

IN THE HIGH COURT OF DELHI AT NEW DELHI

**ARB.P. 163/2013 with I.A. Nos. 11925/2013, 7867/2014,
and 14174/2014**

SHAMSHER GUJJAR @ CHOUDHARY Petitioner
Through: Mr. Kirti Uppal, Senior Advocate
with Mr. Manish Gandhi, Mr. Ravi
Kumar and Mr. Manish
Kr. Singh, Advocates.
versus

SARTAJ HOTEL APARTMENTS AND
VILLAS PVT LTD & OTHERS Respondents
Through: Mr. Sunil Kr. Atreya with
Mr. Munish Kr. Mahendra and
Mr. Ajay Wadhera, Advocates.

AND

**O.M.P. 1047/2012 with I.A. 17526/2013, 12632/2014,
12913/2014, 484 of 2015 and CRL. M.A. 9066 of 2013 and
CCP(OS) 59 of 2013**

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CORAM: JUSTICE S.MURALIDHAR

ORDER
02.02.2015

1. Arb. P. No. 163 of 2013 is a petition under Section 11(5) read with Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the parties including their claims and the counter claims. O.M.P. No. 1047 of 2012 is under Section 9 of the Act for interim reliefs.

2. The background facts are that, according to the Petitioner, in August 2011, he began negotiating with the Respondent No.1, Sartaj Hotel Apartments and Villas Pvt. Ltd. through its Managing Director Mr. Raghbir Singh (Respondent No.2) for the purchase of land measuring 3.90 acres in Khasra Nos. 396, 377, part of 369, part of 370, part of 372 and part of 376 in Block-II in the revenue estate of village Malikpur-Kohi @ Rangpuri, New Delhi including the motel constructed thereon under the name "Celebration Garden" for a total sale consideration was Rs.79 crores. According to the Petitioner, the parties signed a Memorandum of Understanding ('MOU') dated 5th October 2011 containing the arbitration clause. It is stated that the Petitioner paid the Respondents a total sum of Rs. 10 crores from time to time for which the Respondents executed receipts. The Petitioner alleges that the Respondent did not come forward to complete the formalities and after much persuasion towards the end of September 2012 assured that they would take the requisite steps for obtaining the No Objection Certificate, completion certificate and completion of other formalities. The Petitioner states that he was induced into issuing a post dated cheque dated 6th December 2012 in favour of the Respondent for a sum of Rs.50,00,000/-. The Petitioner claims to be ready and willing to perform his part of the obligations under the MOU. He sent the legal

notices on 25th October 2012 and 30th October 2012 invoking the arbitration clause.

3. The stand of the Respondents in the reply filed is that negotiations took place in respect of Block-II motel along with land admeasuring 3.75 acres. Respondent No.1. was under tremendous pressure from the bank from which it had availed credit facility and was facing proceedings under the Securitization And Reconstruction Of Financial Assets And Enforcement Of Securities Act, 2002. It is in those circumstances that it agreed to sell the said property for a sale consideration of Rs.1,15,00,00,000/- . Respondent No.1 does not deny that it received Rs.1 crore from the Petitioner on 20th August 2011 for which a receipt-cum-letter of intent (LOI) was signed by the parties. It is stated that the parties agreed to enter into a MOU, at the time of signing of which 10% of the sale consideration was to be paid. It is alleged that the Petitioner, however, did not come forward to make the payment of 10% of the amount. It is, however, acknowledged that upto 17th September 2011, a sum of Rs. 3.50 crores had been received for which an acknowledgment was issued by the Respondent No.1. A copy of the said document has been enclosed with the reply. It is stated that the Petitioner got the said receipt signed which had blank space next to the khasra number, since at that time the khasra number could not be mentioned. It is further acknowledged that on 28th September 2012 the Petitioner paid Rs. 50 lakhs of which Rs. 35 lakhs was by cheque and Rs.15 lakhs in cash. The Respondent signed a receipt for a total sum of Rs.4 crores. This receipt again had a blank space next to the khasra number. It, however, contained the words 'Block-II'.

