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HIGH COURT OF DELHI AT NEW DELHI

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OMP No.341/2009

Date of Decision : 29.05.2012

ANSAL HOUSING & CONSTRUCTION LTD. Petitioner
Through: Mr. A.S. Chandhiok and
Mr. Suhail Dutt, Sr. Adv.
with Mr. Vikas Tiwari and
Mr. Ritesh Kumar, Advocates.

Versus

AJB DEVELOPERS (P) LTD. Respondent
Through: Mr. Sandeep Sethi, Sr. Adv.
with Mr. Gurmehar Sistani,
Adv.

AND

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Arbitration Application No.47/2010

ANSAL HOUSING & CONSTRUCTION LTD. Petitioner
Through: Mr. A.S. Chandhiok and
Mr. Suhail Dutt, Sr. Adv.
with Mr. Vikas Tiwari and
Mr. Ritesh Kumar, Advocates.

Versus

AJB DEVELOPERS (P) LTD. Respondent
Through: Mr. Sandeep Sethi, Sr. Adv.
with Mr. Gurmehar Sistani,
Adv.

**CORAM :
HON'BLE MR. JUSTICE V.K. SHALI**

V.K. SHALI, J.

1. These are two petitions filed by the petitioner u/S 9 and Section 11 of the Arbitration and Conciliation Act, 1996 seeking a direction restraining the respondent company from transferring, mortgaging, creating any charge or lien on the share holding of the company and/or registering any transfer of shares or causing the same to be registered by the respondent company and from alienating, transferring, creating any third party right or interest, parting possession with and/or encumbering in any manner whatsoever with any of the immovable assets of the respondent company, as per and in accordance of MOU dated 7.12.2006 pending resolution of disputes or claims of the petitioner company in arbitration. So far as the petition u/S 11 is concerned, that is for appointment of an independent Arbitrator to adjudicate the dispute between the parties.
2. Briefly stated, the facts of the case are that in November 2006 the respondent company is alleged to have made a representation to the petitioner company that it had acquired contiguous agricultural land measuring 150 acres situated on the By Pass Road, Village Valla & Village Verka, District Amritsar, Punjab, duly approved under the Mega Project Schemes by the

Govt. of Punjab for the development of residential colony. The petitioner and the respondent company entered into a MOU/ Agreement dated 7.12.2006, whereby, the respondent company agreed to transfer its rights, title and interest in the said land/ project by causing its promoters to transfer all their shares to the petitioner company at a value derived after reducing the liabilities of the respondent company, for a total consideration calculated @ ₹68 Lac per acre amounting to almost ₹102 Crores. A separate detailed agreement covering all the aspects of the transaction had to be executed within 30 days from the date of MOU. However, due to failure of the respondent company in giving specific details of complete contiguous land and its revenue records, measurement, interest etc. for the purpose of ascertaining the value of shares, the separate detailed agreement for the transfer of shares never got executed.

3. The petitioner alleges that in the beginning of the year 2008, the petitioner company while carrying out the due diligence of the respondent company came to know that the respondent was only having approx. 80 acres of clear and developable contiguous land as against the false representation of having approx. 150 acres of clear land. Petitioner also learnt that the

respondent had further about 60 acres of land which is not contiguous and approx 38 acres of land falls in 'No Construction Zone' being within 1000 yards of the Vallah Army Ammunition Dump.

4. It is further alleged that the said fact had been deliberately suppressed by the respondent company at the time of execution of MOU whereas the petitioner duly acted upon the MOU and made various payments to the respondent company from time to time totaling to a sum of approx. 34 Crores till date. Despite the receipt of the aforesaid amount, the respondent company is alleged to have still persisted in its breaches and defaults.
5. It is alleged that till date the respondent company does not have contiguous land as represented which was vital for the development of the project and for obtaining the sanction from the competent authority. In addition to this till date, the respondent company has been unable to acquire clear/licensable title for approx. 54 acres of land.
6. It is averred by the petitioner that on 26.7.2009, the petitioner company learnt that the promoters of the respondent company are already in process of transferring the share holding of the

company and immovable assets to the third party and therefore they were constrained to file the present petition.

