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

ARBITRATION APPLICATION NO.69 OF 2026

Wellgroomed Venture … **Applicant**

Vs.

Dr. Kamat's Hospital … **Respondent**

ATUL GANESH KULKARNI
Digitally signed by ATUL GANESH KULKARNI
Date: 2026.09.29 11:16:14 +0530

Mr. Manoj P. Mhatre with Shubham Gupta for the Applicant.

Ms. Shabnam Indorewala for the Respondent.

CORAM : AMIT BORKAR, J.

RESERVED ON : SEPTEMBER 23, 2026.

PRONOUNCED ON : SEPTEMBER 29, 2026

JUDGMENT:

1. By this Application under Section 11 of the Arbitration and Conciliation Act, 1996, the Applicant seeks appointment of an Arbitrator for deciding the disputes and differences which have arisen between the parties out of the registered Agreement for Sale dated 4 July 2014.

2. According to the Applicant, the facts which have led to filing of the present Application are as follows. In the year 2012, the Applicants were constructing a commercial building known as "Hubtown Viva" at Jogeshwari (East), Mumbai. In June/July 2014,

the Respondent approached the Applicants and expressed an intention to purchase a commercial unit in the said building. On 4 July 2014, the Applicants agreed to sell and the Respondent agreed to purchase Commercial Unit No.501 situated on the 5th Floor, having carpet area of 1950 sq. ft. (181.15 sq. mtrs.), along with the use and exclusive possession of the attached area of the said unit. Accordingly, the Applicants and the Respondent entered into a registered Agreement for Sale in respect of Unit No.501. Under the said Agreement, the Respondent was required to make the payments within time and was also required to pay the outgoings, including maintenance charges and assessment charges, whenever demanded by the Applicants.

3. According to the Applicants, till June 2021, the Respondent had failed to pay an amount of Rs.29,36,552/-, together with interest at the rate of 24% per annum, in respect of Commercial Unit No.501. The Applicants had, by their communication dated 20 August 2019, called upon the Respondent to clear the outstanding amount. Thereafter, several communications were addressed to the Respondent between August 2019 and April 2024, calling upon the Respondent to clear the arrears.

4. In June 2021, the Applicants handed over the management and affairs of the building to the society formed by the purchasers of various units in the building. According to the Applicants, from 2014 till June 2021, they were maintaining the building and were paying the taxes, assessment charges and other expenses relating to the building. The Applicants thereafter issued a final notice dated 30 April 2024, informing the Respondent of their intention

to terminate the registered Agreement dated 4 July 2014 on account of failure to clear the outstanding dues. Thereafter, on 4 July 2024, the Applicants issued a notice invoking Clause 51 of the Agreement. It is in these circumstances that the present Application has been filed.

5. Mr. Mhatre, learned Advocate appearing for the Applicants, submits that under the terms and conditions of the registered Agreement, and particularly under Clauses 4.1, 4.2 and 4.5, the Respondent was required to pay to the Applicants his monthly provisional proportionate share of the outgoings and other expenses mentioned in the said clauses. According to the Applicants, till August 2019, an amount of Rs.6,74,210/- was outstanding towards maintenance charges. An additional amount of Rs.3,07,595/- was also outstanding towards assessment charges up to March 2018 in respect of Commercial Unit No.501.

6. Mr. Mhatre submits that the Applicants, through their Advocate, issued a communication dated 20 August 2019 calling upon the Respondent to make the payments mentioned therein. The envelope containing the said notice was returned with the remark "UNCLAIMED". Therefore, the Applicants forwarded an email dated 4 October 2019 along with the notice dated 20 August 2019. According to the Applicants, the said email and notice were received by the Respondent. Even after receipt of the email and notice, the Respondent did not give any reply.

7. In the meantime, the society was formed on 29 May 2021 by the purchasers of the units in “Hubtown Viva”. In or about June

2021, the Applicants handed over the management and affairs of the building to the society. After taking over the management, the society started issuing maintenance bills to the unit holders from 1 July 2021. According to the Applicants, till 30 June 2021, the Applicants themselves had maintained the building and its services. As stated in the Applicants' communication dated 10 August 2023, the Respondent had, till 30 June 2021, outstanding maintenance charges of Rs.12,63,843/-, calculated on the basis of provisional billing from July 2011 till June 2021. The Applicants further claim interest of Rs.16,72,710/- at the rate of 24% per annum under the terms of the Agreement. Thus, according to the Applicants, the total amount payable by the Respondent was Rs.29,36,552/-. It is submitted that, despite several communications and demands, the Respondent deliberately failed to clear the outstanding amount.

