IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.28 of 2020

==

M/s Bihar Home Developers and Builders, through its authorised and registered Partner Sh. Rajiv Ranjan Kumar, S/o Late Sh. Sundeshwar Roy, aged about 51 years, having registered office at B-107, Beur City Armaan, Beur, Patna, also at B-405, Western Mall, R.P.S. Mode, 4th Floor, Bailey Road, Patna.

... ... Petitioner/s

Versus

Shri Narendra Prasad Gupta, S/o Late Ramdhani Shaw, Resident of Mohalla Danapur, Cant Road, Gaadi Khana, P.O.- Thana Khagaul, Zila, Patna, Bihar.

... ... Respondent/s

==

Appearance :

For the Petitioner/s	:	Mr. Anand Mishra, Advocate
		Mr. Sumit Kumar Jha, Advocate
For the Respondent/s	:	Mr. T.N. Maitin, Sr. Advocate
		Mr. Sudhir Kumar Bijpuria, Advocate

==

CORAM: HONOURABLE THE CHIEF JUSTICE
CAV JUDGMENT
Date : 07-07-2021

The sole issue that arises for consideration in the present petition is whether the allegation of fraud alleged by the respondent would render the arbitration clause in the agreement dated 15th November 2016 null and void?

2. The facts are short and simple.

3. Sometime in November 2016, the petitioner, a registered private firm, entered into an agreement with the respondent to develop and construct a property near Danapur, Patna District. Allegedly, the petitioner paid huge sums of money to the respondent at that time. In furtherance of the agreement, the petitioner constructed a boundary wall for developing the plot

and applied for necessary permissions and sanctions under the relevant statutes. Certain disputes having arisen, the parties reduced the terms afresh into writing, which agreement dated 15.11.2016 was also registered with the appropriate authority. This agreement contains an arbitration clause 17, which stands invoked by the petitioner seeking appointment of a sole arbitrator, more so in the absence of any response to the notice dated 23rd September 2019 requiring the respondent to do so. Petitioner alleges the respondent to have concealed correct information of ownership and pending litigation *inter se* co-owners. Further, the respondent adopted an obstructionist approach in executing the project and implementing the terms of the agreement.

4. On the other hand, the respondent alleges fraud perpetuated by the petitioner in the execution of the agreement. The document was not allowed to be read over before signing. Thus challenging its validity, the respondent initiated civil proceedings to declare the agreement null and void. They also initiated criminal proceedings on fraud falling within the purview of Sections 468 and 417 of the Indian Penal Code.

5. In reliance of his submission, supporting the petitioner, Sri Anand Mishra, learned counsel for the petitioner has referred

to and relied upon the decisions of the Hon'ble Apex Court in **Chloro Controls India Private Limited, (2013) 1 SCC 641; A. Ayyasamy Versus A Paramasivam and others, (2016) 10 SCC 386; Rashid Raza Versus Sadaf Akhtar, (2019) 8 SCC 710; and N. N. Global Mercantile Pvt. Ltd. Versus Indo Unique Flame Ltd. and others, 2021 SCC Online SC 13.**

6. Seeking rejection of the petition on the ground that the agreement is null and void Sri T. N. Maitin, learned Senior Advocate, appearing for the respondent seeks reliance upon the decision of the Hon'ble Apex Court in **A. Ayyasamy Versus A Paramasivam and others, (2016) 10 SCC 386 (para 23, 24 & 25); Rashid Raza Versus Sadaf Akhtar, (2019) 8 SCC 710 (para 4); Afcons Infrastructure Limited and another Versus Cherian Varkey Construction Company Private Limited and others, (2010) 8 SCC 24 (para 27).**

7. To recapitulate the facts, parties did enter into an agreement on 15th November 2016, which stood registered under the law. Respondent does not categorically deny and dispute having executed an agreement and, before that, also received certain amounts. It is not his case that they received such payments for any other transaction. It is a single transaction, *inter se* the parties, which appears to be only concerning the

agreement in question. Respondent does not also deny having signed the contract and the petitioner having taken specific consequential steps to develop the property in terms thereof. In fact, under the alleged agreement dated 15th November 2016, the petitioner launched the project on 18th August 2016 when a ceremony was performed, which fact, empathetically, is not disputed at the bar. The fact that there is litigation *inter se* the landowners is admitted. Title Suit No.2808 of 2015 is pending consideration before the trial court, but then the petitioner is not a party there.