7. It was also stated that the petitioner company has already paid the substantial amount of money and it was ready and willing to pay the balance amount to the respondent as and when the later would agree to transfer the shares at the agreed rate in favour of the petitioner.
8. So far as the question of jurisdiction of Delhi Courts is concerned, it was averred that the respondent company has its Registered Office in Delhi. The petitioner is also in New Delhi. The Agreement was executed in New Delhi. The meeting between the representatives of two groups both at pre and post MOU are stated to have taken place in Delhi. The shares of the respondent company are allegedly being agreed to be transferred in Delhi and, therefore, the Delhi Court is stated to have the jurisdiction.
9. Apart from disputing the correctness of the allegations of the petitioner on merits, the respondent has raised preliminary objection as to the jurisdiction of this court to entertain the present petition, since the claim of the petitioner is in respect of the land situated in Amritsar. The plea of the respondent is that

since the present MOU is essentially an agreement for the transfer of land situated in Amritsar and the purchase of share holding of the respondent company is only a method for transfer of the land, the present petition is hit by the proviso of Section 16(d) of Code of Civil Procedure, and therefore liable to be rejected for the want of jurisdiction.

10. It was contended by the petitioners that they are not claiming the specific performance of the MOU or possession of the land in question. It is stated that the land is owned by the company and it will remain with the company. Thus, the provisions applicable are Section 20 and proviso to Section 16 of CPC and not Section 16 (d) of CPC for determining the question of territorial jurisdiction.
11. It was further contended by the learned counsel for the petitioner that the respondent has expressly admitted that the respondent has office in Delhi and the agreement was executed in Delhi and, therefore, the Delhi Court has got the territorial jurisdiction to entertain the present petition. Therefore, now they can not dispute the same.
12. I have heard the learned senior counsel Mr. A.S. Chandhiok and Mr. Suhail Dutt for the petitioners and Mr. Mukul Rohtagi and

Mr. Sandeep Sethi, the learned senior counsel for the respondent.

13. The question of territorial jurisdiction is going to the root of the matter and will have to be decided first. This question is fundamental for deciding the maintainability of the relief of the petitioner. For deciding this question, it will have to be decided whether this was an Agreement to Sell and Purchase the shares simplicitor or immoveable property? If the Court holds that it was essentially an Agreement for Sale and Purchase of the immovable property, then perhaps this Court may not have the jurisdiction and the petitioner will be required to file the petition at a place where the land is situated. If it is held that it was an agreement to sell and purchase of shares, the compliance of which can be obtained by personal obedience then this Court will have jurisdiction.
14. The learned counsel for the petitioner has contended that all the acts in relation of performance and discharging the respective contractual obligations of the parties were performed within the territorial jurisdiction of this Hon'ble Court. The MOU was executed in Delhi, payments were made and received in Delhi, both the parties to the MOU have their registered offices in Delhi

and they work for gain in Delhi and most importantly, the talks of settlement, pre and post filing of the present petitions, were also held in Delhi and, therefore, this court has the jurisdiction to adjudicate the petitions filed by the petitioner.

15. It was contended that the petitioners were seeking only enforcement of MOU from the Arbitrator with a direction against the respondent to cause the transfer of entire share holding in favour of the petitioners and also a direction against the respondent company to do or cause to do all necessary transfers in the books of the respondent company and also before the office of the Registrar of Companies and thus, provisions of Section 20 of the CPC would apply for the purpose of determination of territorial jurisdiction and not Section 16 (d) of CPC as is sought to be urged by the respondent. In this regard, the petitioners in paragraph 6 of the OMP has urged as under :-

"then the petitioner has always been ready and willing to perform his obligation to produce the entire share holding of the respondent company"

16. It was also contended by the petitioners that the respondent had, in its written statement to the petition, admitted the factum of the jurisdiction of Delhi Courts by admitting all the averments

with regard to payment, office of the parties being in Delhi and the MOU having been executed in Delhi. It was contended that the petitioner had belatedly, only at the stage of hearing for the first time on 28.3.2011, orally raised this question of jurisdiction after a lapse of almost two years. It was contended that the petitioner by its conduct was estopped from raising the question of preliminary objection with regard to jurisdiction, as the averments in the written statement by the respondent tantamounted to waiver of this question of jurisdiction apart from the principles of estoppel.

