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

+ **ARB.P. 584/2015**

BHUPENDRA ENGINEERING AND CONSTRUCTIONS..... Petitioner

Through: Mr. Anil Sapra, Senior Advocate with Mr. Ashutosh Dubey, Mr. Rupal Kapoor, Ms. Piyusha Singh & Mr. Lavnish Kumar, Advocates.

versus

SHREE RAM URBAN INFRASTRUCTURE LTD & ORS... Respondents

Through: Mr. Sachin Datta, Senior Advocate with Mr. Lalit Katariya, Ms. Nanda Devi Deka & Ms. Prity, Advocates.

+ **O.M.P.(I) 526/2015**

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versus

SHREE RAM URBAN INFRASTRUCTURE LTD Respondent

Through: Mr. Sachin Datta, Senior Advocate with Mr. Lalit Katariya, Ms. Nanda Devi Deka & Ms. Prity, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

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08.12.2016

1. Arb. P. 584 of 2015 is a petition under Section 11 of the Arbitration and

Conciliation Act, 1996 (Act) filed by M/s. Bhupendra Engineering & Constructions, which describes itself as a partnership firm having its office at C-143, Inside Jaipuria Mills, Old Sabzi Mandi, Clock Tower, Delhi – 110007 and its second address at Shree Ram Mills Compound, 1547, G.M. Bhosle Marg, Worli, Mumbai – 400018.

2. There are four respondents to the petition. Respondent No. 1 is Shree Ram Urban Infrastructure Limited (SRUIL), which was earlier known as Shree Ram Mills Limited, having its registered office at Ganpatrao Kadam Marg, Lower Parel, Mumbai – 400013. Respondent No. 2 is Utility Premises Private Limited (UPPL) having its registered office at Ground Floor, Y-14A, Green Park Main, New Delhi – 110016. Respondent No. 3 is Mr. Santosh Kumar Bagla, described as the Attorney of SRUIL at First Floor, Y-14A, Green Park Main, New Delhi – 110016. Respondent No. 4 is CVIL Infra Limited (CIL), earlier known as M/s. Bhupendra Capital & Finance Limited, having its registered office at 33, Atlanta, 3rd Floor, Nariman Point, Mumbai – 401021 and another office at Second Floor, Y-14A, Green Park Main, New Delhi – 110016.

3. It is stated that the petition is being filed by Mr. Rohit Bagla, one of the partners, who has been duly authorised by the Petitioner firm by the Resolution dated 28th July, 2015. According to the Petitioner, the firm consists of two partners – (i) Aston Enterprises Limited and (ii) Mr. Rohit Bagla s/o late Mr. Vinod Kumar Bagla.

4. Respondent No. 1 is stated to be currently engaged in real estate development and construction business. Respondent No. 2 is also stated to be in the same business. Respondent No. 3 is stated to be an Attorney of

SRUIL and also the Director of UPPL. Respondent No. 4 is stated to be in the business of infrastructure development and financial services and has extended financial support to the projects of Respondent Nos. 1 & 2.

5. It is stated that on 27th April, 1994, a Joint Venture (JV) Agreement was entered into between Respondent Nos. 1 and 2 wherein Respondent No. 1 agreed to sell to Respondent No. 2 a piece of land admeasuring 4848 sq. mts. A Floor Space Index (FSI) of 1,20,000 sq.ft. was expected to be developed on the said land. When it was realised that it was not going to be possible to construct such FSI, another Agreement was entered into on 18th July, 1994 whereby Respondent No. 1 agreed to provide 2500.72 sq. mts. of land so that the above FSI could be achieved.

6. According to the Petitioner, pursuant to the aforementioned agreement, Respondent Nos. 1 and 2 by the resolution dated 31st October, 1994 approved and confirmed the appointment of the Petitioner 'M/s. Bhupendra Engineering & Constructions' as Project Manager for the smooth development of the said JV property. The resolution authorised Mr. Abhaykumar S. Kasliwal and Mr. Warij A. Kasliwal, Directors of Respondent No. 1 to hand over physical possession of the property to the Petitioner.

