

In the High Court of Punjab and Haryana, at Chandigarh

Civil Revision No. 7440 of 2019 (O&M)

Date of Decision: 22.01.2020

M/s Solitaire Ventures Pte Ltd. and Another

... Petitioner(s)

Versus

M/s Vipul Limited and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal

Present: Mr. Ashish Aggarwal, Senior Advocate
with Mr. Mukul Aggarwal, Advocate
for the petitioners.

Anil Kshetarpal, J.

The petitioner/plaintiffs are assailing the correctness of the judgement passed by learned Additional District Judge, Gurugram dated 12.07.2019 reversing the order passed by the learned Civil Judge (Junior Division), Gurugram, resulting in relegating the parties to get their dispute adjudicated from the Arbitral Tribunal (hereinafter referred to as “the Tribunal”). It is very important to note that proceedings between the parties are already pending before the Tribunal.

The learned Additional District Judge has allowed an application filed under Section 8 of the Arbitration & Conciliation Act, 1996 as amended by Arbitration & Conciliation (Amendment) Act, 2015 (hereinafter referred to as “the Act”).

The facts as noticed by the learned Additional District Judge, correctness whereof is not disputed by learned counsel for the parties are extracted as under:-

“The facts in brief leading to the filing of this case as made out from the records are that the plaintiffs no.1 and 2

have invested in Real Estate Development Projects in India. The defendant no.1 is a company incorporated under the Companies Act 1956 and engaged in Real Estate Development Business, whereas, defendants no.2 and 3 are its sister concerns. The defendant no.1 obtained an in-principal approval dated 7.4.2006 from Ministry of Commerce and Industry for setting up a Special Economic Zone (SEZ) for ITs Sectors at Fazilpur and Behrampur Villages in Gurugram in terms of The Special Economic Zone Act, 2005 and The Haryana Special Economic Zone Act, 2005 and for that purpose the defendants no.1 to 3 and their associate companies acquired the land measuring 150 acre approximately in and around Villages Fazilpur and Behrampur, Tehsil and District Gurugram. The defendant no.1 entered into a Memorandum of Understanding (hereinafter to be referred as MOU) dated 5.4.2006 followed by another MOU dated 18.4.2006 with Solitaire Buildmart Private Ltd (hereinafter to be referred as SBPL) to develop the said SEZ and proposed to enter into a Joint Development Agreement (JDA) for development, construction, sale and management of the said proposed SEZ in the State of Haryana through the defendant no.2. By virtue of the above said MOUs, SBPL had agreed to deposit a sum of not less than ₹57.75 crore as commitment deposit with the defendant no.1 till 31.12.2016 to be applied for SEZ Project and in lieu of the above said commitment amount, the SBPL

was entitled to 22% of the fully paid equity share capital of the defendant no.1. The affirmative rights were also given to the SBPL by the defendant no.1 by virtue of clause No.4.9 of the MOU and it was further agreed that none of the parties shall directly or indirectly encumber the project land (measuring 150 acre approx.) or any part thereof in any manner whatsoever, without the prior written approval of other party. At the time of the execution of the said MOUs , it was disclosed by the Vipul Group that out of total 150 acre of project land, approximately 50 acre land was acquired by way of sale deeds already executed and registered in favour of Vipul and /or its associates, whereas, the remaining approximately 100 acre of land was acquired by way of agreements to sell executed in their favour. Vide subsequent Assignment Agreements dated 19.5.2016 and 21.8.2016, SBPL assigned its right to invest in the SEZ project to the plaintiffs and a Joint Development Agreement dated 29.8.2006 (hereinafter to be referred as JDA dated 29.8.06) was executed by the plaintiffs no.1 and 2 acting upon the assignment in their favour by SBPL. The said JDA dated 29.8.2006 was also accepted by the defendants no.1 and 2 and they also signed the same. The details of the project land under JDA dated 29.8.2006 were mentioned in Schedule-1 attached therewith. As per the JDA, the plaintiffs were also given a representation on the Board of the defendant no.2 and its representative was appointed as a Director in the defendant

