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

Date of decision: 20.11.2018

+ ARB.P. 94/2018

SHRI B.D. SHARMA

..... Petitioner

Through: Mr. Rajesh Yadav with Ms. Ruchira,
Advocates.

versus

SWASTIK INFRA ESTATE
PRIVATE LIMITED & ORS.

..... Respondents

Through: Ms. Mukti Chaudhry with Ms.
Manika Goswami and Ms. Tejaswini
Chandra Shekhar, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.: (ORAL)

1. This a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). The petitioner seeks appointment of an Arbitrator.

2 Broadly, the following facts and assertions need to be noticed to adjudicate upon the instant petition.

2.1 The petitioner appears to have booked a plot with an entity by the name: Ansal Hi-Tech Townships Ltd. (in short "Ansals"). The consideration for purchase of the plot was pegged at Rs.35 lakhs.

2.2 The obligations undertaken by the petitioner and Ansals are captured in an agreement dated 31.03.2012.

2.3 This agreement permitted the petitioner to exit from the principal transaction which involved purchase of plot by opting for buy-back arrangement.

2.4 The petitioner appears to have triggered that option qua Ansals.

2.5 It appears that Ansals failed to re-pay the money to the petitioner. What Ansals, in fact, did on the other hand was to persuade the petitioner to enter into a Tripartite Agreement on 30.04.2015 (in short 'Tripartite Agreement'). The Tripartite Agreement stood executed between the petitioner, Ansals and respondent no.1 i.e. Swastik Infraestate Pvt. Ltd. (in short "Swastik").

2.6 In sum, via the Tripartite Agreement, the liability concerning Ansals was taken over by Swastik.

2.7 I may only indicate that Swastik has taken a stand that since the Tripartite Agreement does not bear the signature of the representative of Ansals, the agreement is forged; an aspect which is vehemently contested by the petitioner.

2.8 Nevertheless, what is not disputed by Swastik is that on the same date when the Tripartite Agreement was executed, another agreement was executed between the petitioner and Swastik.

2.9 This Bipartite Agreement, *inter alia*, reserved a flat admeasuring 1867 sq. ft. in a Group Housing Complex described as: Group Housing-1, Golf Community, Sushant Golf City, Lucknow (in short "subject property") in favour of the petitioner. The agreement also provided for a buy-back option which crystallised into a liability only after expiry of two months and fifteen days from the date its execution.

2.10 The amount quantified therein, which the petitioner was to get once it exercised the buy-back option was a sum of Rs.66,08,000/-.

3 The petitioner, apparently, invoked the buy-back option, *albeit*, orally. As a result of the same, a cheque dated 30.12.2015 for a sum of Rs. 28 lakhs drawn on HDFC Bank, Laxmi Nagar, New Delhi, was issued by Swastik. A copy of the same is also on record.

3.1 There is no dispute that the aforementioned cheque on presentation was dishonoured. There is also no dispute that thereafter Swastik remitted Rs.28 lakhs to the petitioner via RTGS.

3.2 Since the remaining amount was not paid, the petitioner served a demand notice dated 28.09.2017 on the respondent. Via this demand notice, the petitioner claimed from Swastik the balance sum i.e. Rs.38,0800/-, along with interest @ 18% per annum.

3.3 Concededly, despite service of the demand notice, no response was sent by Swastik. The petitioner, thereafter, followed the demand notice with another notice dated 16.11.2017, whereby it triggered, *inter alia*, the arbitration agreement obtaining in the Bipartite Agreement.

3.4 Once again Swastik despite service of the said notice failed to respond to the same. As a matter of fact, one of the Directors of Swastik, one, Mr. Ajit Mishra vide his e-mail dated 30.12.2017, *inter alia*, informed the petitioner that Swastik was going through a difficult time and that it had no intention not to pay the balance amount to the petitioner.

3.5 It appears that despite the aforementioned e-mail there was no movement in the matter which propelled the petitioner to approach this Court via the instant petition.

4 Upon notice being issued, a reply has been filed on behalf of Swastik. I may indicate that notices were issued to other respondents as well i.e. respondent nos.2 to 4. Today, during the course of hearing Mr. Yadav, who appears on behalf of the petitioner, conveyed to me that respondent nos. 2 to 4 can be dropped from the array of parties

5 Based on the stand taken by Mr. Yadav, I have deleted respondent no.2 to 4 from the array of parties.

5.1 It is for this reason that Swastik is now the sole respondent left to resist the instant petition. Even otherwise, I am of the view that Mr. Yadav has taken the correct position as respondent nos.2 to 4, even according to the petitioner, were only Directors on the Board of Swastik.

