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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION APPLICATION NO.191 OF 2013**

1. M/s. Parkview Developers  
a registered partnership firm having  
its office at Construction House 'B',  
623, Linking Road, Opp. Khar Telephone  
Exchange, Khar (West), Mumbai-400 052.
2. Palm Grove Beach Hotels Pvt. Ltd.,  
a company registered under Companies  
Act, 1956 and having its registered  
office at Ramada Plaza, Palm Grove,  
Juhu Beach, Juhu, Mumbai- 400 049.
3. Sandeep G. Raheja,  
Age 45 years of Mumbai, Indian  
Inhabitant, having his office at  
Construction House 'B', 623,  
Linking Road, Opp. Khar Telephone  
Exchange, Khar (West), Mumbai-400 052.      ..Applicants.

V/s.

1. Noella Donald Miranda,  
Age 86 years, Indian Inhabitant,  
residing at 33, Sherly Rajan,  
First Floor, St. Anne's Road,  
Bandra (West), Mumbai-400 050.
2. Susan Donald Miranda,  
Age 61 years, Indian Inhabitant,  
residing at Flat No.73, 7<sup>th</sup> floor,  
Landmark Building, 178, Carter  
Road, Bandra (W), Mumbai-400 050.
3. Maureen Tantony,  
Age 55 years, Indian Inhabitant,  
residing at Grotto Apartments,  
St. Anne's Road, Bandra (West),  
Mumbai - 400 050.      ..Respondents.

Mr.Rajiv Kumar, Senior Advocate with Mr.Kirti Munshi with Ms. Heena Daulat i/b. M/s. Negandi Shah and Himayatullah for the applicants.

Mr.Basil Menezes with Mr.A.P. Fanibanda for the respondents.

**CORAM : A.K. MENON, J.**

**RESERVED ON : 7TH JULY, 2015**

**PRONOUNCED ON : 17TH JULY, 2015**

**JUDGMENT.**

1. By this application under Section 11 of the Arbitration and Conciliation Act, 1996 the applicants seek appointment of a Sole Arbitrator to adjudicate upon the disputes between the parties arise out of the two Memoranda of Understanding dated 4<sup>th</sup> January, 2003. The first Memorandum of Understanding (MOU) Exhibit-C1 is executed between late Donald Miranda and applicant No.1. Donald Miranda in his capacity as the sole surviving executor of the last Will and Testament dated 20<sup>th</sup> July, 1945 of his late mother Mrs. N.Q.Miranda as well as the sole beneficiary of one half share of certain immovable property agreed to grant to the applicant No.1 the right to redevelop property forming the subject matter of the MOU by demolishing the old structure and constructing a new multi-storied building in accordance with law.

2. Applicant Nos.2 & 3 are the partners of applicant No.1.

Applicant No.3 is also the Director of applicant No.2. Respondent No.1 is the widow of late Donald Miranda. Respondent Nos.2 & 3 are the children of late Donald Miranda. Together, the respondents are entitled to one half undivided share in the property of deceased Donald Miranda admeasuring 3289.80 sq. mtrs. situated at Village Bandra, Tal. Andheri, Mumbai Suburban District.

3. Clause 38 of the MOU which embodies the arbitration clause is reproduced below:-

*" In the event of any dispute or difference between the Grantor or his heirs / legal representatives or any of them on the one hand and the Developer on the other hand, in connection with this Memorandum of Understanding and / or in relation to the interpretation or meaning or carrying out of any term or provision hereof, the same shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification thereto for the time being in force. "*

4. The second MOU is between late Donald Miranda and one Palmgrove Grove Beach Hotels Private Limited, applicant No.2. This MOU is similar to the earlier MOU executed by late Donald Miranda and applicant No.2. The second Memorandum of Understanding also contains identical arbitration clause embodied

in clause 35. The subject matter of the first MOU are lands bearing CTS Nos.C/1142, C/1143 and C/1144 and in the second MOU the lands are bearing CTS Nos. C/1141 and C/1153. These MOUs were executed by Donald Miranda in respect of two different but contiguous plots of land. From the receipt clause, it is seen that late Donald Miranda had received Rs.5 lakhs under each agreement from the applicants. Donald Miranda was entitled to only one half share of the property collectively admeasuring 3289.80 sq. mtrs. The other half was owned by James Miranda. James Miranda died on 5<sup>th</sup> July, 1997 and his share was bequeathed to Joseph Miranda.

