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

+ O.M.P. (T) (COMM.) 105/2023, I.A. 22122/2023

MR. MOHAMMAD ESHRAR AHMEDPetitioner
Through: Ms. Swati Surbhi and Mohd.
Shahid, Adv.

versus

M/S TYSHAZ BUILDMART INDIA
PRIVATE LIMITEDRespondent
Through: None.

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

ORDER (ORAL)

03.09.2024

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1. This is a petition under Section 14(1)(a) of the Arbitration and Conciliation Act, 1996¹. The petitioner seeks termination of the mandate of Mr. Vishwanath Pratap Singh, who is presently conducting arbitration proceedings between the petitioner and the respondent as the sole arbitrator.

2. Notice of this petition was issued to the respondent. Notice stands served by speed post as well as by email. The speed post tracking report records that the package was delivered. The email has also been addressed at the email ID to which, the respondent responded with the petitioner.

3. Despite service, no response has been filed to this petition.

¹ "the 1996 Act", hereinafter



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There is no appearance on behalf of the respondent when the matter is called out.

4. I have heard Ms. Swati Surbhi, learned Counsel for the petitioner and have perused the record.

5. In this case, the record reveals that there is, in fact, no arbitration agreement between the parties within the meaning of Section 7 of the 1996 Act. Section 7 requires an agreement by the parties to submit dispute if arise, to arbitration. Section 7(3) requires an arbitration agreement to be in writing. Section 7(4) delineates the circumstances in which an arbitration agreement can be said to be in writing. Of these circumstances, the present case does not attract any of these circumstances.

6. There is no document, to which the petitioner has either appended its signature or expressed consent, envisaging resolution of dispute between the parties by arbitration.

7. Ms. Swati Surbhi has taken me to a notice dated 31 May 2023 addressed by the respondent to the petitioner. The notice refers to various invoices and proceeds to state thus:

“Respected Sir,

M/s Tyshaz Buildmart India Pvt Ltd having its Corporate Address at E-90, 7th Cross Avenue, Site-4, UPSIDC, Greater Noida, UP(DELHI-NCR), G.B.Nagar, Uttar Pradesh-201308 has been in the regular course of business with your goodself and a dispute has arisen between the parties to the invoices with regard to non-payment as per the invoices. As per the terms of invoice M/s



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Tyshar Buildmart India Pvt Ltd nominates the two arbitrators for possible appointment of arbitrator as follows- 1. Mr. Vishwanath Pratap Singh, Villa No. B-269, Amrapali Leisure Valley, Techzone 4, Sector-1. Greater Noida West-201306; and 2. Mr. Vikas Negi, House No. 37, Ground Floor, opposite Una Enclave Gate No.2, Mayur Vihar-1, New Delhi-110091, Email ID: vikas negi01@rediffmail.com. Mob: 8860029007.

Your goodself is requested to select one arbitrator from the two names given above as the arbitrator on your behalf and inform us within three days from the receipt of the present notice, failing which appropriate arbitration proceedings shall commence, which your goodself may please note.

Yours Sincerely
Mr. Sameer Suyeb

Authorized Signatory for M/s Tyshaz Buildmart Private Limited
Corporated Address at:
E-90, 7th Cross Avenue, Site-4, UPSIDC,
Greater Noida, UP(DELHI-NCR), G.B.Nagar,
Uttar Pradesh-201308
Email: tyshazbuildmart@gmail.com

8. This was followed by another notice dated 7 June 2023, from the respondent to the petitioner, which read thus:

“Dated: 07.06.2023

To

Mr. Mohammad Eshrar Ahmed,
C-109/A, Shaheen Bagh, Abul Fazal Enclave Part II,
Jamia Nagar, Okhla,
New Delhi-110025, Mobile No: 8826800994, +971 504507530
Email: cshrar.ahmedi@yahoo.com.cshranieim as

Ref: Letter dated 12.05.2023 & Letter dated 31.05.2023 sent by M/s Tyshaz Buildmart Private Limited to your goodself

Subject: Appointment of arbitrator deemed to be mutually appointed with the consent of both the parties

Respected Sir.

That by virtue of the previous Letter dated 31.05.2023, you



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were suggested two names of potential arbitrators. As per the arbitration clause you could either select one name or nominate one arbitrator of your own choosing within two days of receipt of the same. That since the period of two days has expired and you have neither selected one arbitrator nor nominated one arbitrator of your own choosing, you have waived your right to appoint an arbitrator.

In light of the above, we hereby appoint the following Arbitrator to resolve the disputes that have arisen between us

Mr. Vishwanath Pratap Singh, Villa No. B-269, Amrapali Leisure Valley, Techaone 4, Sector-1 Greater Noida West-201306.”