7. Yet another agreement was stated to have been executed on 2nd November, 1994 between the Petitioner on the one hand and Respondent Nos. 1 and 2 on the other whereby the physical possession, use and occupation of land admeasuring 7348.82 sq. mts. in Lower Parel Division at G.M. Bhosle Marg, Worli, Mumbai belonging to Respondent No. 1 was handed over to the Petitioner.

8. According to the Petitioner, a Tripartite Agreement (TPA) was executed between the parties on 9th November, 1994 wherein Respondent No. 2 agreed to raise finances to discharge the obligations and liabilities of Respondent No. 1 to various banks and financial institutions. It is stated that Respondent No. 2 agreed to arrange funds for Respondent No. 1. Respondent No. 4, on the guarantee of Respondent No. 2, agreed to extend financial assistance to Respondent No. 1.

9. The Petitioner claims that the entire management, administration and development project of Respondent Nos. 1 and 2 was to be supervised by the Petitioner for a consideration of Rs. 110 per sq. ft. for a total FSI of 1,20,000 sq. ft. According to the Petitioner, Respondent No. 1 at a Board Meeting on 19th January, 1995 resolved that since it was not possible to develop the total FSI of 1,20,000 sq. ft., additional land admeasuring 2500.72 sq. mts. being CS No. 1547 (Part) and 1/1540 had to be earmarked and handed over to the Petitioner. It is stated that an Addendum/Supplementary Agreement was executed on 15th March, 1995 with the Petitioner wherein Respondent Nos. 1 and 2 agreed that the fee of Rs. 110 per sq. ft. for 1,20,000 sq. ft. payable to the Petitioner would be shared and paid to the Petitioner by Respondent Nos. 1, 2 and 4 in the ratio of 40:30:30, respectively.

10. It was further agreed in the above Supplementary Agreement by Respondent Nos. 1 and 2 that over and above the fee of Rs. 110 per sq. ft., the Petitioner would be given Rs. 85 per sq. ft. towards actual costs and expenses including liaison within 30 days of raising the bills/debit notes.

Default in making the payment was to carry interest at 18% per annum compounded quarterly.

11. Disputes arose between the parties and the development of the FSI came to a standstill. Respondent Nos. 1 and 2 assured the Petitioner that since it had a lien over the property, it should not have any apprehension. It is stated that on 5th August, 2015, the Petitioner issued a notice to the Respondents invoking the arbitration clause and claiming that as on 30th June, 2015 a sum of Rs.42.34 crores together with future interest and expenses was owed to the Petitioner. The Petitioner also sought concurrence of the Respondents for appointment of an Arbitrator nominated by the Petitioner as the sole Arbitrator. By the Reply dated 24th August, 2015, UPPL claimed that it owed nothing to the Petitioner.

12. The Petitioner then filed OMP (I) No.526/2015 under Section 9 of the Act, in which, on 16th September, 2015 *inter alia* the following order was passed:

“3. The competent officers of all the parties shall remain present in Court on the next date of hearing along with all original documents relating to this case within their power and possession. The respondents shall also produce the original agreement, if any, already executed by them to sell the said property. If the respondents have already entered into any agreement, the respondents shall not accept any further consideration from the purchaser till the next date of hearing and shall intimate the purchaser to remain present in Court on the next date of hearing.”

13. Thereafter Arb. P. No.584/2015 was filed on 16th October, 2015 praying for the appointment of an Arbitrator.

14. In the reply filed on behalf of Respondent Nos. 2 and 3, a preliminary

objection was taken as regards the maintainability of the petition under Section 11 of the Act. It was alleged that there was collusion between the Petitioner and Respondent No. 1 to cause delay in obtaining requisite permissions/clearances from various authorities including the Municipal Corporation of Greater Mumbai. It was alleged that the said delay led to illegal gains to Respondent No. 1 at the cost of Respondent Nos. 2 and 3.