4. It is stated that only a draft MOU was signed by the parties on 5th October 2011. Further a sum of Rs.1 crore was paid by cheque on 12th October 2011 and Rs.50 lakhs on 17th November 2011. Rs.1.30 crores was paid on 9th December 2011 out of which a sum of Rs.50 lakhs was paid by cheque. A further sum of Rs. 45 lakhs was also paid. It is further submitted that on 9th January 2012 the Petitioner paid Rs.65 lakhs out of which Rs.30 lakhs in cash and Rs.35 lakhs by cheque. Up to 9th January 2012 a total sum of Rs. 7.9 crores was received by Respondent No.1. Receipt for the said amount was also issued.

5. On 31st January 2012, the Respondent No.1 reminded the Petitioner that he should complete the transactions by making payment of the balance sum. This was reiterated on 21st March 2012. It is stated that on 2nd March 2012 the Petitioner paid Rs. 2.10 crores of which Rs.1 crore was paid in cash. A receipt was issued for a total sum of Rs.10 crores. It is stated that one of the cheques of Rs.50 lakhs was dishonoured and therefore, in fact only Rs. 9.50 crores was received till then and this was conveyed to the Petitioner by letter dated 14th December 2012.

6. The stand of Respondent No.1 is that the Petitioner has not come forward to fulfill his obligations. It is stated that in collusion with one Mr. Mohinder Kumar Magon, the Petitioner and his father interpolated the khasra number in the blank receipts and sold the properties which form subject matter of the dispute to third parties. Criminal proceedings were initiated against the Petitioner on the basis of the complaint with the Police Station Vasant Kunj on 7th December 2012. The Respondents No.1 also claim that they carried out a sting operation

against the Petitioner. The electronic data gathered in that regard has been placed on record by way of CDs along with transcripts.

7. Relying on the decision of ***S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1*** and ***N. Radhakrishnan v. Maestro Engineers 2009 (13) SCALE 403***, it is submitted by Mr. Sunil Atreya, learned counsel for the Respondents, that the Petitioner has not come to the Court with clean hands and is relying on the documents which were interpolated by him and used in other proceedings in respect of which a criminal complaint has been filed. He accordingly submitted that no relief ought to be granted to the Petitioner.

8. Mr. Kirti Uppal, learned Senior counsel for the Petitioner, on the other hand, submitted that the MoU dated 5th October 2011 containing the arbitration clause has admittedly been signed by both parties. This being a document within the meaning of Section 7 (4) (a) of the Act is sufficient to constitute an arbitration agreement. Relying on the decision in ***Trimex International Fze Ltd. v. Vedanta Aluminium Ltd., II (2010) SLT 6***, he submitted that an agreement which required a formal contract to be entered into can still be treated as an arbitration agreement. Relying on the decision in ***Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677***, he submitted that the mere pendency of criminal proceedings involving the parties, need not be a ground to delay the reference of the disputes to arbitration.

9. The above submissions have been considered. It requires to be noticed that under Section 7 (4) (a) of the Act, an arbitration agreement

could be contained in a document signed by the parties. What is not disputed is that the document titled as an MoU is dated 5th October 2011 and has been signed by both parties. It does contain certain blanks but not in the arbitration clause. There is a contemporaneous correspondence between the parties that refers to the MoU. In the receipt dated 20th August 2011, it is stated that a proper MoU will be signed by both parties on or before 4th September 2011. This is again referred to by Respondent No. 2 in his letter dated 24th September 2011 to the Petitioner. He confirms in his letter dated 29th October 2011 in which he states that “Also as per your request we had made a draft MOU and have got it approved from you....”. This confirms that it is the Respondents who actually drew up the draft MoU containing the arbitration clause and both parties signed on it. Therefore, for the purposes of Section 7 (4)(a), this is more than sufficient for the Court to proceed on the basis that there is an arbitration agreement between the parties.

10. The question as to the consequences of there being blanks in the document titled as an MoU and whether there was a binding agreement between the parties in terms of which each of them was bound by certain obligations of conduct, will be obviously be gone into in the arbitral proceedings. As observed in ***Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee*** (supra), the parties having agreed to have their disputes resolved through arbitration “cannot be permitted to avoid arbitration, without satisfying the Court that it will be just and in the interest of all the parties not to proceed with the arbitration”. In ***Trimax International Fze Ltd. v. Vedanta Aluminium Ltd.*** (supra), the Court proceeded on the basis that “..once

the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed”.