5. For the purposes of this application, we are not concerned with the undivided share that Joseph Miranda has become entitled to. It appears that after the demise of James Miranda, Josesph Miranda filed a suit bearing Suit No.1944 of 2010 in this Court on 15<sup>th</sup> June, 2010. On 21<sup>st</sup> September, 2010, a learned Single Judge of this Court has recorded the statement that defendant Nos.1 & 3 in the suit, who are respondents herein will not create any third party rights and not transfer the suit property.

6. In a subsequent order order dated 19<sup>th</sup> December, 2011 the existence of the MOUs dated 4<sup>th</sup> January, 2003 have been recognized and the following order came to be passed :-

*“ It is declared that plaintiff has one half undivided share in the suit properties. A preliminary decree for partition and separate possession of the suit properties is hereby passed. However, the prayer for appointment of a court commissioner under Order 26 Rule 13 cannot be granted at this stage and hence rejected. Motion is disposed of.”*

7. A preliminary decree for partition and separate possession appears to have been passed. Subsequently, on 30<sup>th</sup> August, 2012 the present applicants vide an Advocate's notice of the same date inter alia recorded the fact on 4<sup>th</sup> November, 2011, the applicants had called upon the respondents to confirm their readiness and willings to specifically perform the two MOUs, but by virtue of their failure to do so, the applicants have invoked the arbitration agreement vide the said notice. The respondents were called upon to concur in the appointment of the nominee of the applicants.

8. An affidavit-in-reply dated 11<sup>th</sup> September, 2013 has been filed by the respondents. According to them, the proceedings initiated are frivolous and vexatious in nature and the applicants are guilty of suppression of facts and of perpetrating fraud. The MOUs were not validly entered into and the same are void and not enforceable as they are not duly stamped and / or registered. The affidavit makes a reference to the partition suit and the deponent

contends that the applicants did not challenge the respondents' claim in the said suit nor did the applicants challenge the order dated 19<sup>th</sup> December, 2011 whereby the learned Single Judge of this Court has declared that the respondents are entitled to one half share of the property.

9. According to respondents, the failure to challenge the order dated 19<sup>th</sup> December, 2010 disentitles the applicants to claim any relief and the MOUs stand frustrated and automatically terminated. The respondents contend that the properties in question are ancestral property and are all contiguous and are in exclusive possession of the respondents and the said Joseph Miranda. According to the respondents, the MOUs are invalid and not legally binding. It is further submitted that there is a bitter dispute amongst the family of the Rahejas who control the applicants 1 & 2 and that as result of the same the applicants are not entitled to any relief.

10. An affidavit in rejoinder has been filed by the applicants on 9<sup>th</sup> December, 2013 wherein they have refuted the various allegations in the affidavit-in-reply and reiterated the contentions in the application. It is submitted that vide order dated 4<sup>th</sup> July, 2014, a learned Single Judge of this Court had directed that the documents are to be adjudicated under the provisions of

Maharashtra Stamp Act and deficit stamp duty be paid. I am informed that the two MOUs have since been adjudicated and stamp duty paid. This factual aspect is not disputed by the counsel for respondents. The applicants have filed an additional affidavit on 9<sup>th</sup> January, 2014.

11. At the hearing of the application, Mr.Menezes, learned counsel appearing on behalf the respondents filed additional affidavit dated 29<sup>th</sup> June, 2015 seeking to bring on record additional facts. According to the deponent of the affidavit, Mr.Gopal Raheja, the partner and Director of applicant No.2 had expired on 18<sup>th</sup> March, 2014 and the firm stood dissolved. It is further stated in the affidavit that Gopal Raheja had instituted a suit in this Court against applicant No.3.

