

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: July 29, 2009

Date of Order: August 12, 2009

+ AA Nos.9/09 & 10/09

%

12.08.2009

M/S. RITMAY BUILDERS PVT. LTD.

.... Petitioner

Through : Mr. Rajive Sawhney, Sr. Adv. with
Mr. Sanjay Bhatt & Mr. Abishek Kumar, Advs.

Versus

MR. PRATAP DUBE & ORS.

.... Respondent

Through: Mr. Dhruv Mehta with Mr. Vijay Nair &
Mr. Rajat Joneja, Advs.

&

M/S. PROVIDENCE BUILDTECH PVT. LTD. Petitioner

Through : Mr. Rajive Sawhney, Sr. Adv. with
Mr. Sanjay Bhatt & Mr. Abishek Kumar, Advs.

Versus

MR. PRATAP DUBE & ORS.

.... Respondent

Through: Mr. Dhruv Mehta with Mr. Vijay Nair &
Mr. Rajat Joneja, Advs.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. The above applications are made by the petitioner for appointment of an Arbitrator. The petitioner has relied upon the agreement dated 28th November, 2007 entered into between the parties which contains an Arbitration Clause and provides that in case of dispute or controversy arising

from the agreement, the parties shall take recourse to arbitration under Indian Arbitration Act as applicable at the time of filing of Arbitration Applications. The contention of respondent is that this agreement dated 28th November, 2007 was obtained by fraud and the parties had already settled all their disputes and the petitioner had given 'No Due Certificate' dated 30th May, 2007 to the respondent discharging respondent from all liabilities.

2. The brief facts relevant for purpose of deciding this petition are that the parties initially entered into an MOU dated 19th December, 2006. Under this MOU a Special Purpose Vehicle/Joint Venture Company was formed for buying, selling and developing agricultural land. This MOU was between the same parties. The MOU also contained an arbitration clause. Under the MOU, the respondent who was to contribute money but in lieu of his share had undertaken to provide expert service and obtain change of land user for the company; gave security of his property namely 8, Golf Links, New Delhi. It was provided in the MOU that the amount due under MOU shall be the first charge over this property for recovery of all payments made as loan and interest thereon in case of failure of the respondent to obtain CLU (change of land user) for the agricultural land in question. Thereafter, another MOU dated 30th May, 2007 was signed between the parties wherein it was recorded that due to change in certain conditions and circumstances which enabled the execution of MOU dated 19th December, 2006, the parties have mutually agreed to vary the terms and condition of the MOU. In this MOU it was stated that all the sums paid by second party (petitioner) in the form of loan, advance, interest to the third party shall be treated as having been adjusted against the services and expertise provided by the third party to the

second party in the business and nothing remained due. In pursuance of this MOU a 'No Due Certificate' was also issued.

3. Agreement dated 28.11.2007 relied upon by the petitioner is stated to have been executed by the respondent after this second MOU. The contention of petitioner is that the second MOU did not discharge respondent from his liability under the MOU dated 19.12.2006, moreover it was obtained by the petitioner by playing fraud and misrepresentation. The MOU dated 30.5.2007 and letters of 'No Due Certificate' were liable to be set aside and declared void because of the misrepresentation and falsehood. It is stated that immediately when the petitioner learnt about this misrepresentation, the petitioner contacted the respondent and the respondent agreed to fulfill the following terms and conditions:

"To immediately send his letter of resignation as a director of PBPL and transfer the shares and his rights to the shares of PBPL to the Petitioner's directors and at par.

To refund Rs.15 crores in a maximum of three installments to PBPL and that he would accordingly give fresh cheques to PBPL for the same in lieu of three earlier cheques of Rs.5 crores each that he had given in favour of the petitioner but on the account and for the benefit of MIPL. He was allowed some time before encashing these cheques. The said time period was to be discussed further and finalized.

That the Respondent no. 1 would complete the acquisition of the NOIDA land from the Society and in the name of PBPL and not in the name of Respondent no. 2 as had been initially proposed.

That on his arranging and completing the purchase by PBPL of the above Noida land, the Respondent no. 1 would then refund a further Rs.3.87 crores only and within an agreed time period, and

That if the Respondent No. 1 failed to secure and complete the purchase of the Noida land for PBPL within a

time period to be agreed, he would then refund the entire Rs.14.87 crores to PBPL also and in addition to the Rs.15 crores for which he was to give Post Dated Cheques."

4. Petitioner submitted that subsequently an exit agreement was executed between the parties on 28th November, 2007 which contained an arbitration clause and which has been invoked by the petitioner for settlement of pending disputes between the parties.

5. The contention of respondent is that the talks of settlement were going on between the parties. The agreement dated 28th November, 2007 was prepared but was not signed by the parties. Since the respondent was to leave for abroad, he signed the agreement and left it with his Chartered Accountant Mr. TAS Mani and gave instructions that it should be given to the petitioner only when instructed to do so. The respondent came back from abroad and enquired from his Chartered Accountant, Mr. TAS Mani, who told him that the agreement was still lying with him. Thereafter, one day the petitioner sent one of his representatives to Mr. TAS Mani who misled Mr. Mani that the parties have arrived at a settlement and some changes were to be made in the agreement. On the basis of this misrepresentation, the agreement was obtained from Mr. TAS Mani and the respondent put his signatures on it. The agreement dated 28.11.2007 was thus obtained by fraud. It is also submitted by the respondent that in view of the MOU dated 30th May, 2007 signed between the parties, 5 lakh shares held by nominees of petitioner were liable to be transferred to the respondent no. 1 or its nominees and the petitioner was illegally holding all the said 5 lakh shares. The dispute regarding transfer of shares was taken to Company Law Board.

