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

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Reserved on: 09.12.2019

Pronounced on: 12.05.2020

+ **ARB.P. 383/2019**

M/S DISTRIBUTION LOGISTICS PVT. LTD. Petitioner

Through: Ms. Diya Kapur & Mr. Kshitij
Dua, Advocates

versus

M/S BPB BUILDERS PVT. LTD. Respondent

Through: Mr. P.K. Aggarwal, Ms. Tannya
Sharma, Mr. Srutisma Hazarika &
Ms. Deepti Gupta, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator to adjudicate the disputes between the parties.

2. An agreement was executed between ETA Engineering Pvt. Ltd. (hereinafter referred to as 'ETA') and BPB Builders Pvt. Ltd., Respondent herein, on 23.08.2007 for purchase and consolidation of approximately 100 acres of land in Village Bagola, Tehsil Palwal, District Faridabad, Haryana (hereinafter referred to as 'land') for development and construction of Rail Linked Inland Container Depot (hereinafter

referred to as 'Project'). The land was purchased at a price of Rs.60 Lakhs per acre. Agreement further stipulated that the acquisition of land would be completed within three months.

3. As the case of the Petitioner goes, it was agreed between the parties by an Agreement dated 13.09.2007 that if the land procured by the Respondent cannot form part of the final contiguous parcel of said land required for the project, it shall be ensured by the Respondent that such land is exchanged for similar or more or less equivalent parcel of land, at the cost and expense of the Respondent.

4. As per the Petitioner, the Respondent failed to acquire the land within the stipulated period of three months. However, due to a long-standing relationship between the parties, a second opportunity was provided to the Respondent and by an Agreement dated 08.11.2007 duration of completion of the Project was extended upto the procurement of the land and the price was revised to Rs.65,70,750/-.

5. Under the aforesaid agreements, there were certain obligations to be performed by the Respondent which are as under :-

- “a) Assist ETA in securing development rights in the said land owned by third parties;*
- b) Execute the necessary legal documents for securing such development rights;*
- c) Obtain possession of the said land;*
- d) Obtain the delivery of the original documents pertaining to the said land from the owners of the said land in respect of which development rights were being obtained under the agreements;*
- e) Upon instructions by ETA, pay such sums of money as may be instructed by ETA to various persons/entities with whom development agreements may be executed.”*

6. Pursuant to a Business Transfer Agreement dated 28.10.2011 (amended on 15.03.2013) between ETA and Vikram Logistic and Maritime Services Pvt. Ltd. (hereinafter referred to as 'VLMS'), ETA agreed to transfer its logistics business to VLMS. With effect from 12.09.2014, VLMS's name changed to Distribution Logistics Infrastructure Pvt. Ltd. (hereinafter referred to as 'DLI') and it acquired all its rights and liabilities.

7. DLI fulfilled all its obligations under the Agreements including making full payments amounting to Rs.56,00,71,450/- which according to the Petitioner is acknowledged by the Respondent in its Statement of Accounts. Despite the payments, Respondent failed to consolidate all the land parcels. The total value of land consolidated as on 31.01.2019 is only Rs.45,48,76,631/-.

8. Learned counsel for the Petitioner contends that there is a clear breach of the Agreement on the part of the Respondent. As a result of the breach, the seller of the land parcel has not been paid the entire amount and is now claiming money from the Petitioner as well as return of portion of the land. This situation is not only with respect to one Sale Deed, but is with respect to all the Sale Deeds in question. This has also resulted in halting the Project, resulting in huge loss to the Petitioner.

9. It is further contended that despite a notice having been issued to the Respondent on 22.10.2018, calling upon it to conduct a joint reconciliation exercise, it has not responded. As on date, there is a complete failure on the part of the Respondent to pay an outstanding amount of Rs.10,51,94,819/-, payable as on 31.03.2013, with further interest thereupon. As on 31.12.2018, an amount of Rs.19,59,25,350/-

has become due including interest to the Petitioner. Vide letter dated 31.01.2019, Petitioner was constrained to terminate the Agreement dated 23.08.2007.