8. Respondent alleges that the petitioner forged documents for obtaining sanction under the Real Estate Regulatory Authority, Patna constituted under the Real Estate (Regulation and Development) Act, 2016 (hereinafter to be referred to as the Act), about which complaint dated 23rd October 2018 was also filed. Allegedly, they also issued a notice dated 2nd September 2019, but it is not disputed that the petitioner had pursued the matter with the authorities since 2016. For two years, the respondent kept quiet. Precisely the petitioner argues that now, prompted by the increase in the price of real estate, the respondent has filed such a petition for ostensible reasons.

9. It is also noticed that while invoking the arbitration

clause contained in the registered agreement dated 15th November 2016 (Clause 17), the petitioner sent a legal notice on 23rd November 2019, to which also there was no response. To justify the respondent's silence, learned counsel emphasizes the initiation of the proceedings, both civil and criminal.

10. Well, this Court does not find favour with such submission for the reasons: that- (a) Criminal Case No.1865 of 2019 was initiated by the respondent against the petitioner in October 2019 pleading that as early as on 23rd August 2018, petitioner had obtained a copy of the registered agreement dated 15th November 2016 and was aware of RERA (the authority constituted under the statute) to have sanctioned the map on 19th September 2018 itself. If that were so, then what prevented the petitioner from promptly initiating any legal action; (b) Civil Suit No.379 of 2019 and Civil Suit No.410 of 2019 were also initiated after the invocation of the arbitration clause. The suits were filed on 25th October 2019 and 13th November 2019, respectively, after the legal notice dated 23rd September 2019. Significantly, the trial Judge, while taking cognizance of the petitioner's complaint itself, ordered, which is in operation, in the following terms:

> "On perusal of record, document submitted, S/A and enquiry of witnesses, it transpires that the signature on the registered deed is genuine and so there is a presumption that both the parties have read and understood the

documents before signing it. Further, there can be no offence of forgery as in case of **Mir Nagvi Askari v. CBI 2009 15 SCC 643** it was held by division bench that s. 463 and s. 464 is to be read together because definition of false document as given in s. 464 is a part of forgery as defined in s. 463. Thus if registered document was genuine so there cannot be any case of forgery merely on the ground that the terms mentioned in the registered deed is not as agreed by the parties. In **Remem v. State 25 Am Rep 639** and again in **State v. Phelps 34 Am Dec 672**, forgery was explained as false making of any written instrument, for the purpose of deceit. The defense that the accused did not allow the complaint to peruse the documents before signing is not a valid defense as the complainant was mature enough to refuse signing the documents when the accused insisted them to sign it. Moreover, the complainant has filed a civil suit to cancel the alleged document."

11. The respondent argues that considering the pendency of the Criminal Writ Petition, challenging the order mentioned above, this Court should refrain from passing any further order. The submission, to say the least, is preposterous. There is no bar under the Act preventing this Court from exercising its power pending such an order. The judicial precedents are to the contrary. In law; or equity, the Court finds no reason sufficient enough not to appoint the Arbitrator.

12. The Apex Court in **A. Ayyasamy (supra)** distinguished a serious allegation of forgery/fabrication in support of the plea of fraud as opposed to an unadorned accusation of criminal act. The twin test laid down to read as

follows: -

> “25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil Court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suiton merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to Arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory Scheme of the Act is concerned,

it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by Arbitration and for resolution of such disputes, Courts, i.e. public fora, are better suited than a private forum of Arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to Arbitration, even if there is an arbitration agreement between the parties. When the Case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to Arbitration, then alone such an application under Section 8 should be rejected."

(Emphasis supplied)

13. Earlier also a similar view in the context of the Arbitration Act was taken by the Hon'ble Apex Court in **Swiss Timing Limited Versus Commonwealth Games 2010 Organizing Committee, (2014) 6 SCC 677**.

