

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 26TH DAY OF JUNE 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

A. No.4431 of 2017

in

C.S.No.351 of 2017

M/s. Olympia Opaline Flat Owners Association (OOOA)
Represented by its Joint Secretary, Vinod B.Cola,
having its Office at Amethyst Stilt,
Olympia Opaline, Phase 1, OMR, Navalur,
Chennai, Tamil Nadu 603 103. : Plaintiff
Vs.

Olympia Infratech, a Unit of
Olympia Tech Park (Chennai) Private Limited
Having its registered office at
1, Sidco Industrial Estate,
Guindy, Chennai 600 032. : Defendant

A.No.4431 of 2017:

Olympia Infratech, a Unit of
Olympia Tech Park (Chennai) Private Limited
Having its registered office at
1, Sidco Industrial Estate,
Guindy, Chennai 600 032. : Applicant/Defendant

-Vs.-

M/s. Olympia Opaline Flat Owners Association (OOOA)
Represented by its Joint Secretary, Vinod B.Cola,
having its Office at Amethyst Stilt,
Olympia Opaline, Phase 1,
OMR, Navalur,
Chennai, Tamil Nadu 603 103. :Respondent/Defendant

Application praying that this Hon'ble Court be pleased
to refer the suit C.S.No.351 of 2017 for Arbitration as
per Section 8 of the Arbitration and Conciliation Act,
1996.

This application coming on this day before this court for hearing the court made the following order:-

This application has been filed by the Defendant in the suit under Section 8 of the Arbitration and Conciliation Act to refer the disputes in the suit for arbitration.

2. CS.No.351 of 2017 has been filed by M/s.Olympia Opaline Flat Owners Association, Chennai, against M/s.Olympia Infratech, a Unit of Olympia Tech Park (Chennai) Private Limited, Chennai.

3. The Plaintiff is an Association of flat owners of the residential complex known as "Olympia Opaline" and is a Resident Welfare Society. It is registered under the Tamil Nadu Societies Registration Act. The Defendant is a Private Limited Company, registered under the Companies Act, 1956. The Plaintiff Association represents the residents in 10 Blocks of towers in Olympia Opaline, Phase-I, Navalur, having 1235 flats. The Plaintiff is representing on behalf of 1235 owners/residents. The Defendant was the builder and promoter, who designed and constructed the apartments in 10 Blocks.

4. The Plaintiff has filed the suit, seeking a judgement and decree, to recover Rs.25,27,84,630/- together

with interest at the rate of 18% p.a. and also for costs.

5. According to the Plaintiff, there are more than 4500 residents in 10 Blocks, which have been classified as Blocks A to L. The Plaintiff Association was established to protect the interest of the residents of all the above Blocks. The Plaintiff Association has taken over the welfare of the residents from 01.10.2016. The Defendant had collected corpus funds from the residents to the tune of Rs.5.45 crores. Interest which had accrued to the said sum till 30.9.2016 is Rs.1.40 crores. The Defendant had also collected advance maintenance deposit at the rate of Rs.10/- per sq.ft. on 16,80,963 sq.ft. to the tune of Rs.1,68,09,630/- from the residents of all 10 Blocks. It is stated that the said sums are payable to the Plaintiff.

6. It is stated that the Plaintiff, by letter dated 15.2.2016, had called upon the Defendant to complete the project deliverable within a specific period mentioned in the letter. However, no action was taken by the Defendant. This was to the value of Rs.5.50 crores. There were also several defects in the flats, which had been constructed by the Defendant and rectifications were not done and the cost of the same was estimated at Rs.1.33 crores. There was also a piped gas supply to the residents which was also not completed and the cost of repairing the

same amounted to Rs.3,08,75,000/- @ Rs.25,000/- per flat for 1235 flats. It is also stated that there are 683 open car parks. These were also sold to the residents. This area was also included in the undivided share of land. This had caused a loss of Rs.6,83,00,000/-. All the above amounts were consolidated to Rs.25,27,84,630/- and claimed in the plaint together with interest @ 18% p.a. and costs.

7. The Defendant had entered appearance and filed the present application under Section 8 of the Arbitration and Conciliation Act, 1996. In this application, the Defendant had stated that the Plaintiff Association had come into existence on 28.4.2016 and even earlier to that date, the Defendant had entered into agreements for construction with each one of the individual owners / residents on 07.07.2008 and on corresponding dates. In these agreements, which are the basis for institution of the suit, the individual flat owners had agreed to settle disputes through arbitration. There was a specific clause in the agreements with the flat owners with respect to referring the disputes arising between the parties to arbitration. The Defendant, therefore, claimed that the parties to the agreement had agreed to resolve the disputes and the differences between them through arbitration. It has been stated that the Plaintiff cannot

claim any greater right than the individual flat owners. They are all bound by the terms of the agreements. It has been, therefore, stated that the disputes in the suit should be referred to arbitration.