10. Learned counsel contends that having no other remedy, the Petitioner invoked the Arbitration Clause contained in the Agreement between the parties and nominated its Arbitrator. Despite receipt of the notice on 11.04.2019, Respondent has failed to appoint the Arbitrator. The Arbitration Clause between the parties reads as under :

"8: Any dispute between the parties shall be settled by arbitration.

9: The parties agree to a fast track arbitration which is to be disposed within 60 days from the date of reference. The arbitration will be held in accordance to the provision of the Arbitration and Conciliation Act, 1996."

11. It is thus prayed that the petition be allowed and a Sole Arbitrator be appointed by the Court to adjudicate the disputes.

12. Per contra, learned counsel for the Respondent argues that the present petition is not maintainable as there is no Arbitration Agreement between the parties. Perusal of the Agreement filed with the petition shows that the Agreement was between M/s. ETA and the Respondent. Petitioner is a separate legal entity and there is no Arbitration Agreement between the Petitioner and the Respondent.

13. It is next contended that the alleged disputes are barred by time and cannot be referred to Arbitration. According to the petition, ETA vide Agreement dated 28.10.2011 had transferred its logistics business to VLMS (now DLI). Thus, all the transactions were prior to the Business

Transfer Agreement. It is averred in the petition itself that the amount was payable as on 31.03.2013 and the interest has also been computed with effect from 01.04.2013. Thus, even as on the date of issue of notice invoking Arbitration, the alleged disputes were barred by time.

14. It is further contended that the alleged disputes are beyond the said Agreement. Under the Agreement executed between ETA and the Respondent on 23.08.2007, Respondent was merely a broker / facilitator to acquire various parcels of land for and on behalf of ETA. The Sale Deeds were to be executed directly between the land owners and ETA. All the payments made to the land owners had been accounted for in the various Sale Deeds executed between ETA and the land owners and no amount whatsoever remains outstanding even otherwise in respect of any of the Sale Deeds.

15. Learned counsel for the Petitioner in rejoinder argues that there does exist a valid and binding Arbitration Agreement between the parties herein. The Agreement was executed between ETA and Respondent on 23.08.2007 and it contains an Arbitration Clause. Subsequently, pursuant to a Business Transfer Agreement, the business undertaking of ETA was transferred to VLMS including the Agreement with the Respondent which is specifically mentioned in Schedule 2.1 (A) read with Clause 2.1 of the Business Transfer Agreement. On 12.09.2014, only the name of VLMS was changed to DLI, which is the present Petitioner. It is argued that in a petition under Section 11(6) of the Act, this Court is only concerned with examining whether a valid Arbitration Agreement exists between the parties or not. It is further submitted that the Respondent is not right in its contention that there is no amount due under the

Agreement to the Petitioner. The value of the total land consolidated by the Respondent as on 31.01.2019 was far less than the actual payments made by the Petitioner. Petitioner is thus entitled to a refund of an amount of Rs.10,51,94,819/- from the Respondent.

16. It is further argued that the scope of inquiry under Section 11(6) of the Act will not include examining the question whether the claims are time barred or not. This issue is in the domain of the Arbitrator and would be so decided, once the Arbitrator is appointed.

17. I have heard the learned counsels for the parties.

18. It is an undisputed fact that an Agreement dated 23.08.2007 was executed between ETA and the Respondent for purchase and consolidation of 100 acres of land in a village at Faridabad, Haryana. The said Agreement contains an Arbitration Clause. It is equally undisputed that a Business Transfer Agreement dated 28.10.2011, as amended on 15.03.2013, was entered into between ETA and VLMS, the latter being renamed as DLI, which is the Petitioner before this Court. By virtue of the said Business Transfer Agreement, the entire logistics business undertaking of ETA stood transferred or assigned to VLMS. A perusal of the initial Agreement dated 23.08.2007 between ETA and Respondent clearly indicates that the parties had agreed that the party of the First Part (ETA) would be deemed to mean and include its legal heirs; representative, successors in interest, executors, administrators and assignees of the First Part. Relevant part is extracted hereinunder :-

