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

\+ O.M.P. (COMM) 204/2021 & I.A. 8857/2021, I.A. 8858/2021, I.A. 8859/2021, I.A. 8860/2021

SELECT REALTY AND & ORS. ..... Petitioners
Through Mr. Prantar Basu Choudhary and Mr. Chirag Jain, Advs.

versus

INTEC CAPITAL LIMITED ..... Respondent
Through Ms. Mallika Ahluwalia, Ms. Rishu Agarwal and Mr. Himanshu Thakur, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (ORAL)

% 09.09.2021

1. The petitioners, having suffered an award passed by the learned Arbitral Tribunal, consisting of a sole arbitrator, on 21st January, 2021, have approached this Court under Section 34 of the Arbitration and Conciliation Act, 1996 (the 1996 Act) for setting aside the award.

2. The only ground urged by Mr. Chaudhary, learned counsel for the petitioners, is that the appointment of the arbitrator, who arbitrated on the dispute, was illegal.

3. When this matter had come up before this Court on an earlier occasion, the stand of Mr. Chaudhary was that there was no arbitration agreement in existence between the parties. This stand was vociferously opposed by Ms. Mallika Ahluwalia, learned counsel for

the respondent, who undertook to place the arbitration agreement on record.

4. Subsequently, under cover of an affidavit, dated 12th August, 2021, the respondent has placed on record the loan agreement, executed between the parties, which contains the following unequivocal arbitration clause:

> "2.1 Any Dispute arising out of the Business Loan Agreement, shall be referred to a sole arbitrator, from amongst those listed in **Schedule** hereto, as per his/her availability, in the order of preference in which they have been set-out. The Parties consent to such appointment of arbitrator and agree that, upon reference of any Dispute to the arbitrator and acceptance by the sole arbitrator, no separate consent of the Parties will be required for the appointment."

5. The Schedule to the aforesaid arbitration agreement enlists the names of the following six persons, from whom, according to the afore-extracted Clause 2.1, the arbitrator was to be appointed, in order of preference, proceeding from the first to the sixth:

> "(i) Mr. S.S. Yadav
> (ii) Mr. Parveen Agarwal
> (iii) Mr. Ashish Wad
> (iv) Mr. Sakie Jakharia
> (v) Mr. Vivek Malik
> (vi) Mr. Arjun Pant"

6. Consequent to arising of disputes between the parties, Mr. Chaudhary concedes the fact that, on 25th August, 2020, the respondent wrote to the petitioner, stating that, in accordance with the afore-extracted Clause 2.1, that it was appointing Mr. S. S. Yadav, an Advocate, being the first name in the panel in the Schedule to the arbitration agreement, as the sole arbitrator to arbitrate on the disputes,

and calling for the petitioner's concurrence thereon.

7. The petitioner did not respond to this communication, and did not, in any manner, oppose the appointment of Mr. Yadav.

8. Thereafter, notices of hearing were issued to the petitioner by the sole arbitrator Mr. S.S. Yadav on 31st August, 2020 and 19th October, 2020. Mr. Chaudhary acknowledges that his client did not respond to these notices either.

9. The petitioner chose not to participate in the arbitral proceedings, or to move any application, either before the arbitrator or before this Court, challenging the authority of Mr. Yadav to arbitrate.

10. Resultantly, the arbitrator came to pass the award dated 22nd January, 2021, which forms subject matter of challenge in the present petition.

11. The petitioner has chosen, in the present petition, to remain studiedly silent regarding the arbitration agreement between the petitioner and respondent, or the fact that, *vide* the said agreement, the parties had, in fact, agreed to the appointment of one person from the panel of six, in the schedule appended to the arbitration agreement. Even during oral submissions on earlier dates of hearing, the specific stand of Mr. Chaudhury was that there *was* no arbitration agreement between the parties. On being confronted, today, with the arbitration agreement, Mr. Chaudhury modifies his stance to contending that several documents were signed by his client, and that, though he has

signed the arbitration agreement – which, thankfully, he does not deny – he had not received any copy thereof.

12. Though, even on this ground, the present petition is liable to be dismissed, as having been filed by resort to deliberate concealment and suppression of facts, I have, nevertheless, heard Mr. Chaudhary at some length, regarding his challenge to the appointment of the sole arbitrator.

