

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9598 OF 2014

M/s VBHC, Mumbai Value Homes
Pvt Ltd

..Petitioner

Vs

1. Shri Laxman Bhoir and Ors

.. Respondents

Mr. Virag Tulzapurkar, Senior Advocate a/w Mr. Simil Purohit, Ms. Swapnil Khatri and Mr. Arnar Nagalia i/b Wadia Ghandy & Co, Advocates for Petitioner.

Mr. Deepak C. Natu a/w Ms. Sunita S. Ghone, Advocate for Respondents no. 1 to 3.

CORAM :	R.G.KETKAR,J.
RESERVED ON:	11/06/2015
PRONOUNCED ON:	03/07/2015

ORDER:

1. Heard Mr. Tulzapurkar, learned senior counsel for the petitioner and Mr. Deepak Natu, learned counsel for respondents no.1 to 3 at length. Mr. Tulzapurkar orally applies for deleting the names of respondents no.4 and 5 as no relief is claimed against them. On the Motion made by Mr. Tulzapurkar, leave to delete respondents no.4 and 5 is granted. Amendment shall be carried out forthwith.

2. Mr. Natu raised preliminary objection that having regard to the prayers made in Application at Exhibit-19, the Petition instituted under Article 227 is not maintainable and the petitioner

has to invoke revisional jurisdiction under Section 115 of C.P.C. In view thereof, leave to convert this Petition into Civil Revision Application is granted. Amendment shall be carried out forthwith.

3. Rule. Mr. Natu waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up finally.

4. By this Petition under Article 227 of the Constitution of India, original defendant no.1 has challenged the Judgment and order dated 20.8.2014 passed by the learned Second Joint Civil Judge, Senior Division, Kalyan below Exhibit 19 in special Civil Suit No.73 of 2014. By that order, the learned trial Judge rejected the application filed by the petitioner under Section 8 of the Arbitration and Conciliation Act, 1996 (for short, "Act") for referring dispute to arbitration. The parties shall, hereinafter, be referred to as per their status in the trial Court. The relevant and material facts, giving rise to filing of the present Petition, briefly stated, are as under.

5. Respondents no.1 to 3, hereinafter referred to as 'plaintiffs', instituted suit for declaration that the registered Agreements of Sale dated 12.11.2010 and 17.2.2011 executed by the plaintiffs in favour of the petitioner-defendant no.1 in respect of Survey No.29, Hissa No.4, admeasuring H-0-R-27-00, Survey No.29, Hissa No.8 (out of), H-0-R-08-00 and Survey No.29, Hissa No.9B, H-0-R-

06-05, situate at village Vadavali, Taluka Kalyan, Dist. Thane admeasuring 4146.05 sq.meters (for short, 'suit property') are sham, bogus, illegal, void and not binding on the plaintiffs and may be cancelled with further declaration that the same may be quashed and set aside under Section 34 of the Specific Relief Act, 1963. The plaintiffs also sought perpetual injunction against the defendant not to invade in the peaceful possession in respect of the suit property. In the agreement of sale dated 12.11.2010 there is a specific clause, namely, clause no.29. Clause 29 lays down that in case there being any dispute with respect to the suit property by and between the parties, then for resolving the said dispute under the provisions of the Act, an Arbitrator shall be appointed by consent of both the parties and the said dispute shall be resolved through Arbitrator. During the pendency of the suit, defendant no.1 filed application under Section 8 of the Act praying that the matter may be referred to arbitration and the suit may be disposed of.

6. The plaintiffs resisted the application by filing detailed reply dated 25.6.2015. By the impugned order, the learned trial Judge rejected the application. It is against this decision, defendant no.1 has instituted the present Petition.

7. In support of this Petition, Mr. Tulzapurkar submitted that in the agreement of sale dated 12.11.2010, there is an arbitration

clause. Clause 29 reads as under :

“29. First Party and Second Party herein admits that in case of dispute between the parties, shall be settled by arbitrator with the consent of both parties under the provisions of the Arbitration and Conciliation Act,1996 which is agreed by both parties.”