no.2 company on 15.11.2007. A subsequent MOU dated 13.9.2008 was entered into between the plaintiffs and the defendants and as per the said MOU dated 13.9.2008, the JDA dated 29.8.2006 was amended only to the extent as agreed between the parties in accordance with the terms and conditions of the MOU, whereas, the remaining terms of the JDA remained unaltered. As per the MOU dated 13.9.2008, the project land was reduced to 138.568 acres of land wherein the land measuring 29.205 acre was taken out of the purview of the earlier project land and 17.959 acres of land was brought into the project. The details of the project land were revised vide Schedule-II attached with the MOU dated 13.9.2008. Over a period of time, differences arose between the parties and plaintiff group invoked the arbitration clause of MOU dated 13.9.2008 and the matter is pending before the Arbitral Tribunal consisting of the Hon'ble Ms. Justice Reva Khetarpal (Retd.), Hon'ble Mr. Justice R.C.Chopra (Retd.) and Hon'ble Mr. Justice S.B.Sinha (Presiding Arbitrator). However in May 2015, the plaintiffs came to know about the existence of the fabricated registered Exchange Deed dated 11.8.2006 and the compromise award dated 3.8.2006 in respect of a part of the project land executed between the defendants no. 2 and 3 without intimation and approval of the plaintiffs. Both the said documents were created with sole intent of causing wrongful gain to the defendants and wrongful loss to the plaintiffs in

contravention of the agreements executed between the parties from time to time and as such the defendants played a fraud upon the plaintiffs. As per the email dated 25.5.2015, copy of impugned Exchange Deed dated 11.8.2006 was provided to the plaintiffs for the first time in the Board Meeting dated 24.5.2015 which was not attended by the nominee Director of the plaintiffs no.1 and 2 (appointed on the Board of defendant no.2 Company). On perusal of the said Exchange Deed, it came to the knowledge of the plaintiffs that the defendants no.2 and 3 had entered into a partnership deed dated 15.5.2006 for developing a part of the land which was also the part of the project land. As per the Partnership Deed M/s. Indica Estate Pvt. Ltd was owner of 56 kanals land situated within the revenue estate of Village Fazilpur Jharsa, whereas, defendant no.3 was the owner in possession of the land measuring 62K 9M situated in Village Fazilpur Jharsa and by virtue of an arbitration award dated 3.8.2006, the defendants no.2 and 3 exchanged the above said land and executed a registered Exchange Deed dated 11.8.2016. It is pleaded that the name of the defendant no.2 was changed from Indica Estates Pvt. Ltd. to Vipul SEZ Developers Pvt. Ltd only on 27.6.2006, whereas, a reference to Vipul SEZ has been given in the above said partnership deed dated 15.5.2006 also and as such the connivance of the defendants is apparent on the face of it. The above said partnership was dissolved on 15.7.2006. The

defendants no.2 and 3 initiated an arbitration in respect of the proposed exchanged land, which was a part of the project land, without keeping the plaintiffs in loop and without safeguarding their interest. It was revealed to the plaintiffs that 7 acres of exchanged land owned by the defendant no.2 is a prime piece of commercial zone land, whereas, 7.806 acre of exchanged land which is given to the defendant no.2 in lieu of the above said 7 acre of land by virtue of the Exchange Deed dated 11.8.2006 is a residential zone land and is of a lesser value. The defendants played a fraud upon the plaintiffs. The Exchange Deed and the related documents had been prepared ante-dated by showing the same to have been executed prior to the JDA dated 29.8.2006. It is further averred that without the knowledge and consent of the plaintiffs, the defendants no. 1 and 3 entered into a Separate Collaboration Agreement dated 28.9.2006 (hereinafter to be referred as SCA dated 28.9.2006) with Karam Chand Pvt. Ltd in respect of the land measuring 32 acre, which also included the above said 7 acres of land (which was exchanged by virtue of the impugned Exchange Deed dated 11.8.2006). The Exchange Deed in question is assailed by the plaintiffs on the grounds detailed in para 23 of the plaint, such as that the land measuring 7 acre which was exchanged by the defendant no.2 with the defendant no.3 was a part of the project land and as such it could not be exchanged without the prior consent of the plaintiffs, it was a prime piece of commercial

