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

+ FAO(OS) 110/2017

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Date of decision : 5th April, 2018

SULEKH AGARWAL

..... Appellant

Through : Mr. Vishwendra Verma, Adv.

versus

M/S SHIV ASTHA CONSTRUCTION COMPANY LTD

..... Respondent

**Through : Mr. Sameer Rohatgi,
Mr. Namit Suri and
Mr. Akshit Pradhan, Advs.**

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. Four petitions filed under Section 11 of the Arbitration and Conciliation Act being Arbitration Petition Nos. 476, 209, 210, 211/2015 as well as four petitions under Section 9 of the Arbitration & Conciliation Act being OMP Nos. 352, 353, 354, 355/2012, separately filed by the appellant with three other persons stand rejected by a

common order dated 16th January, 2017 passed by the learned Single Judge.

2. So far as the present appeal is concerned, it assails the aforesaid common order dated 16th January, 2017 so far as OMP No.355/2012, being a petition under Section 9 of the Arbitration & Conciliation Act, is concerned.

3. Challenge to this very order dated 16th January, 2017, so far as it decided OMP Nos. 352, 353, 354/2012, was laid by way of FAO(OS) Nos. 104, 105, 106/2017 . These appeals were listed and heard by a Coordinate Bench of this court on the 12th of April, 2017 and disposed of on the same date. For expediency, we extract the order dated 12th of April, 2017 on these appeals hereunder :

" + FAO(OS) 104/2017 & CM Nos.13396-13398/2017

SULEKH AGARWAL

..... Appellant

Through Mr.Vishwendra Verma, Adv.

versus

M/S SHIV ASTHA CONSTRUCTION COMPANY LTD Respondent

Through None

+ FAO(OS) 105/2017 & CM Nos.13399-13401/2017

SULEKH AGARWAL

..... Appellant

Through Mr.Vishwendra Verma, Adv.

versus

M/S SHIV ASTHA CONSTRUCTION COMPANY LTD Respondent

Through None

+ FAO(OS) 106/2017 & CM Nos.13413-13415/2017

SULEKH AGARWAL

..... Appellant

Through Mr.Vishwendra Verma, Adv.
versus

M/S SHIV ASTHA CONSTRUCTION COMPANY LTD Respondent

Through None

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

S. RAVINDRA BHAT, J (Oral)

CM No.13397/2017 in FAO(OS) 104/2017

CM Nos.13400/2017 in FAO(OS) 105/2017

CM Nos.13414/2017 in FAO(OS) 106/2017

Exemption is allowed subject to just exceptions.

FAO(OS) 104/2017 & CM Nos.13396/2017, 13398/2017

FAO(OS) 105/2017 & CM Nos.13399/2017, 13401/2017

FAO(OS) 106/2017 & CM Nos.13413/2017, 13415/2017

1. The appellant is aggrieved by the judgment of learned Single Judge who declined to grant relief under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'Act'). On 16.01.2017 a common order was made rejecting the application under Section 9 of Act and the appellant's request for an order under Section 11 of Act.

2. The court had taken note of its previous directions of 23.4.2015 as well as subsequent orders, especially of the order dated 11.08.2016. The Court had required the appellant to furnish several details such as the payment of tax, whether the sale consideration allegedly paid by the petitioner was in cash, whether such financial transactions were disclosed, statements etc. After noticing the response as well as the contentions urged on behalf of the respondent as to the authenticity or genuineness of the documents, the Court proceeded to examine the affidavit in response to its order dated