He submitted that the learned trial Judge rejected the application only on the ground that the averments of the Plaint disclosed that the plaintiffs are alleging commission of fraud by defendant no.1. The plaintiffs are questioning legality of documents of agreement of sale which contains arbitration clause. The learned trial Judge held that when entire document is put into doubt, such type of dispute cannot be left to the decision of the arbitration. When agreement itself is in question, and the declaration, cancellation in respect of the said agreement is sought, such type of dispute cannot be termed as arbitrable dispute.

8. Mr. Tulzapurkar submitted that without considering averments regarding alleged fraud, the learned trial Judge has rejected the application. He submitted that it depends upon the nature of allegations of fraud made in the suit. He submitted that if the subject matter of the dispute has imminently civil profit, then it may not be proper to conclude that subject matter of dispute is incapable of settlement by arbitration merely because fraud has been alleged as one of the grounds for questioning the contract. As a general rule, it cannot be said that moment

allegations of fraud are made in the context of a contract, subject matter of the dispute is rendered incapable of resolution by arbitration. In support of his submissions, he relied upon following decisions:-

1. HSBC PI Holdings (Mauritius) Limited Vs. Avitel Post Studioz Limited and Ors, Arbitration petition No.1062 of 2012 decided on 6.12.2013 (Coram : R.D.Dhanuka, J.);
 2. Avitel Post Studioz Ltd. and Ors Vs. HSBC PI Holdings (Mauritius) Ltd, Appeal No.196 of 2014 in Arbitration Petition No.1062 of 2012, decided on 31.7.2014 (Coram : Mohit S. Shah,C.J. & M.S.Sonak,J.) which upheld the decision of learned Single Judge at Sr.No.1;
 3. Lotus Refineries Private Limited Vs. National Spot exchange Limited, Notice of Motion (L) No.2036 of 2013 in Suit (L) No.870 of 2013 decided on 10.9.2014 (Coram: S.J.Kathawalla, J.);
 4. N. Radhakrishnan Vs. Maestro Engineers and Ors, (2010) 1 Supreme Court Cases 72;
 5. Swiss Timing Limited Vs. Commonwealth Games, 2010 Organizing Committee, (2014) 6 SCC 677;
 6. P. Anand Gajapathi Raju Vs. P.V.G.Raju (dead) and Ors, (2000) 4 Supreme Court Cases 539.
9. On the other hand, Mr Natu supported the impugned order. He submitted that the suit properties are khalsa lands as is evident from extract of village Form No.8A. He relied upon the second proviso to Section 5(3)(b) of the Bombay Inferiorlages Watans Abolition Act, 1958 as also Section 4 of the Maharashtra Pragana And Kulkarni Watans (Abolition. He further submitted that mandate of Section 7 of the Act has to be complied. Mr

Natu further submitted that allegations of fraud are of serious nature requiring leading of evidence by the parties. Arbitrator will not be in a position to decide a complicated matter involving various questions and issues raised in the suit. For all these reasons, he submitted that the learned trial Judge was fully justified in dismissing the application. In support of this submission, he relied upon decision of the Apex Court in the case of *Booz Allen And Hamilton Vs. SBI Home Finance Ltd*, AIR 2011 SC 2507.

10. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. While dismissing the application, the learned trial Judge has noted in paragraph 3 that execution of the agreement as well as existence of clause 29 relating to the decision of the dispute between the parties by the arbitration is not in dispute. The learned trial Judge has further observed in paragraph 6 that the averments in the Plaint disclose that the plaintiff is alleging fraud by the defendants. The plaintiff is questioning legality of documents of agreements of sale which contains arbitration clause. When the entire document is put into doubt, such type of disputes cannot be left to the decision of arbitration. Mr, Tulzapurkar submitted that the learned trial Judge failed to consider Section 16(1)(a) of the Act which lays down

that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

11. Merely because the allegations of fraud are made, it will not preclude civil court from referring the parties to the arbitration unless those allegations are examined. In the case of HSBC PI Holdings (Mauritius) Limited (*supra*), the learned Single Judge has considered the decisions of the Apex Court as also various High Courts. In paragraph 83, the decision of the Apex Court in the case of N. Radhakrishnan (*supra*) was considered. In that case, after considering the submissions advanced on behalf of the respondents that when a case involves substantially questions relating to facts where detailed evidence are needed to be produced by either parties and serious allegations pertaining to malpractices were made, it was held that the matter must be tried in a court and Arbitrator could not be competent to deal with such matter which involves elaborate production of evidence to establish fraud and criminal misappropriation.

