

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2015

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
11.09.2015	18.09.2015

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM**

O.P. No.646 of 2013

B.Murugeswaran

.. Petitioner

Vs

1.Amir Jamal

2.Hameetha Banu

.. Respondents

Prayer :-Petition filed under Section 11 (5) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator in terms of Clause 17 of the Agreement for sale dated 06.02.2012, to adjudicate the disputes between the petitioner and the respondents.

For petitioners .. Mr.Jayesh B.Dolia for
M/s.Aiyar & Dolia

For Respondents .. Mr.M.N.S.Mohammed Habeeb Raja

O R D E R

This petition has been filed under Section 11 of the

<https://hcservices.ecourts.gov.in/hcservices/>

Arbitration and Conciliation Act, 1996, (Act) for

appointment of an Arbitrator to adjudicate the dispute between the petitioner and the respondents in connection with an agreement for sale dated 06.02.2012.

2. The case of the petitioner is that he entered into an agreement for sale for purchase of the schedule mentioned property owned by the respondent for a total sale consideration of Rs.6,02,25,000/-. The petitioner paid a sum of Rs.5,00,000/- by cheque dated 30.01.2012 and undertook further payment of Rs.45,00,000/- for which four cheques were issued. The petitioner claims that he has been put in possession of the property and invested a sum of Rs.1,00,00,000/- for developing the same. It is further stated that the respondents sent a telegram on 18.02.2013, stating as if, the petitioner is not ready to conclude the sale transaction in respect of the schedule property and instructed the petitioner to be present in the office of the Sub-Registrar, Kodaikanal on 25.02.2013, to complete the transaction. The petitioner sent a reply telegram on 23.02.2013, furnishing the details of the payment and the expenditure incurred for developing the property and also assured that he will register the sale deed on 25.02.2013. The petitioner would state that on the said date, the respondents were not present in the office of the Sub-Registrar. It is the further case of the petitioner that the respondent demanded the petitioner to furnish his Bank

Account number for depositing the advance amount received by them in respect of the schedule property. There has been exchange of notices between the parties, it is the further case of the petitioner that he issued a notice dated 09.03.2013, calling upon the petitioner to perform his obligation under the agreement of sale and execute the sale deed. After receipt of the notice, the respondent is said to have deposited the entire sum of Rs.50,00,000/- received under the agreement into the bank account of the petitioner and sent a reply notice dated 18.03.2013, stating that it is the petitioner who wanted the money to be deposited in his bank account. To this reply notice, a re-joinder was sent by the petitioner on 25.03.2013, reiterating the earlier contentions. Thereafter, on 09.04.2013, the petitioner through his counsel sent a letter to the respondents referring the matter to arbitration and appointing a retired Hon'ble Judge of this Court as their Arbitrator and called upon the respondents either to give consent or to suggest some other name of their choice. Since the said letter did not evoke any response, the petitioner has approached this Court by way of this petition.

3. Heard Mr. Jayesh B. Dolia, learned counsel appearing for the petitioner after referring to the facts stated above submitted that the agreement provides for an

Arbitration though the agreement is one for sale of property, the petitioner need not be directed to approach the Civil Court to sue for specific performance and he is entitled to invoke the Arbitration clause and seek for referring the matter to Arbitration. In support of such contention, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Olympus Superstructures Pvt., Ltd., vs. Meena Vijay Khetan & Ors., dated 11.05.1999*** and ***The Branch Manager, M/s.Magma Leasing & Finance Ltd., & Anr., vs. Potluri Madhavalata & Ors., dated 18.09.2009.***