15. On behalf of Respondent No. 4, a separate reply was filed where it was contended that the said petition had been filed in collusion with Respondent No. 1. In the reply filed by SRUIL in OMP (I) No.526/2015, it is pointed out that the purported agreements were executed in Mumbai and the land in respect of which the dispute is raised is also in Mumbai and therefore, this Court does not have jurisdiction to entertain the petition. Secondly, it was pointed out that the “purported agreement dated 2nd November, 1994 and 15th March, 1995 has been executed by Bhupendra Industries Limited (BIL), a company registered under the Companies Act.” It was pointed out that in the year 1999, BIL made a reference to the Board for Industrial and Financial Reconstruction (BIFR) and to the best of the knowledge of Respondent No.1, BIL had been wound up. The present petition was filed by M/s. Bhupendra Engineer and Constructions, a partnership firm. Consequently, the petition was liable to be dismissed on the said ground as well.

16. After hearing of both these petitions, at one stage on 1st February, 2016, orders were reserved. Both parties were directed to file “the original documents which are in their power and possession.” The parties were also allowed to file the written synopsis within two weeks.

17. Thereafter on 15th February, 2016, the following order was passed:

“These matters are ordered to be listed for directions, as the petitioner has filed the original documents along with the written submissions. Earlier, both the parties made their submissions on the basis of photocopies and the respondents contended that these are forged documents. Thus the matter be listed for re-hearing.

No one appears on behalf of respondent No.1. Learned counsel for the petitioner states that he will inform the counsel for respondent No.1 who is the main contesting party.

List on 23rd February, 2016 for directions.

Dasti, to both the parties.”

18. On 23rd February 2016, the following order was passed:

“The matter is fixed for re-hearing in view of reasons mentioned in the last order. Original documents have been filed by the petitioner after arguments. Copies have been given to the learned counsel for the respondents who submit that inspection is required so that the remaining submissions be made on the next date. Learned counsel for the petitioner has no objection.

Learned counsel for the petitioner submits that the respondents had produced the original minutes book for the relevant period, his client also wishes to inspect the said minutes book. Learned counsel for the respondents has no objection. Time may be fixed between the parties for the purpose of inspection as agreed. Original minutes book thereafter be filed by the respondents on or before the next date.

List on 16th March, 2016.”

19. Meanwhile, against the interim order dated 6th November, 2015 passed in OMP(I) No.526/2015 vacating the earlier interim order dated 16th September, 2015, an appeal being FAO (OS) No.23/2016 was filed by the

Petitioner which was dismissed as withdrawn by the Division Bench (DB) on 8th February, 2016 by the following order:

“The learned counsel for the parties inform us that the hearing in OMP No.526/2015 has been concluded before the learned Single Judge and judgment has been reserved on 01.02.2016. Consequently, the learned counsel for the appellant submits that he may be permitted to withdraw this appeal with liberty to challenge the order passed by the learned Single Judge in the said OMP in case it goes against him.

The appeal is dismissed as withdrawn with the aforesaid liberty.”

20. On 19th July, 2016, the parties were allowed inspect of the documents of each other. At the hearing on 9th November, 2016, the following order was passed:

“1. Way back by the order dated 16th September, 2015 in OMP (I) 526/2015, this Court had directed the competent officers of the parties to remain present in the Court along with the original documents relating to this case within their power and possession.

2. In the notice sent by the Petitioner to the Respondents on 5th August, 2015, a reference has been made by the Petitioner to both the Agreement dated 2nd November, 1994 as well as the Supplementary Agreement dated 15th March, 1995 both of which contain an arbitration clause. It is stated that while the Agreement dated 2nd November, 1994 is filed in the original, only a photocopy of the Supplementary Agreement dated 15th March, 1995 has been filed.

