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

Date of Decision: 29th October, 2018

\+ **ARB.P. 35/2014**

JAI NARAIN & ANR ..... Petitioners

Through: Mr. Rishi Kumar proxy counsel for Mr. Rajesh Rai, Advocate. (M:9718844435)

versus

RAJENDER SINGH & ORS ..... Respondents

Through: Mr. Sanat Kumar, Senior Advocate with Mr. Vinayak Batta and Mr. Sunil Kumar Jha, Advocates for R-1 to 3 and 5 to 7. (M:9873980084)

AND

\+ **O.M.P. 995/2013 & I.A. 17925/2014**

JAI NARAIN & ANR ..... Petitioners

Through: Mr. Rishi Kumar proxy counsel for Mr. Rajesh Rai, Advocate. (M:9718844435)

versus

RAJENDER SINGH & OTHERS ..... Respondents

Through: Mr. Sanat Kumar, Senior Advocate with Mr. Vinayak Batta and Mr. Sunil Kumar Jha, Advocates for R-1 to 3 and 5 to 7. (M:9873980084)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petitions, one under Section 9 of the Arbitration &

Conciliation Act, 1996 (*hereinafter, 'the Act'*) and the second under Section 11 of the Act are filed seeking interim reliefs and appointment of an Arbitrator.

2. The disputes arise out of Agreement to Sell dated 10th August, 2011 by which the Petitioners had agreed to purchase property bearing Mustil No.55- Khasra No.3 (4-16), 4/1 (05), 4/2 (4-13), 5 (4-16), 7/1 (1-16), 7/2 (1-7), Mustil No.61 - Khasra No.11/1 (2-8), 20/2 (4-16), Mustil No. 62- Khasra No.16 (4-16), 24 (4-16) and 25 (4-08) total area admeasuring 37 Bigha 01 Biswa i.e. 7.7 acres situated in revenue estate of village Jharoda, Tehsil-Najafgarh, New Delhi (*hereinafter, 'suit property'*). The total sale consideration agreed between the parties was Rs.7,71,87,500/-. The Petitioners paid a sum of Rs.77,18,750/- i.e. 10% of the sale consideration as advance money and part payment in the following manner: -

- Rs.7,18,750/- in cash
- Rs.70,00,000/- by cheque

Disputes arose between the parties in respect of the performance of their respective obligations under the said agreement to sell.

3. It is the case of the Petitioners that they were ready and willing to pay the balance sale consideration but the No Objection Certificate (*hereinafter, 'NOC'*) which was to be obtained by the Respondents from the concerned authorities was not obtained.

4. On the other hand, it is the case of the Respondents that the last date for performance was extended from 10th March, 2012 to 30th May, 2012. Within the said period, the Respondents, had obtained the NOC. Thus, despite obtaining the NOC, the Petitioners having failed to pay the balance sale consideration, the Respondents forfeited the amounts already paid.

5. Disputes thus arose between the parties. The Petitioners filed the present OMP seeking the following reliefs: -

> *"(a) Restraining the Respondents their agents, associates or assigns from creating any third party rights with regard to subject property bearing Mustil No.55- Khasra No.3 (4-16), 4/1 (05), 4/2 (4-13), 5 (4-16), 7/1 (1-16), 7/2 (1-7), Mustil No.61 - Khasra No.11/1 (2-8), 20/2 (4-16), Mustil No.62- Khasra No.16 (4-16), 24 (4-16) and 25 (4-08) total area admeasuring 37 Bigha 01 Biswa i.e. 7.7 acres situated in revenue estate of Village Jharoda, Tehsil-Najafgarh, New Delhi and subject matter of the agreement dated 10.08.2011."*

6. In OMP 995/2013, the stand of the Respondents was that the agreement which was placed on record by the Petitioners was a tampered/forged and fabricated document. According to the Respondents, there was no arbitration clause in the Agreement to Sell and the only clause was that disputes would be subject to jurisdiction of Courts at New Delhi. Considering the competing stands of the parties, learned Single Judge of this Court on 28th February, 2014, had passed the following order:

