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

+ ARB.P. 398/2009

INDIABULLS REAL ESTATE LIMITED Petitioner

Through Mr. Darpan Wadhwa with
Mr. Ankit Shah, Mr. Akshay
Ringe and Ms. Rohana Hameed,
Advocates

versus

M/S VIRASAT AGRO FOODS

PVT. LTD. & ANR.

..... Respondents

Through Mr. Hemant Chaudhri with
Mr. Dhananjay Kumar Singh,
Mr. S.W. Haider and Mr. Amit
Mishra, Advocates for R-1.
Mr. Pallav Saxena, Advocate for R-2.

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Date of Decision : May 05, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Mr. Pallav Saxena, learned counsel for respondent no. 2 has today across the bar tendered a reply affidavit. The same is taken on record.
2. Present petition has been filed under Section 11 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996").

3. Mr. Darpan Wadhwa, learned counsel for petitioner submits that petitioner has invoked the arbitration clause as it seeks to recover monies due and payable under the Share Purchase Agreement (in short “Agreement”) dated 4th December, 2008. He drew my attention to Clause 9.7 of the Agreement which contains the arbitration clause. The said Clause 9.7 reads as under :-

“9.7 Disputes, if any, that may arise between the Parties with respect to this Agreement, or interpretation of terms, or its performance or execution unless resolved mutually shall be referred to a mutually agreed arbitrator and law under the provisions of Indian Arbitration Act shall be applicable to all proceedings. The venue of arbitration shall be Gurgaon/Delhi.

4. On other hand, Mr. Hemant Chaudhry, learned counsel for respondent no. 1 submits that the matter cannot be referred to arbitration as the underlying understanding under the Agreement was that respondent no. 2 would be able to purchase land admeasuring 11.30 acres situated at Tehsil Sohna, District Gurgaon, Haryana. According to him, even though the said land was transferred in the name of respondent no. 2 company, it was later on learnt by respondent no. 1 that there were injunction orders restraining the owners of the land from selling the said property to respondent no. 2. Consequently, Mr. Chaudhry submits that the Agreement is vitiated by fraud and the priority which the respondent no. 2 company had with regard to colonisation licence did not materialise. In this connection, he relies upon the judgments of Supreme Court in *N. Radhakrishnan Vs. Maestro Engineers & Ors.* reported in (2010) 1 SCC 72 and *India*

Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd. reported in (2007) 5 SCC 510.

5. Mr. Chaudhry lastly submits that respondent no. 1 has filed a suit in Civil Court at Gurgaon seeking declaration that the Agreement executed between the petitioner and respondent no. 1 is null and void and an injunction order has been passed by the trial court. The said order is reproduced hereinbelow :-

“Present : Mr. M.S. Vashishta Adv., for the plaintiff.

Summons issued to the defendant no. 1 received back with the report of refusal. Case called several times since morning. It is already 2.30 PM. None has appeared on behalf of defendant no. 1. Now defendant no. 1 to be summoned by way of substituted service i.e., munadi for 8.10.2009. Notice to remaining defendants no. 2 to 17 be also issued for that date. Till further orders the defendant no. 1 is restrained from taking any steps in pursuance to cheque No. 21863 drawn on Axis Bank Limited, Sector 14, Gurgaon, amount of Rs. 9.75 crores. Now to come upon the date fixed.”

6. In rejoinder, Mr. Wadhwa points out that land at Sohna was to be sold by third parties and not the petitioner and injunction order with regard to land, if any, was passed against the said third parties and not the petitioner.

7. Mr. Wadhwa also states that petitioner has filed an application under Section 8 of the Act, 1996 seeking reference of the suit filed at Gurgaon for arbitration.

8. Before I deal with the rival contentions, I may point out that the

Supreme Court in *National Insurance Company Ltd. vs. Boghara Polyfab (P) Ltd.* reported in (2009) 1 SCC 267 has clearly outlined the issues which have to be determined by this Court before making a reference under Section 11 of the Act, 1996. The relevant portion of said judgment is reproduced as under:

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

(emphasis supplied)

9. As far as the territorial jurisdiction is concerned, since Mr. Wadhwa has made a statement that petitioner shall be seeking relief of only recovery of monies against respondent no. 1—which has a registered office at New Delhi – I am of the view that this Court has territorial jurisdiction to entertain and decide the present Section 11 petition.

10. As far as allegation of fraud is concerned, it is settled law that even though the word ‘fraud’ has been ritually repeated, it would not prevent even a civil court from dismissing a suit under Order 7 Rule 11 of Code of Civil Procedure, 1908. (Refer to *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Ors.* reported in (1998) 2 SCC 70).