4. Mr.M.N.S.Mohammed Habeeb Raja, learned counsel appearing for the respondents submitted that the petition is not maintainable in law and liable to be dismissed *in-limine*, as it is a mandatory requirement to have a subsisting and legally enforceable arbitration agreement and since the petitioner has already received back the entire advance amount of Rs.50,00,000/-, and nothing remains to be done under the agreement for sale and the fact that the amount has been returned by the respondent, has been admitted by the petitioner and the admission is unequivocal. Further, it is submitted that the petition is a clear abuse of process of Court and not maintainable under Section 11(6) of the Act. Further, it is submitted that the petition seeks to specifically enforce the

agreement for sale for which he has to approach the Civil Court by remitting necessary Court Fee under Section 42(a) of the Tamil Nadu Court Fees and Suit Valuation Act, 1955 and the Court Fee payable is Rs.45,16,875/- and the intention of the petitioner is to cheat and defraud the payment of Court Fee and his attempt is to camouflage a civil proceedings by seeking for reference to arbitration. Further, it is submitted that the petitioner is not in possession of the schedule mentioned property and the respondents are in possession of the same for several years and the allegation that the petitioner has invested Rs.1,00,00,000/- for developing the property is totally false and baseless more particularly, when there is no specific clause found in the agreement permitting the petitioner to develop the property.

5. It is further submitted that as per the telegram issued by the respondent, he and his wife were present in the Sub-Registrar's office on 25.02.2013, and there is over whelming evidence to show his presence. However, the petitioner intentionally and deliberately did not present himself in the Sub-Registrar's office. Thus, it is contended that the petitioner was never ready and willing to complete the sale by paying the remaining sale consideration of Rs.5,07,25,000/-. Further, it is submitted that it is the petitioner who had given his bank account

number to the respondents for depositing the entire advance amount received by them as specifically demanded and the receipt of the entire advance amount of Rs.50,00,000/-, has not been disputed by the petitioner, but unequivocally accepted, as a consequence of which the agreement for sale itself stands terminated and the present petition is not maintainable. Further, it is submitted that the respondent did not receive any letter dated 09.04.2013, from the petitioner allegedly nominating their Arbitrator. The learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of **Ramesh Kumar and Anr., vs. Furu Ram & Anr.**, reported in **(2011) 8 SCC 613**, stating that the attempt of the petitioner is a clear case of stamp fraud as explained by the Hon'ble Supreme Court as the intention of the petitioner is to avoid payment of stamp duty and this is also one of a fraudulent activity. Reliance was also placed on the decision of the Hon'ble Supreme Court in the case of **Schlumberger Asia Services Limited vs. Oil and Natural Gas Corporation Limited** reported in **(2013) 7 SCC 562**, to support the contention that unless and until there is a valid arbitration agreement, the question of referring the matter for arbitration does not arise and this is required to be decided in a petition under Section 11(6) of the Act and in this regard, reference was also made to the decision in the case of **Anil & Ors. vs Rajendra & Ors.**, reported in **2015-3-**

L.W., 609. To support the contention that the petitioner is estopped from invoking Section 11(6) of the Act, after having accepted the entire advance amount, pursuant to which the agreement for sale stood terminated, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of **International Amusement Limited vs. India Trade Promotion Organisation & Anr.**, reported in **AIR-2015 SC 749**.

6. Heard the learned counsels appearing for the parties and perused the materials placed on record.

7. The first question to be considered is as to whether there is a valid and binding arbitration agreements between the parties so as to maintain this petition seeking for a direction to refer the dispute to an Arbitral Tribunal invoking Section 11(6) of the Arbitration and Conciliation Act, 1996. The observations of the Hon'ble Supreme Court in the case of **SBP, & Company vs. Patel Engineering & Anr.**, reported in **(2005) 8 SCC 618** was explained by the Hon'ble Supreme Court in the case of **Indian Oil Corpn. Ltd. v. Sps Engg. Ltd.**, reported in **(2011) 3 SCC 507**, and it was held that to find out whether a claim is barred by *res judicata* or whether a claim is *malafide*, it will be necessary to examine the facts and relevant documents. It was pointed out that the issue to

be decided in an application under Section 11 of the Act, is whether there is a Arbitration Agreement between the parties, the Chief Justice or his designate is not expected to go the merits of the claim or examine the tenability of the claim in an application under Section 11 of the Act. The Chief Justice or his designate may however choose to decide whether the claim is a dead (long barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. It was further pointed out that when it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time-barred claim and there is no need for any detailed consideration of evidence.

