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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMMERCIAL ARBITRATION APPLICATION NO.69 OF 2019
WITH
COMMERCIAL ARBITRATION PETITION NO.366 OF 2019**

Holostik India Ltd	...	Petitioner
V/s.		
Shalu Multitrade Pvt. Ltd and two others	...	Respondents

Mr.Akhilesh Dubey a/w Mr.Vagish Mishra, Mr. Uttam
Dubey and Mr. Siddhesh Rajput i/by Law Counsellors, for
the applicant/petitioner.
None for respondents

CORAM : G. S. KULKARNI, J.

DATE : 26TH APRIL, 2019.

P.C. :

1] Commercial Arbitration Application No.69 of 2019 is filed by the applicant under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "ACA), praying for appointment of an arbitral tribunal to adjudicate the disputes and differences which are stated to have arisen under the Memorandum of Understanding dated 12th February, 2014.

2] Commercial Arbitration Petition No.366 of 2019 is filed by petitioner under Section 9 of the ACA, praying for interim reliefs pending arbitral proceedings.

3] When these proceedings were listed before this Court, on 10th April, 2019, this Court had passed the following order.

"1] Issue notice to the respondents, returnable on 24.04.2019. In addition to the Court Notice, learned counsel for the applicant to serve respondents by private notice and shall file affidavit of service on or before the returnable date.

2] The notice shall indicate, that if despite service of notice, the respondent fails to appear on the adjourned date of hearing, the Court shall proceed to hear the matter and pass appropriate orders.

4] The office report indicates that respondent No.2, who is the Director of Respondent No.1 is served and in respect of respondent Nos. 1 & 2 following remark has been made.

Notice issued to	Address	Mode of delivery	Served/un-served	Remarks and enclosure
Shalu Multitrade Pvt. Ltd. Respondent No.1.	Sankalp Siddhi, 4 th floor, Room No.160, Pathhe Bapurao Marg, Mumbai 400 007	Hand delivery	Un-served	As per returned envelope with remark, "door closed"
Nilesh S. Sawant Director of Shalu Multitrade Pvt. Ltd.	Sankalp Siddhi, 4 th floor, Room No.160, Pathhe Bapurao Marg, Mumbai 400 007	Hand delivery	Un-served	As per returned envelope with remark "door closed"
Nikhil Ramakant Oak Director of Shalu	At post Nagaon, Alibaug 402 204.	Speed post	Served	Acknowledgement slip still awaited. However, after

Multitrade Pvt. Ltd.				verifying postal website, remark appears as item delivered.
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5] There is an affidavit of service placed on record on behalf of petitioner of Mr. Babu Islam Khan dated 18th April, 2019. In paragraph No.4 of the affidavit, it is stated that the notice of respondent No. 1 was delivered on 11th March, 2019 as is clear from the track report of the postal authorities. In paragraph No.5 of the affidavit of service, it is stated that the deponent has also personally visited the addresses of the respondent Nos. 1 & 2, on 15th April, 2019 and on reaching the said address, it was found that the door was locked and on enquiry with the neighbours, it was informed that the address is correct but there is no company by name of respondent No.1. The delivery report of postal authority is also annexed to the affidavit of service.

6] On this background these proceedings are taken up for hearing.

7] In the Section 9 petition, the petitioner has averred that the petitioner is a company registered under the Companies Act, 1956, having its registered address at set out in the cause title of the petition. Respondent Nos. 2 & 3 are the Directors of respondent No.1 M/s Shalu Multitrade Pvt. Ltd., who had approached the petitioner sometime in February, 2012 and represented that they are duly authorized by respondent No.1 under a

resolution of the Board of Directors of respondent No.1 dated 7.2.2014 to sell commercial premises in building known as "Haware's Infotech Park", situated at block No.39/3 Sector 30A,Vashi Navi Mumbai, District: Thane, which was allotted by the developer Haware Infotech Park to respondent no.1. Copies of allotment letters issued by Haware Infotech Park in favour of respondent no.1 are annexed at Exhibit B-1, B-2 and B-3 to the petition (page No.22, 23 and 24) dated 29th September, 2012.

8} On 12th February, 2014, a memorandum of Understanding was entered between the petitioner and respondents for sale of the said commercial premises to the petitioner, for total consideration of Rs.16 crores. An amount of Rs.6 crores was to be paid at the time of execution of the agreement and the remaining amount was to be paid on or before 5th August, 2014. Accordingly on 12th February, 2014, an amount of Rs.6 crores was paid by the petitioner to the respondents by RTGS. Further amount of Rs.2 crores was paid on 3.4.2014, which was also paid by RTGS. Receipts of the said payments are also issued by respondents in favour of the petitioners. Petitioner did not make further payment as there were some issues between the respondents and the developer M/s Haware Infotech.