17. So far as the application of principles of jurisdiction initiated under Section 20 and not Section 16 (1) (d) are concerned, the petitioners have placed reliance on the following judgments :-

1. M/s Adcon Electronics Pvt. Ltd. vs Daulat & Anr., **2001 (7) SCC 698**
2. Rohit Kochhar vs Vipul Infrastructure Developers Ltd., **122 (2005) DLT 480**
3. Bhawna Seth vs DLF Universal Ltd. & Anr., **138 (2007) DLT 639**
4. Zoom Motels Pvt. Ltd. vs. Sheranwali Hotels and Resorts in **OMP 28/2008** (Delhi High Court), decided on 25.9.2009.

18. It was also contended that so far as the judgment of Harshad Chiman Lal Modi vs DLF Universal & Anr., **(2005) 7 SCC 791** is

concerned, the same is not applicable to the facts of the present case because no relief qua that land is sought.

19. With regard to the principles of waiver and estoppels, it was contended that Section 21 of the CPC also lays down that if there is any objection with regard to the territorial jurisdiction, it must be raised at the first available opportunity and this provision was also not adhered to by the respondents and therefore, Delhi Courts have the jurisdiction. Reliance in this regard was placed on *Bahrein Petroleum Co. Ltd. vs P.J. Pappu & Anr.*; **AIR 1966 SC 634** and *Hiralal Patni vs Sri Kali Nath*; **AIR 1962 SC 199** etc.
20. As against this, the respondent had essentially contended that the judgments which have been relied upon by the petitioners are not applicable to the facts of the present case. It was contended that the principles of law laid down in *Harshad Chimanolal Modi's* (supra) case is applicable to the facts of the present case inasmuch as in effect, the petitioners were seeking specific enforcement of the MOU. It was contended that the transfer of shares was only a modality to be adopted by the petitioners and the respondent for actual transfer of right, title or interest in the immovable property which was not situated within

the jurisdiction of this court. It was contended that assuming, though not admitting, that the Arbitrator decides the matter and grants the relief to the petitioners, viz. a restraint against the transfer of mortgaging, transferring of shares to a third party still that would not be the complete relief to the petitioners because ultimately the possession of the land in question is with the respondent company and its officials. The company, though being in possession of the property on papers, but actually the possession of the land is with the individuals and unless and until a suit for specific performance is filed, the possession of the land could not be transferred.

21. I have carefully considered the respective submissions made by the parties. Before embarking on the examination of the respective contentions of the parties, it would be worthwhile to reproduce Sections 16 and 20 of the CPC, which reads as under:-

“16. Suits to be instituted where subject-matter situate, subject to the pecuniary or other limitations prescribed: suits,

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

- (c) *for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,*
- (d) *for the determination of any other right to or interest in immovable property,*
- (e) *for compensation for wrong to immovable property,*
- (f) *for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:*

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant, may where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.- *In this section "property" means property situate in [India].*

- 20. *Other suits to be instituted where defendants reside or cause of action arises, Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-*
 - (a) *the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or*
 - (b) *any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry*

on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.”

22. In Harshad Chimanlal Modi Vs. DLF Universal Ltd. **(2005) 7 SCC**

791, wherein it has been observed by the Apex Court as under:

“16. Section 16 thus recognizes a well established principle that actions against rest or property should be brought in the forum where such rest is situate. A court within whose territorial jurisdiction the property is not situated has no power to deal with and decide the rights or interests in such property. In other words, a court has no jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to Section [16](#), no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam", recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam, i.e. by arrest of defendant or by attachment of his property.

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18. The proviso is thus an exception to the main part of the section which in our considered opinion, cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant.