9. It is impossible to discern whether the invocation of arbitration, in the aforesaid notices, dated 31 May 2023 and 7 June 2023, is in sink with the arbitration agreement between the parties, for there is in fact, no such agreement. The only document in which resolution of dispute by arbitration finds reference are the invoices documents to which the notice dated 31 May 2023 refers. These invoices, submits Ms. Swati Surbhi, were received by the petitioner for the first time on or around 15 May 2023. The invoices have been placed on record. They do not contain the signature of the petitioner or anything to indicate that the petitioner had consented to the recitals in the invoices. Indeed, the invoices are practically unintelligible.

10. It is clear that, even assuming that the recitals in these invoices envisages resolution of dispute by arbitration, inasmuch as these invoices have not expressly or by necessary implication been accepted by the petitioner, they cannot be said to contain any arbitration agreement between the petitioner and the respondent.

11. No other document envisaging resolution of dispute by



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arbitration having ever been made available to the petitioner, it is clear that there is no arbitration agreement between the parties.

12. Ms. Swati Surbhi has place reliance on the judgment of the High Court of Madras authored by Sanjay Kishan Kaul, Chief Justice, as he then was, in *NSK India Sales Company Pvt Ltd v Proactive Universal Trading Company Pvt Ltd*². Paragraph 17 of the said decision read thus:

“17. In the sequence of documents issued, it is the respondent who first issued the purchase order. This does not contain an Arbitration Clause. The document of delivery of goods also does not contain an arbitration clause. It is stated to be signed by the ‘gate keeper’ of the respondent. It is only the invoice issued to the petitioner which contains the arbitration clause and it is stated to have been simultaneously issued in view of the factum of the same being interlinked to the goods received. This document neither contains the declaration in the prescribed form duly signed at the back nor is there any other endorsement so as to consider it as an acceptance on the part of the respondent. There is in fact thus no agreement whatsoever inter se the parties on the issue of the mode of resolution of the dispute through arbitration and there cannot be an arbitration clause by implication in any other document. In fact, the very fact that the respondent has not signed this document would show the unwillingness of the respondent to accept the arbitration as a mode of resolution of dispute, to which the petitioner had never protested.”

13. The position of law enunciated in paragraph 17 of *NSK India Sales Company* applies *mutatis mutandis*, to the case at hand. There is no arbitration agreement between the parties.

14. Besides, even if, it were to be assumed that there was an existence of any arbitration agreement, the arbitrator has not been

² 2015 SCC OnLine Mad 14146



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appointed by mutual consent. The law in this regard is perfectly clear. If one party writes to the other, seeking the appointment of the arbitrator, and the other party does not respond, the first party does not have a right to unilaterally appoint the arbitrator. The party has, in such a situation, to approach the Court under Section 11(5) or (6) as the case may be, for having an arbitrator appointed.

15. Even if it were, therefore, for the sake of argument, to be assumed that there existed an arbitration agreement between the petitioner and the respondent, and even if it were to be further assumed that the notice invoking arbitration dated 31 May 2023 was correct in law, the remedy with the respondent, on the petitioner not condescending to arbitration as suggested in the notice dated 31 May 2023, would have been to approach the Court under Section 11(5) to have an arbitrator appointed. The respondent could not have unilaterally proceeded to appoint an arbitrator, as it chose to do by the subsequent communication dated 7 June 2023.

16. Unilateral appointment of an arbitrator is completely impermissible. The arbitral proceedings consequent on such unilateral appointment stands vitiated as held by the Supreme Court in *Bharat Broadband Network Ltd v United Telecoms Ltd*³, *Perkins Eastman Architects DPC v HSCC (India) Ltd*⁴ and *Haryana Space Application Centre (HARSAC) v Pan India Consultants Pvt Ltd*⁵.

³ (2019) 5 SCC 755

⁴ (2020) 20 SCC 760

⁵(2021) 3 SCC 103



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17. An arbitrator, who is unilaterally appointed, is *de jure* incapable of functioning as arbitrator. The Court is justified, therefore, in terminating his mandate under Section 14(1)(a). Though Section 14(1)(a) ordinarily envisages a substitute arbitrator being appointed consequent on the mandate of the existing arbitrator being terminated, I have already held recently in *Precitech Enclosures Systems Pvt Ltd v Rudrapur Precision Industries*⁶ that there is no legal mandate on the Court to follow up every decision terminating the mandate of the existing arbitrator by the appointment of a substitute arbitrator.

18. In any case, such a consequential order cannot be passed in the present case, as there is no arbitration agreement in existence between the parties.

19. Accordingly, the mandate of Mr. Vishwanath Pratap Singh, presently acting as arbitrator between the petitioner and the respondent stands terminated.

20. The petition stands allowed in the aforesaid terms.

C.HARI SHANKAR, J

SEPTEMBER 03, 2024/aky

Click here to check corrigendum, if any

⁶ 2024 SCC OnLine Del 5364