land of the project, Exchange Deed and the related documents are forged and fabricated documents which have been ante-dated by the defendants to cause wrongful gain to themselves and wrongful loss to the plaintiffs, the Exchange Deed in question was never mentioned in the minutes of the meetings during the year 2006, fake arbitral proceedings were initiated by the defendants no.2 and 3 before the sole arbitrator with malafide intention without keeping the plaintiffs in the loop, the said Exchange Deed has not been referred to in the JDA dated 29.8.2006 etc. etc. As such the plaintiffs have prayed to declare the arbitral award dated 3.8.2006 and the registered Exchange Deed No.10229 dated 11.8.2006 executed between the defendants no.2 and 3 in pursuance of the arbitration award as illegal, null and void”.

The plaintiffs along with the plaint filed an application for injunction with a prayer to restrain the defendants from alienating the disputed seven acres of land to anyone referred to in the impugned Exchange Deed. The defendants, on appearance, filed an application under Section 8 of the Act to refer the parties to the pending arbitration before the Tribunal with a plea that in pursuance of Memorandum of Understanding (hereinafter referred to as the “MOU”) dated 13.09.2008 executed between the parties, any dispute arising between the parties regarding the project land covered by the MOU is liable to be referred to the Tribunal for adjudication. The application was dismissed by the learned Civil Judge (Junior Division) on the ground that the plaintiffs have pleaded fraud by the defendants which has

been reversed by the Additional District Judge.

This Court has heard learned counsel for the parties at length and with their able assistance, gone through the documents filed.

Learned senior counsel appearing for the petitioners has submitted that the plaintiffs are praying for setting aside of an arbitral award dated 03.08.2006 and a registered exchange deed dated 11.08.2006. He submitted that another Arbitral Tribunal does not have power to set aside the award passed by another Arbitral Tribunal. He further submitted that one of the plaintiffs is not party to the arbitration agreement and, therefore, the first Appellate Court has erred in allowing the appeal. He further submitted that the plaintiffs have pleaded serious fraud at the hands of defendants and, therefore, only the Civil Court is competent to adjudicate the dispute.

On the other hand, learned counsel appearing for the respondent has submitted that the allegations with regard to the fact that seven acres of the project land has been taken out by the defendants is already pending before the Tribunal. He further submitted, while referring to the order passed by the Tribunal dated 31.03.2016, that the Tribunal is also examining the dispute sought to be raised through the plaint/suit before the Court. He further submitted that the allegations, as are sought to be alleged in the present suit do not constitute fraud, and therefore, the jurisdiction of the arbitrator is not ousted. He further submitted that the plaintiffs are assignees of M/s Solitaire Buildmart Private Limited and, therefore, they are party before the Tribunal. He drew attention of the Court to the plaint filed by the petitioners herein and the parties before the arbitrator to establish the correctness of the contention.

This Court has analysed the arguments of the learned counsel for the petitioner and with his able assistance, gone through the paper book.

First argument of learned counsel for the petitioner, although appear to be attractive in first blush, however, on deep scrutiny, found without substance. It is undisputed that the plaintiff/petitioners (herein) are neither party to the arbitration proceedings resulting in the award dated 03.08.2006 nor party to the registered deed of exchange dated 11.08.2006. There is fundamental error in the argument of learned senior counsel for the petitioner to the effect that petitioners are seeking setting aside of the arbitral award dated 03.08.2006 and deed of exchange dated 11.08.2006. On careful reading of the suit, it is apparent that the plaintiffs have sought declaration. Even if the plaintiffs have sought cancellation thereof, their suit would have to be treated as one filed for declaration. There is a difference between a suit filed for cancellation of instrument or award or decree of the court and declaration with regard to status. A person who is not party to the instrument, award or decree of the Court is not required to, in strict sense, seek cancellation thereof. Such person can initiate proceedings for seeking declaration to the effect that such instrument, award or decree of the Court is not binding or does not affect his rights. This difference can very well be appreciated from careful reading of the Sections 31 & 34 of the Specific Relief Act, 1963, which are extracted as under:

“31. When cancellation may be ordered.—(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it

adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

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34. Discretion of court as to declaration of status or right.