8. The Applicants thereafter issued another communication dated 30 April 2024 to the Respondent. By the said communication, the Applicants placed their case on record and informed the Respondent that, if the demands made in the said communication were not complied with, the registered Agreement dated 4 July 2014 would stand terminated and the Applicants would be required to take appropriate action against the Respondent.

9. The Applicants state that, while preparing the notice dated 30 April 2024, a typographical error occurred in its last and concluding paragraph. In that paragraph, the date of the Agreement was wrongly mentioned as 16 April 2013. However, in

the other portions of the notice, including the reference and the body of the notice, the correct date of the Agreement, namely 4 July 2014, was mentioned. According to the Applicants, the said mistake was neither deliberate nor intentional. The Applicants also submit that they would not gain anything by mentioning an incorrect date in the concluding paragraph. The Respondent was admittedly aware of the correct date of the Agreement. According to the Applicants, the notice dated 30 April 2024 clearly informed the Respondent about their intention to terminate the registered Agreement dated 4 July 2014 if the demands contained in the notice were not complied with.

10. The Applicants submit that the Respondent received the said notice. In any event, the same notice was also forwarded to the Respondent by email dated 2 May 2024. According to the Applicants, the notice was therefore duly communicated to the Respondent at his email address. The Applicants further submit that, as the Agreement dated 4 July 2014 stood terminated, the License Agreement annexed as Annexure-H to the said registered Agreement, which permitted the Respondent to park two cars in the mechanical car parking space in Basement-2, would also stand terminated as it was connected with and arose out of the said registered Agreement.

11. Since the Respondent did not reply to the notice dated 30 April 2024, the Applicants, through their Advocate, invoked Clause 51 of the registered Agreement dated 4 July 2014. The Respondent was called upon to submit the disputes to arbitration. According to the Applicants, the said notice was also received by the

Respondent. However, the Respondent did not reply even to the arbitration notice. The Applicants claim an amount of Rs.29,36,552/- as on 30 April 2024 and rely upon the statement of claim in support of the said claim.

12. Clause 51 of the registered Agreement for Sale dated 4 July 2014 contains the arbitration agreement relied upon by the Applicants. The said clause reads as follows:

> "51. ARBITRATION: In the event that, any dispute is not resolved even after mediation before MCHI the same shall be settled through arbitration by a sole arbitrator. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in Mumbai, by sole arbitrator, a panel of three arbitrator is agreed by the parties from amongst which one of the arbitrator as may be available shall be selected by the Developer/Promoter to be the sole Arbitrator. The panel of Arbitrators as agreed between the parties is as follows namely (1) Retd. Judge M. S. Rane, (2) Retd. Judge V. R. Datar and (3) Retd. Judge P. S. Pandit. The Purchaser(s) hereby confirms that he/she/it shall have no objection to such appointment. The arbitration shall be conducted in English. The Court at Mumbai alone shall havbe the jurisdiction in all matters 18 arising out of touching and/or concerning this Agreement regardless of the place of execution of this Agreement which is deemed to be at Mumbai."

13. The Applicants further submit that, under the Agreement for Sale, interest at the rate of 24% per annum was payable on defaulted and delayed payments. According to the Applicants,

since the parties had expressly agreed to this rate of interest under the Agreement, the same rate would apply to the amounts payable by the Respondent to the Applicants. The Applicants further claim liquidated damages as agreed between the parties, amounting to 25% of the purchase consideration, which according to them comes to Rs.90,11,025/-.

14. Ms. Indorewala, learned Advocate appearing for the Respondent, submits that Clause 51 on page 52 of the registered Agreement for Sale dated 4 July 2014 cannot be invoked directly by the Applicants. According to her, Clause 51 contains a condition that the dispute must first undergo mediation under Clause 50 of the registered Agreement. She submits that the Applicants have not complied with this mandatory pre-condition before invoking arbitration. It is further submitted that the Applicants have not disclosed this material fact to the Court and have thereby suppressed an important part of the Agreement.