19. In the instant case, the proviso has no application. The relief sought by the plaintiff is for specific performance of agreement respecting immovable property by directing the defendant No. 1 to execute sale-deed in favor of the plaintiff and to deliver possession to him. The trial court was, Therefore, right in holding that the suit was covered by Clause (d) of Section 16 of the Code and the proviso had no application.

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21. Plain reading of Section 20 of the Code leaves no room of doubt that it is a residuary provision and covers those cases not falling within the limitations of Sections 15 to 19. The opening words of the section "Subject to the limitations aforesaid" are significant and make it abundantly clear that the section takes within its sweep all personal actions. A suit falling under Section 20 thus may be instituted in a court within whose jurisdiction the defendant resides, or carries on business, or personally works for gain or cause of action wholly or partly arises."

23. A perusal of the aforesaid judgment makes it abundantly clear that a Court within whose jurisdiction the property is not situated cannot decide the rights of the parties in respect of land or any other immoveable property and give effective judgment ruling on the same. The only exception to this is provided in the provision that is if the relief which is sought is of such a nature that it can be obtained simply by the personal obedience then that Court may entertain such a suit as an exception to Section 16(d).

24. In *Vipul Infrastructure Developers Ltd. & Anr. vs Rohit Kochhar; 2008 (102) DRJ 178 (DB)*, a suit for specific performance relating to a property situated in Gurgaon was filed in Delhi on the ground that the agreement was executed at Delhi and the defendants also carried on business at Delhi. The learned Single judge held the suit to be maintainable on the ground that only a declaration of right and title in the property was sought and not the delivery of possession. The Division Bench overruled this judgment holding that Delhi Court had no jurisdiction to entertain and try the suit. The relevant paras of the judgment are reproduced as under:

“19. Accordingly, we are of the considered opinion that the submissions of the learned Counsel for the Respondent and the findings recorded by the learned Single Judge that the present case is covered by the proviso of Section 16 of the Code of Civil Procedure are misplaced. In the facts and circumstances of the case as delineated, the relief in the present suit cannot be entirely obtained through the personal obedience of the Defendants. The proviso to Section 16 of the Code of Civil Procedure would be applicable to a case where the relief sought for by the Plaintiff was entirely obtainable through the personal obedience of the Defendant, i.e., the Defendant has not at all to go out of the jurisdiction of the Court for the aforesaid purpose. The present case is not a case of the aforesaid nature. In the present case for execution of the sale deed the Defendants will have to go out of the jurisdiction of this Court and get the same executed and registered in Gurgaon.

20. In the present case also it is an admitted position that possession of the said property was with the seller and, therefore, in terms of the provisions of Section 55(1) of the Transfer of Property Act, 1882, the relief of possession is inherent in the relief of specific performance of the contract. In our considered opinion the ratio of the decision of the Supreme Court in Babu Lal (supra) and the principles laid down in the case of Harshad Chiman Lal Modi(supra) are applicable to the facts of the present case. In Harshad Chiman Lal Modi (supra) it was found that in addition to passing decree, the court was also required to deliver possession of the property. It was held that such a relief can be granted only by sending the concerned person responsible for delivery of possession to Gurgaon and the court at Delhi does not have the jurisdiction to get the aforesaid decree enforced for the property situate outside territorial jurisdiction of Delhi High Court. The Court while referring to the provisions of Section 16 of the Code of Civil Procedure held that the location of institution of a suit would be guided by the location of the property in respect of which and for determination of any right or interest whereof the suit is instituted. The proviso to Section 16 Code of Civil Procedure is also not applicable to the case, as the relief sought for cannot be entirely granted or obtained through the personal obedience of the Respondent.