9] By a communication dated 3.5.2016, respondent No.2, Mr. Nilesh S. Sawant, the Director of the respondent No.1 informed the Managing Director of the petitioner that the Memorandum of Understanding

dated 12th February, 2014 executed between the parties is in existence and binding upon the respondents.

10] As the respondents failed to fulfill the terms and conditions of the agreement/Memorandum of Understanding dated 12th June, 2012, the petitioner issued a legal Notice dated 9.4.2018 to the respondents calling upon the respondents to fulfill their obligations under the agreement. The legal notice, however, was returned with a remark that registered address of respondent No.1 is changed. Another legal notice was accordingly issued by the petitioner on the new address of respondent No.1 and the same was duly served. As there was no response the petitioner addressed another notice dated 23.7.2018, to the respondents with the hope and expectation that respondent would resolve the disputes amicably.

11] As there was a failure on the part of respondents to comply with their obligations under the MOU, as also the respondents had failed to repay the amounts as paid by the petitioner to the respondents, the petitioner by its notice dated 28.9.2019 invoked the arbitration agreement between the parties as contained in clause No.7 of the agreement, which reads thus :-

"Both the parties specifically agree that if any dispute regarding the interpretation, meaning, effect of the present agreement or in relation to Agreement between the parties arises, the same shall at the first instance be tried to be resolved amicably. If dispute cannot be resolved

amicably, the same shall be referred to the arbitral tribunal and governed by the Arbitration and Conciliation Act, 1996. The venue of the Arbitration shall be at Mumbai".

12] As there was no response of the respondents to any of the said notices of the petitioner, the petitioner has approached this Court, praying for the following interim reliefs pending arbitration proceedings :-

(a) That pending the initiation of the arbitration proceedings, the disposal thereof and the execution of any award that may be passed therein, the Respondents, their agents and servants and anyone claiming through them, be restrained by an order of injunction of this Hon'ble Court from alienating, allotting, selling, transferring, encumbering, giving on lease or rent, or from creating any third party right, title or interest in the commercial property whatsoever in favour of anyone except the petitioner herein.

(b) That pending the initiation of the present Arbitration Petition, the Respondents, their agents and servants and anyone claiming through them, be restrained by an order of injunction of this Hon'ble Court from alienating, allotting, selling, transferring, encumbering, giving on lease or rent, or from creating any third party right, title or interest in the commercial property whatsoever in favour of anyone except the petitioner herein".

13] As the respondents despite service have not appeared and have not contested the proceedings, the averment as made in the Section 9 petition, as also in the Section 11 petition, are required to be taken as

uncontroverted.

14] Having heard, learned counsel for the petitioner and having perused the record of these proceedings, it is prima facie clear that the respondents have accepted amount of Rs.8 crores from the petitioner under the Memorandum of Understanding dated 12.2.2014 by which respondents intended to sell the commercial premises subject matter of the said allotment letters dated 29th September, 2012 in favour of the petitioner. The respondents appear to have failed to comply the obligations, as also have not shown any inclination to return the amounts.

15} In the aforesaid circumstances, it is quite clear that the disputes and differences have arisen between the parties. Perusal of clause No.7 of the Memorandum of Understanding in question also indicates that there is an arbitration agreement between the parties. Thus the disputes which have arisen between the parties under the MOU would be required to be referred for adjudication by the arbitral tribunal.

16}. In the facts and circumstances of the case the petitioners would also be required to be protected by grant of interim protection so that the substance of the arbitration is protected. Certainly there is a prima facie case made out by the petitioner for grant of interim protection as the

petitioner has parted with substantial amounts under the MOU.

17} In the circumstances, I propose to dispose of both these proceedings by the following order.

ORDER

i] Mr.Justice R.M. Sawant, Former Judge of this Court, is appointed as the prospective sole Arbitrator to adjudicate the disputes and differences between the parties, arising under the Memorandum of Understanding dated 12th February, 2014.

ii] The prospective sole arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the provisions of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of these applications with a copy to be forwarded to both the parties;

iii) At the first instance, the parties shall appear before the prospective arbitrator within 30 days from today at a date and time as may be fixed by the prospective arbitrator.

iv) Pending arbitration proceedings there shall be interim relief in terms of prayer clause (a) and (b) of the Section 9 Petition.

v] The learned prospective arbitrator shall endeavour to publish an award as expeditiously as possible and within the time limit as prescribed under Section 29-A of the Act;

vi) All contentions of the parties on merits of the matter are expressly kept open.

(vii) Both the Arbitration Application and Arbitration Petition are disposed of in the above terms. No costs.

(viii) Office to forward a copy of this order to the learned Arbitrator on the following address:

Flat No.103, Atur Terraces Co-op.
Housing Society Ltd. Capt. Prakash Pethe Marg,
19-A, Cuffe Parade,
Mumbai 400 005.
Mobile No.9619555152
Email: rajendramsavant@gmail.com

[G. S. KULKARNI, J]

Note: The order is corrected as per order dated 3rd June, 2019.