

In the High Court of Judicature at Madras

Dated : 27.02.2015

Coram :

The Hon'ble Mr.Sanjay Kishan Kaul, Chief Justice

O.P.No.636 of 2012

Paramount Group Private Limited
Rep. by its Director,
Mr.C.D.Vivekanandan. ... Petitioner

-vs-

1.M/s.Land Marvels Homes (LM)
Regd. Partnership Firm,
Rep. by its Partners.
2.M.Veerashekar
3.Palaniappan
4.M.Arivazhagan
5.M.Vinayagaraj ... Respondents

Petition filed under Section 11 (6) of the
Arbitration and Conciliation Act, 1996, to appoint an
Arbitrator to decide the disputes between the Petitioner
and the Respondents under the Joint Venture Agreement dated
14.02.2005 entered into between them.

For Petitioner : Mr.P.B.Ramanujam
For Respondents : Mr.AR.L.Sundaresan, S.C.
For Mr.K.Kumaran

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O R D E R

The petitioner company, owning a property of 5 acres

and 34 cents at Old No.13, New No.24, Ponniyamman Koil

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Street, Saligramam, Chennai 600 093, was desirous of

developing the property and thus, entered into an agreement with M/s.Alacrity Housing Ltd. The project could, however, not take up and thus, the petitioner and the respondents entered into a Joint Venture Agreement dated 14.02.2005 for construction of a residential complex by the respondents. The subsisting loan with bank was also taken over by the respondents.

2.The aforesaid agreement contains the dispute resolution clause No.25, which reads as under:

''25.Both the parties are entitled to specific performance. The party of the First Part and the Party of the Second Part may refer any dispute that may arise in future or any breach of this agreement by any one of the Parties herein to an Arbitrator or Arbitrators as per the provisions of the Arbitration and Conciliation Act, 1996.''

3.It is the case of the petitioner that even thereafter, the matter did not proceed smoothly giving rise to disputes and consequently, the petitioner sent a legal notice invoking the arbitration clause through counsel on 14.06.2011. This was replied to by the respondents through counsel on 22.06.2011 referring to other agreements, apart from the Joint Venture agreement in question. It was accepted that there was some non-compliances by the

respondents, but the blame for that was sought to be laid at the door of the petitioner. The operative portion of the letter is as under:

'My client states that as per the agreement with your client, an Arbitrator or Arbitrators can be appointed only with the mutual consent of both your client and my client and either party has no right to appoint an arbitrator unilaterally without the consent of other party and as such the unilateral appointment of Mr.N.C.Vijayaraghavan, Thangam Flats, 2nd Floor, 5th Main Road, Anna Nagar, Chennai, as Arbitrator by your client, as mentioned in your above notice, is not valid and the same cannot be taken cognizance of, and if any action is taken by the said Mr.N.C.Vijayaraghavan in pursuance of the said appointment by you, the same is not binding on my client.

My client reserve their right to give a detailed reply to your notice later at an appropriate time and place if it is required to do so.'

In terms of the last two sentences referred above, thereafter, there was no so-called detailed reply.

4.The Arbitrator appointed by the petitioner

addressed a letter dated 23.02.2012, to which the respondents replied on 06.03.2012. It is, in this reply,

that the respondents sought to claim that there was no concluded arbitration agreement between the parties, as Clause 25 is not a firm or a mandatory arbitration clause and that without any further mutual agreement by the parties, the unilateral act of the petitioner in appointing an Arbitrator could not be accepted. This letter is, however, preceded by a communication dated 06.02.2012, in response to a telegram sent by the petitioner, the relevant portion of which reads as under:

'Be that as it may, in my reply notice dated 22.06.2011 in response to your notice dated 14.06.2011, my client has categorically stated that as per the agreement with your client, an Arbitrator or Arbitrators can be appointed only with the mutual consent of both parties, and either of the parties do not have the right to appoint an arbitrator unilaterally without the consent of the other party and as such, the unilateral appointment of Mr.N.C.Vijayaraghavan as arbitrator is not valid and the same cannot be taken cognizance of and if any action is taken by the said Mr.N.C.Vijayaraghavan in pursuance thereof, the same would not be binding on us. As earlier stated, my client has not received any further communication from you or your client thereafter.