11. Interestingly, it is not as if the document termed as MoU is being characterized by the Respondents as forged or fabricated. Their case is that some of the receipts relied upon by the Petitioner were interpolated by him and misused subsequently for other transactions for which separate criminal proceedings are pending. The mere fact that there could be criminal proceedings between the parties need not come in the way of the Court appointing an Arbitrator as far as the disputes between the parties are concerned. Again as observed in ***Swiss Timing Limited (SCC @ 693)***:

“28. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract *void*, necessary plea can be taken on the basis of the conviction to resist the *execution/enforcement* of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is *void* or *voidable*, it would have the wholly undesirable result

of delaying the arbitration.”

12. Consequently, the Court holds that the objections of the Respondents to the appointment of an Arbitrator are not tenable.

13. The Court accordingly appoints Justice P.K. Bhasin, a former Judge of this Court, residing at S-6/21, DLF, Phase-III, Gurgaon (Mob. 9871300032) as sole Arbitrator to adjudicate the disputes between the parties, including the claims and counter-claims. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre (‘DAC’). The fees of the learned Arbitrator will be in terms of the Delhi International Arbitration Centre Arbitration Proceedings (Arbitrators’ Fees) Rules.

14. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator as well as Secretary, DAC forthwith.

I.A. Nos. 11925 of 2013, 7867 of 2014 and 14174 of 2014

15. These applications relate to the so called ‘Sting Operation’ carried out by the Respondents and for authentication of the electronic evidence sought to be produced by the Respondents. The Court is of the view that appropriate directions in that regard, including any directions for forensic examination of documents by experts can be obtained in the arbitral proceedings in accordance with law.

16. For the above purpose it will open to the parties to rely on the pleadings and documents in O.M.P. No. 1047 of 2012. They can even seek the production of the original record in the arbitral proceedings.

OMP No. 1047 of 2012

17. As far as this petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') is concerned, the Court had passed an interim order on 23rd November 2012 directing the Respondents to maintain status quo in respect of the property in questions which falls in land admeasuring 3.90 acres in khasra Nos. 396, 377, part of 369, part of 370, part of 372 and part of 376 in Block-II in the revenue estate of Village Malikpur-Kohi @ Rangpuri, New Delhi-110037 and also Motel with its building thereon known as Celebration Garden.

18. During the pendency of the present petition, the said interim has continued. The attempts at mediation have not succeeded.

19. In that view of the matter, the order of status quo dated 23rd November 2012 will continue during the arbitral proceedings subject to any modification or variation thereof by the learned Arbitrator, in an application by either party under Section 17 of the Act.

20. Accordingly, the petition is disposed of.

CCP (O) No. 59 of 2013 & Crl.M.A. No. 9566 of 2013

21. The Petitioner is stated to have paid a sum of Rs.10 crores to the Respondents as part consideration for the property in question. By a separate order made today, the Court has appointed an Arbitrator to adjudicate the disputes between the parties. The question whether there has been any interpolation made by the Petitioner in documents, some of which may have been relied upon in the present proceedings, will have to await the outcome of the other proceedings between the parties. In any event, the said question is likely to be examined by the learned

Arbitrator as well. Consequently, at this stage, the Court is not inclined to examine the question whether a case is made out against the Respondents under Sections 2, 10 and 12 of the Contempt of Courts Act for disobedience to the order dated 23rd November 2012. This issue can also be examined by the learned Arbitrator, and if found favour in the Award, appropriate proceedings can be initiated.

22. CCP(O) 59 of 2013 is accordingly disposed of.

23. CRL. M.A. 9066 of 2013 filed under Section 340 CrPC is also accordingly disposed of.

IA No. 17526 of 2013 & 12913 of 2014

24. As far as these pending applications are concerned, the Court is not inclined to vary the order of *status quo* dated 23rd November 2012 at this stage at the instance of Respondent No. 1 since the parties have been relegated to the arbitral proceedings for interim reliefs.

25. I.A. Nos. 17526 of 2013 and 12913/2014 are disposed of in the above terms.

IA No. 12632 of 2014

26. As far as I.A. 12632 of 2014 is concerned, the Court is not inclined at this stage to permit the Petitioner to exhibit any signboard on the property in question. The application is dismissed.

IA No. 484 of 2015

27. Since the contempt petition has been disposed of, I.A. 484 of 2015 filed by Respondent No. 1 seeking clarification/modification of the

order dated 23rd November 2012 does not survive and it is disposed of as such.

S. MURALIDHAR, J.

FEBRUARY 02, 2015

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