

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 09, 2021

+ ARB.P. 424/2020

YOY HOTELS AND HOMES PVT. LTD.

..... Petitioner

Through: Mr. Jeevan Ballav Panda, Adv.
with Ms. Satakshi Sood & Mr.
Satish Padhi, Advs.

versus

RAJAN TEWARI & ANR. Respondents

Through: Ms. Bobby Anand, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

JUDGMENT

V. KAMESWAR RAO, J

1. This present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act', for short) with the following prayers:

"It is most respectfully prayed that this Hon'ble Court may be pleased to:

- (i) appoint a Sole Arbitrator to adjudicate the claims of the Petitioner in accordance with the Arbitration and Conciliation Act, 1996 as amended;
- (ii) declare that Hon'ble Justice Aruna Suresh (retired) has no jurisdiction to adjudicate the disputes between the parties;

(iii) Award costs of this Petition in favour of the Petitioner and against the Respondent;

(iv) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. The petitioner herein is a company incorporated under the Companies Act, 2013 and having its registered office at Ground Floor-001, Mauryansh Elanza, Shyamai Cross Road, Nr. Parekh Hospital, Satellite Ahmedabad, Gujarat-380015 (formerly known as Alcott Town Planners Pvt. Ltd.).

3. The respondents herein are the joint owners of the premises / property situated at 3/16, Main Shankar Road, Old Rajinder Nagar, New Delhi ('Premises', for short).

4. It is the case of the petitioner and so contended by Mr. Jeevan Ballav Panda, learned counsel appearing for the petitioner that the petitioner and respondents entered into a Lease Deed dated May 27, 2019 ('Lease Deed', for short) in respect of the Premises.

5. Pursuant to the execution of the Lease Deed, petitioner started fulfilling the obligations contained thereunder on the assumption that the respondents will also do the same and even disbursed an amount of Rs.3,32,000/- to the respondents in order to expedite the refurbishment and upgradation of the Premises to make it at par with the petitioner's benchmark.

6. Thereafter it took over the Premises and started using the same for the purposes of its commercial activities as laid down in the Lease Deed. In the wake of the corona virus

pandemic, the entire hospitality sector faced huge financial setback and on account of the same, the petitioner sought to invoke the force majeure clause in the Lease Deed vide email dated March 27, 2020.

7. He stated that after detailed discussion with the representatives of the petitioner, the respondents while agreeing to the invocation of the *force majeure* clause agreed to amend the commercial understanding between the parties in the interim.

8. Mr. Panda submitted that the respondents were in breach in terms of Clause 11.2.1 of the Lease Deed, which obligated the respondents to obtain as well as maintain all requisite building approvals required for running the Premises as a commercial establishment for the purposes as laid down in the Lease Deed. It is submitted by him that even after repeated communications and grant of time as sought by the respondents, the respondents failed to furnish the complete set of documents as mandated under Clause 11.2.1 of the Lease Deed.

9. That while attempts were being made to get the breach of Clause 11.2.1 cured, the respondents suddenly and to the complete shock and dismay of the petitioner, issued a letter date June 03, 2020 demanding a sum of money by misrepresenting the clauses of the Lease Deed.

10. Thereafter, the respondents, vide notice dated June 23, 2020, invoked arbitration clause citing the existence of disputes between the parties arising under the Lease Deed and nominated a learned Retd. Judge of this Court as the sole Arbitrator to adjudicate the disputes between the parties in terms of the dispute

resolution clause contained in the Lease Deed. It is also stated by him that the petitioner, however, could not respond to the said notice owing to various logistical constraints on account of the corona virus pandemic. Therefore, it is his submission that the recommendation of the respondents was not confirmed by the petitioner.

11. Mr. Panda stated that despite there being no confirmation from the petitioner or mutual agreement, the respondents instead of approaching this Court under the mandate of the Act, illegally confirmed the appointment of the sole Arbitrator.

12. It is also submitted that the sole Arbitrator issued notice on August 12, 2020 to the parties for the primary hearing to be held on August 29, 2020, when for the first time, the petitioner became aware of the appointment of the sole Arbitrator, and objected as well as sought cancellation of the primary hearing vide letter dated August 26, 2020.

13. Despite the objections being raised, the Arbitrator went ahead with the hearing as scheduled on August 29, 2020 and the petitioner, according to Mr. Panda, during the hearing also raised its objection to the proceedings as being in contravention of the settled principles of law and Lease Deed. Thus, it is submitted by him that the sole Arbitrator is *de facto* as well as *de jure* incapable of entering reference as sole Arbitrator for the adjudication of disputes between the parties.

14. Reliance is placed by Mr. Panda on the judgments of coordinate benches of this Court in ***Naveen Kandhar & Anr. v. Jai Mahal Hotels Pvt. Ltd., (Arb.P. 453/2017)*** and ***Manish***

Chibber v. Anil Sharma & Anr., (Arb.P. 249/2020), wherein it was held that an appointment of an Arbitrator in contravention of the agreed procedure is *non-est* and ought to be ignored.