While reiterating the aforesaid stand of my client, it needs to be emphasised here that the number of arbitrators and the procedure for appointing them would have to be

decided between the parteis. In the absence of which there cannot be any proper constitution of the Arbitral Tribunal to proceed further in the matter in accordance with law. Hence, it is suggested that a meeting of both parties may be fixed for that purpose with prior intimation. By way of clarification, it may be added here that till a decision is jointly taken by the parties in that regard, Mr.N.C.Vijayaraghavan cannot assume any role or function as an arbitrator in the matter and a copy of my reply notice dated 04.02.2012 is being sent to him so as to apprise him of the samd accordingly.'

5.The aforesaid resulted in the present petition being filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the said Act') calling upon this Court to appoint an Arbitrator.

6.This petition is opposed by the respondents by filing a counter affidavit after more than two years. In fact, on the last date of hearing, an adjournment was requested by the learned Senior Counsel for the respondents to address submissions, but no leave was sought to file the counter-affidavit after such a prolonged period of time, though it is stated that this counter-affidavit was filed in the morning of the hearing. This itself was sufficient

to reject the counter-affidavit. Be that as it may, I have considered it appropriate even to examine the said counter-affidavit on merits.

7.The sum and substance of the arguments emanate from the wordings of Clause 25. It is the submission of the learned Senior Counsel for the respondents that the clause is actually only an agreement to enter into an arbitration agreement and cannot be construed as an arbitration clause. This plea is predicated on the use of the word 'may' in the said clause.

8.It is, however, not disputed by the learned Senior Counsel for the respondents that the first sentence of the clause provides for right of specific performance, which can take place either before the Arbitrator or before the Court. The remaining portion of the clause stipulates the reference to arbitration by using the word 'may'. It is, thus, the submission that if arbitration was mandatory, the word used should have been 'shall'.

9.In support of the aforesaid contention, learned Senior Counsel has referred to the judgment of the Hon'ble Supreme Court in **State of Orissa and Others vs.**

Bhagyadhar Dash, (2011) 7 SCC 406. The said decision

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discussed the essentials of the arbitration agreement by

referring to three other judicial pronouncements in paras 2 to 4. However, it is conceded that this judgment does not deal with the question of the use of the word 'may' or 'shall'.

10. The aforesaid aspect has, however, been discussed in the judgment relied upon by the learned counsel for the petitioner in **Wellington Associates Ltd. vs. Kirit Mehta, (2000) 4 SCC 272**. It was observed in the said judgment that sub-section (1) of Section 7 of the said Act means an agreement by the parties to submit to arbitration, which, in turn, postulates an agreement, which necessarily or rather mandatorily requires the appointment of an arbitrator/arbitrators. It does not cover a case, where the parties agree that they 'may' go to a suit or that they 'may' also go to arbitration. The word 'may' was, thus, also not capable of construing as 'shall'. The relevant clauses in the two agreements in question in the aforesaid judgment, read as under:

"4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may

be referred to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

11. In my view, the judgment would have to be read in the context of the aforesaid clauses, the first of which provided for exclusive jurisdiction in the Bombay Courts to try and determine the suit (a jurisdictional clause) while the second clause provided for the option of reference to arbitration. This is quite different from the clause in the present case, which does not talk about the civil suit, but exclusively about the arbitration, albeit with the word 'may'.

12. Learned counsel for the petitioner also referred to the judgment of the Hon'ble Supreme Court in **Shakti Bhog Foods Limited vs. Kola Shipping Limited**, (2009) 2 SCC 134, to support the plea that the existence of an arbitration clause can be inferred from the documents signed by the parties or exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement.

clause 25 is construed especially in the context of communications exchanged inter se the parties, there can be no second opinion on the issue. The only difference between the parties was qua the number of arbitrators, as, according to the respondents, the matter had to be referred to a Sole Arbitrator. It is said in as many words by the respondent, after legal advice, through a reply sent by the lawyer dated 22.06.2011 and 06.02.2012. It is only when the Arbitrator appointed proceeded to act in pursuance to his appointment that the respondents appeared to have had a change of thought and wanted to wriggle out of the arbitration agreement, something which cannot be countenanced. The belated defence of the respondents is also predicated on the same plea.

14.I am, thus, of the view that the disputes between the parties have to be referred to the arbitration by a Sole Arbitrator, the learned counsel for the petitioner having conceded that he is not pressing the issue of arbitration by three Arbitrators.

15.By consent of learned counsel for parties, I, thus, appoint **Mr.Justice K.Sampath, 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,

preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally.

16.The original petition is, accordingly, allowed, with costs quantified at Rs.7,500/- (Rupees seven thousand five hundred only) payable to the petitioner.

Sd/..(S.K.K., CJ.)
27.02.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/21.04.2015

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