> *"I have heard learned counsel for the parties and proceed to deal with the aspect of making of interim arrangement at this stage. It is not in dispute that the parties entered into an agreement to Sell on 10.08.2011 where under the petitioner agreed to purchase and the respondent agreed to sell their agricultural land admeasuring 37 bighas 1 biswa for a total consideration of Rs.7,71,87,500/-. However, disputes have arisen between the parties, as each is claiming other to be in breach of the agreement. According to the petitioner, the date for completion of the transaction was 10.03.2012- by which date the respondent was required to obtain the NOC, so that the*

sale deed could be executed on the said date while making payment of the balance consideration. According to the petitioner, clause 20 of the Agreement to Sell contains an arbitration clause providing that the dispute shall be referred to an Arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996, mutually. According to the petitioner, clause 18 of the Agreement provides that in case the petitioner fails to get the sale deed executed in its favour or in favour of some other person by the closing date i.e. 10.03.2012, the earnest money and any additional money paid by the petitioner to the respondents shall not be forfeited.

The case of the petitioner is that the respondents did not obtain the NOC by 10.03.2012 and, therefore, the sale transaction could not be completed by the said date. The petitioners claims that the respondents expressed difficulty in concluding the transaction by claiming that there were differences in their family, and they agreed to refund the money received by the respondents of Rs.77,18,750/- along with 12% interest.

The case of the petitioner is that the respondents did not return the said amount and, instead sent a notice on 13.06.2012 claiming that the transaction had not been completed by 30.05.2012 as per the extended date and, therefore, the amount of Rs.77,18,750/- has been forfeited by the respondent.

The petitioner states that after learning that the respondents had obtained the NOC on 30.05.2012, the petitioner had also expressed its willingness to complete the transaction. However, the respondents have not heeded to this request.

In this background, the petitioner has preferred this petition to seek a restraint against the respondents from dealing with the said parcel of the land.

Upon issuance of notice, the respondents have *filed their reply. The case of the respondents is that there is no arbitration agreement in existence between the parties. The respondents have filed a copy of the Agreement to Sell stated to have been executed between the parties. The agreement set up by both the parties are, more or less, similar. The material difference is that on the first page - which is on a stamp paper, the signatures of the petitioner is also present in the copy, and in original filed by the petitioners, where as in the copy filed by the respondents, only the signatures and thumb impressions of the respondents are present. In the copy/ original filed by the petitioner, the signatures of neither party is found in intervening pages. In the copy filed by the respondents signatures and thumb impressions of all the defendants are found. The last page filed by the petitioner (in copy and in original) bears the signatures and thumb impressions of the respondents; the signatures of the petitioners, and; signatures of two witnesses. However, in the copy filed by the respondents, the signature of only one witness is to be seen on the last page. The page containing clauses 17 to 23, as filed by the petitioner contains clause 18, as well as clause 20 (the arbitration agreement), whereas the copy filed by the respondents shows that clause 18 had been struck out in hand, and clause 20 does not contain the arbitration agreement. The clause reads, "This agreement shall be governed by laws of India and dispute (s), if any, shall be subject to jurisdiction of courts at New Delhi." The copy of the agreement filed by the respondents also contains one material difference in clauses 22 and 23. Whereas, the agreement filed by the petitioner bears the date "10.03.2012" in both the clauses, in the copy filed by the respondents, the date is "30.05.2012" as the completion date. According to the respondents, the petitioner could not complete the transaction by 10.03.2012 and, therefore, sought extension of time till*

30.05.2012. Accordingly, the page containing clauses 17 to 23 alone were replaced after carrying out the necessary modification of dates, and the same was signed by the respondents and their thumb impressions are affixed. The case of the respondents is that the petitioner being the agreement purchaser retained the original agreement, while the respondents were only provided with a photocopy of the said agreement.