8. Bearing the above legal principle in mind, if we examine the facts of the case, we may notice that substantially the factual details are admitted; there is no dispute as regards the execution of the agreement of sale, total sale consideration payable, the amount of advance paid, the mode of payment and the return of the advance amount by the respondent to the petitioner in full.

9. Thus, the only issue would be as to whether on receipt of the refund of the full advance amount from the respondent whether the agreement of sale continued to survive. Only if the petitioner succeeds in establishing the same, he could contend that there is a valid arbitration agreement. If on facts, the Court comes to a conclusion that neither the contract nor the arbitration agreement survive, then the petition is liable to be rejected.

10. As noticed above, the petitioner does not dispute the receipt of the entire advance amount. Admittedly, the advance amount was remitted into the bank account of the petitioner. This remittance was made by the respondent and accepted by the petitioner in their rejoinder notice dated 24.03.2013. On receipt of the said amount, the petitioner did not take any other step to either return the amount or sue for specific performance.

11. On the other hand, the respondent sent a reply notice dated 01.04.2013, to the notice issued by the counsel for the petitioner dated 24.03.2013. The notice dated 01.04.2013, clearly spells out about the termination of the agreement. It is thereafter the petitioner is stated to have sent a notice dated 09.04.2013, nominating their Arbitrator. The respondent would state that they have not

received any such notice appointing an Arbitrator.

12. Be that as it may on and after the receipt of the refund of amount of Rs.50,00,000/- being advance paid by the petitioner to the respondent, there was no legal recourse resorted to by the petitioner to establish his right under the agreement for sale. The attempt of the petitioner to set up a case that the respondent on his own volition deposited a sum of Rs.50 lakhs into his Bank Account without the petitioner seeking for refund is a very hard story to believe, more particularly noting the subsequent conduct of the petitioner. Thus, it has to be concluded that the agreement for sale stood terminated for all purposes and the question of contending that the arbitration agreement still continuous to survive is untenable.

13. The decisions relied on by the learned counsel appearing for the petitioner in the case of **Olympus Superstructures Pvt., Ltd.**, (supra), and **The Branch Manager, M/s.Magma Leasing & Finance Ltd., & Anr.**, (supra) are factually different as in those cases, the existence of the agreement and the Arbitration Agreement were not in dispute. The Court considered the issue as to whether the Arbitrator could consider a relief of specific performance and whether he was empowered to grant such relief. In the

context of such contention, it was pointed out that merely because the consequence of Specific Relief Act confer discretion on Courts to grant specific performance of the contract does not mean that the parties cannot agree that the discretion will be exercised by a form of their choice. The decisions relied on by the learned counsel for the petitioner are of no assistance to the case on hand, as they are distinguishable on facts.

14. Further, it has to be noted that when the petitioner sought for an order of interim injunction to restrain the respondents from alienating are dealing with the property in Original Application in O.A.No.321 of 2013, the same was rejected observing that the relief for specific purpose is discretionary and the right of the parties seeking specific purpose is duly protected under the principles of *lis pendence*. In terms of the decision of the Hon'ble Supreme Court in the case of **SBP & Co.,** (supra), has explained in **Indian Oil Corporation Ltd.,** this Court is entitled to examine as to whether the parties have recorded satisfaction, exhausted all rights and obligation and nothing survived in the contract or not. On facts this Court is convinced that the parties have exhausted all rights under the contract and the agreement for sale does not any longer survive in the light of the undisputed facts that the entire advance amount of Rs.50,00,000/-, has been

paid by the respondent to the petitioner and has been accounted and utilised by him.

15. For all the above reasons, the petitioner has not made out any case for issuance of direction to appoint an Arbitrator in the facts and circumstances of this case and accordingly, the Petition stands dismissed. No costs.

sd/.T.S.S.J

18.09.2015

//Certified to be a true copy//
Dated this the day of 2015.

R.s/15.10.2015

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