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

%   **Date of decision: 13th August, 2021.**

+   **CM(M) 525/2021**

AMBIENCE PROJECTS & INFRASTRUCTURE PVT. LTD.
..... Petitioner

Through: Ms. Kittu Bajaj, Advocate.

Versus

NEERAJ BINDAL **..... Respondent**

Through: Mr. Adhish Srivastava and Mr. Rohit Gandhi, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL
[VIA VIDEO CONFERENCING]

AMIT BANSAL, J. (Oral)
C.M. No.25855/2021 (for exemption)

1. Allowed, subject to just exceptions and as per extant Rules.

2. The application is disposed of.

CM(M) 525/2021 & CM No.25854/2021(for stay)

3. The present petition under Article 227 of the Constitution of India has been filed impugning the order dated 23rd June, 2021 passed by the Ms. Bimla Makin, District Judge (Retd.), Sole Arbitrator, whereby the application dated 15th March, 2021 filed by the petitioner for quashing of arbitration proceedings on account of there being no arbitrable dispute and for holding that the Arbitrator has no jurisdiction to deal with the dispute between the parties, was dismissed.

4. The brief facts giving rise to the present petition are set out hereinafter. A Memorandum of Understanding (MoU) was executed between the petitioner and the respondent on 11th August, 2016, whereby the respondent agreed to purchase an apartment from the petitioner in Gurgaon, and which MoU contained an arbitration clause. A tripartite agreement was entered into between the respondent, HDFC and the petitioner on 15th October, 2016 whereby the respondent took a loan from HDFC to finance the apartment and to create a mortgage. Disputes arose between the parties, which led to filing of an application under Section 11 of the Arbitration and Conciliation Act, 1996 (A&C Act) on behalf of the respondent. Vide order dated 29th January, 2021, a Sole Arbitrator was appointed by this Court to adjudicate the disputes between the parties. The petitioner raised the issue of non-arbitrability of the disputes before the Sole Arbitrator, which was rejected by the Sole Arbitrator vide impugned order dated 23rd June, 2021.

5. The counsel for the petitioner has drawn my attention to Claim No. 3 of the Statement of Claim filed by the respondent before the Sole Arbitrator to contend that the relief claimed therein is towards foreclosure of the loan taken by the respondent with HDFC and therefore, the dispute is not arbitrable. It is further contended that since HDFC is a necessary party to the foreclosure process, and since HDFC is not a party to the arbitration agreement, no arbitration proceedings can take place. The counsel for the petitioner has relied upon the judgment of the Supreme Court in ***Vidya Drolia and Ors. Vs. Durga Trading Corporation (2021) 2 Supreme Court Cases 1***, to contend that a right *in rem* is not amenable to arbitration. It is further contended that the petitioner does not have any other remedy against

the said decision of the Sole Arbitrator as it is not within the ambit of challenge under Section 34 of the A&C Act.

6. The counsel appearing on advance notice on behalf of the respondent submits that the present petition under Article 227 of the Constitution of India is not maintainable. He draws attention to Section 16 of the A&C Act to contend that an Arbitral Tribunal has the right to rule on its own jurisdiction and where the Arbitral Tribunal rejects the pleas raised with regard to negating its jurisdiction, the arbitral proceedings will have to be continued, resulting in an award. In terms of Section 16 (6), the party aggrieved by the aforesaid decision of the Arbitral Tribunal will have the right to challenge it in accordance with Section 34 of the A&C Act.

7. The counsel for the respondent has placed reliance upon a recent judgment of the Supreme Court in ***Bhaven Construction vs. Executive Engineer*** 2021 SCC OnLine SC8 to contend that writ jurisdiction under Articles 226 and 227 of the Constitution of India cannot be ordinarily invoked against arbitration proceedings. He further submits that the same contentions of non-arbitrability of the current dispute were raised by the petitioner under the Section 11 proceedings before this Court, which were rejected, and the Sole Arbitrator was appointed. The said contentions cannot be raised once again by the petitioner, having failed to challenge the order passed in the section 11 proceedings, which order has now attained finality.