3. Learned counsel for the Petitioner seeks one last opportunity to either file the Supplementary Agreement dated 15th March, 1995 in original or to explain on an affidavit the reasons for its inability to do so by the next date. Likewise, the Petitioner will either file Annexures P-14, P-16, P17 & P-25 of OMP (I) No.526/2016 in original or explain in the same affidavit the reasons for its inability to do so by the next date.

4. Mr. Datta, learned Senior Advocate for Respondent No. 1 states that all the original documents in possession of Respondent No.1 have been brought to the Court today, the same will also be brought to the Court on the next date.

5. List on 8th December, 2016.”

21. Pursuant to the above order, the Petitioner has filed an additional affidavit by Mr. Rohit Bagla, Partner of the Petitioner on 6th December, 2016. The explanation for not being able to produce the original of the Supplementary Agreement dated 15th March, 1995 and Annexures P-14, P-16, P-17 and P-25 filed in OMP(I) No.526/2016 was on account of the Respondent stopping to give access to the Petitioner to the site office since 2014. It is claimed that these documents are lying in the site office. It is further claimed that the original of the letter dated 27th June, 1995 (Annexure P-16) written by the Petitioner to Respondent No. 1 should be available with Respondent No. 1. The Petitioner also claims to have made applications under the Right to Information Act to the Municipal Corporation of Greater Mumbai asking for certified copies of the Supplementary Agreement dated 15th March, 1995, which is yet to be received.

22. There is a fundamental issue as regards maintainability of the petition under Section 11 of the Act in the above facts and circumstances. Section 2(1)(h) of the Act defines “party” to mean a party to an arbitration agreement. In order to be able to maintain Arb. P. No.584/2015 under Section 11(6) of the Act praying for the appointment of an Arbitrator, the Petitioner has to be able to show that it is a party to an arbitration agreement.

23. In this context, it is seen that the Memorandum of Understanding (MoU) dated 2nd November, 1994 which contains the arbitration clause which is sought to be invoked by the Petitioner has been executed by (i) Shree Ram Mills Limited; (ii) UPPL and M/s. Bhupendra Engineering and Constructions, a division of BIL, also a company incorporated and registered under the provisions of the Companies Act, 1956. Therefore, the parties to the said MoU did not include the partnership firm i.e., M/s. Bhupendra Engineering and Constructions, which filed the present petition.

24. It was urged by Mr. Anil Sapra, learned Senior Advocate appearing for the Petitioner that the reference to M/s. Bhupendra Engineering and Constructions as 'a division' of BIL should be taken to mean the present firm. The Court is unable to accept the above submission. An entity being described as 'a division' of a company cannot possibly be taken to be a registered partnership firm. Further, the registration certificate of the Petitioner issued by the Registrar, NCT of Delhi is dated 30th August, 2015.

25. Mr. Sapra then referred to a copy of the Board Resolution dated 31st October, 1994 of Shree Ram Mills Limited, which reads as under:

“RESOLVED that pursuant to the Joint Venture Agreement dated 27.4.94, Utility Premises Private Limited have appointed MESSERS BHUPENDRA ENGINEERING & CONSTRUCTIONS PRIVATE LIMITED having office at 1/F, La-Kozy Mansion, 21 Chowpatty Seaface, Bombay 400007 as Project Manager for the smooth development of the property of the Company be and is hereby confirmed by the Company their appointment as Project Manager.

RESOLVED further that the following documents, Standard Forms thereof are placed before this Meeting and initial by the Chairman fix the purpose of identification, be and are hereby approved and that Shri Abhayakumar S. Kasliwal, Shri Warij A. Kasliwal, Directors of the Company, be and are hereby severally authorised to finalise and to execute the same for and on behalf of the Company.

RESOLVED further that the Common Seal of the Company be affixed to the Agreement and to such other documents by whatever name called as may be required to be executed under the Common Seal of the Company of the Company in favour of M/s. Bhupendra Engineering & Constructions.