“M/S ETA Engineering Pvt. Ltd. A company registered under the Indian Companies Act 1956, having its registered office at No.5, Moores Street, Chennai-600006,

herein after referred to as PURCHASER/PARTY OF FIRST PART, which terms or expression wherever the context so require in this Deed shall be deemed to mean and include its legal heirs, representative, successors in interest, executor, administrators and assigns of the FIRST PARTY duly "represented by its C.E.O Sh. K. Salhianathan."

19. Perusal of the Business Transfer Agreement indicates, as rightly contended by the Petitioner, that ETA had agreed to sell, transfer, convey, assign and deliver to the purchaser, which is the Petitioner herein, all rights, title, interest and privileges of the seller in and under the Business Undertaking and assume the liabilities as a going concern. 'Business Undertaking' was defined and clarified to mean various assets of the seller as on the date of the Agreement, which were mentioned therein to the extent related to the logistic business. In para 2.1(A) it was clearly mentioned that the Business Undertaking would include immovable property and lease property listed in Schedule 2.1(A) together with fixtures etc. Schedule 2.1(A), under the Heading 'owned immovable property', clearly refers to the properties in question in this petition. Relevant part of para 2.1 and the Schedule is as under:-

"2.1 Purchase and Sale of Business Undertaking

..... "Business Undertaking" shall mean all of the following assets of the Seller, as of the date of this Agreement and updated on the Closing Date, to the extent related to the Logistics Business:

(a) all rights, title and interest of the Seller under all owned immovable property and leased property listed in Schedule 2.1(a) together with all

improvements, fixtures and other appurtenances thereto and rights in respect thereof (collectively, the “Seller Properties”)

“SCHEDULE 2.1(A)

OWNED AND LEASED IMMOVABLE PROPERTY

A. Owned Immovable Property

- 1. Khasra No. 52, measuring 5.73 acres, Rights Class-I situated at Mouza: Jangeshwar, Revenue Circle: Bori, Tehsil Nagpur (Rural) District, P.H. No. 81, Maharashtra.*
- 2. Khasra No. 49, measuring 0.54 acres and Khasra No. 50 measuring 13.46 acres, Rights Class-I situated at Mouza: Jangeshwar, Revenue Circle: Bori, Tehsil Nagpur (Rural) District, P.H. No. 81, Maharashtra.*
- 3. Khasra No. 59/2, measuring 5.43 acres, Rights Class-II, situated at Mouza: Jangeshwar, Revenue Circle: Bori, Tehsil Nagpur (Rural) District, P.H. No. 81, Maharashtra.*
- 4. Khasra No. 59/1, 59/3, 59/4 and 67, measuring 8.52 acres, 6.91 acres, 6.91 acres and 3.65 acres respectively, Rights Class-II situated at Mouza: Jangeshwar, Revenue Circle: Bori, Tehsil Nagpur (Rural) District, P.H. No. 81, Maharashtra.*
- 5. Khasra No. 53, measuring 20.87 acres, Rights Class-I situated at Mouza: Jangeshwar, Revenue Circle: Bori, Tehsil Nagpur (Rural) District, P.H. No. 81, Maharashtra.*

6. Palwal Land:

<i>S. No.</i>	<i>Date</i>	<i>Type of Document</i>	<i>Parties to Agreement</i>	
<i>Land 1 - In the name of Mr. A.R. Kiyammudin for 11.775 Acres</i>				
<i>1.</i>	<i>January 15, 2008</i>	<i>Letter of Intent</i>	<i>Mr. A.R. Kiyammudin</i>	<i>ETA Engineering Private Limited</i>
<i>2.</i>	<i>October 9,</i>	<i>Development</i>	<i>Mr. A.R.</i>	<i>ETA Engineering</i>