8. I have considered the rival submissions.

9. The first and foremost issue to be decided in the present case is whether the present petition under Article 227 of the Constitution of India is

maintainable or not. The scope of jurisdiction to be exercised by the High Court under Article 226 and 227 of the Constitution of India in respect of proceedings arising under the A&C Act, has been elucidated in ***Bhaven Construction*** (supra). Relevant extracts from the aforesaid judgment are reproduced below:

> *"10. Having heard both parties and perusing the material available on record, the question which needs to be answered is* ***whether the arbitral process could be interfered under Article 226/227 of the Constitution, and under what circumstance?***
>
> *11. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." The non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.*
>
> *12. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope*

for any extra statutory mechanism to provide just and fair solutions

.....

16. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of ***Section 34 reads as 'Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3)'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.***

17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In ***Nivedita Sharma v. Cellular Operators Association of India****, (2011) 14 SCC 337, this Court referred to several judgments and held:*

> *"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226*

of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - ***L. Chandra Kumar v. Union of India****, (1997) 3 SCC 261.* ***However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it ignoring the fact that the aggrieved person has an effective alternative is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation****. **(emphasis supplied)***

18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

22. If the Courts are allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished*.*

23. The High Court did not appreciate the limitations under Articles 226 and 227 of the Constitution and reasoned that the Appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering the Respondent No. 1 remediless. However, a plain reading of the arbitration agreement points to the fact that the Appellant herein had actually acted in accordance with the procedure laid down without any mala fides.

27. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In ***Deep Industries*** *case (supra), this Court observed as follows:*

> *"22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up.* ***The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a***

final award at which stage it may be raised under Section 34." (emphasis supplied)"

10. A reading of the above, makes it abundantly clear that in respect of arbitration proceedings, it is only in exceptional cases that the High Court can utilise its discretionary powers under Article 226 and 227 of the Constitution of India. This Court, in case of dismissal of an application under Section 16 of the A&C Act by the Arbitral Tribunal, can exercise writ jurisdiction only when such order is so perverse that it is indicative of a patent lack of jurisdiction. Reference in this regard may be made to the order dated 18th September, 2020 of the Supreme Court in SLP No. 8482/2020 titled ***Punjab State Power Corporation Limited Vs. EMTA Coal Limited & Anr.***

11. The A&C Act is a complete code in itself. The intent of the A&C Act is to ensure expeditious disposal of disputes between the parties and that there is minimum interference by the Courts with the arbitration proceedings. If the parties are encouraged to approach the Court at every stage of the arbitration proceedings, the whole purpose of the arbitration would stand frustrated. Section 5 contains a non obstante providing that notwithstanding anything contained in any other law, no judicial authority shall intervene in arbitration proceedings except where the A&C Act provides for. With respect to a challenge under Section 16, Arbitral Tribunal has the power to rule on its own jurisdiction. Section 16 (5) provides that where the Arbitral Tribunal rejects a challenge to its jurisdiction, the arbitral proceedings will be continued, and an award will be passed. As per sec 16 (6), a party aggrieved by the award has the right to

challenge the same under Section 34. Under the scheme of the A&C Act, there is no provision for a challenge to an order passed by the Sole Arbitrator rejecting the challenge to the jurisdiction of an Arbitral Tribunal. The aggrieved party will have to wait till the final award is passed and it is only at that stage that he may challenge the same under Section 34. Any attempt to expand the scope of interference by the High Court in exercise of its power under Articles 226 or 227 of the Constitution would defeat the purpose of A&C Act.

12. In the present case, the petitioner had taken the plea of non-arbitrability of disputes in the Section 11 proceedings. However, the said plea did not find favour with the Court and the Court proceeded to appoint the Sole Arbitrator, holding that the issue of non-arbitrability of a dispute is a contentious one and the same has to be decided by the Sole Arbitrator. It is an admitted position that the petitioner did not challenge the said order and thereafter submitted himself to the jurisdiction of the Sole Arbitrator.

13. The petitioner filed an application before the Sole Arbitrator questioning the jurisdiction of the Arbitral Tribunal on the ground of non-arbitrability of the dispute. The same was rejected by the Sole Arbitrator vide impugned order dated 23rd June, 2021, holding that (i) the arbitration agreement contained in the MoU dated 11th August, 2016 continued to remain binding on the parties even after execution of the tripartite agreement; (ii) the dispute, which was the subject matter of the arbitration, was not a subject matter of the tripartite agreement; (iii) the dicta of ***Vidya Drolia*** (supra) was not applicable to the present arbitration proceedings, as the dispute therein was not an action *in rem*. It was a simple dispute between

the claimant and the respondent and did not affect third party rights; (iv) deciding the dispute between the claimant and the respondent did not affect the right of the third party, viz. HDFC; and, (v) therefore, the Arbitral Tribunal has the jurisdiction to deal with the dispute.