15. Ms. Indorewala submits that the present Application, as well as the claims made by the Applicants, are barred by limitation. According to her, by invoking arbitration, the Applicants are attempting to raise claims relating to alleged arrears from the year 2014. She submits that the possession letter dated 9 September 2014 was issued by the Applicants within about two months from execution of the Agreement, after receiving the entire consideration amount, including taxes, from the Respondent. According to the Respondent, this circumstance itself shows that the claim now made by the Applicants is not genuine and is barred by limitation.

16. Ms. Indorewala further submits that, even if the Applicants' case regarding the notice dated 20 August 2019 is accepted only for the sake of argument, the cause of action, according to the Applicants themselves, arose in the year 2019. The present Arbitration Petition No.69 of 2026 has been filed almost seven years thereafter. She submits that the Applicants had also handed over the management and charge of the building to the registered society consisting of the purchasers, including the Respondent. According to the Respondent, the claim sought to be raised after such a long period is a dead claim and is prima facie barred by limitation.

17. Ms. Indorewala further submits that the Respondent has already filed a dispute before the Co-operative Court in which the Applicants have been made parties. According to her, the said dispute concerns the same subject matter and the Applicants are contesting the proceedings before the Co-operative Court. The Applicants have also filed their written statement therein. It is therefore submitted that, when the dispute between the same parties concerning the same subject matter is already pending before the competent Co-operative Court, commencement of parallel proceedings under Section 11 of the Arbitration and Conciliation Act by the Applicants amounts to misuse of the legal process. The Respondent therefore submits that appropriate orders, including penal action, ought to be passed against the Applicants.

18. The Respondent has also filed written submissions in response to the query raised by this Court regarding the latest

submission filed by the Applicants. It is submitted that the said submission was filed on the same day without advance service upon the Respondent. According to the Respondent, the dispute filed by the Respondent, as the Original Disputant, before the Co-operative Court makes the Applicants herein Opponent No.2. The said dispute also refers to the arbitration notice and the claims raised by the Applicants. The Respondent has relied upon and enclosed its reply to the arbitration notice for consideration by the Co-operative Court.

19. The Respondent submits that this position is clear from Clauses 4, 5 and 6 appearing on pages 4, 5 and 6 of the dispute filed before the Co-operative Court, which was produced by the Applicants during the hearing of the present proceedings at Serial No.15. According to the Respondent, this material establishes the Respondent's contention raised in the Affidavit in Reply that proceedings between the same parties concerning the same subject matter are already pending before the competent Co-operative Court. The Respondent therefore submits that this circumstance ought to be taken into consideration by this Court while deciding the present Application under Section 11 of the Arbitration and Conciliation Act, 1996.

REASONS AND FINDINGS:

20. I have considered the present Application, the registered Agreement for Sale dated 4 July 2014, the arbitration clause relied upon by the Applicants, the objections raised by the Respondent and the written submissions placed before the Court. I have also

considered the relevant page of the Agreement which is produced on record. On page 52 of the Agreement, Clause 50 deals with mediation and Clause 51 deals with arbitration. The Agreement itself therefore shows that mediation and arbitration are provided as separate stages. The question before the Court is therefore not only whether there is an arbitration clause in the Agreement. The question is also whether, according to the procedure agreed by the parties, the Applicants have reached the stage where an Arbitrator can be appointed by this Court.

21. There is no serious dispute that the parties entered into the registered Agreement for Sale dated 4 July 2014 and that the said Agreement contains an arbitration clause. Clause 51 is part of the same Agreement. It is not a clause taken from any other document. Therefore, the existence of the arbitration agreement is clear from the Agreement itself. At the stage of Section 11, the Court mainly has to see whether there is an arbitration agreement and, where necessary, whether there is any issue apparent from the record which prevents the matter from being referred to arbitration. The Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning* has explained that at this stage the Court is not required to conduct a full trial. The enquiry has to remain limited.

22. However, merely because an arbitration clause is there, every notice invoking arbitration cannot automatically result in appointment of an Arbitrator. The parties have to follow the procedure which they themselves agreed. In the present case, Clause 50 and Clause 51 have to be read together. Clause 50 provides:

> "All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be referred for mediation to the Maharashtra Chamber of Housing Industry (MCHI)."
>
> Clause 51 then provides:
>
> "In the event that any dispute is not resolved even after mediation before MCHI the same shall be settled through arbitration by a sole arbitrator."

