

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:10.04.2015

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM**

O.P. No.294 of 2013

P.Surulinarayanasami

.. Petitioner

Vs

1.K.K.Kulathugan
2.K.Senthamarai
3.K.Chithra
4.K.Elango

.. Respondents

Prayer :-Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator and decide the disputes that have arisen between the petitioner and the respondents under the Development Agreement dated 26.04.2005.

For petitioners .. Mr.V.Guberan

For Respondent .. M/s.B.Srujana for
Mr.T.Gowtham

ORDER

Heard Mr.V.Guberan, learned counsel appearing for the petitioner and Ms.B.Srujana for Mr.T.Gowtham, learned counsel appearing for the respondents.

2. The petitioner has filed this Original Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator and decide the disputes that have arisen between the petitioner and the respondents under the Development Agreement dated 26.04.2005

3. The case of the petitioner is that they entered into a Development Agreement dated 26.04.2005 with the respondents 1 to 3 for development of the property mentioned therein. In this Petition, there will not be necessity to elaborately set out the terms and conditions of the agreement between the parties and how the contract was to be executed etc and it suffice to note that in the Development Agreement dated 26.04.2005, there was an arbitration clause by which the parties agreed to refer for arbitration by a sole Arbitrator appointed with the consent of both parties to sort out all disputes and difference arising under the agreement. It appears that there were disputes and differences which resulted in subsequent agreements entered into in the form of Memorandum of Understanding dated 24.10.2011, 27.10.2011 and an Addendum to the Memorandum of Understanding dated 07.11.2011. The petitioner by legal notice dated 18.12.2012, informed the respondent invoking clause 22 of the Joint Development Agreement, which provides for resolution of

disputes/differences through the process of arbitration by a sole Arbitrator, nominated a Hon'ble Retired Judge of this Court for adjudicating the dispute. The petitioner called upon the respondent to provide their consent for the said nomination within a period of seven days. In response to the said communication all the four respondents by a common reply dated 25.12.2012 while stating that they are agreeable for appointment of Arbitrator mutually agreed upon between the parties, however took exception for the unilateral appointment of Arbitrator by the petitioner in their legal notice dated 18.12.2012, stating that the same defeats the very purpose of alternate dispute resolution mechanism. Thereafter, one of the signatories to the said letter namely the first respondent herein sent a separate letter on 28.03.2013, to the counsel for the petitioner stating that without prejudice to his rights including his rights to question the Joint Development Agreement and the right of the petitioner to invoke the arbitration clause, the first respondent nominated another Hon'ble Retired Judge of this Court as the Arbitrator to adjudicate the dispute among them. Even thereafter, since nothing transpired, the petitioner has approached this Court and filed this Petition.

4. It is brought to the notice of this Court that during the pendency of this Original Petition, the second respondent has sent a

letter to the counsel for the petitioner on 18.01.2014 on the same lines as that of the first respondent letter dated 28.03.2013, nominating another Hon'ble Retired Judge as her Arbitrator.

5. The learned counsel appearing for the respondent elaborately set out the factual matrix and submitted that there is no provision for arbitration in any of the subsequent agreements of the year 2011, which sets forth new terms of understanding between the parties and there is no provision whatsoever in the agreement executed in 2011 to the effect that the provisions of the Development Agreement dated 26.04.2005 would apply *mutatis mutandis* to the subsequent agreements or that the provisions of the Development Agreement dated 26.04.2005 were deemed to be saved in the subsequent agreement. Therefore, it is submitted without any provision for arbitration and without any express understanding that all the terms of Development Agreement, dated 26.04.2005 would be applicable to the subsequent agreement also, it is not open to the petitioner herein to invoke Section 11 of the Act and seeks for appointment of Arbitrator.

6. Thus the sum and substance of the objection raised by the learned counsel appearing for the respondent is that except for the

Development Agreement dated 26.04.2005, the subsequent Memorandum of Understanding/Agreement did not have any arbitration clause and the subsequent agreement does not adopt the conditions or covenants in the Development Agreement dated 26.04.2005 as part and parcel of the subsequent agreement.

7. After hearing the learned counsels appearing for the parties and perusing the materials placed on record, it has to be pointed out that whether the differences between the parties is an arbitrable dispute or not, could always be raised before the Arbitrator along with the merits of the claim petition/reply. However, the contention raised by the respondents is that the agreements executed in 2011 between the parties do not adopt all the terms and conditions of the Development Agreement dated 26.04.2005 and therefore, the petitioner cannot resort to arbitration provided in the 2005 Development Agreement. It is not in dispute that the 2005 Development Agreement contained an arbitration clause.

8. On a perusal of the Memorandum of Understanding dated 24.10.2011, it is seen that the memorandum records the earlier transaction of entering into of the Joint Development Agreement and

this is evident from several clauses in the agreement, more particularly clause No.1 and clause No.2.

9. The contention of the learned counsel appearing for the respondents is that the 2011 Development Agreement does not adopt all the conditions in the 2005 Joint Development Agreement and therefore, the arbitration clause cannot be invoked. However, this contention is factually incorrect in the light of clause No.5 of the Memorandum of Understanding dated 24.10.2011, which states that both parties agree to and acknowledge the continuance of the Development Agreement dated 26.04.2005, and revert back to status-quo. That apart, the parties have been described as developer and power agent etc. Further, the Memorandum of Understanding dated 27.10.2011, specifically states that it is drafted to clarify the subsequent events and there is reference to the Joint Development Agreement dated 26.05.2005. The third Memorandum of Understanding which is in the nature of Addendum to the Memorandum of Understanding dated 24.10.2011, states that it is not only an addendum to the 24.10.2011 MOU, but as well as the Development Agreement dated 26.04.2005. Thus, the contention raised by the respondents that the subsequent Memorandum of Understanding, which is a separate transaction and the conditions

contained in the Development Agreement dated 26.04.2005 cannot be made applicable is an argument stated to be rejected.

10. For all the above reasons, the petitioner is entitled to succeed and accordingly, Original Petition is allowed and I appoint Mr.Justice G.M.Akbar Ali, a retired Judge of this Court, as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne equally by both the parties.

10.04.2015

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Index :Yes/No
Internet:Yes/No

T.S.SIVAGNANAM J.
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