25. Similar view was taken by this Court in Splendor Landbase Limited vs M/s. Mirage Infra Ltd. & Anr. **2010 (116) DRJ 702 (DB)**. In this case, a suit for declaration and permanent injunction relating to a property situated at Chandigarh was filed at Delhi on the ground that the agreement was executed at New Delhi and payments were also made at New Delhi. The Division Bench of this Court following the judgments of the Supreme Court

in Harshad Chiman Lal Modi (supra) and of Division Bench of this Court in Vipul Infrastructure Developers Ltd. (supra) held that this Court has no jurisdiction to entertain and try the suit. The relevant paragraph is as under:

“25. Having considered the decisions referred by the parties and on a plain reading of the plaint as a whole, it is clear as we have indicated above that the present suit is one which comes within the purview of Section 16 (d) of the Code of Civil Procedure and the proviso of Section 16 of Code of Civil Procedure is not applicable under the circumstances as the proviso of Section 16 of Code of Civil Procedure is an exception to the main part of the Section which cannot be construed to enlarge the scope of the main provision. If the suit comes within Section 16(d) of the Code of Civil Procedure, it has been held by the Apex Court in Harshad Chiman Lal Modi's case (supra) that Section 20 of the Code would have No. application in view of the opening words of Section 20 "subject to limitations aforesaid". The Apex Court has held that the proviso to Section 16 would apply only if the relief sought could entirely be obtained by personal obedience of the Defendant. The proviso we feel will only apply if the suit falls within one of the categories specified in the main part of the Section. In the present case, although specifically the relief for possession of the property has not been claimed by the Appellant in the prayer for the purpose of development, however, it is settled law that by clever drafting a party cannot be permitted to come within different meaning of relief claimed. Hence, No. benefit can be derived by the Appellant either from the proviso of Section 16 or Section 20 of the Code of Civil Procedure.

26. Learned counsel for the respondent submitted that in view of the aforesaid decisions, since the petition filed by the petitioner essentially pertains to a property situated in Amritsar, in view of the provisions of section 16 (d) CPC, this court will have no jurisdiction to try and entertain the same.

27. Learned counsel for the petitioner has contended that all the acts in relation to performing and discharging of the respective contractual obligations were to be done in Delhi and, therefore, Delhi Court had jurisdiction. Reliance has placed reliance on the following judgments:

- (i) M/s Adcon Electronics Pvt. Ltd. vs Daulat & Anr. **2001 (7) SCC 698**
- (ii) Rohit Kochhar vs Vipul Infrastructure Developers Ltd. **122 (2005) DLT 480**
- (iii) Bhawna Seth vs DLF Universal Ltd. & Anr. **138 (2007) DLT 639**

28. The decisions relied upon by the petitioner have been discussed by the learned Single Judge of our own High Court in Bhawna Seth's case (supra), including the judgment in Harshad Chiman Lal's case (supra). A distinction between a suit for specific performance simplicitor and a suit for specific performance coupled with delivery of possession has been drawn, it has been

held that the court has no jurisdiction to try the case if the property in question is not situated within its jurisdiction though in former case the legal position is different and the judgment in Adcon Enterprises (supra) squarely applies. It would be relevant to reproduce the relevant paragraphs of the said judgment:

“20. On consideration of the aforesaid judgments, I am of the view, that there can be no doubt that where in a suit for specific performance possession is also claimed as a relief, the competent court to deal with the matter is the court where the property is located in view of Section 16 of the said Code. The judgment in Harshad Chiman Lal Modi case (supra) clearly lays down the said proposition. However, what cannot be lost sight of is that the judgment is in the facts of the case where the relief of possession was specifically claimed. The question as to what would happen where the relief for possession is not claimed does not form subject matter of a relief in Harshad Chiman Lal Modi case (supra).

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22. M/s. Adcon Electronics Pvt. Ltd. case (supra) deals with the distinction in a case simplicities for specific performance as against a case where possession is also prayed. This issue is not discussed in Harshad Chiman Lal Modi case (supra) nor has the judgment in Adcon Electronics Pvt. Ltd. case (supra) been apparently cited in the proceedings in Harshad Chiman Lal Modi case (supra). Thus, both the judgments would operate in their respective areas. M/s. Adcon Electronics Pvt. Ltd. case (supra) clearly sets down that in a suit for simplicities specific performance the same does not amount to a suit for land. If it is a simplicities suit for specific performance, i.e. for enforcement of Contract for Sale and for execution of sale, in that event there can be no good ground for holding that such a suit is for determination of title to the land or that the decree in it would operate on the land. The observations made in the judgment in Moolji Jaitha & Co. v. The Khandesh Spinning

& Weaving Mills Co. Ltd. referred to in the said judgment being a judgment of the Federal Court was approved by the Supreme Court, as noted in paragraph 15 of the Adcon Electronics Pvt. Ltd. case (supra). Thus a distinction has been carved out in respect of a suit where no possession has been claimed of the land in question.