14. In the instant Request case, there is no allegation that the document of agreement was forged or fabricated. The assertion being the petitioners adopting an obstructionist

approach, which this Court need not deliberate upon, save and except take note of the response filed denying such fact. It is not a severe allegation of forgery/fabrication in support of the plea of fraud as opposed to the unadorned accusation. In a similar circumstance, where parties alleged fraud, the Hon'ble Apex Court in **Rashid Raza (supra)** referred the disputes to be adjudicated by an Arbitral Tribunal.

15. The law on arbitrability on fraud is well developed and is held that it would be wrong to consider arbitration as a flawed or inferior mode of the adjudication process unfit to deal with public policy aspects of legislations.

16. In the case of **VidyaDrolia v. Durga Trading Corporation (2021) 2 SCC 1**, a three-judge bench of the Hon'ble Supreme Court undertook the task of assessing the law on arbitrability in contemporary jurisprudence. In light of the decision in **Avitel Post Studioz v. HSBC PI Holdings (Mauritius) Limited and Ors**. **2020 SCC OnLine SC 656**, the view expressed in **N. Radhakrishnan v. Maestro Engineers (2010) 1 SCC 72**, was held to be a good law. The Apex Court held:

> "*35.* … it is clear that serious allegations of fraud arise only if either of the two tests laid down are satisfied and not otherwise. The first test is satisfied

> only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus, necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof but questions arising in the public law domain."

17. This position in **Avitel Post Studioz** (supra) therefore clarifies that section 17 of the Contract Act would apply if the contract was obtained by fraud or cheating. This provides a distinction between contract obtained by fraud and, post-contract fraud and cheating.

18. Further in **Vidya Drolia (supra)**, the Hon'ble Apex Court held as follows:

> **"78.** In view of the aforesaid discussions, we overrule the ratio in **N. Radhakrishnan**, inter alia observing that allegations of fraud can (*sic* cannot) be made a subject-matter of arbitration when they relate to a civil dispute. This is subject to the caveat

that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability."

19. The more recent judgment of *N.N. Global Mercantile Pvt. Ltd., 2021 SCC OnLine SC 13,* has further upheld **Avitel Post Studioz** (supra) and **VidyaDrolia** (supra), and held that:

> **"**110. The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself."

20. As per the above decisions civil aspects of fraud are considered arbitrable in contemporary arbitration jurisprudence. However, in the matter at hand the allegation made by the respondent challenges the Development Agreement by ipso facto the Arbitration Clause of the agreement as well. The position laid down by the Hon'ble Apex Court therefore provides that such an allegation challenging the validity of the underlying contract and the arbitration clause itself would serve as an exception to the contemporary view on arbitrability of

fraud.

21. What further requires consideration is the factum of petitioner applying the authority constituted under the Real Estate (Regulation and Development) Act, 2016. Is it a valid ground or reasons sufficient enough to reject the instant application?

22. The object and purpose of both the statutes are distinct and different, and there is nothing inconsistent or derogation therein. The Arbitration Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Whereas the RERA Act was enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating

officer and for matters connected therewith or incidental thereto.

23. Section 88 thereof provides the provisions of this Act explicitly to be in addition to and not in derogation of the provisions of any other law, with the only limitation contained in Section 89 making it prevail over in any other consistent law. Reading of both the statutes do not make the Arbitration Act to be inconsistent with the provisions of the RERA Act, more so when respondent no.1 himself disputes its applicability for want of the jurisdictional issue.

24. In **Management Committee of Montfort Senior Secondary School Vs. Vijay Kumar and Others (2005) 7 SCC 472**, the Hon’ble Apex Court dealt with the ambit and scope of the Delhi School Education Act, 1973 vis-à-vis the provisions of the Arbitration and Conciliation Act, 1996. The issue arose as to whether the Tribunal for the Arbitration Act can be said to be a judicial authority or not. Clarifying it not to be, the Court reiterated that the plaintiff is *dominus litis* having dominion over his Case. He is the person who has carriage and control of the action. In Case of conflict of jurisdiction, the choice ought to lie with him to choose the forum best suited unless there be the rule of law excluding access to a forum of his choice; permitting recourse to a forum is opposed to public

policy; or would be an abuse of process of law. The Court reiterated its earlier principle laid down in **Bank of India Vr. Lekhi Moni Das & Ors. (2000) 3 SCC 640** that as a general principle where two remedies are available under law, one of them not to be taken as operating in derogation of the other.