	2008	Agreement	Kiyammudin	Private Limited
3.	October 9, 2008	General Power of Attorney	Mr. A.R. Kiyammudin	
4.	October 9, 2008	Special Power of Attorney	Mr. A.R. Kiyammudin	
5.	October 9, 2008	Possession Letter	BPB Builders (Private) Limited on behalf of Mr. Mr. A.R. Kiyammudin	
<i>Land 2 - In the name of Deshpal Realtors Private Limited for 9.60 Acres</i>				
1.	April 7, 2008	Letter of Intent	Deshpal Realtors Private Limited	ETA Engineering Private Limited
2.	June 23, 2008	Development Agreement	Deshpal Realtors Private Limited	ETA Engineering Private Limited
3.	June 23, 2008	General Power of Attorney	Deshpal Realtors Private Limited	
4.	June 23, 2008	Special Power of Attorney	Deshpal Realtors Private Limited	
5.	June 23, 2008	Possession Letter	BPB Builders (Private) Limited on behalf of Deshpal Realtors Private Limited	
<i>Land 3 - In the name of Deshpal Realtors Private Limited for 10.343 Acres</i>				
1.	April 7, 2008	Letter of Intent	Deshpal Realtors Private Limited	ETA Engineering Private Limited
2.	September 16, 2008	Development Agreement	Deshpal Realtors Private Limited	ETA Engineering Private Limited
3.	September 16, 2008	General Power of Attorney	Deshpal Realtors Private Limited	
4.	September 16, 2008	Special Power of Attorney	Deshpal Realtors Private Limited	

5.	September 16, 2008	Possession Letter	BPB Builders (Private) Limited on behalf of Deshpal Realtors Private Limited	
<i>Land 4 - In the name of Deshpal Realtors Private Limited for 4.2625 Acres</i>				
1.	January 6, 2009	Letter of Intent	Deshpal Realtors Private Limited	ETA Engineering Private Limited
2.	May 25, 2009	Development Agreement	Deshpal Realtors Private Limited	ETA Engineering Private Limited
3.	May 25, 2009	General Power of Attorney	Deshpal Realtors Private Limited	
4.	May 25, 2009	Special Power of Attorney	Deshpal Realtors Private Limited	
5.	May 25, 2009	Possession Letter	BPB Builders (Private) Limited on behalf of Deshpal Realtors Private Limited	
<i>Land 5 - In the name of Megha Jain 3.525 Acres</i>				
1.	January 15, 2008	Letter of Intent	Ms. Megha Jain	ETA Engineering Private Limited
2.	May 26, 2008	Development Agreement	Ms. Megha Jain	ETA Engineering Private Limited
3.	May 26, 2008	General Power of Attorney	Ms. Megha Jain	
4.	May 26, 2008	Special Power of Attorney	Ms. Megha Jain	
5.	May 26, 2008	Possession Letter	BPB Builders (Private) Limited on behalf of Ms. Megha Jain	
<i>Land 6 - In the name of Habeeb Zarook for 7.525 Acres</i>				
1.	January 15, 2008	Letter of Intent	Mr. Habeeb Zarook	ETA Engineering Private Limited
2.	May 21,	Development	Mr. Habeeb	ETA Engineering

	2008	Agreement	Zarook	Private Limited
3.	May 21, 2008	General Power of Attorney	Mr. Habeeb Zarook	
4.	May 21, 2008	Special Power of Attorney	Mr. Habeeb Zarook	
5.	May 21, 2008	Possession Letter	BPB Builders (Private) Limited on behalf of Mr. Habeeb Zarook	
<i>BPB Builders (Private) Limited</i>				
1.	August 23, 2007	Land purchase agreement for Palwal Land	BPB Builders (Private) Limited	ETA Engineering Private Limited
2.	September 13, 2007	Amendment Letter	BPB Builders (Private) Limited	ETA Engineering Private Limited
3.	November 8, 2007	Amendment Letter	BPB Builders (Private) Limited	ETA Engineering Private Limited

