

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO.4 OF 2016**

Blue Baron Developers and Ors.Applicants

Vs.

Kalash Dhara Developers LLP and Ors.Respondents

Mr. Gaurav Mehta a/w. Mr. Bimal Bhabhda i/b. M/s. Apte and Co. for applicants.

Ms. Mahek Bookwala-Shetty i/b. Snehal Marathe for respondent nos.2 and 4.

Mr. Atul Damle, senior advocate i/b. Mr. Ashutosh R. Gole for respondent nos.3 and 5.

CORAM : K.R.SHRIRAM, J.

DATE : 31st JULY, 2017

PC.:

1 This application is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (the said Act). The arbitration clause according to applicants is clause 31 in a Memorandum of Understanding (MOU) dated 19th January, 2014 entered into between respondent no.1 on the first part as owners and applicants on the other part. On behalf of respondent no.1, respondent nos.2,3,4 and 5 who are partners of respondent no.1, have signed the MOU. Respondent nos.2 and 4 while denying liability to applicants, agree that there is an arbitration clause. So far as respondent nos.3 and 5 are concerned, though they do not dispute that there is an arbitration clause in the MOU, according to respondent nos.3 and 5 the MOU effectively is a development agreement and not adequately stamped as required under Article 5 (g- a) of the Maharashtra Stamp Act and

therefore, applicants cannot rely on this document, the Court should impound this document and send it for adjudication and only if applicant pays the stamp duty, the agreement can be looked into and Arbitrator be appointed.

2 Mr. Damle, senior counsel for respondent nos.3 and 5 states that the agreement can be split into two parts – Schedule-A and Schedule-B. So far as the land at Schedule-A is concerned, it is a concluded contract as development rights have been created and therefore, is inadequately stamped. Per contra, Mr. Mehta, counsel for applicants states that such a split cannot be made and the whole MOU has to be read not in bits and pieces and it was a contingent contract as admitted by respondent nos.3 and 5 and in any event, the agreement itself provides that it is to take effect only upon happening of certain events.

3 Therefore, let us see whether the MOU is a development agreement or it is only an agreement to enter into an agreement and contingent upon happening of certain events.

4 The MOU is prepared on Rs.100/- non judicial stamp paper. The MOU provided for development of two parts of land, one referred to in Schedule-A and the other referred to in Schedule-B. Schedule-A comprised a land which was owned by respondent no.1 and Schedule-B provided for land to be acquired by respondent no.1.

5 As it appears from the recitals, respondent no.1 had made it

very clear that they have clear title only with respect to property described in Schedule-A and so far as Schedule-B is concerned, respondent no.1 has entered into an MOU with respective owners of the adjacent land to the land mentioned in Schedule-A and the adjacent land is yet to be conveyed in their names. The understanding between the parties was respondent no.1 would get the conveyance of 20 acres of land in favour of applicants and upon that happening, applicants and respondent no.1 shall enter into a development agreement. The recitals provide as under :

“(1) WHEREAS the party of the first part made it clear to the party of the second part that they will make clear marketable title to the said property as owners at their own cost AND expenses and thereafter they are all interested to give the said properties for Development to the Developers on the following terms and conditions stated hereunder. This term is the Essence of these present Memorandum of Understanding. (The said properties/properties are defines as both properties in Schedule-A together with Schedule-B).

(2) the party of the second part have shown their willingness for the development of the said property with the condition to that they are require at least 20 acres of land including the said property mentioned in Schedule-A.

6 The recitals also provides that if respondent no.1, i.e., party of the first part, is unable to get the properties mentioned in Schedule-B, then respondent no.1 shall get development rights of another land of roughly the same area approximating to the area of the said properties mentioned in Schedule-B. Clause 6 (b), 14,16 and 18 read as under :

“6(b). The part of deposit @ Rs.100/- per sq. ft. of the constructible built-up area of the property to be registered under development agreement shall be deposited with party of the first part shall be paid on or before signing of and registration of the development agreement. This amount shall include the initial payment of Rs.2,00,00,000/- (Rupees two crore only) deposited

by the party of second part the developer.

14. It is mutually agreed that the owners undertakes on execution and registration of respective Development Agreements in respect of the said properties mentioned in Schedule-A and Schedule-B shall handover the possession of the said property for Development purpose only to second part who shall be fully authorize to put board of this name. The owners the transferor herein reserves the right to object when they do not receive the security deposit as per the developers commitments and/or when the owners rights are hampered in any manner by the developers herein.

16. The party of first part have agreed that on execution and registration of the respective Development Agreements the said properties mentioned in Schedule-A and Schedule-B have agreed to give complete, vacant and peaceful possession of the said property to the second part only for the construction and development purpose on the terms and conditions stated herein.

18. It is agreed by and between both the parties herein that upon the execution of the respective Development Agreements in respect of the said properties mentioned in Schedule-A and Schedule-B the party of the first part have given the following authorities to the developers which shall be exercised by them at their own costs, charges and expenses and responsibilities.”

7 Therefore, the development agreement is yet to be executed and registered. The MOU only binds both the parties to enter into a development agreement and the obligation is of respondent no.1 to make available 20 acres of land for development. In the letter dated 2nd December, 2015 from the Advocate for respondent nos.3 and 5 to the Advocate for applicants, the stand taken is that the agreement is contingent on respondent no.1 obtaining the properties of Schedule-B and therefore, a contingent contract.

8 In my view, therefore, the MOU will certainly not be a document or an instrument that can be categorised under Article 5 (g-a) of the Maharashtra Stamp Act.

9 In the circumstances, the application has to be allowed. Clause 31 of the agreement provides for three Arbitrators but Mr. Damle, senior counsel for respondent nos.3 and 5, Mr. Mehta, counsel for applicants and Ms. Bookwala-Shetty, counsel for respondent nos.2 and 4 state that parties are ready and willing to refer the disputes to a sole Arbitrator and suggest Mr. Karl Tamboly, an Advocate practicing in this Court be appointed as sole Arbitrator.

10 Mr. Karl Tamboly, Advocate, is hereby appointed as sole Arbitrator to decide on all disputes and differences arising out of and in connection with or relating to MOU dated 19th January, 2014.

11 Mr. Damle and Ms. Bookwala-Shetty state that since they represent all the four partners of respondent no.1 and there are no other partners of respondent no.1, respondent nos.2 to 5 shall not make any application on behalf of respondent no.1 at a later stage stating that the arbitration clause provided for three Arbitrators and applicants and respondent nos.2 to 5 could not have agreed for a sole Arbitrator. This statement is accepted as an undertaking to this court.

12 The application accordingly stands disposed.

(K.R. SHRIRAM, J.)