25. In **M.D. Frozen Foods Exports Private Limited and Others Vrs. Hero Fincorp Limited (2017)16 SCC 741** the Hon'ble Apex Court held that proceedings both under the Arbitration Act and the SARFAESI Act could continue simultaneously.

26. For the aforesaid reason, it cannot be said that petitioners' right is foreclosed in light of RERA Act; they had an equally, alternative and efficacious remedy of adjudication under the said Act; They waived of their right to invoke clause 17 for resolution of disputes through Arbitration; or that they elected not to enforce their statutory rights under the Arbitration Act.

27. The decision of the Criminal Court as presented via Annexure E of the Counter Affadavit. The Court of JMFC no. 7 Danapur, has held that there is no case of forgery as per Section 463 and 464 of the Indian Penal Code. The Court reasoned that it is presumed that both parties have read and understood the

document before signing it and it cannot be allowed to state that the respondents were not permitted to peruse the document before signing the same. However, this issue, uninfluenced of any observation made herein can be urged before the learned Arbitrator.

28. Further as provided in the case of **A. Ayyasamy (supra)** and reiterated in **N.N. Global Mercantile (supra)**, the Hon'ble Apex Court has held that Section 8 of the Arbitration and Conciliation Act, 1996 provides that unless the arbitration agreement prima facie is found to be invalid, the Court must refer the same to arbitration. Given the above finding of the absence of forgery in signing the Development Agreement, one finds no reason to believe prima facie that the arbitration agreement is not valid.

29. Reference of **Chloro Controls India Private Limited** (supra) does not assist the parties in any manner, save and except that the principles determining the scope of jurisdiction while referring the parties to arbitration already stands reiterated subsequently.

30. In **Afcons Infrastructure Limited** (supra), the only emphasis is on the significance and importance of parties resorting to the mechanism of ADR.

31. Having held that the matter at hand is not a case of a serious allegation of fraud or forgery, the only question remains is whether this Court should appoint an arbitrator for reference of this matter to arbitration. Given that the respondents have failed to meet the statutory period of 30 days for the appointment of an arbitrator, after multiple notice sent by the petitioner, as per Section 11(6) of the Arbitration and Conciliation Act, 1996 this Court can appoint an arbitrator for the same.

32. Hence the petition is allowed and this court shall appoint a sole arbitrator for the resolution of the abovementioned dispute as per provisions of the Arbitration and Conciliation Act, 1996.

33. Accordingly, Hon’ble Mr. Justice Dinesh Kumar Singh, a retired Judge of the High Court of the Judicature at Patna, is appointed as an Arbitrator to adjudicate the dispute *inter se* the parties.

34. All disputes arising out of Agreement dated 15th November 2016 entered between the parties is referred to the learned Arbitrator for arbitration.

35. On the name of the learned Arbitrator, there can be no objection by either of the learned counsel for the parties.

36. Parties undertake to appear before the learned Arbitrator within one week through the mode of Video Conferencing and as permissible with the lockdown period of current Pandemic Covid-19. Parties also undertake to fully cooperate and agree to request the learned Arbitrator to complete the proceedings at the earliest, which request, this Court, trust would be favourably considered.

37. Learned Arbitrator shall be entitled to fees as per the Fourth Schedule of the Arbitration Act.

38. Learned Registrar General shall ensure that a copy of this order is made available to the learned Arbitrator positively through an electronic mode forthwith.

39. Parties shall file their statement of claims before the learned Arbitrator on such date of hearing, which he may fix, as per mutual convenience.

40. In fact, even during the lockdown period, subject to the convenience, arbitral proceeding can commence and conclude through the use of video conferencing/other electronic mode.

41. Learned counsel for the parties also undertake to apprise the learned Arbitrator of the passing of the order. This, they shall positively do so within next two working days.

42. The learned Arbitrator shall hold the proceedings in the State of Bihar.

43. The Request Petition stands disposed of in the above terms.

44. No order as to costs.

(Sanjay Karol, CJ)

P.K.P./-

AFR/NAFR	AFR
CAV DATE	03.02.2021
Uploading Date	07.07.2021
Transmission Date	