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not inexistence, and for whom, if in existence, he would be a trustee”.

It is clear from the reading of both the provisions that Section 31 deals with cancellation of the instrument, whereas Section 34 provides for declaration

of status. Once the plaintiff/petitioners are not party to the arbitral award and deed of exchange, they are well within their rights to seek declaration which can be granted by the Tribunal. In fact, the Tribunal has already culled following broad points for determination:

- “1. To determine the extent of the Project Land as per the contract between all parties to this arbitration and on the basis of such determination to grant appropriate reliefs, if any, as pleaded by the parties in the claims or counter claims filed by them in these proceedings.*
- 2. To determine whether or not the Claimants or the Respondent No.9 have any rights in or to the separate commercial parcel of around 28 acres and on the basis of such determination to grant appropriate relief, if any, as pleaded by the parties in the claims or counter claims filed by them in these proceedings.*
- 3. To determine whether or not there has been any surplus or shortfall in contributions required to be made by the parties in Vipul SEZ and on the basis of such determination to grant appropriate relief, if any, as pleaded by the parties in the claims or counter claims filed them in these proceedings.*
- 4. To ascertain whether or not any party to these proceedings has committed any breach of the MOU, and JDCA or any other ancillary or related agreement and to grant appropriate relief, if any, for such breach as*

pleaded in the claims or counter claims filed by the parties in these proceedings.

5. *To ascertain whether or not in the facts and circumstances of this case any reliefs ought to be granted for the preservation and/or renewal of the License No. 7 of 2010 and License No. 9 of 2010.*
6. *To ascertain whether or not any relief as pleaded by the parties in their claims or counter claims for specific performance of the MOU, JDCA(s) or any other related or ancillary agreement ought to be granted.*
7. *To ascertain whether or not any reliefs as pleaded by the parties in their claims or counter claims in relation to capitalization of Vipul SEZ and/or transfer of the various land parcels ought to be granted.*
8. *To ascertain whether or not the parties are entitled to any other relief (including declaratory reliefs, relief for unjust enrichment, restitution, damages, interest, costs, etc.) as pleaded in their claims and/or counter claims.”*

Point No.2 would cover the aforesaid dispute between the parties with regard to seven acres of land.

Next argument of learned counsel for the petitioners that petitioner/plaintiffs are not party to the MOU dated 05.04.2006 and 18.04.2006 is also not correct particularly when plaintiffs themselves claim that vide deed of assignment dated 19.05.2006, M/s Solitaire Buildmart Private Limited had assigned its rights in favour of the plaintiffs. Therefore,

as per the amended provision of Section 8 of the Act, the plaintiff/petitioners are claiming their right through or under M/s Solitaire Buildmart Private Limited. Significant amendment made in Section 8 of the Act has enhanced the scope of the Court while dealing with the application under Section 8 of the Act for relegating the parties to the arbitration. Further, this Court has also examined that both the plaintiff/petitioners are parties to the arbitration proceedings being claimants before the Tribunal.

Last argument of learned counsel also does not have substance because by now it is well settled that mere allegations of fraud does not oust the jurisdiction of the arbitrator. The reference to the Tribunal cannot be avoided by the parties by merely making allegations of fraud. Simple allegations of fraud, which concerns internal affairs of the parties, are not sufficient to oust the jurisdiction of the Tribunal. It is only in those cases where the Court finds that there are serious allegations of fraud which make a virtual case of criminal offence and complex issues requiring adjudication on appreciation of evidence to be led, the parties can be permitted to avoid Forum of their choice i.e. adjudication of dispute by Arbitral Tribunal. Reference, in this regard, can be made to a recent judgement passed by the Hon'ble Supreme Court in the case of *Ameet Lal Chand Shah v. Rishabh Enterprises (2018) 15 Supreme Court Cases 678*.

Hence, dismissed.

(Anil Kshetarpal)
Judge

January 22, 2020
"DK"

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No