13. Mr. Chaudhary submits that the afore-extracted Clause 2.1 is in the teeth of Section 12(5) of the 1996 Act and the law laid down by the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***[1] and the judgment of this Court in ***Proddatur Cable TV Digi Services v. Siti Cable Network Ltd***[2]**.** Mr. Chaudhary has also relied on the decisions of the Supreme Court in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd***.[3] and ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)***[4] as well as the decision of this Court in ***VSK Technologies Pvt. Ltd. v. Delhi Jal Board***[5] and of the Bombay High Court in ***Lite Bite Foods Pvt. Ltd. v. Airports Authority of India***[6].

14. Mr. Chaudhary submits that, the grounds urged by him, to question the appointment of the arbitrator, constitute a legitimate basis for the setting aside thereof, as they fall within Section 34(2)(a)(ii) of

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[1] **AIR 2020 SC 59**
[2] **267 (2020) DLT 51**
[3] **(2017) 4 SCC 665**
[4] **(2020) 14 SCC 712**
[5] **2021 SCC OnLine Del 3525**
[6] **2019 SCC OnLine Bom 5163**

the 1996 Act.

15. I am of the opinion that there is no substance, whatsoever, in any of the submissions of Mr. Chaudhary.

16. The decisions, on which Mr. Chaudhary relies, are clearly distinguishable. None of those cases relates to a challenge against an award which stands passed under Section 34 of the 1996 Act. The grounds on which an award can be challenged under Section 34 of the 1996 Act are exhaustive and stand enumerated in Section 34(2), which may be reproduced, for ready reference, thus:

> "**34 Application for setting aside arbitral award. –**
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> *****
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> (2) An arbitral award may be set aside by the Court only if –
>
> (a) the party making the application furnishes proof that –
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
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> (iv) the arbitral award deals with a dispute not contemplated by or not

falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. — Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

17. The submission, of Mr. Chaudhary, that the ground on which he is seeking to found his challenge come within Section 34(2)(a)(ii) needs only to be urged to be rejected.

18. There is no substance, whatsoever, in the contention that Clause 2.1 of the arbitration agreement is not valid in law. The decisions on which Mr. Chaudhary has relied are cases in which the right to appoint the arbitrator enured preferentially in favour of one of the parties to the exclusion of other, or where the agreement did not provide any choice to the party, from the panel which was suggested by the opposite party.

19. Besides, as already noted earlier, these were not decisions in which the *award* was sought to be challenged under Section 34. The rigours of Section 34(1), therefore, did not apply to these cases.

20. On facts, too, the said decisions are clearly distinguishable. In ***Perkins Eastman***[1], sole and complete authority to appoint the arbitrator was conferred on the Managing Director of one the parties. This, held the Supreme Court, was unconscionable, as the Managing Director was a party interested in the outcome of the dispute. Alike situation obtained in ***Proddatur Cable TV Digi Services***[2], ***Lite Bite Foods***[6] and ***Central Organisation for Railway Electrification***[4], in fact, *rejected* the challenge, by the respondent in that, case, holding that the contractual stipulation, providing for appointment of the arbitrator from a panel maintained by the appellant, was valid. (Be it noted, the petitioner has not sought to question the impartiality of any of the persons, named in the panel in the Schedule annexed to the Arbitration Agreement.)

21. In ***Voestalpine Schienen GmbH***[3], Mr Chaudhury stresses the

following passage (para 28 of the report):

> "Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, *discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons*. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (*b*) & (*c*) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel."
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> (Emphasis supplied)

22. This passage does not, in any manner, assist Mr. Chaudhury, or the stand espoused by him. The arbitration agreement, in the present case, to reiterate, *does not* confer exclusive jurisdiction on the respondent to select the arbitrator from the panel contained in the Schedule. *Rather, the parties have themselves worked out the arrangement, by expressly stipulating that the arbitrator would be selected from the said panel by preferring a person, higher in the panel, to the ones below him and proceeding sequentially through the*

names. In appointing Mr. S S Yadav, the respondent merely adhered to the arrangement provided in the arbitration clause. It is, clearly, *not* a case where the respondent exercised a unilateral choice regarding appointment of the arbitrator.