8. The Plaintiff has filed a counter, disputing the averments made in this application. According to the Plaintiff, the Plaintiff Association is a separate legal entity and the Plaintiff Association had not entered into any agreement with the Defendant. Consequently, the Plaintiff Association, which is recognised as a separate entity, cannot be bound by the terms of the agreements entered into by the individual flat owners with the Defendant. It has been further stated that the Defendant is due and liable only to the Plaintiff Association since it represents each one of the individual owners. Their rights had been transferred to the Plaintiff Association with effect from 01.10.2016. It has been, therefore, stated that the Plaintiff Association is competent to institute the suit for recovery of money. It was also stated that there is no arbitration clause pertaining to resolve disputes between the Plaintiff Association and the Defendant. Consequently, since there is no such agreement, the disputes cannot be referred to arbitration.

9. This Court heard Mr.Sathish Parasaran, learned

senior counsel for the Applicant/ Defendant and M/s..Nithyaesh & Vaibhav, the learned counsel for the Respondent/ Plaintiff. For the sake of convenience, the parties herein after shall be referred to as the Plaintiff and the Defendant.

10. The Plaintiff, M/s.Olympia Opaline Flat Owners Association is an Association registered under the Tamil Nadu Societies Registration Act with the object of protecting the interest of the residents/ flat owners of 10 Blocks in Olympia Opaline, Phase-I, Navalur, having 1235 flats. The Blocks had been categorised as Blocks A to L. There are more than 4500 residents. The suit had been instituted by the Plaintiff, seeking a judgement and decree for a sum of Rs.25,27,84,630/- with interest at 18% p.a. and also for costs of the suit. This amount, according to the Plaintiff, is due with respect to the following particulars:-

S.No	Particulars	Amount Due
1	Corpus Fund as per OIPL as per email dated 18.01.2017 from the Defendant.	Rs.5,45,00,000/-
2	Accrued interest 2 9% on corpus as per OIPIL up to 30.092016 as per email dated 18.01.2017 from the Defendant	Rs.1,40,00,000/-
3	Advance maintenance deposit of Rs.10/- per sq.ft. on 16,80,963 sq.ft. .	Rs.1,68,09,630/-

S.No	Particulars	Amount Due
4	Estimated Project Deliverable as per letter dated 15.2.2016.	Rs.5,50,00,000/-
5	Due diligence report amount as per report of Blue Bell Integrated Facility Services Pvt Limited	Rs.1,33,00,000/-
6	Piped gas 2 Rs.25,000/- per flat for 1235 flats	Rs.3,08,75,000/-
7	683 open car parks allotted on UDS already sold to residents 2 Rs.1 lack per open car park.	Rs.6,83,00,000/-
	Total	Rs.25,27,84,630/-

11. According to the Plaintiff, the Defendant is due and liable for to the above sums and since the Plaintiff is the representative of each one of the individual Members, the Plaintiff is entitled to receive the amounts. The learned counsel for the Plaintiff has placed reliance on Section 17 of the Tamil Nadu Apartment Ownership Act, which is as follows:-

"17. Action by Society or Association of Apartment comes on behalf of the apartment owners:-

"Without limiting the rights of any apartment owner, action may be brought y 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."

12. The Defendant has produced before this Court a certified copy of one of the agreements for construction entered into between them and one of the allottees by name, Jaikumar Krishnamoorthy. It is dated 7.7.2008. According to the Defendant, the agreement is not disputed by the Plaintiff. The Defendant had entered into similar agreements for construction with each one of the allottees. In the agreement, there is a separate clause with respect to maintenance and the Defendant had the responsibility to maintain the common services for a period of five years. For this purpose, the allottee had undertaken to enter into an agreement for maintenance/arrangement with the Defendant. The allottee also undertook to pay the maintenance amount to the Defendant. The allottee also undertook to be a Member of the proposed Association/ Society if any formed. It was also agreed that such Association/ Society shall recognise the maintenance agreement which is intended to be entered into between the allottees and the Defendant. There was also an independent agreement for construction entered into between the allottee and the Defendant. The agreement for construction has an arbitration clause, which is as follows:-

"XII. ABITRATION/JURISDICTION:-

All disputes arising between the parties hereto out of or as a result of this agreement shall

be referred to the single Arbitrator to be appointed by the parties by mutual consent. In the event of the parties not agreeing on a single arbitrator, the DEVELOPER shall appoint an Arbitrator and the ALLOTTEE shall appoint an Arbitrator and the two arbitrators so appointed shall appoint a third arbitrator who shall be the presiding arbitrator. The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996. The arbitration proceedings shall be held in Chennai and the language of the proceedings shall be English. The Arbitrators shall give their award in writing and the same shall be final and binding on the parties."

13. The learned senior counsel for the Defendant has placed reliance on this arbitration clause and further stated that since the Defendant had entered into an agreement, which has a clause to refer the disputes for arbitration and since the Plaintiff is only a representative of all the agreement holders, who entered into such an agreement, the Plaintiff is also bound by the arbitration clause. It was also pointed out that it would be highly impractical for the Defendant to refer each one of the individual flat owners numbering 1235 for 1235 separate arbitration proceedings. Since the Plaintiff is effectively representing each one of the individual members, it has been urged that the Plaintiff is also bound by the arbitration agreement entered into by each one of the individual members.