15. Ms. Bobby Anand, learned counsel appearing for the respondents has raised a preliminary objection as to the maintainability of the present petition. It is the case of the respondents and contended by Ms. Anand that while adjudicating a petition under Section 11 of the Act, the scope of enquiry is limited and the petitioner, under the garb of Section 11, is in fact seeking termination of the mandate of the learned sole Arbitrator, who has already been appointed for adjudication of all disputes between the parties.

16. By drawing the attention of this Court to the petition, it is stated by Ms. Anand that even though the petition has been filed under Section 11 of the Act, reliefs and the various paragraphs of the petition indicate and calls for the termination of the mandate of the sole Arbitrator, which relief does not fall within the ambit and scope of Section 11(6) of the Act.

17. It is also stated by Ms. Anand that the present petition is infructuous and therefore liable to be dismissed as the sole Arbitrator has already given consent and has entered upon reference to adjudicate upon all the disputes emanating between the parties from the Lease Deed. In fact, she stated that hearings have taken place on August 29, 2020 and August 30, 2020, which has been duly attended by the petitioner. More so, she also stated that the sole Arbitrator has served upon both the parties an undertaking dated September 02, 2020 as per Schedule VI as

mandated under Section 12 (1)(b) of the Act.

18. Thus, according to Ms. Anand, the mandate of the sole Arbitrator already appointed cannot be terminated under the provisions of Section 11(6) of the Act. In fact, it is her submission that the petitioner is within its right to challenge the jurisdiction of the Arbitrator by resorting to Sections 12-15 of the Act, which concedingly not done.

19. Without prejudice, it is also submitted by her that the petitioner has not shown as to how the sole Arbitrator already appointed has become *de jure* or *de facto* unable to perform functions especially under Section 14 and it is not the case of the petitioner that the sole Arbitrator falls under any one of the categories specified in the fifth and / or the seventh schedule of the Act.

20. That apart, it is submitted by Ms. Anand, the issuance of a prior notice under Section 21 of the Act is *sine qua non* for filing a petition under Section 11, which the petitioner has failed to issue in respect of the disputes raised by the petitioner in the present petition and that the present petition is nothing but a complete afterthought.

21. On the conduct of the petitioner, it is stated that the petitioner has been delaying the payment of pending monthly rentals since March 2020 and it was after repeated reminders that the respondents were forced to invoke the arbitration clause calling upon the petitioner to consent to the appointment of the learned Retd. Judge of this Court, as sole Arbitrator, to which the petitioner did not even respond and after the expiry of 30 days,

the appointment was deemed to be accepted by the petitioner. Even after her appointment, on the first date of hearing, petitioner sought and was granted a period of 15 days for filing an appropriate application challenging the appointment of the sole Arbitrator. No application was in fact moved before the sole Arbitrator. It is submitted by Ms. Anand that therefore, petitioner having failed to take any action within the prescribed time, has forfeited its right to challenge the appointment. She also submitted that the petitioner having been acquiesced into the appointment of the sole Arbitrator and not resorting to any challenge within a reasonable time shall surely attract doctrine of estoppel against the petitioner.

22. Rejoinder was also duly filed by the petitioner, reiterating its stand in the petition and refuting the stand of the respondents in the reply.

23. Having heard the learned counsel for the parties and perused the record, the only issue which arises for consideration is whether the appointment of the learned arbitrator is at variance with the stipulation in the contract and as such *non-est* for this court to grant the relief to the petitioner by appointing a new arbitrator.

24. To answer this issue, it is necessary to reproduce the arbitration clause in the contract:

“18. **DISPUTE RESOLUTION**- Any dispute or controversy arising out of or in connection with the Deed or its performance, including the validity, interpretation or application hereof, shall to the extent possible be

settled amicably by negotiation and discussion among the Parties within 30 (thirty) days as of the date requested by either Party. Failing which, either Party shall be at liberty to refer the matter to arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996. The arbitral panel shall consist of a sole arbitrator appointed mutually by the Parties. Any arbitral award issued by such sole arbitrator shall be final and binding on the Parties. The language of the arbitration shall be English and seat of arbitration shall be Delhi.”

Emphasis supplied

25. From the above it is clear that the arbitrator has to be appointed mutually by both the parties. The respondent had invoked the arbitration clause and issued notice dated June 23, 2020 and nominated a retired Judge of this Court as the nominator. The notice could not be responded by the petitioner.

26. Mr. Panda is right to submit that the notice / recommendation of the respondents with regard to the learned arbitrator was not confirmed. Mr. Panda is also right in stating that the respondents should have approached this Court under Section 11 of the Act seeking an appointment of an Arbitrator when the petitioner has not confirmed the appointment.

