

In the High Court of Judicature at Madras

Dated : 30.09.2016

Coram :

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

O.P.No.350 of 2016

Bollineni Hillside Residential Township
Owners' Association (Reg.No.342/2010),
rep. by its Secretary,
Nookampalayam,
Perumbakkam Road,
Sithalapakkam Post,
Chennai-600 126.

.. Petitioner

VS

BSCPL Infrastructure Limited,
rep. by its Executive Officer,
Nookampalayam,
Perumbakkam Road,
Sithalapakkam Post,
Chennai-600 126.

.. Respondent

Petition filed under Section 11 (4) (A) & 11(6) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator to adjudicate the disputes arising out of the construction agreement on 02.02.2012 between the petitioner association and the respondent.

For Petitioner : Ms.Dakshyani Reddy

For Respondent : Mr.K.M.Vijayan
Senior Counsel for
Mr.M.Baskar

* * * * *

ORDER

The present petition has been filed under Section 11(4) (A) and 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to "*the said Act*") by the petitioner, which is the Owners' Association against the builder, which is the respondent.

2. Bollineni Hillside Residential Township Owners' Association is stated to have been promoted by the respondent in about 45 acres of land at Nookampalayam, Perumbakkam Road, Sithalapakkam Post, Chennai-126. The members of the petitioner-association purchased Villas/Apartments from the respondent, which were duly registered. The allegation of the petitioner association is that various common services are supposed to be provided by the respondent and there is failure to do so *inter alia* in respect of proper sewerage plant, club house, electric fencing etc. The corpus fund formed from the contribution of the members of the association is to be transferred to the association as soon it was formed. The corpus fund is stated to be to the tune of Rs.12.00 Crore, as informed by the respondent vide letter dated 23.09.2014, but has not been transferred. The petitioner association also seeks to raise the issue about maintenance, which was required to be carried out by the

respondent for a period of 15 years.

3. It is the case of the petitioner that despite endeavours to resolve the issue, the disputes could not be settled. The disputes having arisen and there being an arbitration clause in the agreement executed between the members of the petitioner and the respondent, the same was invoked vide notice dated 06.02.2016.

4. The said notice refers to clause XVI and clause IX of an identical agreement executed between the members of the petitioner and the respondent. The relevant clause XVI for resolution of dispute is as under:-

"XVI. DISPUTE RESOLUTION:

In the event of breach of the terms of this Agreement for sale or in the event of any differences or disputes arising between the parties in this regard to this Agreement or any matter relating thereto, the same shall be referred to an arbitrator appointed by the DEVELOPER in accordance with and subject to the provisions of the Arbitration and Conciliation Act 1996. The PURCHASER/S shall not be entitled to raise any objection to the appointment of any such Arbitrator. The Arbitration shall be conducted in English Language and the place of Arbitration shall be in Chennai."

5. It may also be noticed that the petitioner, while invoking the arbitration clause, sought to nominate a Senior Advocate of this Court as an Arbitrator. A reply was sent on 12.03.2016 denying the existence of any valid and subsisting arbitration clause between the petitioner and the respondent and claiming that a separate agreement was entered into with the individual buyers and the same would not create any privity of contract between the petitioner and the respondent. Thus, the present petition was filed.

6. The petition has been opposed by the respondent.

7. I have heard the learned counsel for the petitioner and the learned Senior Counsel for the respondent.

8. The first limb of the first submission opposing the petition arises from the notice sent by the petitioner. The learned Senior Counsel refers to the fact that while invoking the arbitration clause, the petitioner cited Clauses XVI and IX and Clause XVI deals with resolution of dispute, while Clause IX deals with maintenance, which has nothing to do with the aspect of arbitration. This plea has to be

rejected, as the relevant Clause XVI has been invoked and reference to Clause IX is in the context of disputes arising qua maintenance.

9. The second limb of the first submission once again arising from the notice is that the petitioner proposed an Arbitrator, while under the arbitration clause, the right to nominate an Arbitrator was of the respondent and the parties having agreed to that procedure, the same should be adhered to.

10. The arbitration clause is quite clear. The question is whether the notice dated 06.02.2016 can be said to be defective, which did not require the respondent to act in pursuance thereto qua the appointment of the Arbitrator. In my view, even if the petitioner had proposed a nominee Arbitrator, the respondent was required, if it wanted to exercise the right to appoint an Arbitrator in terms of the arbitration clause, to do so. The respondent, in fact, denied the existence of the arbitration clause *inter se* the parties and did not nominate their Arbitrator. Thus, clearly the respondent has failed to exercise the right vested in it to appoint an Arbitrator in terms of the arbitration clause and the only remedy for the petitioner was to invoke the jurisdiction of this Court to appoint an Arbitrator.

11. Turning to the second submission of the learned Senior

Counsel for the respondent based on the absence of any privity of contract *inter se* the parties, the learned counsel for the petitioner has drawn the attention of this Court to the agreement between the members of the petitioner and the respondent, where Chapter X deals with Membership of Association. The relevant Clauses X and XII are reproduced hereunder:-

"X.MEMBERSHIP OF ASSOCIATION:

1.The PURCHASER/S shall become a Member of the Association of Owners of the Premises proposed to be formed by the DEVELOPER on behalf of the other Co-Owners.

2.The PURCHASER/S has/have read and understood the contents of the Draft By-Laws of the proposed Association (attached hereto as Annexure-D) and agrees to abide by the same at all times.