12. In paragraph 84, the learned Single Judge considered the decision of Calcutta High Court in the case of Ram Kishan Mimani Vs. Goverdhan Das Mimani, Arbitration Petition No.126 of 2010

decided on 7.4.2010, wherein decision of the Apex Court in the case of N. Radhakrishnan was considered. It was observed that N. Radhakrishnan has to be read to imply that an exception may be made to general rule when it appears to Court that a matter involving serious charges with heavy documentary and oral evidence may not be referred to arbitration notwithstanding the dispute being covered thereby. It was held that even if a serious allegations of fraud or malpractices have been made and it is only the exceptional cases which are required to be retained in Court and not sent to arbitration on the reasoning contained in N. Radhakrishnan case that "it cannot be properly dealt with by the arbitrator".

13. In paragraph 85, the learned Single Judge accepted the submission made on behalf of the petitioner that the case of N. Radhakrishna is not an authority on the proposition that as soon as allegations of fraud is made by any party, no such matter can be referred to arbitration at all. The learned Single Judge concurred with the view taken by Calcutta High Court.

14. In paragraph 88, the learned Single Judge dealt with the decision of the Apex Court in Booz Allen and Hamilton (supra) and observed that the decision has carved out category of dispute which are not arbitral, i.e. such as dispute relating to rights and liability giving rise to or arising out of criminal

offences, matrimonial disputes, child custody, guardianship matters, insolvency and winding up matters, testamentary matters, eviction or tenancy matters. The learned Single Judge observed that the Court has to decide whether such allegations made by the party can be referred to arbitration or it would be more appropriate and convenient to decide such allegations by the Court itself though arbitration agreement exists.

15. The decision of the learned Single Judge was upheld by the Division Bench in *Avitel Post Studios Ltd.* (supra). After considering various decisions, the Division Bench observed in paragraphs 30, 31 and 33 thus:

“30. Having considered the aforesaid submissions and having perused the decisions as aforesaid, we are of the opinion, that said judgments do not lay down any general or peremptory rule that allegations of fraud, in all cases, are incapable of settlement by arbitration under the law of India. There is a real though subtle difference between 'suitability' and 'arbitrability' in the context of subject matter of disputes. In order to be conscious of this difference, regard shall have to be had to the nature of allegations, the context in which the same are made and the ultimate relief which is being applied for on basis of such allegations. If the subject matter of dispute has an eminently civil profile, then it may not be proper to conclude that the subject matter of dispute is incapable of settlement by arbitration, merely because fraud or misrepresentation as defined under Section [17](#) and [18](#) of the Indian Contract Act, 1872 may have been alleged as one of the grounds for questioning the contract.”

“31. In the context of provisions of Contract Act 1872, fraud and misrepresentation are some of the well accepted grounds for questioning validity of a contract by the entity, upon whom the same are alleged to have been practiced.

Section [10](#) of the Contract Act, 1872 provides that all agreements are contracts, if they are made by free consent of the parties, competent to contract, for lawful consideration, with lawful object which is not expressly declared to be void. Therefore, 'free consent' is one of the essential ingredients for a valid contract under the Contract Act. Section [13](#) of the Contract Act provides that two or more persons are said to consent, when they agree upon the same thing in the same sense. Section [14](#) of the Contract Act provides that a consent is said to be 'free' when it is not caused, inter alia by 'fraud' as defined under section [17](#) or 'misrepresentation' as defined under section [18](#) of the Contract Act. Sections [17](#) and [18](#) of the Contract Act define in great details, the expressions 'fraud' and 'misrepresentation'. The principle difference between fraud and misrepresentation is that in cases of fraud the person, who makes the representation does not himself believe it to be true, whilst in cases of misrepresentation, the person himself believes it to be true. Thus, 'fraud' and 'misrepresentation' as defined under sections [17](#) and [18](#) of the Contract Act are well accepted grounds which would vitiate 'free consent' and consequently the contract itself. Therefore, as a general rule, it cannot be said that the moment allegations of fraud and misrepresentation are made in the context of a contract, the subject matter of the dispute is rendered incapable of resolution by arbitration."