23. The words used by the parties make the procedure reasonably clear. First, the parties were required to try to settle the dispute by mutual discussion. If the dispute was not settled, the dispute was then to be referred to MCHI for mediation. Only when the dispute remained unresolved "even after mediation before MCHI" could the matter proceed to arbitration. Therefore, the parties had provided different stages for settlement of their dispute. They could have agreed to go directly to arbitration, but they did not do so. They specifically placed mediation before arbitration. Therefore, this part of the Agreement cannot be treated as an unnecessary provision and simply ignored while considering Clause 51.

24. The objection raised by Ms. Indorewala, learned Advocate for the Respondent, that the Applicants directly invoked arbitration without first following Clause 50 therefore has substance. The Applicants have relied upon the notice dated 20 August 2019, the subsequent demands, the notice dated 30 April 2024 and thereafter the notice dated 4 July 2024 invoking Clause 51.

However, there is no material placed before this Court to show that the Applicants referred the dispute to MCHI for mediation. There is no notice seeking mediation before MCHI. There is no reference made to MCHI. There is no mediation proceeding and there is no material showing that mediation before MCHI failed. Therefore, the step which was required to be taken before invoking arbitration has not been shown to have been taken.

25. This distinction is important. The Applicants say that several demands were made to the Respondent and that the Respondent did not reply. This may show that the monetary dispute was not settled through correspondence between the parties. But this by itself does not show that the second stage agreed by the parties, namely mediation before MCHI, was followed. Correspondence between the parties cannot automatically be treated as mediation before MCHI. A demand notice and mediation before MCHI are different things.

26. The Respondent had raised this objection at the stage of the present Section 11 proceedings itself. Therefore, there is no conduct of the Respondent from which it can be said that the Respondent knowingly gave up the agreed requirement of mediation. The Respondent has consistently relied upon Clause 50 and has specifically submitted that the invocation of arbitration was premature. In these circumstances, this Court cannot ignore the contractual requirement merely because the Respondent may not have replied to the earlier demands or because mediation may not have resulted in settlement.

27. I am conscious that arbitration law seeks to avoid unnecessary technical objections and unnecessary interference by the Court. At the same time, arbitration itself is based upon the consent of the parties. The Court cannot change the procedure which the parties had agreed between themselves. When the Agreement provides that one step has to take place before the next step can be taken, that agreement has to be given proper meaning. Otherwise, Clause 51 could be invoked even before the event mentioned in Clause 50 had taken place.

28. This approach is also in keeping with the limited jurisdiction of the Court under Section 11. The Supreme Court has recently reiterated that the Court making a reference may conduct a limited examination, but should not decide complicated factual questions which are properly to be decided by the Arbitral Tribunal. At the same time, where an objection is clear from the Agreement itself, the Court can refuse the reference. In the present case, the requirement of mediation is clearly found in Clauses 50 and 51. It does not depend upon complicated oral evidence. The material placed before the Court also does not show that this requirement was followed.

29. The submission of Mr. Mhatre that the Applicants had repeatedly demanded the outstanding amount does not answer this objection. Those demands may show that, according to the Applicants, there was non-payment and a dispute between the parties. But they do not show that the procedure required before invoking arbitration was followed. The existence of a monetary dispute and the stage at which arbitration can be invoked are two

different questions.

30. I, therefore, find that the arbitration notice dated 4 July 2024 cannot, on the material presently before the Court, be treated as a valid invocation of Clause 51. The Applicants had not first completed the procedure agreed under Clause 50. The present Application under Section 11 is therefore premature.

31. The next objection raised by the Respondent is that the claims made by the Applicants are barred by limitation. This objection has to be considered separately. Two different periods have to be kept in mind. One concerns the limitation for filing the Section 11 Application itself. The other concerns the limitation applicable to the actual monetary claims which the Applicants seek to raise in arbitration.

32. So far as the Section 11 Application is concerned, the Supreme Court in *M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd.*, 2024 INSC 155, has held that Article 137 of the Limitation Act applies to an application under Section 11. The period is three years from the date when the right to apply arises. The Supreme Court has also made it clear that this period is different from the limitation applicable to the substantive claims. Normally, the right to file a Section 11 Application arises after a valid invocation of arbitration and failure or refusal to make the appointment according to the agreed procedure.

