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

ARBITRATION APPLICATION NO. 141 OF 2016

Rewa Infrastructure Pvt. Ltd. ...Applicant.
vs
Samir Bhojwani & Ors. ...Respondents

.....

Mr Dinesh Pednekar a/w Mr Shailesh Poria i/b Economic Laws Practice for the Applicant.

Mr Aspi Chinoy, Sr. Counsel a/w Mr D.V.Deokar & Mr Sachin Pandey i/b Parimal K. Shroff for Respondent No.1.

Mr Cherag Balsara i/b Sachin S.S. Rawool for Respondent No.2.
Mr. Nakul Jain a/w Ms Hiral Vora i/b Maniar Srivastava Associates for Respondent Nos.3 and 4.

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CORAM : **B.P.COLABAWALLA, J.**
SEPTEMBER 27, 2017.

P.C. :

This Arbitration Application has been filed by the Applicant under Section 11 of the Arbitration and Conciliation Act, 1996 (**"the Act"**) seeking appointment of an Arbitrator of any of the persons mentioned in paragraph 13 of the Application. The property forming subject matter of the dispute are basically four flats more particularly described in paragraph

3 of the Application. These flats are part of a building known as "**33 South**" (formerly known as Renaissance Tower) which is situated on a piece or parcel of land at Peddar Road. Respondent No.4 to this application is the owner of the said land and had granted development rights to Respondent No.1 for development of the said land and construct the said building.

2 After assignment of the development rights, Respondent No.1 had executed an Agreement for Co-operation for Development dated 1st December, 2003 and an Additional Agreement for Co-operation for Development dated 2nd December 2003 with the Applicant for consideration in the form of constructed floor space in favour of the Applicant. According to the Applicant, Respondent No.1, dehors the said Agreement for Co-operation for Development and without the consent of the Applicant has created rights in favour of Respondent No.2 which is a concern run and managed by Respondent No.1 himself. Therefore, according to the Applicant, disputes and differences have arisen between the Applicant and the Respondents herein and to resolve these disputes, the Applicant first invoked mediation by its letter dated 16th September, 2015. Since, the

mediation failed, Arbitration was invoked by the Applicant vide its letter dated 16th October, 2015. It is thereafter that the present Application under Section 11 of the Act has been filed seeking appointment of a Sole Arbitrator.

3 In this factual backdrop, Mr Pednekar, learned Advocate appearing on behalf of the Applicant submitted that there was an arbitration clause in the Agreement for Co-operation for Development dated 1st December, 2003 and which agreement was duly signed by Respondent No.1 as well as the Applicant. In this regard, Mr Pednekar brought to my attention clauses 8 and 9 of this agreement. He submitted that the disputes and differences have arisen between the parties, because it is the case of the Applicant that these four flats were sold by Respondent No.1 without the consent of the Applicant and at an undervalue and that too to a concern which was run and managed by Respondent No.1. It is, in these circumstances, that he prayed that this Arbitration Application be allowed and any of the persons named in paragraph 13 of the Arbitration Application be appointed as a Sole Arbitrator to adjudicate upon the disputes and differences that have arisen between the

Applicant and the Respondents herein.

4 On the other hand, Mr Chinoy, learned Senior Counsel on behalf of Respondent No.1, submitted that admittedly the alleged disputes and differences that have arisen between the Applicant and Respondent No.1 are with reference to four flats that have been mentioned in paragraph 3 of the Arbitration Application. He submitted that as per clauses 8 and 9 of the Agreement for Co-operation for Development dated 1st December, 2003, these were kept out of the purview of the Arbitration Agreement. Mr Chinoy submitted that for the Applicant to move this Court under Section 11 of the Act seeking relief of appointment of an Arbitrator for a constituting Arbitral Tribunal, it was for the Applicant to *prima facie* show that there is a valid, subsisting and legal Arbitration Agreement in favour of the Applicant. Mr Chinoy submitted that all matters pertaining to these four flats, referred to in paragraph 3 of the Arbitration Application and sale of the same by Respondent No.1 in favour of Respondent No.2, were expressly excluded from clauses 8 and 9 of the said Agreement for Co-operation. Since this was the only alleged dispute between the Applicant and

Respondent No.1, the subject matter of the arbitration was not covered under the Arbitration Agreement and hence there is no merit in the contentions raised on behalf of the Applicant. To put it in a nutshell, it was the submission of Mr Chinoy that there was no arbitration agreement that could be invoked to resolve any disputes in relation to the four flats mentioned in paragraph 3 of the application. Therefore, Mr Chinoy submitted that this application is wholly misconceived and ought to be dismissed.