23. ***VSK Technologies***[5], too, was a case in which the arbitration agreement provided for a unilateral right with the respondent to appoint the arbitrator. This was held to be impermissible, following ***Perkins Eastman***[1]. Interestingly, the reliance, by the respondent (in that case), on ***Central Organisation for Railway Electrification***[4] was found to be misguided as, unlike the situation which obtained in ***Central Organisation for Railway Electrification***[4], the arbitration agreement in the case before this Court *did not envisage selection of the arbitrator from a panel.* Para 21, from the report in ***VSK Technologies***[5], is relevant:

> "21. The reliance placed by Mr. Singh on the decision in the case of ***Central Organization for Railway Electrification v. ECI (supra)*** is misplaced. In that case, the Arbitration Clause provided for the Arbitral Tribunal to be constituted by Gazetted Railway Officers or three retired Railway Officers above a certain rank. The petitioner (Railways) was required to send names of four empanelled retired Railway Officers and the contractor was required to suggest two names out of the said panel for appointment as its nominee. The General Manager was required to appoint one of the names out of the two names as suggested by the contractor as the contractor's nominee and the remaining Arbitrator from the panel or outside the panel. The Supreme Court noted that the procedure adopted also took into account the option of the contractor. *The Court was of the view that since the agreement provided for the appointment of an Arbitral Tribunal out of the panel of serving/retired officers, the procedure as agreed by the parties ought to have been*

> *followed. In the present case, the Clause does not entail any such procedure for suggesting any names out of the panel of Arbitrators maintained by the DJB. Therefore, the contention that the decision of the DJB to nominate an Arbitrator must be sustained since the Arbitrator appointed was one from the panel maintained internally, is unpersuasive*. The question whether the DJB maintains a panel of Arbitrators is its internal matter. *The Arbitration Clause does not contemplate the appointment of any Arbitrator from the panel of Arbitrators maintained by the DJB and therefore, the decision in the case of* ***Central Organization for Railway Electrification v. ECI (supra)*** *is, wholly inapplicable in the facts of the present case*."
>
> (Emphasis supplied)

24. In the present case, the parties, with open eyes, had agreed to arbitration of the dispute between them by an arbitrator out of the panel which was scheduled in the agreement. Not only this, they had consciously provided that the names of arbitrator would be selected in order of preference, from the names contained in the said panel.

25. This is a conscious and deliberate protocol, worked out between the parties, for reference of the disputes between them to arbitration. The Court can hardly presume that the petitioner agreed to such a specific protocol blindfolded. If anything, Clause 2.1 places this aspect of the matter beyond any pale of doubt by further stating that the parties *consented to the appointment of the arbitrator in the said manner.*

26. The present case, therefore, is not one in which the right to appoint the arbitrator enured entirely in favour of the respondent to the prejudice of the petitioner, or where the petitioner was forced to

appoint an arbitrator out of the panel suggested by the respondent.

27. The appointment of the arbitrator has taken place strictly in accordance with the protocol suggested in Clause 2.1.

28. Section 34(2)(a)(ii) of the 1996 Act, clearly, does not apply.

29. No ground, whatsoever, for any interference, by this Court, with the impugned arbitral award, within the grounds envisaged by Section 34(2) of the 1996 Act, can be said to have been made out.

30. The present case, in the opinion of this Court, is a gross instance of abuse of the legal process. The petitioner has decided to remain silent, without responding either to the notice invoking arbitration or to any of the notices issued by the arbitrator during the course of arbitral proceedings. The petitioner did not file any application before the arbitrator, disputing his authority to continue with the proceedings. Nor did the petitioner invoked Sections 11, 13 or 14 of the 1996 Act, by moving this Court, questioning the authority of the arbitrator to continue with the proceedings.

31. I am constrained to take a view that, for reasons best known to the petitioner, it has chosen to take a chance, questioning the arbitral award, only after the award came to be passed, on grounds which have no substance, whatsoever, in the law. Apparently aware that there was no justifiable basis to question the appointment of the arbitrator, the petition preferred to remain a "watcher" in the proceedings.

32. The present instance, according to me, is one which requires to be quelled with a heavy hand so that the arbitral process is not abused and its sanctity remains unsullied.

33. As such, this petition is dismissed with costs of ₹ 50,000/-, to be deposited by the petitioner with the Delhi High Court Legal Services Authority (DHCLSA) within a period of four weeks from today.

C. HARI SHANKAR, J.

SEPTEMBER 9, 2021
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