11. In the present case, I find that even if I were to accept respondent no. 1’s plea that fraud, if any, is alleged to have been committed, the same would be attributable to the owners of the land in question and not the petitioner. In fact, in the Agreement executed between petitioner and respondent no.1 there is no representation and/or warranty given by petitioner that either the aforesaid land is free from litigation or that the petitioner would ensure that DTCP, Haryana grants the colonisation licence. In this connection, I may refer to some of the relevant clauses of the Agreement, which read as under :-

“AND WHEREAS the Purchaser has conducted a due diligence with respect to the Company, the land owned by the Company and with respect to the license applied before the Director, Town and Country Planning, Haryana and the Purchaser is satisfied with the due diligence conducted by it.

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3. **Consideration and Payment.**

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3.2 *The Parties understand that applications for grant of commercial license made by the Company for development of land admeasuring 11.30 acres situated at Kherki Dhaula, Tehsil Sohna, Distt. Gurgaon and owned by M/s. Padmini Technologies Limited (said Land), the details of which is shown in Annexure – I of this Agreement, is pending before the competent authorities. In no circumstances the Seller shall ever have any responsibility or liability of any kind whatsoever towards obtaining the Letter of Intent (LOI) / said license in respect of the said Land.*

3.3 *The Seller shall be entitled to encash the undated cheque for Rs. 9,75,00,000/- on the 30th day from the LOI being issued by the authorities or 31.07.2009 whichever is earlier.*

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3.6. *The Purchaser has represented that it is at an advanced stage of acquiring, either in its own favour or in favour of its nominee, the entire rights and title in the said Land admeasuring 11.30 acres situated at Kherki Dhaula, Tehsil Sohna, Distt. Gurgaon. As a security towards the payment of balance sale consideration along with interest thereon, if any, as mentioned under this Agreement by the Purchaser, the Purchaser shall cause the mortgage of said Land admeasuring 11.30 acres situated at Village Kherki Dhaula, Tehsil Sohna, Distt. Gurgaon in favour of the Seller simultaneous to the execution of this Agreement by the Parties. The mortgage for this purpose shall be only equitable mortgage by depositing the original title deeds of the said Land with the Seller and the Seller shall enforce the mortgage only on default of the Purchaser with respect to payment of the entire Sale Consideration under the Share Purchase Agreement including any interest thereon. The said mortgage shall be redeemed as soon as the entire sale consideration is received by the Seller in terms of clause 3.3 of this Agreement or the sale consideration along with interest thereon is paid by the Purchaser in terms of clause 3.5. Non encashment of the said cheque or non payment of balance sale consideration along with interest thereon as envisaged in clause 3.5 shall*

be deemed as default on part of the Purchaser for the purpose of exercising redemption of the mortgage.

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5. ***Representations and Warranties of the Seller and the Company***

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5.5 *The applications for grant of license on the said Land applied by the Company are subsisting as on the date of execution of this Agreement. The Purchaser has to its satisfaction conducted the due diligence of the said applications and the Purchaser agrees that the Seller shall in no way be liable and be held responsible for any actions of the concerned authorities with respect to the said applications.*

12. From the aforesaid clauses, it is apparent that petitioner had given no warranty with regard to either the title of the land that was being purchased by respondent no. 2 from third parties or with regard to the colonisation licence. Moreover, independent due diligence had been carried out by respondent no. 1 at its own risk and costs. Consequently, for any defect in the title of the land and any fraud perpetrated by the owners of the land, it cannot be said that the Agreement executed between the parties is vitiated by fraud.

13. In any event, the arbitration clause in the Agreement is not disputed. Since the arbitration clause is a severable one, it would survive even if the Agreement is held to be void.

14. I am further of the opinion that pendency of the proceedings as well as injunction order in Gurgaon does not fetter this Court from deciding the Section 11 proceedings inasmuch as it is only this Court which can decide the present matter.

15. Accordingly, present petition is allowed and Mr. Justice (Retd.) P.K. Bahri, 171, Jor Bagh, New Delhi – 110 003, Mobile No. 9818542737 is appointed as Sole Arbitrator to adjudicate upon all the disputes between the parties. The learned Arbitrator shall be entitled to fix his own fee schedule, which would be equally shared by both the parties.

16. Both the parties are directed to appear before the learned Arbitrator on 28th May, 2010 at 4:30 p.m. at his residence on which date, petitioner-claimant would file its claim statement. Since date of hearing has been fixed in the presence of both the counsel, no notice is required to be issued by the learned Arbitrator for the said date of hearing. The Arbitrator is requested to expeditiously adjudicate all the disputes between the parties. Registry is directed to communicate a copy of this order to the learned Arbitrator.

17. With the aforesaid observations, present petition stands disposed of.

MANMOHAN,J

MAY 5, 2010

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