5 Mr Balsara, learned Advocate appearing for Respondent No.2, submitted that as far as his client is concerned they were admittedly not signatories to the Agreements for Co-operation for Development dated 1st December, 2003 and 2nd December, 2003 respectively, and therefore, they cannot be bound by any Arbitration clause that was contained in the said agreements. This being the case he submitted that in absence of any Arbitration Agreement between the Applicant and Respondent No.2, Respondent No.2 cannot be roped into any arbitration that was sought to be invoked by the Applicant for the alleged disputes that they may have with Respondent No.1.

Mr Nakul Jain, learned Advocate appearing on behalf of Respondent Nos.3 and 4, also adopted the same argument as was canvassed by Mr Balsara. For all these reasons, Respondent Nos.2 to 4 also submitted that this Arbitration Application is wholly misconceived and ought to be dismissed.

6 I have heard learned Counsel for the parties at length and have perused the papers and proceedings in the Application. The real controversy really involves around certain clauses of the Agreement for Co-operation for Development dated 1st December, 2003. This agreement itself records that Respondent No.1 had acquired development rights from Respondent No.3 in respect of the properties situated and lying at Dr. Gopalrao Deshmukh Marg, Mumbai City admeasuring 2381.38 sq.meters and more particularly described in the First Schedule to the said Agreement. For the purpose of development, Respondent No.1 required various services and facilities. It was for this purpose that the Agreement for Co-operation for Development dated 1st December, 2003 was entered into with the Applicant (which was formerly known as Kapil Finance Investment Pvt. Ltd.). This agreement further records that for the purpose of carrying out

the development, the Applicant shall provide various services enumerated in the agreement and on the terms and conditions more particularly set out therein. Thereafter clauses 2 and 3 set out the obligation of Respondent No.1 and the Applicant herein respectively. Clauses 4 and 5 of this Agreement reads as under:-

> "4. For the obligations undertaken by the Facilitator under this Agreement, the Developers shall make available to the Facilitator 15% of the entire developed area (i.e. 30 % of the area coming to his share) it is clarified that the area to which the Developer is entitled under the said Development Agreement shall be shared between the Developer and the Facilitator in Ratio of 70 to the Developer and 30 to the Facilitator) and which is more particularly described in the Third Schedule hereto free of cost and free of encumbrances which area on behalf of the Facilitator, <u>the Developer will be entitled to deal with, dispose of and receive and appropriate consideration in accordance with clause 5</u>.
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> 5. <u>It is agreed between the Developer and the Facilitator that the Developer alone shall be entitled on behalf of the facilitator to deal with or dispose of the entire developed area coming to the share of the Facilitator (i.e. 15 % of the entire developed area) under this Agreement for the price to be determined by the Developer in such a manner that the price shall not be less than Rs.5 (five) crore for each of the 3.75 % of the entire developed area</u> towards the payment and discharge of the obligations of the Facilitator for payment of stamp duty, interest and penalty payable on Conveyance in respect of the said property to be executed in favour of Ispat Ltd. by Owners of the said property and for registration charges and other documents as set out in Clauses 3.5 hereof and for payment of premium to be paid by the Developer to the Brihan Mumbai Mahanagar Palika under Clause 3.3 hereof and for payment of premiums to be paid by the Developer to the Brihan Mumbai Mahanagar Palika under clause 3.3 hereof and for other obligations of the Facilitator as specified in clauses 3.1, 3.2 and 3.4 of this Agreement. If the said consideration is not sufficient

> then the balance amount or amounts payable in respect of the aforesaid expenses and other expenses to carry out obligations of the Facilitator shall be borne and paid by the facilitator in accordance with this Agreement as and when called upon to do so by the Developer. If however, the said consideration is more than the amount or amounts payable in respect of the aforesaid expenses and other expenses to carry out obligations of the facilitator than the amount over and above the said expenses shall be passed on to the Facilitator in accordance with this Agreement. The Facilitator confirms that right of the Developer to deal with dispose of the said entire developed area coming to the share of the Facilitator under this Agreement is absolute, irrevocable and without recourse to the Facilitator and Facilitator shall not challenge or dispute the same. The Facilitator have simultaneously on the execution hereof executed irrevocable Power of Attorney in favour of the Developer authorizing the Developer to execute all deeds, documents and writings and do all acts, deeds, matters, and things for and on behalf of the Facilitator in respect of the said developed area coming to the share of the Facilitator and the same shall not be revoked by the Facilitator."