From the aforesaid, it is clear that a serious dispute has arisen with regard to existence of the arbitration agreement itself. In the light of the judgments of the Supreme Court in ***National Insurance Co. Ltd. Vs. M/s Godhara Polyfab Pvt. Ltd. AIR 2009 SC 170 and Bharat Rasiklal Ashra Vs. Gautam Rasklal Ashra AIR 2011 SC 3562****, the said issue would have to be decided by this Court, as the jurisdiction of this Court to deal with the present petition is dependent on the determination of the issue whether, or not, an arbitration agreement exists between the parties. If no such agreement exists, this Court would have no jurisdiction. On the other hand, if such an agreement exists, this petition would be maintainable and this Court would have jurisdiction to deal with this petition.*

Whilst the said inquiry is undertaken, it is necessary to make an appropriate interim arrangement.

A perusal of the petition shows that at one stage, according to the petitioner, the petitioner had agreed to take back the earnest money along with interest @ 12% per annum. I may note that this is only the version of the petitioner, and not the respondents. However, from the averment made in para 12 of the petition, it appears that the petitioners have accepted the position that the agreement need not be proceeded to conclusion, and the petitioner allegedly accepted the return of earnest money deposited along with interest

@ 12% per annum from 10.08.2011. However, there is no document in writing to support this plea.

The submission of the petitioner is that the NOC was not obtained by the respondents by 10.03.2012. To this, the response of the respondents is that the respondents are illiterate villagers. They had signed the requisite forms so as to enable the petitioner to obtain the NOC. The petitioners themselves failed to obtain the NOC by 10.03.2012.

Be that as it may, in my view, at this stage, interest of justice would be served if the respondents are directed that in case they deal with the property in question, from out of sale proceeds received, an amount of Rs.77,18,750/- shall be retained by them in a fixed deposit and shall not be dealt with or encumbered till the decision of this petition. I find no justification in continuing either the statement of the respondents made on 18.11.2013 or the direction, directing maintenance of status-quo with regard to title in possession of the suit property, since the petitioners, even according to their pleadings, accepted the closure of the agreement. They cannot, therefore, claim any stake in the property in question. Their interest, if any, is restricted to the monetary claim for refund with, or without interest. Accordingly, the order dated 18.11.2013 stands modified as aforesaid.

The following issue is framed:

1. *Whether the Agreement to Sell set up by the petitioner is the true and correct agreement, or the one set up by the respondents is the true and correct agreement between the parties? (Onus upon parties).*

The parties are at liberty to file additional documents within two weeks.

The petitioner shall file the list of witnesses along with affidavits by way of evidence of the petitioners' *witnesses within four weeks with advance copy to the respondents.*

List the matter before the Joint Registrar on 17.04.2014 for fixing dates for trial on the aforesaid issue."

After the petitioners close their evidence, the respondents shall similarly lead evidence before the Joint Registrar, where after the matter shall be placed before the Court."

7. Thus, the learned Single Judge had, while passing the interim order, framed an issue in order to adjudicate upon the existence of the arbitration agreement between the parties.

8. Pursuant to the said issue being framed, parties led their evidence in the matter. Petitioners filed the affidavits of Shri Jai Narain (PW-1), Shri Satpal Yadav (PW-2) and Shri Chander (PW-3). The Respondents filed the evidence of Shri Vijender Singh (RW-1). The cross-examination of the witnesses were recorded before the Joint Registrar.

9. It is important to note that in the cross-examination of PW-1, the witness specifically states that the agreement Exhibit-PW-1/B, original of which was placed on record by the Petitioners, was changed several times. He admits that he had signed on all the pages of the agreement, however, in Exhibit-PW-1/B, the signatures appear only on the first and the last page. The relevant portion of his cross-examination is set out herein below:

"Mahender Singh on behalf of the other defendants also signed on the first and last page of the agreement and I signed all the pages of first agreement. Meena, petitioner No.2 has also signed all the pages of first agreement. EX PW1/B bears my signature on first page at point A and at page at point A and it bears the

signatures of petitioner No.2 Meena Singh on the first and last page at Point B. It is correct that Ex PW1/B does not bear our signatures on the other pages signed by me, Meena Singh and Mahender Singh on all pages. Vol It may be with my counsel. I do not know what period of time the agreement was extended.