"33. In paragraph 23 of the decision in N. Radhakrishnan (supra), the Supreme Court has held that the facts of the said case do not warrant the matter to be tried and decided by the arbitrator, rather, for furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such complicated matters involving various questions and issues raised in the dispute. Similarly, in paragraph 26, the Supreme Court after noticing the allegation made, has held that the disputes cannot be 'properly' dealt with by the arbitrator. It does appear therefore, that the Supreme Court was concerned with the issue of 'suitability' rather than 'arbitrability' of the disputes."

16. In paragraph 34, the Division Bench considered the

decision of the Apex Court in Swiss Timing Limited (supra), wherein after analysing the decision of N. Radhakrishnan case it was held that N. Radhakrishnan Judgment is 'per incuriam' on two grounds. Firstly, decision in Hindustan Petroleum corporation Ltd Vs. Pink City Midway Petroleums, (2003) 6 SCC 503, though was referred, was not distinguished and also not followed. The decision in P. Anand Gajapathi Raju Vs. P.V.G. Raju (dead), (2000) 4 SCC 539 was not even brought to the notice. Secondly, the provision contained in Section 16 of the Act was also not brought to the notice of the Court.

17. In the case of Lotus Refineries Pvt Ltd (supra), the learned Single Judge also considered the decision of HSBC V Avitel (supra). In para 109 it was observed thus :

“109. In this context, it seems to me that the rationale underlying decisions like N. Radhakrishnan is that Indian courts may refuse to refer a matter to arbitration under Section 8 of the Act, if satisfied that there is a sufficient reason why the matter should not be referred to arbitration. In my view, there would be sufficient reason, in a dispute involving allegations of fraud, only where a detailed investigation of the fraud as a whole is required to decide the dispute between the parties. The reason is that such an investigation may involve the interests and concerns of third parties to the dispute, or of the general public, which cannot be represented in the private process of arbitration. Again, if an investigating authority is in the midst of an investigation at the time of a dispute, and it is expected that certain directions may have to be issued to such authority as regards the investigation, in order to resolve the dispute between the parties and/or decide the question of fraud, it would be sufficient reason for the Court to refuse to refer the matter to arbitration, bearing in mind that the arbitral

tribunal would not have the power to issue such directions to an investigating authority. It is pertinent to mention in this context that in a recent decision of the Hon'ble Supreme Court in *Swiss Timing Ltd. v. Organising Committee, Commonwealth Games 2010, Delhi*² the Hon'ble Court observed that there is no inherent risk to the parties in permitting arbitration to proceed, even with criminal proceedings running simultaneously."

18. In the light of the principles laid down in the above decisions and with the assistance of learned counsel appearing for the parties, I have carefully perused the averments made by the plaintiff in the suit as regards fraud. In paragraph 13, 14 and 16 the plaintiff has alleged thus :

"13. The plaintiffs further state that inspite of the aforesaid visits paid by the plaintiff nos 1 and 2 to the office of the defendants to fulfill the condition of Annexure 'H' (Colly), the defendants have miserably failed to comply with the terms and conditions of the Annexure 'H' (Colly), therefore, in view of the aforesaid facts it is evident that the defendants are not interested to go ahead with the suit lands and violated the terms and conditions which they agreed with an intention to create a fraud on the plaintiffs knowing fully well that the suit lands were purchased from the plaintiffs in the year 2011 under the Agreement to Sale at Annexure 'H' (Colly) at a dustbin throw price that too not paid in time, therefore, the plaintiffs have suffered irreparable loss and injury which cannot be compensated in terms of money. ..."

"14. It is further submitted that the Agreement to Sale executed by defendants with the plaintiffs is not binding on the plaintiffs because the defendants have miserably failed to follow the terms and conditions as mentioned in Annexure 'H' (Colly) at the time of execution of Annexure 'H' (Colly) the same was executed on 12.11.2010 and the document was registered on 17.2.2011 that means after a gap of two months, it is important to note here that the defendants are not in a position to comply the terms and

conditions as set out in the Agreement to Sale at Annexure 'H' (Colly) as the cheques given by them at Annexure '11' and '13' was bounced, this clearly shows that they are not financially sound and to create fraud on the plaintiffs, they have executed an Agreement to Sale at Annexure 'H' (Colly) and failed to pay proper consideration within time and therefore they have committed a breach of contract and therefore the plaintiffs have no option but to file the present suit for cancellation of Annexure 'H' (colly) so that the defendants should not create any third party interest in respect of the suit lands, the defendants have violated the terms and conditions of Agreement to Sale at Annexure 'H' (Colly), therefore they are not entitled to take benefits in view of non followance of terms and conditions of Annexure 'H' (Colly), therefore, Agreement to Sale executed between the plaintiffs and defendants being illegal, void ab-initio and therefore the same is liable to be declared as not binding on the plaintiffs, therefore the same are liable to be declared as null and void, not binding, cancelled and liable to quashed and set aside.