6 Continuing with the narrative, the arguments in support of the petition have been advanced by Mr. Yadav while Ms. Mukti Chaudhary made submissions for Swastik.

7 Mr. Yadav has argued in line with the facts set forth by the petitioner in the instant petition. In particular, Mr. Yadav has stressed that the Bipartite Agreement gave an option to the petitioner to seek return of money. Learned counsel says that this option was triggered, however, only after a partial payment was made. According to Mr. Yadav, all that the petitioner seeks is adjudication of the claim made for the balance money.

7.1 It is learned counsel's submission that no relief concerning specific performance which, according to him, even otherwise is not available to him is sought for by the petitioner.

7.2 Furthermore, learned counsel submits that Clause 8 of the Bipartite Agreement clearly adverts to the fact that jurisdiction concerning the

disputes which are to be adjudicated upon by an Arbitrator will lie in New Delhi.

7.3 It is in this context that Mr. Yadav says that since the Bipartite Agreement is not an agreement to sell, as contended by Swastik in its reply, the issue pertaining to adequacy of stamp would not arise.

8 To be noted, in the reply, Swastik has made the following assertions:-

8.1 That this Court has no territorial jurisdiction as the subject property is situate in Lucknow. According to the learned counsel the petition under Section 11 if at all be filed before the High Court which would have territorial jurisdiction over Lucknow.

8.2 It is in line with this submission that Ms. Mukti Chaudhary also submitted that since the Bipartite Agreement is, in effect, an agreement to sell, the aspect concerning the adequacy of stamp impressed upon the document would have to be examined by the Court. It is contended that a bare perusal of the Bipartite Agreement would show that it is inadequately stamped and that this Court upon taking into account provisions of Sections 33 and 35 of the Stamp Act, 1899, would have to impound the original document once it is produced.

8.3 Furthermore, learned counsel says that a close examination of Bipartite Agreement would show that all ingredients of an agreement to sell are present in the said agreement. In sum, as indicated above, learned counsel says that the Bipartite Agreement is nothing but an agreement to sell.

8.4 It is in this context that the learned counsel says that since the subject property is located in Lucknow, Courts at Lucknow will only have

jurisdiction in the matter.

9 Learned counsel has also drawn my attention to the Bipartite Agreement to emphasize that it does not mention that the seat of the Arbitration will be at New Delhi. It is, thus, the submission of learned counsel that the circumstances surrounding the transaction including the place where the Bipartite Agreement was executed and the place where the subject property was located establish that New Delhi was not designated as the seat of arbitration. In support of her submissions, learned counsel relied upon the following judgments: -

- i) *Aggarwal Hotels Pvt. Ltd. vs. Focus Properties*, 1996 II AD (Delhi) 625.
- ii) *SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd.*, (2011) 14 SCC 66.
- iii) *Sunil Gupta vs. Roots Corporation Ltd.*, ARB. P. No.444/2012 decided on 04.10.2016 by High Court of Delhi.
- iv) *Bharat Lal Maurya vs. Godrej & Boyce Mfg. Co. Ltd.*, (2014) 208 DLT 680.
- v) *State of West Bengal & Ors. vs. Associates Contractors*, (2015) 1 SCC 32.
- vi) *Harshad Chiman Lal Modi vs. DLF Universal Ltd. & Anr.*, (2005) 7 SCC 791.
- vii) *Jyoti Structure Ltd. vs. Dakshinanchal Vidyut Vitran Nigam Ltd. & Ors.*, O.M.P.(I) No.15/2016, decided on 06.09.2016 by High Court of Delhi.

10. I have heard learned counsel for the parties and perused the record. According to me, what requires to be examined closely is: what is the language of Clause 8 of the Bipartite Agreement? For the sake of

convenience the same is extracted herein: -

“8. In case of any dispute, the same shall be resolved through arbitration and the jurisdiction would be New Delhi.”