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25. I am thus of the view that since the plaintiff is not claiming possession of the suit property and has specifically stated so and the relief is confined to specific performance of the Agreement in question without the relief of possession, the judgment in Adcon Electronics Pvt. Ltd. case (supra) would squarely apply to the facts of the present case and thus this Court would have territorial jurisdiction to try and entertain the present suit. The issue is accordingly answered in favor of the plaintiff and against the defendants.”
29. The case of the petitioner is that the relief sought by the petitioner in the present petition does not involve determination of any right or title in the immovable property, the petitioner has only sought relief to the extent of restraining the respondent from alienating, transferring or creating any third party interest in the immovable assets of the respondent company & the relief sought is such which can be obtained through personal obedience of the respondent, and therefore, proviso to section 16 and section 20 CPC are applicable.
30. The examination of the aforesaid decisions relied upon by the parties, In my considered opinion the decisions relied upon by the petitioner in Bhawna Seth’s case (supra) and Adcon

Electronics Pvt. Ltd case (supra) are not applicable to the present petition as herein the petitioner has approached this Court under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the 'Act') & these judgments have not addressed and dealt with the issue of jurisdiction under Section 9 of the Act. In order to decide a petition under section 9 of Arbitration and Conciliation Act, the court where petition is filed must have the jurisdiction taking into account the subject matter of the petition. Section 2 (1) (e) read with section 9 of the Arbitration and Conciliation Act makes it clear that in order to have jurisdiction to decide an application under section 9, the court entertaining the petition should be one which has power to entertain the suit on the same facts.

31. To illustrate the fact, the relief claimed by the petitioner does not simply involve the transfer of shares in the books or in the office of the Registrar of Companies, but it would also involve the transfer of the possession of the land in question because this transfer of shares has no meaning. The petitioner's reasoning is that once the transfer of shares takes place, the land being in the name of the Company, therefore, they also get the possession of the land. I feel that the petitioner is deliberately

expressing ignorance in the sense that even if shares are transferred, that does not solve the problem or get the complete relief to the petitioner, which in Harshad Chiman Lal's case is called effective judgment or adjudication of the dispute between the parties. This is because, no doubt, the company is in possession of the land but being a juristic person, it has to be in possession through some individual office bearer or the employee. Suppose, despite transfer of these shares, these employees, individuals or the office bearers do not give the possession to the petitioner, the only remedy available to the petitioner is to rush to the Court to file a suit for possession or suit for specific performance because the complete relief cannot be obtained by simply passing order, it has to be implemented also. Therefore, what would be applicable is not only the personal obedience but also actual specific performance and hence the petitioner would be barred by Section 16(d) of the CPC.

32. In Trehan Promoters and Builders Pvt. Ltd. vs Welldone Technology Parks Development Pvt. Ltd., the learned Single Judge of this court observed as under:

“Section 9 is applicable only where a party has invoked the arbitration clause or has intention to invoke the arbitration clause. Section 9 is not in the nature of provisions of Specific Relief Act where a party can come to the Court and pray for a relief of performance of the contract and ask the Court to compel the other party to abide by the terms and conditions of the contract and seek an injunction from the Court that the party should be restrained from violating the terms and conditions of the contract. In fact, Section 9 of the Act envisages existence of an arbitration clause whereunder the disputes resolution mechanism is provided and the parties had chosen the arbitration as a dispute resolution mechanism instead of choosing the Court to resolve their disputes. Resort to the Court under Section 9 of the Act is for limited purpose of preserving the property which is the subject matter of dispute so that by the time the arbitrator decides the dispute, the property itself is either sold away or disposed of by the opposite side, or being of perishable nature is likely to perish or where there is need to appoint a receiver, the Court passes an order for appointing a receiver. The extent and scope of relief under Section 9 of the Act cannot extend so as the Court directs a party to specifically perform the contract so that the party approaching the Court has not to go to the arbitrator for breach of contract. Section 9 does not envisage a situation where the order of the Court under Section 9 itself settles the disputes between the parties. Neither by the instrumentalities of Section 9, the Court can put the party back into pre-dispute situation and ask the party to comply with the contract. If the Court could direct specific performance of the contract under Section 9 of the Arbitration & Conciliation Act, and could place the parties in the position prior to rising of dispute, no dispute would ever go to the arbitrator and by an interim relief itself, the Court would be finally disposing of all the disputes between the contracting parties by just directing specific performance of the contract, irrespective of the breach on the part of one or the other.”

33. The aforesaid judgment also reinforces the view that this court does not have the territorial jurisdiction to entertain the present petition. The present petition relates to a relief in respect of an immovable property situated in Amritsar i.e. outside Delhi and therefore, it is covered by section 16 (d) of CPC and the proviso to section 16 has no application, nor section 20 would apply as a residuary section and Delhi Court has no jurisdiction. Clause 16(d) of CPC provides that for determination of any right or interest for immovable property, the suit has to be instituted in the Court within the local limits of whose jurisdiction the immovable property is situated. The proviso cannot be explained in a manner that for every relief under Section 16 CPC personal obedience is pleaded. Personal obedience cannot be stretched to such an extent that Section 16 of CPC itself becomes redundant. Moreover, this MOU in my opinion was essentially an agreement for sale and purchase of property between the parties. It was only camouflaged as an agreement or MOU to sell and purchase shares of a company so that the property changes the hands by changing the management. This was only done in my opinion to avoid the payment of various duties or levies which have to be paid normally on such transactions therefore, if seen in its proper prospective, it was essentially an agreement of purchase

of immoveable property though with a different modality which will be governed by Section 16(d) CPC.

34. The second contention of the learned counsel for the petitioner is that the respondent in their reply to the petition has expressly admitted/ stated that *'this court has got the territorial jurisdiction to entertain the petition'* and therefore, the respondent cannot challenge the territorial jurisdiction of this court after having admitted the same in the pleadings and participating without any objection for almost 2 years. This belated stage of objection is hit by section 21 of the code of Civil Procedure. Section 21 of CPC reads as under:

“No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.”

35. The learned counsel for the petitioner has placed reliance on a full bench judgment of the Apex court in case titled *Bahrein Petroleum Co. Ltd. vs P.J. Pappu & Anr*, **AIR 1966 SC 634** where Apex court relying upon a constitution bench judgment *Hiralal Patni vs Sri Kali Nath*, **AIR 1962 SC 199** held that:

“As a general rule, neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to

try the suit. But Section 21 of the Code provides an exception, and a defeat as to the place of suing, that is to say the local venue for suits cognizable by the Courts under the Code, may be waived under this section. The waiver under Section 21 is limited to objections in the appellate and revisional Courts. But Section 21 is a statutory recognition of the Principle that the defeat as to the place of suing under Ss. 15 to 20 may be waived. Independently of this section, the defendant may waive the objection and may be subsequently precluded from taking it.”

36. However, in Harshad Chiman Lal’s case Supreme Court has held as under:

The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.

In *Halsbury's Laws of England*, (4th edn.), Reissue, Vol. 10; para 317; it is stated;

317. Consent and waiver. Where, by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction

over the particular subject matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent." In *Bahrein Petroleum Co.*, this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that 'where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.' A decree passed by a court having no jurisdiction is *non-est* and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is *acoram non judice*.

The case on hand relates to specific performance of a contract and possession of immovable property. Section 16 deals with such cases and jurisdiction of competent court where such suits can be instituted. Under the said provision, a suit can be instituted where the property is situate. No court other than the court where the property is situate can entertain such suit. Hence, even if there is an agreement between the parties to the contract, it has no effect and cannot be enforced.