………………………………

The first and last pages are original and rest are changed and I do not know who has changed the same."

10. The other two witnesses on behalf of the Petitioners stated that they had no personal knowledge about the changes made in the intervening pages.

11. Insofar as the Respondents' witness RW-1 is concerned, he admits that the sum of Rs.77,18,750/- was received. He stated that he and all his brothers had signed and put their thumb impressions on all pages of the documents. He states that he received only a photocopy of the agreement. He also states as under: -

> *"The agreement between the parties was executed only twice. First time, all the pages were signed and second time, only two pages were changed for extension of time. All the respondents had signed on the said two pages also. The agreement signed for extension of time is Ex.RW1/2 and page 17 was changed and signed by all the respondents."*

12. According to him, the agreement was signed on two occasions. On the first occasion, all pages were signed by all parties but on the second occasion only two pages were changed for extension of time.

13. A perusal of the two versions of the agreement which have been placed on record shows that in one of the agreements, i.e., Exhibit PW-1/B,

there exists an arbitration clause. This agreement which is in original, bears the signatures/thumb impressions of the parties only on the first and last pages. Even the signatures of the witnesses appear only on the last page. The intervening pages bear no signatures. The arbitration clause appears in the penultimate page, which is an intervening page. The same reads as under:

<u>Agreement filed by the Petitioner Exhibit PW-1/B</u>

> *"20. Any dispute arising out of this agreement shall be referred to arbitration in accordance with the provisions of arbitration and conciliation act, 1996 as may be amended and by a sole arbitrator to be appointed by mutual consent by the parties and shall be subject to exclusive jurisdiction of court at New Delhi.*

14. However in the version of the agreement RW1/1, filed by the Respondents there is no arbitration clause. This is a copy of the agreement to sell which bears the thumb impressions on all pages, of the Respondents. One witness has signed the agreement. The impugned clause 20 as contained in both the agreements filed on record reads as under:-

<u>Agreement filed by the Respondent RW1/1</u>

> *" 20. This agreement shall be governed by laws of India and disputes(s), if any, shall be subject to jurisdiction of court at New Delhi."*

15. On the basis of the evidence which has been adduced, including the testimony of PW-1, that he had signed along with the other two purchasers on all the pages of the agreement but the original which is produced on record does not contain the signs of the Petitioners on all pages, but only on

the first and last page, and signature of PW-1 on the last page, it is held that the agreement PW-1/B, relied upon by the Petitioners dated 10^{th} August, 2011 cannot be considered to be valid and genuine.

16. The copy of the agreement to sell filed by the Respondents i.e., RW-1/1 bears the thumb impressions of several of the Respondents on various pages and the signatures of Shri Jai Narain on the last page. This version of the agreement does not contain the arbitration clause.

17. It is accordingly held that there is no arbitration agreement between the parties. Under these circumstances, the Section 9 and Section 11 petitions are not maintainable. The same are liable to be dismissed. Ordered accordingly.

18. However, since the factum of the execution of agreement to sell as also the receipt of the amount of Rs.77,18,750/- is not in dispute, the Petitioners cannot be rendered remediless. The interim order which has been passed on 28^{th} February, 2014 shall continue for a period of another eight weeks, allowing the Petitioners to avail of any remedies, which may be available to them, in law. The said interim order would only be in operation subject to any orders which may be passed by the appropriate court, which may be seized of the disputes between the parties. If after a period of eight weeks, no order is passed by any Court of competent jurisdiction, the interim order shall stand automatically lifted.

19. Both petitions are dismissed. No order as to costs.

PRATHIBA M. SINGH
JUDGE

OCTOBER 29, 2018
Rekha