The petitioner did not disclose to the Company Law Board about the existence of the Arbitration Agreement between the parties nor moved an application before the Company Law Board under Section 8 of Arbitration and Conciliation Act alleging the existence of Arbitration Agreement. It is only when the respondent filed a suit being CS(OS) No.938/08 before this Court seeking a declaration regarding notice issued by the petitioner, claiming himself to be director and shareholder of respondent's company, to be bad in law along with other reliefs, the petitioner moved application under Section 11(5) of the Arbitration and Conciliation Act. The stand taken by the petitioner regarding facts in that suit and stand taken by the petitioner in the present application also did not match.

6. It is argued by counsel for the respondent that since the respondent had assailed the existence of the Arbitration Agreement, this Court should not entertain this application under Section 11(5) of the Arbitration and Conciliation Act and should not appoint the Arbitrator. On the other hand, it is stated by counsel for the petitioner that the respondent's stand that the MOU dated 28th November, 2007 was obtained by fraud, is a false stand. The signatures on the MOU have not been denied by respondent. The witness to the MOU was Mr. TAS Mani, the Chartered Accountant of the respondent. The respondent cannot take a stand that the agreement was obtained by fraud. The agreement also contained signatures of parties on those portions of the MOU, which were scored off. Thus, there can be no doubt that there was an Arbitration Agreement between the parties and the dispute was required to be settled through arbitration.

7. In ***SBP & Company vs. M/s. Patel Engineering Ltd.*** AIR 2006 SC 450, the Supreme Court observed that at the stage of appointment of Arbitrator the satisfaction required is merely of a prima facie nature and the Chief Justice does not decide lis nor contentious issues between the parties. Section 11 neither contemplates detailed inquiry nor trial nor a finding on controversial or contested matters. In the present case, the Court has therefore to see whether prima facie there was an Arbitration Agreement between the parties and whether there was a dispute between the parties under the agreement containing arbitration clause which required reference to the arbitrator. The perusal of material placed by both the parties on record show that the parties entered into an MOU dated 19.12.2006 initially for procuring agricultural land for the purpose of development and the respondent had agreed to Mortgage his property No. 8, Golf Links, New Delhi since the respondent was not contributing the amount required to the joint venture. The property was mortgaged for security of payment of dues by the respondent. After this MOU dated of 19th December, 2006, a collaboration agreement was entered into between the parties on 3rd February, 2007. In the collaboration agreement, it was recorded that the respondent had handed over the actual physical possession of the property bearing no. 8, Golf Links, New Delhi to the developer. The developer in this case was the petitioner. This agreement was entered into to ensure the refund of huge amounts involved in the MOU dated 19.12.2006 payable by the respondent. Thereafter, came MOU dated 30th May, 2007 which again gave detailed terms and conditions and it was recorded that the petitioner has issued 'No Due Certificate' to the respondent for the amount given/paid by the petitioner. The amount payable by the respondent was to be treated as

service/expertise charges of the respondent. Consequently, letters were also written. The petitioner has alleged that this agreement dated 30th May, 2007 was obtained through falsehood and by playing upon the emotions of the petitioner and making false representation. However, the fact remains that the transaction between the parties continued and this fact is clear from the subsequent correspondence between the parties and subsequent payments exchanged between the parties. Then, came the third MOU dated 28th November, 2007 which the respondent alleges was obtained by misrepresentation from his Chartered Accountant. It is admitted fact that respondent filed a suit against the petitioner in respect of the disputes which arose between the parties because of the transactions which took place in furtherance to MOU of December, 2006 and continued even after MOU dated 28.11.2007. This Court cannot hold trial whether the MOU dated 28th November, 2007 was kept by the respondent duly signed by himself and his Chartered Accountant only for a future date. The very fact that this MOU was prepared and was signed by the respondent and his Chartered Accountant, to be signed by the petitioner at a future date, shows that the transaction between the parties which started on 19th December, 2006 was not yet over and the contractual relationship between the parties was continuing and the contract was continuing. It is for this reason that MOU dated 28th November, 2007 provided a mechanism for settlement of disputes between the parties through arbitration. Prima facie, there exists an Arbitration Agreement between the parties executed in writing and duly signed by both the parties. Whether this agreement was signed voluntarily by the respondent or it was obtained by misrepresentation from the Chartered Accountant of the respondent is a matter of trial and at this stage the Court cannot go into this

issue and only the Arbitrator can decide this during the arbitration proceedings on the basis of evidence. I, therefore, consider that prima facie there exists an Arbitration Agreement between the parties and the disputes between the parties have to be decided through the arbitration. The existence of a dispute between the parties is not an issue. The respondent has filed a suit against the petitioner seeking certain declarations and other reliefs. The petitioner also has specified disputes in this application which arise out of the MOU. I, therefore, consider that this application under Section 11 made by the petitioner has to be allowed. I therefore allow these applications.

8. Sh. G.P. Thareja, Retd. Additional District Judge is appointed as an Arbitrator to adjudicate disputes between the parties. The parties shall appear before Sh. G.P.Thareja, Retd. Additional District Judge on 3rd September, 2009.

9. Copy of this order be sent to Sh. G.P. Thareja, Retd. Additional District Judge. Sh. Thareja shall fix his own fee taking into account the labour involved in the matter.

August 12, 2009
ak

SHIV NARAYAN DHINGRA J.