12. According to Mr.Menezes, for the reasons aforesaid, the applicants in this application are not entitled to invoke the arbitration clauses and the application should be dismissed. These contentions were disputed by Mr.Kumar who had then taken time to file affidavit in rejoinder.

13. On 10<sup>th</sup> July, 2015 Mr.Kumar tendered a further affidavit in rejoinder of applicant No.3 wherein he has deposed that the events arising out of the demise of Gopal Raheja had no effect on

the present application. In paragraph 8, it is stated that late Gopal Raheja was not a partner of applicant No.1 either at the time of execution of the MOUs or thereafter. Late Gopal Raheja was only a director of applicant No.2 and his demise does not affect the present application. The disputes amongst the family members in relation to the property has no effect on the said application.

14. Not to be outdone, respondent No.2 has filed a sur-rejoinder dated 7<sup>th</sup> July, 2015 wherein respondents denied the statement on behalf of the applicant that Gopal Raheja was not a partner of applicant No.1.

15. Mr.Menezes relied upon the decision of the Supreme Court in <sup>1</sup>**SMS Tea Estates Pvt. Ltd. V/s. Chandmari Tea Co. Pvt. Ltd.** and relies upon the observations in paragraph 15 of the said decision, which reads as under:-

*“ But where the contract or instrument is voidable at the option of a party (as for example under Section 19 of the Contract Act, 1872), the invalidity that attaches itself to the main agreement may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. For example, if a person is made to sign an agreement to sell his property under threat of physical harm*

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*or threat to life, and the said person repudiates the agreement on that ground, not only the agreement for sale, but any arbitration agreement therein will not be binding. ”*

16. According to Mr.Menezes, the main agreement is void / voidable at the option of respondents in view of the fact that the agreement was executed under coercion and undue influence. He submits that the MOUs being void, the arbitration clause also becomes invalid. According to him, it is clear that if a person is made to sign an agreement under a threat or physical harm and and the said persons repudiates the agreement on that ground, not only the agreement for sale but any arbitration agreement contained therein is not binding. It is thus his case that the MOUs have not been executed by Donald Miranda of his free will.

17. Having heard submissions of learned counsel and having considered the facts as pleaded, I find that MOUs reveal that late Donald Miranda executed the same in presence of Noella Miranda and Susan Miranda, who are respondent Nos.1 & 2 respectively. The wife and daughter of late Daniel Miranda have admittedly witnessed the execution of the MOUs. The receipt clause under each MOUs is also witnessed by respondent Nos.1 & 2. Although three affidavits have been filed on behalf of respondents, namely affidavit in reply dated 11<sup>th</sup> September, 2013, additional affidavit in reply on 29<sup>th</sup> June, 2015 and affidavit in sur-

rejoinder on 7<sup>th</sup> July, 2015, none of these affidavits refer to any act of undue influence or coercion by the applicants in procuring the execution of MOUs by late Donald Miranda. Moreover, it is also not the case of the respondents that in his lifetime, Donald Miranda had objected to the manner of execution of the MOUs. The two witnesses named above also made no such grievance. They had enough opportunity since the execution of the documents to question the same or challenge the same. No such attempt has been made. Even in the three affidavits being filed in the present application, apart from a bare statement no specific allegation of fraud are to be found.

18. In the circumstances, I am of the view that the contentions taken by the respondents are without any substance. Needless to mention that it is always open to the respondents to raise all defences raised in the application in the arbitration proceedings. The objection on the stamp duty has already been dealt with and rectified as aforesaid. For the aforesaid reasons, I am unable to agree with Mr.Menezes that the arbitration clauses in the MOUs are invalidated. In the circumstances, I pass the following order.

- a) All disputes between the parties are referred to the Sole Arbitration of Mr.Justice H.Suresh (former judge of this Court).

The sole Arbitrator shall adjudicate upon the claims of the applicants and counterclaims of the respondents.

- b) The Prothonotary & Senior Master to intimate the learned Arbitrator of his appointment at the earliest.
- c) There will be no order as to costs.

**(A.K.MENON, J.)**