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

+ O.M.P. (COMM) 99/2023, I.A. 4685/2023

M/S PGL ESTATECON PVT. LTD.Petitioner

Through: Mr. Yasobant Das, Sr. Adv.
with Mr. Dhananjay Bhaskar Ray & Mr.
Amol Sinha, Advs.

versus

M/S JYOTI ENTERPRISESRespondent

Through: Mr. Bhupesh Narula, Ms. Rinku
Narula and Mr. Anugrah Ekka, Advs.

+ O.M.P. (COMM) 100/2023, I.A. 4689/2023

M/S FLOZEN ESTATES AND DEVELOPERS
PVT. LTD.Petitioner

Through: Mr. Yasobant Das, Sr. Adv.
with Mr. Dhananjay Bhaskar Ray & Mr.
Amol Sinha, Advs.

versus

M/S JYOTI ENTERPRISESRespondent

Through: Mr. Bhupesh Narula, Ms. Rinku
Narula and Mr. Anugrah Ekka, Advs.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER

% **11.09.2024**

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1. Mr. Yasobant Das, learned Senior Counsel appearing for the petitioner submits that the learned arbitrator has been unilaterally appointed by the respondent without any consent from the petitioner



and without approaching this Court under Section 11 of the Arbitration and Conciliation Act, 1996¹.

2. The arbitration clause governing the relationship between the parties reads thus:

“2.0 PRELIMINARIES OF ARBITRATION.

2.1 The arbitration is to be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding therefore this Tribunal before entering into the reference conveyed the acceptance of the appointment by making mandatory disclosure under Fifth schedule and Schedule VI of section 12(1)(a), (b) of Arbitration (Amendment) Act-2015 with regard to qualification as well as independence and impartiality of Arbitrator.

2.2 The claimant filed a statement of claims dated or 26.03.2021.

2.3 The venue of the arbitration is to be such place as may be fixed by the arbitrator in his sole discretion; therefore, all the hearings were held at Delhi/New Delhi. The first and preliminary hearing was held at 2 PM on 01.04.2021 at New Delhi through video conferencing, The claimant was represented by Shri Hari Om Gupta and Sh. Sukrit Gupta Advocates, and none appeared for the Respondent.

2.4 Despite the Respondents entering appearance before this Tribunal on 04.09.2021 and undertaking to file their Statement of Defense as also assist with the Fees and other procedural matters on 18.09.2021, no further appearance was entered into thereafter despite repeated requests. In light of the same, this Tribunal was constrained to proceed under Section 25 of the Arbitration and Conciliation Act, 1996.”

3. Clearly, the arbitration clause envisages the proprietor of the respondent himself being the arbitrator, and is, therefore, in the teeth of Section 12(5) of the 1996 Act.

¹ “the 1996 Act”, hereinafter



4. Nonetheless, the position in law is that, even if the arbitration clause is unilateral, if the actual appointment of the arbitrator was not unilateral but with consensus *ad idem*, the arbitration would still be saved.

5. In the present case, however, Mr. Narula, learned Counsel for the respondent submits that notice invoking arbitration was issued by the respondent to the petitioner under Section 21 of the 1996 Act on 13 March 2021. A reading of the said notice reveals that it is not *stricto sensu* a notice seeking reference of the dispute to arbitration but is actually in the nature of a demand notice, which states that in the event of the demand not being made by the petitioner, the respondent would initiate arbitral proceedings.

6. Even if one were to treat the said notice as equivalent to a Section 21 notice, Mr. Narula, on being queried by the Court, acknowledges that the respondent never approached this Court under Section 11 of the 1996 Act before the arbitrator entered on reference.

7. In that view of the matter, the arbitration *prima facie* is invalid *ab initio*. Even if it were to be assumed that the notice dated 13 March 2021 was entitled to be treated as a Section 21 notice, on the petitioner not having responding to the notice, the respondent could not itself have appointed an arbitrator, and would have had to approach this Court under Section 11 of the 1996 Act. That was never done.

8. Mr. Das further submits that the arbitrator, who was appointed by the respondent and who has passed the impugned Award, is the



respondent's own Counsel. He submits that, before the arbitrator, two requests were made in writing by the petitioner, calling on the arbitrator not to proceed with the matter as he lacked jurisdiction as his appointment was invalid but that neither of these requests have been addressed.

9. It was in view of this limited nature of the dispute that I had issued emergent notice returnable today.

10. Mr. Narula, however, submits that his client is not in Delhi and seeks some time to take instructions.

11. In that view of the matter, let reply to this petition, if any, be filed on or before 18 September 2024 with advance copy to the learned Counsel for the petitioner, who may file rejoinder, if any, on or before 22 September 2024.

12. No extension of time to file reply or rejoinder shall be granted.

13. List on 24 September 2024 for hearing and disposal.

14. Given the above facts, till the next date of hearing, the execution of the impugned award shall remain stayed.

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15. The award under challenge in these proceedings suffers *prima facie* from the same infirmity which plagues the award under



challenge in OMP (Comm) 99/2023, as it has been passed by the same arbitrator appointed in the same manner.

16. As such, issue notice.

17. Notice is accepted on behalf of the respondent by Mr. Bhupesh Narula, Advocate.

18. Reply to this petition, if any, be filed on or before 18 September 2024 with advance copy to the learned Counsel for the petitioner, who may file rejoinder, if any, on or before 22 September 2024.

19. No extension of time to file reply or rejoinder shall be granted.

20. List on 24 September 2024 for hearing and disposal.

21. In the meanwhile, till the next date of hearing, the execution of the impugned award shall remain stayed.

C.HARI SHANKAR, J

SEPTEMBER 11, 2024/aky

Click here to check corrigendum, if any