(emphasis supplied)

7 As can be seen from the aforesaid clauses, for the obligation undertaken by the Applicant, Respondent No.1 (Developer) was to make available to the Applicant (Facilitator) 15 % of the entire developed area (i.e. 30 % of the area coming to Respondent No.1's share) and it was clarified that the area to which Respondent No.1 was entitled was to be shared between Respondent No.1 and the Applicant in the ratio of 70% to Respondent No.1 and 30% to the Applicant. The description of

this share is more particularly set out in Third Schedule to the said Agreement. Respondent No.1 was also entitled to deal with, dispose of and receive and appropriate consideration for sale of the area coming to the Applicant in accordance with clause (5). Clause (5) of this agreement clearly stipulates that Respondent No.1 alone was entitled, on behalf of the Applicant, to deal with or dispose of the entire developed area coming to the share of the Applicant and for a price to be determined by Respondent No.1 in such a manner that the price shall not be less than Rs.5 crores for each of the 3.75% of the entire developed area towards the payment and discharge of the obligations of the Applicant. It is further confirmed on behalf of the Applicant that the right of the Developer to deal with, dispose of the said entire developed area coming to the share of the Applicant was absolute, irrevocable and without recourse to the Applicant. It was further recorded that the Applicant shall not challenge or dispute the sale of said developed area.

8 In furtherance of these clauses, the Applicant also executed an Irrevocable Power of Attorney on 1st December, 2003 in favour of Respondent No.1 as well as one Shibani Samir

Bhojwani. In the said irrevocable Power of Attorney it was recorded that the Applicant irrevocably appoints, constitutes and nominates Respondent No.1 as well as Shibani Bhojwani jointly and severally to do and carry out the acts, deeds, matters and things more particularly mentioned in the said Irrevocable Power of Attorney. Clause (1) of this Power of Attorney clearly gives power to Respondent No.1 to enter into any Agreement, arrangement, writing, contract or commitment including but not limited to any Memorandum of Understanding for sale, Agreement for Sale, Conveyance or Deed of Apartment in respect of the entire developed area coming to the share of the Applicant under the said agreement dated 1st December, 2003. The price was also to be determined by Respondent No.1 without recourse to the Applicant so that the aggregate sum coming to the share of the Applicant would not be less than Rs.20 Crores. This Power of Attorney further records that the sale could also be done in favour of any person or party where such person or party is related to or connected with Respondent No.1 and/or Shibani Bhojwani.

9 Clause 6 of the Co-operation Agreement dated 1st

December, 2003 restricts the Applicant either directly or indirectly from dealing with or disposing of the areas allocated and described in the Third Schedule to this Agreement and which were to go to the Applicant in the proposed building. Thereafter clauses 8 and 9 of this Agreement deal with mediation and arbitration. They read as under:

> "8. It is agreed between the Facilitator and the Developer <u>that save and except the right of the Developer to deal with or dispose of 15 % of entire developed area (i.e. 30 % of the area coming to the share of the Developer) under the said Development agreement and appropriating the consideration received there from and any ancillary or incidental questions thereto</u>, any dispute or difference which may arise between the parties hereto under this Agreement shall be first referred to the mediation of Mr. Pramod Mittal on behalf of the Facilitator and Mr Samir Narain Bhojwani on behalf of the Developers. It is agreed that the parties hereto will make efforts to resolve the dispute if any through the aforesaid mediators within a period of 30(thirty) days of reference of mediation. It is agreed that if either the mediators are unable to resolve by mediation such dispute or differences or if any of the mediators fail to act upon the reference of mediation for a period of 15 (fifteen) days from the date of notice for mediation given by either party hereto, then and in either even the parties will be entitled to refer the matter to Arbitration in accordance with the terms hereof. Notwithstanding what is contained hereto to the contrary, it is the contention of the parties that parties will first make effort to mediate and resolve the dispute and differences between the parties hereto and in the event of the mediation failing to resolve such dispute or differences, the parties will invoke the provisions for arbitration under this Agreement.
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> 9. <u>Subject to what is stated herein Clause 8 hereof</u> all