23.04.2015. The learned Single Judge observed as follows :

“12. Interestingly, the Petitioner does not mention when each of the persons gave the said sum. The Petitioner does not mention whether he issued them any receipt for such payment. The Court is prima facie not satisfied with the reply given by the Petitioner as regards the source of his income. Although he has enclosed with the affidavit his bank account statements and claims that he has been filing income tax returns on regular basis, the Court is of the view that a fresh detailed investigation is required in this regard. 13. The question that arises is whether the Court should appoint an Arbitrator and refer all the questions to the Arbitrator as prayed for by the Petitioner or should the Court decline it given the nature of dispute that has arisen and as mentioned in its order dated 23rd April, 2015. IN the latter order the Court has already extracted the passage from the decision of the Supreme Court in *Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra* (2012) 2 SCC 144 where it was stated that the mere fact that the allegations of fraud, forgery, fabrication are likely to involve recording of evidence or involve some delay in disposal, “are not grounds for refusing to consider the existence of a valid arbitration agreement.” 14. However, there are limits to the extent to which a Court can undertake such exercise in a petition under Section 11 of the Act. Given that arbitration itself is supposed to be an efficacious remedy, if even at the stage of appointment of arbitrator, the Court is going to have to take evidence and satisfy itself that the agreements in question are not forged or fabricated as alleged by the Respondent, the exercise would be complicated

and time consuming thus defeating the very object of the Act. 15. In the present case, the arbitration petition was first filed by the Petitioner in 2012. Even by the end of 2016 there is no clarity on whether the agreements and FAO(OS) Nos.104-106/2017 Page 4 of 5 receipts in question were forged and fabricated. The disputes between the parties also include two criminal cases where the investigation is still going on. The Court of the MM is far better equipped to deal with the issues arising out of the FSL report and to examine in great detail the evidence that emerges. Likewise, in a civil Court, there would be scope for examination of exhibits and prepare the scientific forensic report to provide an opportunity to the Respondent to cross-examine such witnesses. 16. No doubt, in terms of the Act as amended with effect from 23rd October 2015 the Court is expected to proceed to appoint an Arbitrator if there is in fact valid arbitration agreement. On the other hand, there might be miscarriage of justice if the Court proceeds to leave all the complicated questions to be decided only by the Arbitrator. In the first instance, the Court must be satisfied that the agreements already entered to are genuine documents. The Court is unable to be prima facie satisfied, on the basis of the documents placed on record, that the agreements are in fact genuine.”

3. In the light of the above discussion the Court declined relief under Section 9 of Act. The learned counsel urges that the Single Judge fell into error in not considering the fact that the FSL reports with respect to the authenticity of the documents was doubtful and in the circumstances a definitive opinion as to the fabrication

or forgery containing the arbitration clause needed to be considered. Stressing the clause 32 of the relevant agreement categorically mandated resolution of dispute to the arbitration, learned counsel submitted that long pendency has prejudiced the appellant and that in these circumstances this Court should pass an appropriate order to secure the property. It is quite evident that the learned Single Judge, conducted a prima facie but detailed inquiry as to the genuineness of the agreement in the light of case laws especially Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra (2012) 2 SCC 144. This line of reason has been followed by subsequent judgment in A. Ayyasamy Vs. A. Paramasivam and others (2016) 10 SCC 386. In Bharat Rasiklal Ashra (supra) the Court held no doubt that mere allegations of fraud or fabrication should not ordinarily lead to the Court refusing to consider the existing arbitration clause. The Single Judge detailed – in paras 14 to 16 extracted above – his reasons why the allegations in the present case were serious. As to the appellant's contention that he would be seriously prejudiced if an order is not made because matter is pending for long, the Court is of the opinion that the law does not give him this remedy. The pendency can be duly explained in accordance with law. In these circumstances the Court is of the opinion that the impugned order is upheld.

4. *The appeal is dismissed.”*

4. It is undisputed that the challenge in the present appeal rests on the very factual basis and legal pleas as was laid in the FAO(OS)Nos.104,105 and 106/2017. The appellant before us seems to be identically placed as the appellants in these appeals.

5. This court is bound by the judgment recorded by the Coordinate Bench with regard to the challenge to the very order which is the subject matter of the present appeal.

Accordingly, for the reasons recorded in the order dated 12th April, 2017, passed in OMP Nos. 352, 353, 354/2012, the present appeal is found devoid of merit and is hereby dismissed.

No order as to costs.

ACTING CHIEF JUSTICE

APRIL 05, 2018/kr

C.HARI SHANKAR, J



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