33. In the present case, the Applicants rely upon the arbitration notice dated 4 July 2024 and the alleged failure of the Respondent to appoint an Arbitrator thereafter. The present proceedings are

stated to be Arbitration Petition No.69 of 2026. Therefore, on the material before the Court, I am unable to hold that the Section 11 Application itself is barred only because the Applicants had earlier raised their demand in 2019. The submission of the Respondent that the Section 11 Application itself is barred because of a delay of seven years therefore cannot be accepted in that broad manner. The limitation for the Section 11 Application has to be considered from the point when the right to seek appointment arose and not necessarily from the date when the first monetary demand was made. The distinction made in *Arif Azim* is relevant in this regard.

34. The position relating to the substantive claims is somewhat different. Under Section 43 of the Arbitration and Conciliation Act, the Limitation Act applies to arbitration proceedings in the same manner as it applies to proceedings before a Court. The Supreme Court has held that where a claim is clearly dead and hopelessly barred by limitation, the referral Court may refuse to make a reference. But where the question of limitation depends upon disputed facts or requires detailed examination of documents, that question normally has to be considered by the Arbitral Tribunal. In *Arif Azim*, the Supreme Court has explained that the Court has to consider two separate aspects. It has to see whether the Section 11 Application itself is barred and also whether the substantive claim is clearly a dead claim on the date when arbitration was commenced.

35. Applying this principle to the present case, the submission of the Respondent has some force, but it cannot be accepted in the broad manner in which it is made. The Respondent submits that

the Applicants are now trying to recover amounts allegedly due from the year 2014 and that the possession letter dated 9 September 2014 was issued after the Applicants had received the entire consideration and taxes from the Respondent. However, payment of the purchase consideration and payment of maintenance charges, assessment charges and other outgoings are different matters under the Agreement, as pleaded by the Applicants. Merely because possession was given after the purchase consideration was paid, it does not automatically mean that all maintenance and other outgoings were also paid. Therefore, the possession letter by itself does not establish that the Applicants' monetary claim is false or impossible.

36. At the same time, another fact cannot be ignored. According to the Applicants themselves, they maintained the building only up to 30 June 2021 and they are claiming maintenance arrears up to that date. Thus, according to their own case, the period for which maintenance charges are claimed ended in June 2021. Thereafter, the Applicants handed over the affairs of the building to the society. The arbitration notice was issued only on 4 July 2024. Therefore, the Respondent is justified in raising a serious question as to whether the amounts which had already become due by June 2021 could be claimed for the first time through an arbitration notice issued more than three years thereafter.

37. The correspondence relied upon by the Applicants also does not, from the material presently before the Court, show any acknowledgment of liability by the Respondent. The notice dated 20 August 2019 was a demand made by the Applicants. The email

dated 4 October 2019 was also sent by the Applicants. The communication dated 10 August 2023 is relied upon by the Applicants for quantifying their claim. But none of these documents, as placed before the Court, is an admission by the Respondent accepting the alleged debt. A demand made by one party does not itself become an acknowledgment of liability by the other party.

38. At the same time, it would not be proper for this Court, while considering a Section 11 Application, to make a detailed calculation of every maintenance bill, assessment charge, interest amount and other alleged dues. The material presently before the Court is not sufficient to determine the exact due date of each amount, whether the amount was payable periodically, whether any payment was made, whether there was any acknowledgment by the Respondent, or whether any particular part of the claim was saved or extended by any legally recognised circumstance. These questions may require examination of documents and facts.

39. I, therefore, do not accept the Respondent's submission that the entire monetary claim can, only from the present pleadings, be finally declared as a dead claim. However, I make it clear that the Applicants cannot proceed on the assumption that the entire amount of Rs.29,36,552/- is within limitation merely because a consolidated amount was mentioned in the communication dated 30 April 2024 or in the arbitration notice. The limitation of each substantive claim has to be considered with reference to the actual date on which the amount became due and any legally recognised event which may affect limitation. Merely sending later demand

letters does not by itself extend limitation. The Supreme Court has made it clear that the referral Court should interfere where the claim is clearly dead, while other disputed questions of limitation are ordinarily to be considered by the Arbitral Tribunal.

40. The Respondent has also relied upon the possession letter dated 9 September 2014 and has submitted that the entire consideration, including taxes, had already been received. This cannot by itself establish that the Applicants had no right to claim maintenance or assessment charges. The Applicants rely upon Clauses 4.1, 4.2 and 4.5 and say that these clauses separately required the Respondent to pay his proportionate share of the outgoings. Whether the charges were correctly calculated, whether they were actually payable under the Agreement and whether the Applicants have included any amount which is not legally recoverable are matters concerning the merits of the dispute. These questions cannot be finally decided in the present Section 11 proceedings only on the basis of the possession letter.