> disputes and differences which may arise between the parties hereto in relation to or arising out of this Agreement in including as to validity, termination or recession or abandonment or cancellation or breach of any of the terms of this Agreement and as to performances or non-performance or terms of performance and interpretation thereto shall be referred to arbitration under the provisions of Arbitration & Conciliation Act, 1996."
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> (emphasis supplied)

10 What can be seen from these Clauses is that it was agreed between the Applicant and Respondent No.1 that save and except the right of Respondent No.1 to deal with or dispose of 15% of the entire developed area (i.e. 30 % of the area coming to the share of the Developer) and appropriating the consideration received therefrom and any ancillary or incidental questions thereto, any dispute or differences which may arise between the parties shall be first referred to the mediation. If the said mediation did not fructify within a period of 30 days or the Mediator failed to act upon the reference then either of the parties were entitled to refer the matter to Arbitration in accordance with the terms thereof. Thereafter clause (9) clearly stipulates that subject to what is stated in clause (8), all disputes and differences which may arise between the parties in relation to or arising out of this Agreement including the validity,

termination, recession, abandonment or cancellation was to be referred to Arbitration under the provisions of the Arbitration and Conciliation Act, 1996.

11 Looking to these aforesaid clauses and the Irrevocable Power of Attorney that has been referred by me earlier, what becomes crystal clear is that the right of Respondent No.1 to deal with or dispose of 15 % of the entire developed area (i.e. 30 % of the area coming to the share of the Developer) under the said Agreement and appropriating the consideration received therefrom and any ancillary or incidental questions thereto would be kept out of, not only of the mediation process but also out of arbitration.

12 It is not in dispute between me that the four flats mentioned in paragraph 3 of the Arbitration Application corresponds to the 15 % of the entire developed area (30 % of the area coming to the share of the Developer) and these have been specifically kept out of the mediation process as well as arbitration as more particularly set out in clauses 8 and 9 of the Agreement for Co-operation for Development dated 1st

December, 2003. This is made further clear when one reads these clauses with clause (5) of the said agreement along with Irrevocable Power of Attorney executed by the Applicant in favour of Respondent No.1 and Shibani Bhojwani. Clause 5 of this agreement clearly stipulates that right of Respondent No.1 to deal with and dispose of the entire developed area coming to the share of the Applicant was absolute, irrevocable and without recourse to the Applicant and that the Applicant shall not challenge or dispute the same. It is for this reason that Clause (8) clearly stipulates that all disputes and differences between the parties, with the exception of the right of Respondent No.1 to deal with the developed area coming to the share of the Applicant, can be referred to mediation and thereafter arbitration, if the mediation fails. On reading this Agreement for Co-operation for Development in its entirety and as a whole along with the Irrevocable Power of Attorney dated 1st December, 2003, I am clearly of the view that the dispute that is sought to be raised by the Applicant and which he wants to refer to the Arbitration cannot form part of the Arbitration Agreement that has been entered into between the parties. This being the case I find considerable force in the arguments canvassed by Mr Chinoy that as far as the disputes raised by the Applicant are concerned, there exists no Arbitration Agreement.

13 As far as Respondent Nos.2 to 4 are concerned, admittedly they are not the signatories to the Agreement for Co-operation for Development dated 1st December, 2003 which contains the arbitration clause. I, therefore, fail to see how they can be bound by the arbitration clause contained in the said agreement.

14 For all the aforesaid reasons, I find no merit in this Arbitration Application and it is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs. It is however clarified that if the applicant has any dispute with Respondent No.1 with reference to the four flats mentioned in paragraph 3 of the application, this order shall not preclude the Applicant from approaching the Civil Court to agitate his rights and grievances in relation to the aforesaid four flats.

(B. P. COLABAWALLA, J.)