11. There is no other clause in the Bipartite Agreement which adverts to jurisdiction. Though learned counsel for respondent had disputed the existence of the Tripartite Agreement. There is no dispute with regard to existence of the Bipartite. The validity of the Bipartite Agreement is challenged on the ground that Swastik had not authorised any person to sign the said agreement on its behalf. This plea is a desperate attempt to get out of an agreement which would otherwise bind it as it has been signed by its Director. The Director would have in law the ostensible authority to bind Swastik. There is no averment in the reply that Mr. Ajit Kumar Mishra who signed the Bipartite Agreement was not its Director at the relevant point of time. Furthermore, the fact that Swastik had concededly paid a part of the sum against the buy-back option i.e., Rs.28 lakhs, fortifies the conclusion that the Bipartite Agreement was executed for and on behalf of Swastik. There is *dehors* the Bipartite Agreement no explanation as to why the said sum was paid to the Petitioner. Thus, the logical corollary of this circumstance would be that the existence of the arbitration agreement obtaining between the parties which stands incorporated in Clause 8 of the Bipartite Agreement cannot be in dispute.

11.1 I may also point out that though a dispute is raised by the respondent with regard to existence of the Tripartite Agreement, there is a reference to the same in the first recital of the Bipartite Agreement. It reads as follows:-

“WHEREAS by a Settlement Agreement dated the 30th day of April, 2015 the First party had settled a maturity amount of INR 56,00,000.00 (“amount settled”) receivable from M/s. Ansal Hi-Tech Township Limited in favour of developer.”

12. Concededly, as alluded to hereinabove, there is no other clause in the Bipartite Agreement which adverts to jurisdiction of Courts, the only reference is in Clause 8 of Bipartite Agreement. Clause 8 adverts to resolution of disputes via arbitration and goes on to state as to where the jurisdiction would lie. Therefore, to my mind, it was intended by the parties that in case a need or necessity arises for having the disputes resolved through arbitration, the parties will approach the Courts which are located in New Delhi.

13. The argument advanced on behalf of Swastik that the Bipartite Agreement is in the nature of an agreement to sell concerning the subject property which is located in Lucknow, *prima facie*, does not appear to be correct. The reason why I say so is that the petitioner claims that once, he exercised the buy-back option a sum of Rs.28 lakhs was remitted via RTGS to his account on 15.01.2016, as noted above. The petitioner, as indicated above, only seeks return of the balance sum with interest.

14. Furthermore, prior to this remittance via RTGS a cheque for the same value was issued by Swastik which was drawn on a Branch of HDFC Bank which is located in New Delhi. There is no dispute that the cheque was presented by the petitioner in New Delhi, which, though, was dishonoured. Thus, if one were to apply the cause of action test, a part of cause of action would, to my mind, necessarily arise in Delhi and, therefore, even *dehors* Clause 8, this Court would have jurisdiction.

15. The judgments cited by the petitioner on the aspect of inadequacy of stamp, in my opinion, given the fact that the Bipartite Agreement is not, *prima facie*, an agreement to sell would have no applicability. This apart, even otherwise after the amendment brought about in Section 11 of the 1996

Act with the insertion of sub-section (6A) all that the Court is required to examine is the existence of an arbitration agreement and in the narrowest sense, its relatability to the dispute at hand.

15.1 As alluded to above, the fact that there is an arbitration agreement in existence is not in dispute. The aspect concerning inadequacy of stamp needs to be, if at all, agitated before the Arbitrator. The inadequacy of stamp duty if at all can be examined by the Arbitrator as under Section 33 of Indian Stamp Act, 1899 he is also amongst others an authority which receives evidence.

16 Thus, having regard to the discussion above, the judgments cited by counsel for Swastik, as to what are the ingredients of the agreement to sell, will also have no relevance nor will the judgments which deal with the provisions of Section 16 of the Code of Civil Procedure, 1908 (in short "CPC").

17 Therefore, for the aforementioned reasons I am inclined to allow the petition. Accordingly, Mr. Prem Kumar, Former Additional District Judge (Mobile No. 9873176030), is appointed as the Arbitrator in the matter. The learned Arbitrator will be paid his fee in accordance with the provisions of Fourth Schedule appended to 1996 Act. Counsel for the parties are agreed that in conduct of the arbitration proceeding, the fee and the rules applicable to arbitrations conducted under the aegis of Delhi High Court International Arbitration Centre should also apply to the instant petition. It is ordered accordingly.

18 There shall however be no order as to cost.

RAJIV SHAKDHER
(JUDGE)

NOVEMBER 20, 2018

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