3.The PURCHASER/S accepts and acknowledges the need for forming an Association for governing the proper use of the project's common hold properties. The PURCHASER/S agrees to become the member of the Association and agrees to comply with the rules and pay the membership fees and annual subscription charges, maintenance fees and other costs for the maintenance of common hold properties and also the facilities and amenities provided.

4.The PURCHASER/S will duly observe all the rules and regulations of the Association and make all

payments for the upkeep of the premises. The PURCHASER/S shall not be entitled for the use and enjoyment of amenities and common facilities in case of the default in payment of the subscription/maintenance charges.

5.The PURCHASER/S agrees that the Association will be empowered to take whatever action it deems necessary to enforce payment of fees in case of default, including legal proceedings.

6.The PURCHASER/S agrees to abide by all the decisions taken by the Executive/Management Committee of the proposed Association, subject to its By-Laws.

7.The PURCHASER/S has/have read and understood the contents of the draft "Property Management Agreement" (as per Annexure-C) proposed to be entered between the DEVELOPER and the Association to be formed for the upkeep and maintenance of the project and its infrastructure and unconditionally agrees to approve and ratify the Property Management Agreement when so required.

8.The corpus fund paid by the PURCHASER/S for the maintenance of "Bollineni Hillside", which shall be deposited in a separate Bank account to the credit of the proposed Association once it is formed before taking possession of the Villa."

"XII.ENTIRE AGREEMENT:

1.This Sale and Construction Agreement, Details of

Amenities in Annexure-A, Architectural Specifications in Annexure-B, the Property Management Agreement at Annexure-C Memorandum & Bye Laws of the owners/residents Association at Annexure-D and the Reservation/Application Form signed by the PURCHASER/S at the time of booking shall constitute the entire agreement between the parties herein. This Agreement shall be binding on the parties subject to the terms and conditions contained herein."

12. Reading of the aforesaid clauses would show that each of the purchasers of the flat has become a member of the Association of Owners of the Premises and Clause XII, while specifying what was the entire agreement, included Sale and Construction Agreement, Details of Amenities in Annexure-A, Architectural Specifications in Annexure-B, the Property Management Agreement in Annexure-C and the Memorandum & Bye Laws of the owners/residents Association in Annexure-D.

13. It may be useful to refer to the provisions of the Tamil Nadu Apartment Ownership Act, 1994. Section 17 gives a right to the Society or Association of Apartment Owners, without limiting the rights of any Apartment owner to bring the legal action. The said

Section reads as under:-

"17.Action by Society or Association of Apartment Owners on behalf of the Apartment Owners.- Without limiting the rights of any Apartment Owner, action may be brought by the Society or the Association of Apartment Owners on behalf of any Apartment Owner as his respective interest may appear; with respect to any cause of action relating to the common areas and facilities and the limited common areas and facilities of more than one apartment."

14. In view of the aforesaid provisions, I am of the unequivocal view that the petitioner-association, well within its right, has filed the present petition.

15. The third aspect raised by the learned Senior Counsel is qua the existence of the petitioner Association. In this behalf there is no doubt, in view of the certificate of registration issued to the Association and the list of members filed from time to time. Mere fact that one of the members of the Association has raised some issues would not help the respondent to defeat the arbitration.

16. The learned counsel for the petitioner also drew the

attention of this Court to Section 8 of the said Act, which reads as under:-

"8.Power to refer parties to arbitration where there is an arbitration agreement:

[(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying

the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

17. The learned counsel for the petitioner submitted that while the provision prior to the Amendment Act 3 of 2016 provided only a party to apply, the expression has been changed to a party to the arbitration agreement or "any person claiming through or under him". It is, thus, submitted that even in view of this provision, the claim by the Society is one of claim by the members through the Society. **[Reference made in Chloro Control (I) Pvt. Ltd. v. Seven Trent Water Purification Inc. and others, reported in 2012 (9) SCALE 595].**

18. The last submission of the learned Senior Counsel for the petitioner emanates from the agreement, which is the draft agreement for property management, to be entered into between the Association and the buyer. Part-I prescribes the Association to appoint a Manager for performing the work of maintenance and

supervision on an exclusive basis. Part-III refers to the term and states that such an appointment will be for a period of one year. On the basis of these terms, the respondent seeks to contend that their obligation for maintenance was only for a period of one year.

19. The aforesaid really is a plea on merits – whether the respondent is absolved of its right of maintenance after one year or whether the obligation continues in terms of the other clauses of the agreement, it is for the Arbitrator to consider.

20. No other plea is raised.

21. In view of the aforesaid, there exists an arbitration clause, disputes have arisen *inter se* the parties, jurisdiction is of this Court and the respondent has failed to appoint an Arbitrator, despite a valid notice.

22. I, thus, appoint Mrs.Chitra Venkatraman, a retired Judge of this Court, as the Sole Arbitrator to enter upon the reference and adjudicate the disputes *inter se* the parties. As requested, the arbitration proceedings will be conducted under the aegis of the

Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

23. The original petition is, accordingly, allowed, leaving the parties to bear their own costs.

(S.K.K., CJ.)
30.09.2016

Index : Yes/No
Internet : Yes/No

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Note: Mark a copy to

(i) The Addl. Registrar-Vigilance
Madras High Court Arbitration Centre,
Madras High Court Campus, Chennai.

(ii) The Arbitrator, as referred above.

The Hon'ble Chief Justice

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