41. The same position applies to the Applicants' claim for interest at 24% per annum. The Applicants rely upon the contractual provision and claim Rs.16,72,710/- towards interest. The Respondent disputes the claim itself. If an Arbitrator is validly constituted, the Arbitrator would have to consider the relevant contractual provisions, the dates on which the principal amounts became due, the principal amount actually payable and whether the agreed rate of interest applies. At this stage, the claim for interest cannot be accepted merely because a particular figure has been stated by the Applicants.

42. The Applicants have also relied upon an alleged right to claim liquidated damages of Rs.90,11,025/-, said to be 25% of the purchase consideration. This is also a substantive claim. Such a claim cannot enlarge the jurisdiction of this Court under Section 11. The question before this Court is whether the agreed procedure for commencing arbitration has been followed and whether the requirements for appointment of an Arbitrator are satisfied. Whether the Applicants are entitled to liquidated damages, what is the contractual basis of such claim and whether it is enforceable are matters which have to be considered in accordance with law at the appropriate stage.

43. The Applicants have relied upon the fact that the Respondent did not reply to the notices dated 20 August 2019, 30 April 2024 and 4 July 2024. The absence of a reply may have some relevance to the dispute between the parties. But such silence cannot be treated as an agreement by the Respondent to bypass Clause 50. The Agreement specifically provides that arbitration would arise "even after mediation before MCHI". There is no material to show that this event has taken place.

44. The explanation given by the Applicants regarding the typographical mistake in the notice dated 30 April 2024 also needs to be considered. The Applicants say that in the concluding paragraph the date of the Agreement was wrongly mentioned as 16 April 2013, whereas in the body and reference of the notice the correct date, namely 4 July 2014, was mentioned. On the material placed before the Court, this appears to be a mistake in one part of the notice. I do not find that this mistake, by itself, makes the

notice ineffective. The Respondent was aware of the Agreement which was the subject matter of the dispute. The other portions of the notice correctly referred to the registered Agreement dated 4 July 2014. Therefore, this mistake does not affect the decision of the present Application.

45. The submission regarding the License Agreement for parking two cars also does not change the position. The Applicants submit that the parking licence was connected with the registered Agreement and therefore came to an end when the main Agreement was terminated. Whether the termination of the main Agreement was valid and what effect it has upon the parking arrangement are substantive questions. It is not necessary to give a final finding on these issues for deciding whether an Arbitrator can be appointed at this stage.

46. The Respondent has also relied upon the fact that proceedings are pending before the Co-operative Court. According to the Respondent, a dispute has already been filed by the Respondent against the Applicants. The Applicants have been made Opponent No.2 and have filed their written statement. It is also submitted that the arbitration notice and the claims made by the Applicants have been referred to in those proceedings. The written submissions of the Respondent specifically rely upon Clauses 4, 5 and 6 of the dispute filed before the Co-operative Court.

47. This submission cannot be rejected only because another proceeding is pending. If two proceedings involve the same

parties, the same cause of action and the same reliefs, the Court would certainly have to consider the legal effect of such proceedings. However, the complete pleadings before the Co-operative Court have not been placed before this Court. What is before the Court is the Respondent's description of that proceeding and reference to certain paragraphs of the dispute. Therefore, there is not enough material to finally hold that the proceedings before the Co-operative Court and the proposed arbitration are exactly the same in parties, issues, cause of action and reliefs. There is also not enough material to hold that the Co-operative Court has exclusive jurisdiction and that arbitration is completely excluded.

48. More importantly, the mere existence of another proceeding does not require this Court to decide the entire substantive dispute while dealing with a Section 11 Application. Section 11 is a limited referral jurisdiction. The Court primarily considers the existence of the arbitration agreement and does not normally conduct a full adjudication of the disputed claims. Therefore, the pendency of the Co-operative Court proceedings, by itself, cannot result in the entire dispute being finally decided in the present Application.

49. The Respondent has also described the conduct of the Applicants as "contemptuous" and has alleged suppression of facts and sought penal consequences. Such serious allegations cannot be accepted only because the Applicants have not stated every fact in the manner suggested by the Respondent. A finding of contempt or deliberate suppression requires proper factual and legal material. On the material presently before the Court, I find no sufficient

basis to record such a finding. The objection regarding non-compliance with the mediation requirement is itself sufficient to decide the present Application. There is therefore no need to convert the present Section 11 proceedings into separate proceedings regarding alleged contempt.