27. Having said so, it must be held in view of the arbitration clause as referred above; the appointment made by the respondent is *non-est* and need to be ignored. The plea of Ms. Anand that the present petition is not maintainable as the petitioner under the

garb of Section 11 is seeking termination of the mandate of the learned Sole Arbitrator is not appealing for the reason when the appointment is *non-est*, being not in accordance with the agreed procedure, the petitioner is within its right to approach the Court for appointment of an arbitrator under Section 11 of the Act. This position of law is well settled in terms of the Supreme Court judgment in ***Walter Bau Ag, Legal Successor of the Original Contractor, Dycheroff & Widmann A.G. v. Municipal Corporation of Greater Mumbai & Anr., (2015) 3 SCC 800***, wherein in paras 8, 9 and 10 the Supreme Court has held as under:

*“8. While it is correct that in Antrix (*supra*) and Pricol Limited (*supra*), it was opined by this Court that after appointment of an Arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix (*supra*), appointment of the Arbitrator, as per ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Limited (*supra*), the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the Arbitrator. In the present case, the situation is otherwise.*

9. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising

jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. (supra) may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of Arbitrators by ICADR, which the parties had agreed to abide in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by the ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non-est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner,

though may appear to be in conformity with the law laid down in Datar Switchgears Ltd. (supra), is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by the ICADR. The said appointment, therefore, is clearly invalid in law.

10. Consequently, we allow the present petition and appoint Shri Justice S.R. Sathe, a retired judge of the Bombay High Court as the Arbitrator on behalf of the respondent Corporation. Both the Arbitrators shall now name the third Arbitrator forthwith whereafter the arbitration proceedings will be held and concluded as expeditiously as possible. The terms of appointment of Shri Justice S.R. Sathe as the Arbitrator on behalf of the respondent Corporation will be settled in consultation with the respondent Corporation.”

28. The aforesaid position is followed by this Coordinate Benches of this Court in the cases of ***Naveen Kandhari & Anr. (supra)*** and ***Manish Chibber (supra)***. In ***Naveen Kandhari & Anr. (supra)***, on the objection taken by the respondent therein that the an arbitrator has already been appointed by them and hence the Section 11 petition is not maintainable, the Court in paragraphs 18 and 19 held as under:

“18. A plain reading of the arbitration clause as set out above indicates that an arbitrator was required to be appointed by the parties. Thus, the unilateral appointment

of Mr A.P. Dhamija as an arbitrator is contrary to the arbitration clause and without authority. It is also relevant to note that the respondent had invoked the arbitration clause by its letter dated 06.06.2016 and unilaterally declared that it had appointed Mr A.P. Dhamija, Advocate as an arbitrator.

19. The said appointment, being contrary to the terms of the arbitration agreement, cannot be considered as an appointment at all. It is for all intents and purposes non est. Mr A.P. Dhamija has no authority to act as an arbitrator; his actions are plainly of no consequence.”

29. Similarly, in the case of **Manish Chibber (supra)**, on the significance of adherence to the procedure agreed upon by the parties to an arbitration agreement with regard mutual/common consent in appointing an arbitrator, the Court has held as under:

“13. Section 11(6) of the 1996 Act specifically states that, if a party fails to act as required by the procedure for appointment of arbitrator, as agreed upon between the parties, the appointment shall, in the case of domestic arbitration, be made by the High Court, on an application of the party, by this Court, where the arbitration is other than an international commercial arbitration. The procedure agreed upon, between the petitioner and the respondents, to appoint the arbitrator in the present case, is encapsulated in Clause 22 of the partnership deed dated 1st April, 2016, which already stands reproduced hereinabove.

A reading thereof makes it clear that “appointment by common consent of all partners” is the sine qua non, for the appointment of the arbitrator to be valid. In the present case, there is nothing, whatsoever, to indicate that, prior to, or even at, the time of his appointment as sole arbitrator, and of his taking cognizance of the arbitral proceedings, there was any consent, by the petitioner to the appointment of Mr. Ankit Batra. Clearly, therefore, the appointment of Mr. Ankit Batra had not taken place in accordance with Clause 22 of the partnership deed, dated 1st April, 2016 supra. Section 11(6) of the 1996 Act, therefore, squarely applies, and the task of appointment of the arbitrator, devolves on this Court, as there is no consensus, ad idem, regarding the arbitrator, who would arbitrate on the disputes between the parties.”

30. A plea has been taken by Ms. Anand that the petitioner having participated in the proceedings held on August 29, 2020 is estopped from challenging the mandate of the arbitrator. The same is not appealing, when it is the case of the petitioner, that during the hearing, the petitioner had raised the objection, that the proceeding being in contravention of principles of law and Lease Deed. That apart, the Supreme Court in **Walter Bau (supra)**, has in para 9 stated as under:-

“9. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar

*the jurisdiction under Section 11(6) cannot be countenanced
in law.”* *emphasis supplied*

Therefore, the petitioner has rightly filed the present petition under Section 11 of the Act, which is under consideration in terms of this order. The appointment of the learned Sole Arbitrator by the respondents is *non-est*.

31. The present petition is liable to be allowed. I appoint Justice S.P. Garg, a retired Judge of this Court, as the sole Arbitrator to adjudicate the disputes and differences between the parties arising out of the Lease Deed. The fee of the learned sole Arbitrator shall be governed by Fourth Schedule to the Arbitration & Conciliation Act, 1996.

32. The petition is disposed of.

33. Let a copy of this order be sent to Justice S.P. Garg (Retd.).

V. KAMESWAR RAO, J

FEBRUARY 09, 2021/aky