20. In my view, the Petitioner is right in its contention that through the Business Transfer Agreement, ETA had transferred its 'Business Undertaking' to VLMS, who subsequently changed its name to DLI. The Agreements also reveal that when the first Agreement was entered into between ETA and the Respondent, the First Party to the Agreement included its assignees and successors. When the Business Transfer Agreement was executed, the entire Business Undertaking was transferred to the Petitioner including the Agreement with respect to the properties in question. It is thus clear that the Petitioner has stepped into the shoes of ETA, through the Business Transfer Agreement. Since the earlier Agreements dated 23.08.2007 and 08.11.2007 are also a part of the

Business Transfer Agreement, as specifically mentioned in para 2.1 and Schedule 2.1(A), the Arbitration Agreement also becomes a part of the Business Transfer Agreement. Needless to state that once the Petitioner took over ETA as a going concern, all its assets, rights and liabilities were transferred to the Petitioner and it has every right under the Agreement to invoke the arbitration clause against the Respondent, who according to the Petitioner has liabilities with respect to the consolidation of land in question.

21. I am fortified in my view by a judgment of the Karnataka High Court in case of ***Force Fitness (India) Private Limited v. Bengaluru Fitness Centre Private Limited*** [Civil Miscellaneous Petition No. **92/2012**] which is very close to the present case on facts and the proposition of law. In the said case, a petition was filed under Section 11(5) & (6) of the Act. Petitioner's case was that Snap Fitness India Pvt. Ltd. had appointed the Respondent as a franchisee to establish a Snap Fitness Centre and a Franchise Agreement dated 27.04.2009 was entered into. The earlier franchisee was Live Fit India Ltd. whose name was later changed to Bengaluru Fitness Centre, the Respondent in the petition. Snap Fitness and the Respondent amended the Franchise Agreement on 11.01.2010. On 16.03.2012, Snap Fitness entered into a Master Franchise Agreement with the Petitioner and transferred all its business interest to the Petitioner by a Business Transfer Agreement dated 17.03.2012. On account of some payments being due to the Petitioner, it issued notice to the Respondent, informing that Snap Fitness had assigned all the Franchise Agreement to the Petitioner and also conveyed its decision to appoint an Arbitrator. The Respondent in its reply, questioned the locus

of the Petitioner. When the petition was filed, the Respondent resisted the petition on the ground that there was no Agreement between the Petitioner and the Respondent and, therefore, for resolving the dispute between the Respondent and the Franchiser, Snap Fitness, Arbitrator could not be appointed. The Karnataka High Court relying on various judgments of the Supreme Court allowed the petition and held as under:-

“13. The submissions of the learned counsel have received my thoughtful consideration. The question that falls for my consideration is whether the petitioner's request for the appointment of the arbitrator can be turned down on the ground that the petitioner is not a signatory to any agreement with the respondent. Admittedly, M/s. Snap Fitness and M/s. Live Fit India Private Limited entered into franchise agreement, dated 27.4.2009 (Annexure-A). Under Clause-11 F of the agreement extracted supra, M/s. Live Fit India Private Limited is under an obligation to recognize M/s. Snap Fitness's right to sell or assign its interest to any third parties. The name of M/s. Live Fit India Private Limited came to be changed to Bengaluru Fitness Center Private Limited (the respondent herein). Thereafter, M/s. Snap Fitness and the respondent have executed on 11.1.2010 the Amendment to Franchise Agreement. There is a clear mentioning of the change of name of the franchisee in Clause 4 of the Amendment to Franchise Agreement. Recital 'B' of the said Agreement states that M/s. Snap Fitness and the respondent desired, inter alia, to confirm each of the obligations under the Franchise Agreement. What follows from these recitals in the subsequent agreement is that the respondent entity's earlier name was Live Fit India Private Limited. Subsequently, M/s. Snap fitness and the respondent desired to confirm each of their obligations under the earlier Agreement. Neither the identity of the respondent is in dispute nor there is any ambiguity about the intention of the parties.