14. On the other hand, the learned counsel for the

Plaintiff has stated that the Plaintiff is a separate legal entity and cannot be bound by any of the agreement entered into by its Members. There is no privity of contract between the Plaintiff and the Defendant and there being no agreement of any nature between the Plaintiff and the Defendant, the issues raised in the suit cannot be referred to arbitration.

15. Reliance was placed by the learned senior counsel for the Defendant on **2016 SCC Online Mad 28001 (Bollineni Hillside Residential Township Owners' Association Vs. BSCPL Infrastructure Limited)** . It was a petition filed under Section 11(4)(A) and 11(6) of the Arbitration and Conciliation Act. The Petitioner therein was the Owners Association. The Respondent was the Builder. In the said application, it was contended that the Respondent had put up the apartments and that the members of the Petitioner Association had purchased Villas/apartments from the Respondent. There was also an undertaking by the Respondent to provide common services and there was a failure to provide such services. Since there was an agreement to refer the disputes to arbitration by the individual members of the Association, the Association sought a direction to refer the disputes and to litigate on behalf of the individual members in

arbitration. Even in that case, a similar arbitration clause was available in the individual agreements. That application was considered by the then Honourable Chief Justice, and it was held that the Petitioner Association had a right to represent the individual flat owners and seek arbitration.

16. In the present case, seeking inspiration from the said judgement, the Defendant has filed the present application as against the Association and sought to refer the dispute to arbitration. The very same ratio which was applied by this Court in the earlier case was sought to be now enforced by the Defendant herein.

17. Section 17 of the Tamil Nadu Apartment Ownership Act is as follows:-

"17. Action by Society or Association of Apartment comes 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."

18. Section 8 of the Arbitration and Conciliation Act is as follows:-

"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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(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.

(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."

19. It was urged that reference can be made to arbitration not only as against the agreement holder, but also against any other person claiming through or under such agreement holder. In the present case, it is seen that the Association claims its right only through the individual members. The Association is only a body of individual flat owners. A situation could arise where an individual flat owner may walk away from the Association. It is a creation by the members. It is a representative entity. The flat owners/allottees/ residents, who had entered into an agreement with the developer, are bound by the individual agreement and if they have a particular grievance, instead of one of them approaching a particular authority to seek redressal of their grievance, for the

sake of such convenience, an Association had been formed. It would be highly inappropriate if the Association disowns such agreement. If the Association disowns the agreement entered into by the flat owners with the Defendant, then the Association cannot claim any of the amounts which they claim in the plaint because these claims arise on the basis of the individual agreements entered into by the flat owners. The genesis of the claim is the individual agreements entered into by the flat owners.

20. For instance, the Plaintiff has claimed a sum of Rs.1,68,09,630/- as advance maintenance deposit of Rs.10/- per sq.ft. on 16,80,963 sq.ft.. This amount has been collected by the Defendant from each one of the flat owners. If the Plaintiff seeks recovery of this amount, the Plaintiff should seek recovery of such amount from each one of the individual owners rather than the Defendant, only after the individual members had in turn collected it from the Defendant. Right to claim such amount arose from the agreements which each one of the individual owners entered into with the Defendant.

21. The Plaintiff also claims a sum of Rs.3,08,75,000/- for piped gas supply at the rate of Rs.25,000/- per flat for 1235 flats. This amount against had been collected by the Defendant on the basis of

individual agreements entered into by the Defendant with each one of the flat owners. The right of the Plaintiff has arisen only from the individual agreements. The Plaintiff does not have any exclusive or independent right than the individual flat owners. If the contention of the Plaintiff that they are not bound by the individual agreements, then questions can be raised over the very locus of the Plaintiff to institute the suit.

22. The learned counsel for the Plaintiff has relied on **2018 SCC OnLine Del 6446 (The Uniworld Garden Apartment Owners Association Vs. Unitech Realty Private Limited)**, wherein the Delhi High Court, had also upheld the right of the flat owners Association to institute a suit and had declined to refer the disputes under Section 8 of the Arbitration and Conciliation Act. It was stated that a party, who had not entered into an arbitration agreement, cannot be subjected to arbitration. It was further held that since the Association is an independent legal entity and not a party to the agreement to sell entered into between by the Members and the Defendant, it was not amenable to arbitration. That was a case where an agreement to sell was under consideration. It was not a concluded contract. It was a contract to perform a particular act, namely, conveyance of property.

23. In the present case, sale deeds have been executed and registered. There had been execution of the agreement after registration of the sale deeds. Thereafter, if a cause of action is made on the basis of individual agreements, then naturally the disputes will have to be resolved as agreed and when there is a clause for arbitration, the parties will have to be referred to arbitration. To that extent, I would follow the ratio laid down in **2016 SCC Online Mad 28001 (Bollineni Hillside Residential Township Owners' Association Vs. BSCPL Infrastructure Limited)** and refer the parties to arbitration. For the reasons stated above, this application is to be allowed.

24. In the result, this application is allowed, as prayed for. No costs.

Sd/-C.V.K.J

26.06.2018

//Certified to be a true copy//

Dated this the day of 2018

jj 18/07/18

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.