

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

% *Date of Judgment : 16.02.2012*

+ CRP 128/2004 and CM No. 85/2012

M/S R.S. BUILDERS & ENGINEERS LTD. Petitioner
Through Mr. Prabhjit Jauhar, Adv.

versus

BUMI HIWAY (M) SDN BHD. Respondents
Through None.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J: (Oral)

1. The order impugned is the order dated 19.2.2004 vide which the application filed by the defendant under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking reference of the disputes to arbitration, had been dismissed.

2. Record shows that the present suit is the suit for declaration that the consequential relief of permanent and mandatory injunction.

3. There are eight defendants who have been arrayed in the plaint.

Prayers are contained in para 28 which read herein as under:-

*“a) to pass a decree of declaration to the effect that the alleged
Joint Venture agreement dated 24.3.2001 and 28.3.2001 and*

alleged GPA dated 16.4.2001 and other related documents are illegal, null and void having been forged and fabricated to procure work contract illegally by defendant company from the defendant/employer no.7.

b) A further decree of Declaration to the effect that the partnership agreement dated 1.4.2001 is legally not binding having neither been acted upon nor ever having started carrying on the desired business and even otherwise having become redundant and having been already dissolved as such by the plaintiff with a consequent relief of;

c) a decree of permanent injunction restraining the defendant company (defendant nos. 1 to 6) from using name and goodwill of the plaintiff Company, the alleged partnership firm and the alleged Joint Venture firm for procuring or executing any project/work so procured illegally in the name of plaintiff company and the alleged Joint Venture firm and with a further consequent relief of a decree.

d) of mandatory injunction against defendant no.7 and 8 to cancel/terminate all agreements relating to any work/project awarded to the defendant company in the name of alleged joint venture firm and take such appropriate legal action against defendants No. 1 to 6 for playing fraud, misrepresenting the facts and submitting fake, false and fabricated documents to defendant no.7 for procuring work contracts illegally in the name of joint venture firm and also grant such further relief/relief against the defendants as may be found necessary and just for the final decision of this case.

e) The litigation and exemplary costs under Section 35 – A of CPC may also kindly be awarded.”

4. The contention of the plaintiff as is evident from the averments made in the plaint is that defendant No.1 R.S. Builders had made misrepresentations to the plaintiff and pursuant thereto forged and fabricated documents were got executed by the plaintiff which include the joint venture agreements dated 24.3.2001, 28.3.2001, GPA dated 16.4.2001 and partnership agreement dated 1.4.2001; the contention being that these documents are fake, forged and fabricated; all these acts were committed by the defendants with a view to obtain a wrongful gain for themselves and to cause a wrongful loss to the plaintiff; a fraud has been played upon the plaintiff. The aforementioned prayers were accordingly made. Prayer 'c' is a specific prayer directed against the defendant No. 1 to 6 of whom defendant No. 1 is company and defendant Nos. 2 to 6 its directors. Prayer "d" is made qua defendant nos. 7 and 8 who are public servants.

5. In the course of the proceedings before the trial court, the present application under Sec. 8 of the said Act had been filed. Contention before the trial court being that there is an arbitration clause contained in the joint venture agreements dated 24.3.2001 and 28.3.2001 as also in the partnership agreement dated 1.4.2001. There is no dispute to this

proposition and attention has been drawn to the said arbitration clause contained in the aforementioned joint venture agreements and the partnership agreement dated 1.4.2001. The vehement contention of the petitioner being that since these agreements contained an arbitration clause and the dispute have arisen out of the aforementioned agreements, the matter must be referred for arbitration; in fact there is a mandate upon the Court in these circumstances to make a reference to arbitration. For this proposition, reliance has been upon the judgment of the Apex Court reported in (2003) 3 SCC 686 in Agri Gold Exims Ltd v. Sri lakshmi Knits & Wovens & Ors.. Reliance has also been placed on 133 (2006) DLT 297 in Shukaran Devi v. Om Prakash Jain & Anr to support the submission that even if a fraud has been alleged by one party qua the said arbitration agreement, there is nothing to stop the Arbitration forum for adjudicating upon the said fraud/forgery and the trial Court in these circumstances declining to refer the disputes to arbitrations has committed an illegality.

6. None has appeared for the respondent, although he has been served.

7. There is no dispute to the proposition if all the requirements of Section 8 of the Arbitration Act are fulfilled, there is a mandate upon the court to refer the dispute to arbitration.

8. The Apex Court while dealing with a power of the Arbitrator in the context of fraud in N. Radhakrishnan vs. Maestro Engineers and Ors. reported in (2010) 1 SCC 72 noted hereinasunder:-

“The learned Counsel for the respondents on the other hand argued that when a case involves substantial questions relating to facts where detailed material evidence (both documentary and oral) needed to be produced by either parties, and serious allegations pertaining to fraud and malpractices were raised, then the matter must be tried in court and the Arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation.

In our opinion, the contention of the respondents relating to the jurisdiction of the Arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the Arbitrator”.

9. The Apex Court in (2007) 5 SCC 510 India Household and Healthcare Ltd. Vs. LG. Household and Healthcare Ltd. has held as under:-

“It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well known, vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law.”

10. The averments made in the present case clearly shows that the entire case of the plaintiff is bordered on a case of fraud and perjury which the defendant had committed upon him pursuant to which the aforementioned documents were got executed through him; these allegations of fraud require a detail examination and trial; this exercise can also be gone into by the Civil Court; it may not be in the domain of the Arbitrator as a detail and elaborate production of evidence would be required to establish the claim of fraud and perjury as set up by the plaintiff.

11. Even otherwise the prayers made by the plaintiff in the present case especially the prayer ‘c’ and ‘d’ which are directed against the persons other than the parties to the Arbitration Agreement i.e. defendant Nos. 2 to 6 being the directors of defendant 1 who are

admittedly not parties to the Arbitration Agreement. There is also no dispute to the proposition that a company is a distinct legal entity and has an entity distinct from its directors. Defendant Nos. 7 to 8 are also government officers. The prayers made against the aforementioned defendants cannot also be gone into or examined by the Arbitrator.

12. These matters thus would be clearly outside the ambit of the Arbitration Agreement and in view of the ratio of the judgment of the Apex Court in Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya reported in AIR 2003 SC 2252, reliefs which are claimed in the suit which are admittedly outside the Arbitration Agreement and also between other persons who are not parties to the Arbitration Agreement the question of the applicability of Section 8 would not arise. In this factual scenario the Trial Court dismissing the application under Section 8 of the Arbitration Act and refusing to refer the disputes to arbitration suffers from no infirmity.

13. Petition is without any merit; dismissed.

FEBRUARY 16, 2012/ 'raj'

INDERMEET KAUR, J