50. There is one more aspect arising from the wording of Clause 51. The clause provides for a panel of three Arbitrators and states that one of them "as may be available" would be selected by the Developer/Promoter to act as the sole Arbitrator. The present proceedings, however, are for appointment by the Court under Section 11. The Applicants cannot, merely on the basis of the unilateral portion of the clause, insist that they themselves should appoint the sole Arbitrator. The Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* has held that a party having an interest in the dispute cannot retain an unrestricted unilateral power to appoint the sole Arbitrator. The present Court, however, need not finally decide this question because the Application fails at an earlier stage itself due to non-compliance with the agreed pre-arbitration procedure.

51. On considering the matter as a whole, I find that the Applicants have established the existence of a written arbitration agreement under Clause 51. They have also shown that there is a dispute regarding maintenance charges, assessment charges, interest and other alleged amounts. The objection that the possession letter by itself proves that there could be no claim towards outgoings is not accepted. Similarly, the submission that the Section 11 Application itself is barred merely because the

alleged dues arose in 2014 or 2019 is not accepted in that broad form. The limitation of the substantive claims has to be considered with reference to the individual dates and supporting documents, subject to the limited power of the referral Court to reject a claim which is clearly dead.

52. However, the main objection raised by the Respondent succeeds. The Agreement does not permit the Applicants to go directly from a dispute regarding payment to arbitration. Clause 50 requires mutual discussion and, if the dispute is not settled, mediation before MCHI. Clause 51 can operate only "in the event that any dispute is not resolved even after mediation before MCHI". The Applicants have not shown that this agreed requirement was followed. Therefore, the arbitration notice dated 4 July 2024 was premature.

53. The consequence is that this Court cannot presently appoint an Arbitrator under Section 11 on the basis of the notice dated 4 July 2024. The parties have to first follow the procedure which they themselves agreed. This finding does not mean that the monetary claim of the Applicants is proved. It also does not mean that the Respondent has no liability. It further does not finally decide the limitation objection in respect of each individual claim. Those questions can be considered in accordance with the Agreement and law after there is a valid invocation of arbitration.

54. I, therefore, hold that the present Section 11 Application is premature because Clauses 50 and 51 of the registered Agreement for Sale dated 4 July 2014 have not been complied with. The

Applicants must first follow the agreed procedure of mutual discussion and, if the dispute remains unresolved, mediation before the Maharashtra Chamber of Housing Industry. Only thereafter can arbitration be invoked in terms of Clause 51. Even then, all objections available to the Respondent in law, including limitation and the effect, if any, of the pending proceedings before the Co-operative Court, will remain open.

55. The Application is therefore liable to be dismissed at this stage. The dismissal is only because the contractual procedure before arbitration has not been followed. It shall not be treated as a finding that the Applicants are entitled to Rs.29,36,552/-, interest of Rs.16,72,710/- or the alleged liquidated damages of Rs.90,11,025/-. These claims have not been finally decided on merits in the present proceedings. Any proceedings which may be initiated hereafter shall remain subject to limitation and all other objections which may be available to either party in accordance with law.

(a) The present Application under Section 11 of the Arbitration and Conciliation Act, 1996 is dismissed as premature;

(b) The Applicants shall, before invoking arbitration under Clause 51 of the registered Agreement for Sale dated 4 July 2014, follow the procedure agreed under Clause 50 of the said Agreement, including mutual discussion and, if the dispute is not resolved, mediation before the Maharashtra Chamber of Housing Industry (MCHI);

(c) It is clarified that this Court has not adjudicated upon the merits of the Applicants' monetary claims of Rs.29,36,552/-, interest of Rs.16,72,710/- or the alleged liquidated damages of Rs.90,11,025/-;

(d) It is further clarified that all objections of the Respondent, including the objection as to limitation of the substantive claims and the effect, if any, of the proceedings pending before the Co-operative Court, are kept open;

(e) In the event of a fresh and valid invocation of arbitration in accordance with the Agreement, the parties shall be at liberty to take all contentions available to them in law;

(f) There shall be no order as to costs;

(g) The Application is accordingly disposed of.

(AMIT BORKAR, J.)