37. Also in *Kiran Singh vs Chaman Paswan & others*, [1955] 1

SCR 117, this Court declared as under:

"It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of

jurisdiction ... strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

38. Moreover, so far as the decision of Apex Court, relied upon by the petitioner, in Bahrein Petroleum's case (supra) is concerned even that does not support the contention of the petitioner inasmuch as in the said case the Apex court has held that unless there has been a 'consequent failure of justice' the objection to jurisdiction under section 21 CPC cannot be raised.

The relevant paragraph reads as under:

7. Counsel for the plaintiff also submitted that the defendants having neither alleged nor proved that there has been a failure of justice in consequence of the order of the High Court, they are precluded by Section 21 of the Code from raising this objection in this Court. We think that this contention has no force. The suit has not yet been tried on the merits. So far, only the preliminary issue as to jurisdiction has been tried. That issue was decided in favour of the defendants by the trial Court and the District Court and against them by the High Court, and from the order of the High Court, this appeal has been filed. There cannot be a consequent failure of justice at this stage. The condition "unless there has been a consequent failure of justice" implies that at the time when the objection is taken in the appellate or revisional Court, the suit has already been tried on the merits. The section does not preclude the objection as to the place of suing, if the trial Court has not given a verdict on the merits at the time when the objection is taken in the appellate or revisional Court

39. Section 21 of the Code, requires that the objection to the jurisdiction must be taken by the party at the earliest possible

opportunity and in any case where the issues are settled at or before settlement of such issues and in case there is consequent failure of justice. Though the petitioner is right in submitting that the respondent had agreed to the jurisdiction of Delhi Court and in their written statement, they had expressly admitted that Delhi court has jurisdiction, yet it cannot take away the right of the respondent to challenge the jurisdiction of the court nor it can confer jurisdiction on Delhi Court, which it did not possess. Moreover, in the present case the issue has still not been settled and the objection to the jurisdiction is only a preliminary objection and also there is no consequent failure of justice, thus the requirements of section 21 CPC are not made out and therefore the respondent cannot be said to have waived their right to raise the objection to the jurisdiction. Moreover, Section 21 CPC restrains a party from raising the question of jurisdiction before the Appellate or the Revisional Court unless and until it is not raised before the Trial Court. In the present case, the petition u/s 9 is not before the Appellate or the Revisional Forum, therefore, in my view, Section 21 would not be applicable.

40. There is another aspect of the matter to illustrate that the question of jurisdiction in the instant case is not a question of territorial or pecuniary jurisdiction which may be waived or given up but, is one pertaining to subject matter, that is to say, it is related to the immovable property or the land which is not situated within the jurisdiction of this Court. In terms of Section 16(d) lays down that in such cases, suit has to be filed at a place where the land is situated. If that be the legal position, then even if the respondent has admitted that Delhi Courts have the jurisdiction, it does not estop the petitioner from turning around and disputing the jurisdiction of Delhi Courts because there is no estoppel against a law passed by a competent legislature. Reliance in this regard is placed on Faqir Chand vs. Rattan Rattan, **AIR 1973 SC 921**.

41. For the reasons mentioned above, I am of the considered opinion that the present petitions under Section 9 for interim relief and Section 11 for appointment are not maintainable in Delhi Courts on account of lack of jurisdiction over the subject matter because the petitioners in effect are seeking a relief which cannot be given simply by personal obedience of the respondents. It will require the transfer of possession of the

land in question also which is admittedly situated in Amritsar, which is beyond the jurisdiction of this court. I also do not agree with the contention of the learned counsel for the petitioners that the respondents are estopped from raising the question of jurisdiction of Delhi Courts having admitted by way of an averment in their written statement originally the Delhi Court as the jurisdiction because there is no estoppel against law. Both the petitions are accordingly dismissed. Interim order dated 03.7.2009 stands vacated.

V.K. SHALI, J.

MAY 29, 2012

AA