RESOLVED that Shri Abhayakumar S. Kasliwal and Shri Warij A. Kasliwal, Directors of the Company are hereby authorised to handover the physical possession of all that piece and parcel of land lying being and situate at 1547, Dr. G.M. Bhosle Marg, Worli Naka, Worli, Bombay 400018, being the immovable property bearing C.T.S. No.1547 (part), 1548, 1549 (part), admeasuring 4848.1 sq.mtrs. or thereabouts (for short “the said property”) to MESSERS BHUPENDRA ENGINEERING & CONSTRUCTIONS PRIVATE LIMITED to work as Project Manager.”

26. It is sought to be contended by Mr. Sapra that although in para 1 of the above resolution M/s. Bhupendra Engineering & Constructions Private Limited has been appointed as the Project Manager, since there was no such entity, it was only a typographical error and it should be read as a reference to Bhupendra Engineering & Constructions, a partnership firm. He further submits that in para 3 of the above resolution, it was made explicit that the common seal and other documents of the Company were given to M/s. Bhupendra Engineering & Constructions, which was another indication that it was the partnership firm which was authorised to act as Project Manager.

27. The Court is unable to agree with the above submission. It is plain

from the last paragraph of the above resolution that the entity appointed to work as Project Manager was Bhupendra Engineering and Constructions Private Limited. It is not possible for the Court, at this stage – 22 years after the resolution, to read into the above resolution something which is not written there viz., that the partnership firm i.e., Bhupendra Engineering and Constructions had been appointed as the Project Manager. It could at the highest be contended that it was BIL which was a party thereto and not the Petitioner in its present form as a partnership firm. Viewed from any angle, therefore, the Petitioner was never a party to the contract or the MoU, which contained the arbitration clause.

28. There is also a problem about the Petitioner being unable to produce the original of the Supplementary Agreement as well as other annexures being relied upon. In this context, a reference may be made to IA No.22297/2015 in Arb.P. No.584/2015, in which it has been offered in para 2 that “some of the Annexures to the petition under Section 11(6) of the Act are not certified copies of its originals. It is respectfully submitted that due to paucity of time the Petitioner are unable to replace them at this stage.” All that was sought was an exemption from filing better copies of the Annexures. This application was supported by the affidavit of Mr. Rohit Bagla, who stated therein that the application was drafted under his instructions. In fact, soon after the receipt of notice in the application, Respondent No. 1 filed IA No.25993/2015 with the prayer that the Petitioner should be directed to file the original MoU dated 2nd November, 1994, Supplementary Agreement dated 15th March, 1995 and the letters dated 19th July, 1995 and 20th October, 1995 enclosed with the arbitration application.

29. From the affidavit now filed by Mr. Rohit Bagla pursuant to the order dated 9th November, 2016, what transpires is that the Petitioner never had with it the originals of the Supplementary Agreement dated 15th March, 1995 or the originals of Annexures P-14, P-16, P-17 and P-25 to OMP (I) No.526/2015, some of which have also been enclosed in the list of documents filed in Arb. P. No.584/2015. Clearly, therefore, the Petitioner was not being candid when it filed the application for exemption from filing the original documents. The net result is that the Petitioner is unable to produce before the Court any credible material to show that it is a party to an arbitration agreement. Consequently, the Court cannot grant the Petitioner the relief prayed for in this petition.

30. Arb P No. 584 of 2015 is dismissed.

IA No.25993/2015 in Arb. P. No.584/2015

31. In view of the dismissal of the Arbitration Petition, the application does not survive for consideration and is disposed of.

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32. In view of the dismissal of Arb. P. No.584/2015 on the ground that the Petitioner is not a party to an arbitration agreement, the question of permitting the Petitioner to invoke Section 9 of the Act and seek interim order does not arise. Consequently, the Court hereby vacates the interim order passed in OMP(I) No.526/2015.

33. The petition is dismissed.

Crl. M.A. Nos. 16388/2015 & 5815/2016 in OMP (I) No.526/2015

34. In view of the dismissal of OMP (I) No.526/2015, the applications do not survive for consideration and are disposed of.

S. MURALIDHAR, J.

DECEMBER 08, 2016

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