“16. it is further submitted that the Agreement to Sale at Annexure 'H' (Colly) executed by defendants and are not binding on the plaintiffs because the defendant 4 for and on behalf of defendant no.3 and defendant no.6 for and on behalf of defendant no.5 are being party to the document ie the Agreement to Sale at Annexure 'H' (Colly) have miserably failed to provide any documentary evidence viz Income Tax registration Certificate, Banking details, authorization letter Partnership Certificate in respect of defendant nos 5 and 6 as to whether it is really registered or not under the provisions of The Indian Partnership Act, 1932, certified copy of the resolution if any, whether the Partnership firm is still in existence or it is dissolved by an order of the Court or by the Will of the Partners, Income Tax Returns, other necessary details authorizing these defendants to enter as a confirming party, it is also important to note here that the resolution submitted by defendant no.2 for and on behalf of defendant no.1 at Annexure “H” (Colly), the kind attention of this Hon'ble Court is invited towards internal page nos 27 and 28 which is being a certified copy of defendant no.1's company resolution, however, at the last page i.e. at internal page no.28 there is no date mentioned as to when it was certified

by the Company Secretary, the certified copy of resolution book of the company i.e. defendant no.1 is not produced, the documentary evidence categorically suggest that the defendants have created a fraud on the plaintiffs by executing an Agreement to Sale at a dustbin throw price, it is also important to note here that the role of defendant nos 3 to 6 are not mentioned or there is no documentary evidence and/or Memorandum of Understanding or any type of mutual agreement executed between them as to why these persons were brought at the time of execution of Agreement to Sale at Annexure 'H' (Colly) and what are their shares in respect of development of suit lands in future, from the conduct of the defendants it may be revealed that the defendants might have developed a modus operandi to execute an Agreement to Sale at a dustbin throw price and by registering it on payment of half of the consideration and then in future after waiting for 3 to 4 years the same land can be sold out at a higher price so that they may gain higher profits by paying less to the plaintiffs, the defendants knowing fully well that the plaintiffs being a rustic villagers, they were fooled and misguided, misrepresented and fraud has been created upon them which is a violation of mandate of the Indian Contract Act, 1872 and the Transfer of Property Act, 1882."

19. Perusal of the averments clearly shows that all these allegations are relating to nonpayment of the balance consideration by defendants 1 to 3. It is not in dispute that total consideration agreed between the parties as 42 Lakhs and that the plaintiffs have received Rs. 28,55,200/- (almost 2/3rd). The plaintiffs have not paid remaining consideration of Rs.13,44,800/-. Thus, the main grievance of the plaintiffs is breach of contract. The other grievance is that the defendants have allegedly purchased the suit property at throwaway price. Perusal of the entire plaint shows that the subject matter of the

dispute has imminently civil profile as held by the Division Bench in the case of Avitel Post Studioz Ltd. In my opinion, having regard to the nature of the allegations of fraud made by the plaintiffs in the suit, it does not involve serious charges requiring parties to lead heavy documentary and oral evidence. Applying the tests laid down in the above Judgments as also in the light of the decisions of the Apex Court in the case of P. Anand Gajapathi Raju (supra), in my opinion, the learned trial Judge committed serious error in dismissing the application without examining the allegations of fraud made in the Plaint. The impugned order, therefore, cannot be sustained and deserves to be set aside. Hence, Civil Revision Application is allowed. The impugned order is set aside and the application at Exh.19 is allowed. The suit is disposed of and the matter is referred to arbitration in terms of clause 29 of the Agreement of Sale dated 12.11.2010. In the circumstances of the case, there shall be no order as to costs.

(R.G.KETKAR, J.)