14. Subsequently, M/s. Snap Fitness transferred all its business interest to the petitioner by appointing the petitioner as the master franchisee. The same is evident from the Master Franchise Agreement, dated 16.3.2012 and Business Transfer Agreement, dated 17.3.2012 (Annexures - C and D respectively). On the respondent raising the question of the petitioner's locus standi in response to the petitioner's notices for the payment of dues, it is clarified by M/s. Snap Fitness itself that all the franchise agreements are transferred to the petitioner. The agreements and the correspondence do not leave anybody in doubt that the petitioner has stepped into the shoes of M/s. Snap Fitness vis-à-vis the respondent.

15. It is also worthwhile to notice that the respondent had filed O.S. No. 7162/2012 against M/s. Snap Fitness and its Directors. The same came to be dismissed by the civil court, by its order, dated 30.10.2012 referring the parties to arbitration holding that the reliefs claimed in the suit are the subject-matter of the agreement providing for arbitration. Aggrieved by the said order, the respondent filed Civil Revision Petition No. 506/2012 in this Court. By its order, dated 20.6.2013, this Court dismissed the said civil revision petition. Further, the respondent took up the matter to the Hon'ble Supreme Court by filing SLP (C) No. 36158/2013. The Hon'ble Supreme Court dismissed the SLP by its order, dated 9.12.2013. If the respondent has any claim or counter claim, the same is also to be raised only in the proceedings before the arbitrator. In view of the said orders, I cannot hold that the respondent has not entered into any agreements or that the agreements do not provide for the arbitral clause.

17. On the ground that M/s. Snap Fitness is not a party to this petition or on the ground that the petitioner is not a party to the Franchise Agreement, the appointment of the arbitration cannot be resisted by the Respondent. The arbitrator himself can take a call on the issue of

joinder/striking off of parties to the arbitration proceedings.

20. For all the aforesaid reasons, I hold that the objections to the CMP are not tenable. As M/s. Snap Fitness and M/s. Live Fit India Private Limited, the forerunner of the Respondent Company and also the Respondent Company itself have entered into the agreements which provide for arbitration and as the petitioner has stepped into the shoes of M/s. Snap Fitness vis-à-vis the Respondent and as the disputes have arisen in relation to the agreements, I allow this petition. I appoint Justice N. Anand, Former Judge, High Court of Karnataka as the sole arbitrator. He shall enter upon the arbitration, arbitrate the dispute and conduct the arbitration proceedings at Bengaluru Arbitration Centre as per the Arbitration Centre - Karnataka (Domestic and International) Rules, 2012. ”

22. There is thus no merit in the contention of the Respondent that there is no Arbitration Agreement existing between the parties and the present petition is not maintainable.

23. In so far as the question of claims of the Petitioner being barred by time, as alleged by Respondent is concerned, this is a matter within the domain of the Arbitral Tribunal and would be so decided in case the objection is raised by the Respondent before the Tribunal. In terms of Section 11(6A) of the Act this Court can only examine the existence of an Arbitration Agreement between the parties and no more. This proposition is no longer res integra and very recently in the case of **M/s Mayavti Trading Pvt. Ltd. v. Pradyut Deb Burman** [2019 SCCOnline Cal 334], Supreme Court has once again endorsed and reiterated it.

24. I accordingly appoint Mr. Justice G.P. Mittal, former Judge of this Court as a sole Arbitrator to adjudicate the disputes between the parties.

25. The address and mobile number of the learned Arbitrator is as under:

Mr. Justice G.P. Mittal (Retd.),
H-37, Green Park Extension,
New Delhi- 110016
Mobile: 9910384619

26. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

27. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

28. The petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

MAY 12th, 2020

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