the contention of Mr. Verma that attempts at mutual settlement and mediation have in fact been made, but did not fructify. The contention that, in these circumstances, a fresh or renewed consent of parties is required for arbitration to proceed is, in my view, not borne out by a proper reading of the clause.

8. In this context, reference may also be made to the judgment of the Supreme Court in *Babanrao Rajaram Pund vs. Samarth Builders and Developers and Anr.*,³ which considers the precedents on the point,

² (2007) 5 SCC 719.

³ (2022) 9 SCC 691.



including *Jagdish Chander*⁴. The following observations of the Court provide guidance as to the approach to be adopted in construction of a dispute resolution clause:

*“25. Even if we were to assume that the subject clause lacks certain essential characteristics of arbitration like “final and binding” nature of the award, **the parties have evinced clear intention to refer the dispute to arbitration and abide by the decision of the tribunal. The party autonomy to this effect, therefore, deserves to be protected.***

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*27. The UNCITRAL Model Law on International Commercial Arbitration, 1985 from which the Arbitration and Conciliation Act, 1996 originated, envisages minimal supervisory role by courts. **When Section 7 or any other provisions of the Act do not stipulate any particular form or requirements, it would not be appropriate for a court to gratuitously add impediments and desist from upholding the validity of an arbitration agreement.***

28. There is no gainsaying that it is the bounden duty of the parties to abide by the terms of the contract as they are sacrosanct in nature, in addition to, the agreement itself being a statement of commitment made by them at the time of signing the contract. The parties entered into the contract after knowing the full import of the arbitration clause and they cannot be permitted to deviate therefrom.

*29. It is thus imperative upon the courts to give greater emphasis to the substance of the clause, predicated upon the evident intent and objectives of the parties to choose a specific form of dispute resolution to manage conflicts between them. **The intention of the parties that flows from the substance of the agreement to resolve their dispute by arbitration are to be given due weightage.** It is crystal clear to us that Clause 18, in this case, contemplates a binding reference to arbitration between the parties and it ought to have been given full effect by the High Court.”⁵*

9. As far as the issue of limitation is concerned, Mr. Verma submits that clause 3 of the agreement contemplates a period of six months for construction of the third and fourth floor. However, in the petition, it has

⁴ Supra (note 2).

⁵ Emphasis supplied.



specifically been averred that the respondents demanded payment of an amount of ₹50 lakhs from the petitioner under the agreement, which was paid “*till the beginning of 2021*”. Mr. Rao submits that the petitioner will produce the necessary evidence in support of his contention before the learned arbitrator, and that the invocation of arbitration on 08.07.2023 was within the period of limitation of three years from the time when payments were made under the MoU. The judgments of the Supreme Court, *inter alia*, in *Vidya Drolia and Ors. vs. Durga Trading Corporation*⁶ and *Bharat Sanchar Nigam Limited and Anr. vs. Nortel Networks India Private Limited*⁷ clearly hold that the issue of limitation may be considered by the Court at the stage of a petition under Section 11 of the Act in limited circumstances, when the bar on limitation is *ex facie* evident from the petition and the record. Having regard to the averments in the petition mentioned above, I am of the view that this is not a fit case for rejection of the petition on this ground. Limitation being generally a mixed question of fact and law, it is left open to the parties to advance their respective cases before the learned arbitrator being the tribunal of choice.

10. The respondents’ contention with regard to the novation of the agreement is similarly a matter which is best left for consideration of the learned arbitrator. It affects the merits of the claims sought to be agitated by the petitioner herein.

11. For the aforesaid reasons, I am of the view that the grounds raised on behalf of the respondents do not deserve acceptance at the stage of the

⁶ (2021) 2 SCC 1.

⁷ (2021) 5 SCC 738.



petitioner's request for appointment of an arbitrator.

12. The petition is therefore allowed, and disputes between the parties are referred to arbitration under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi-110503 ["DIAC"]. DIAC is requested to appoint an arbitrator from its panel. The arbitral proceedings will be governed by the Rules of DIAC, including as to the remuneration of the learned Arbitrator. The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

13. It is made clear that the Court has not entered into the merits of the dispute, and any claims and counter-claims may be placed before the learned arbitrator in accordance with law.

14. The petition stands disposed of with these observations.

PRATEEK JALAN, J

JANUARY 22, 2024

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