

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **REVIEW PET.545/2014 in O.M.P.745/2014**

Judgment reserved on: 17.07.2015

Judgement pronounced on: 20.08.2015

M/S OPAQUE INFRASTRUCTURE PVT. LTD. Petitioner
Through: Mr.Harish Malhotra, Sr.Adv. with
Mr.Rajender Agarwal, Advocate
versus

M/S MILLENNIUM REALTECH PVT. LTD.
..... Respondent/Applicant
Through: Mr.B.R.Sharma, Advocate

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. This Petition has been filed by M/s Millennium Realtech Private Limited for the review of the order dated 18.11.2014.
2. The brief background of the case is that the petitioner i.e. M/s Opaque Infrastructure Private Limited had filed an O.M.P.No.745/2014 under Section 9 of the Arbitration and Conciliation Act, 1996 with the prayer to restrain the applicant i.e. M/s Millennium Realtech Private Limited from transferring or in any manner dealing with, selling or parting with possession of the plot of land measuring 1148 square yards in Khasra No.260 situated in revenue estate of village Bahapur, Tehsil Kalkaji, New

Delhi. The parties had entered into a collaboration agreement for the construction on the said plot. Pursuant to that collaboration agreement the petitioner i.e. M/s Opaque Infrastructure Private Limited had paid a sum of ₹50 lakhs to the respondent/applicant. One of the conditions of the collaboration agreement was that the respondent/applicant was required to get plan sanctioned from the concerned authorities, which he had failed to do. Subsequently, the petitioner i.e. M/s Opaque Infrastructure Private Limited had invoked the arbitration clause and filed an application for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act vide Arb.Pet.No.634/2014. It also moved an application under Section 9 being O.M.P.No745/2014 for restraining the applicant to dispose of the said property. This court vide order dated 18.11.2014 restrained the applicant from creating third party interest in the said property in any manner. Aggrieved by this order, the applicant/respondent had preferred an appeal being FAO (OS) 503/2014 but withdrew the said appeal.

The order of the appellate court is reproduced as under:

“1. Learned counsel for the appellant concedes to the point that before the learned Single Judge defence under Section 14(b) of the Specific Performance Act, 1963 was not pleaded.

2. Counsel concedes that the contract between the parties dated November 07, 2011 requires a building to be

constructed from the funds made available by the builder. After the building is constructed different areas thereof have to be shared between the parties as per Clause-XII of the agreement. The quality of the construction has to be as per specification in Schedule-B and B1 to the agreement.

3. Whether or not such contract is capable of specific performance has concededly not been argued before the learned Single Judge. If argued, it would require the learned Single Judge to consider whether at all the property has to be preserved by way of an interim measure pending adjudication of a claim for specific performance of the Collaboration Agreement.

4. Faced as aforesaid, learned counsel for the appellant seeks leave of this Court to withdraw the appeal with liberty to seek a review of the impugned order before the learned Single Judge.

5. The right of review exists in law to the appellant, and thus what is conferred by law need not be conferred by a judicial order.

6. So observing, we dismiss the appeal as withdrawn observing simultaneously that if the appellant were to file an application before the learned Single Judge seeking review on the ground above noted the learned Single Judge would bestow a consideration thereto as per law.”

3. This order makes it clear that the applicant was permitted to file review application on the ground whether the collaboration agreement was capable of specific performance or not.

4. The respondent/applicant however has re-agitated the matter even on the grounds raised by it earlier before this court and rejected vide impugned

order. In view of this background, this court confines itself only to the issue relating to the specific performance of the collaboration agreement.

5. It is contended by the respondent/applicant that the collaboration agreement cannot be enforced because it is a construction contract of which specifications, type of construction, quality and quantity as such details minutes which has not been yet settled between the parties, cannot be continuously supervised by the court. Reliance has been placed by the applicant/respondent on *S.B.L.Limited vs. Himalaya Drug Co. AIR 1998 Delhi 126*. This case law has no relevance on the facts of this case.

6. In reply to the review application it is contended on behalf of the petitioner M/s Opaque Infrastructure Private Limited that the same plea had been raised by the applicants in Arb.Pet.634/2014 which the petitioners had filed under Section 11 of the Arbitration and Conciliation Act and the court while disposing of the said petition had rejected the said contention of the respondent/applicant. The learned counsel has relied on the following paragraph of the said order dated 30.01.2015:

“4. The Court is of the view that the above plea of the Respondent can be considered by the learned Arbitrator. He will also have to consider the alternate prayer for damages, in the event the prayer for specific performance is declined.”

It is further argued that the issue, whether plea of specific performance, raised, is maintainable or not is within the province of the learned Arbitrator and this court under Section 9 of the Arbitration and Conciliation Act has no jurisdiction and moreover the order in Arb.Pet.634/2014 is final (being not challenged) and thus binding.

7. I agree with Mr.Harish Malhotra, learned senior counsel appearing for the petitioner.

8. The admitted facts are that there existed a collaboration agreement between the parties containing an arbitration clause and when the disputes arose between the parties, the petitioner i.e. M/s Opaque Infrastructure Private Limited had sought intervention of the court under Section 11 of the Arbitration and Conciliation Act for appointment of an arbitration by way of Arb.Pet.364/2014 and this court had appointed the arbitrator and referred all the disputes including the plea of the applicant that the contract in question was not enforceable in view of the provisions of Specific Relief Act and also the alternate prayer for damages, for adjudication to the learned arbitrator. The plea raised before this court relating to specific performance of contract now is already a subject matter before the arbitrator, on which Arbitral Tribunal will give its findings.

9. By entering into an arbitration agreement the parties had mutually agreed to refer all their disputes relating to the collaboration agreement to the Arbitral Tribunal. This also includes the enforceability of the Contract. By entering into the agreement parties have ousted the jurisdiction of the civil court to deal with such disputes which is the subject matter of the arbitration agreement. This court therefore cannot enter into the question whether the collaboration agreement was enforceable or not.

10. In view of the foregoing reasons, the present review petition has no merit, the same is dismissed.

**DEEPA SHARMA
(JUDGE)**

AUGUST 20, 2015
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