14. Relevant extracts from the impugned order passed by the Sole Arbitrator are set out below:

> *"21. When these four principles are applied to the facts of the present case, one comes to the conclusion that none of these are applicable to the facts of the present case. The subject matter of this dispute is not an action in rem. It is a simple commercial dispute between the Claimant and the Respondent. It does not affect third party rights as argued by and insisted by Ms. Bajaj.*
>
> *The third party in this case is HDFC Bank. By deciding the disputes between the Claimant and the Respondent the rights of the bank are nowhere affected because the Claimant has asked to clear all" the loan amount taken by it from the HDFC. The loan of the bank is secure and there is no dispute with the bank as such. This dispute also does not relate to sovereign and public interest functions of the state and the disputes between the parties are not non-arbitrable under any statute.*
>
> *22. It is not a dispute between the rights of the mortgagor and the mortgagee as held in this Judgment and argued by Ms. Bajaj. It is not a case of foreclosure which is non-arbitrable according to this Judgment. Had the Bank initiated any civil*

proceedings against the Claimant for foreclosure of the loan amount, it would not have been covered under the arbitration clause and may not have been arbitrable. The bank has no dispute with the Claimant for its loan amount. Neither the bank has initiated any proceedings against any of the parties for foreclosure of the loan amount. Simply by using the word 'foreclosure' it does not become a non-arbitrable dispute. The Claimant has asked the Respondent to foreclose the bank loan as agreed between the parties under the Memorandum of Understanding. In the Tripartite Agreement itself in clause 3 para (ii), it was provided:

> *"3 . ...*
>
> *The Borrower has informed HDFC of the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability of payments under the loan agreement as payable by the Borrower to HDFC till the period be referred to as the 'Liability Period' and 'the Liability be referred to as 'Assumed Liability'. It is however, agreed that during the liability period the repayment liability is joint and several by and between the Borrower and the Builder. The assumption of liability by the Builder in no manner whatsoever releases, relinquishes and/or reduces the liability of the Borrower and that same shall not be affected in any manner on account of any difference and/or dispute*

between the 'Borrower and the Builder under the arrangement between them."

23. After considering the detailed arguments of the parties and going through the documents relied upon by them, I come to the conclusion that it is a simple commercial dispute between the Claimant and the Respondent regarding allotment of a flat with an offer to 'buy back' and according to the Claimant pay back the money received from him with interest and other consequential reliefs. There exists a valid arbitration agreement between the

parties which was not extinguished or abrogated by execution of Tripartite Agreement between the parties. It is not a dispute of foreclosure, which is non-arbitrable. Merely by using the word foreclosure, it does not mean foreclosure in its legal sense which refers to a dispute between the mortgagor and mortgagee or for redemption of mortgaged property. There is no dispute between the mortgagor and mortgagee in this case and hence it is not a dispute for foreclosure. This Arbitral Tribunal has jurisdiction to deal with this dispute as referred by the Hon'ble High Court."

15. The learned Sole Arbitrator has appreciated the submissions made by the petitioner and taken into account the ratio of ***Vidya Drolia*** (supra) relied upon by the petitioner in reaching her conclusion. In my view, the learned Sole Arbitrator has duly considered the matter and passed a well-reasoned order holding the present dispute is arbitrable and the Arbitral Tribunal has the jurisdiction to deal with the same. There is no perversity in the order

passed by the Sole Arbitrator so as to call for interference by this court in its jurisdiction under Article 226 or 227 of the Constitution of India.

16. Reliance placed by counsel for the petitioner on paragraph 17 of ***Bhaven Construction*** (supra) is misplaced. Undoubtedly, a legislative enactment cannot curtain a constitutional right, but at the same time the High Court in exercise of its power under Article 227 of the Constitution cannot frustrate the intent and purpose of the A&C Act. No merit is found in the contention of the counsel for the petitioner that the petitioner would be left remediless. In the event, the arbitration proceedings result in an award against the petitioner, the petitioner would have its remedies under Section 34 read with Section 16 of the A&C Act.

17. Consequently, this court holds that the present petition under Article 227 of the Constitution of India is not maintainable.

Dismissed.

AMIT BANSAL, J

AUGUST 13, 2021

A/*Sakshi R./at*