

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.168 OF 2016

ORDER:

This is an Application under sub-sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act, 1996; hereinafter referred to as 'the Act'.

2. Heard learned counsel for the applicants and learned counsel for the respondents.

3. The six applicants have pleaded and placed on record the Development Agreements-cum-General Power of Attorney documents executed by each of them and the first respondent, which is a Company represented by the second respondent, its Managing Director. The pleadings of the applicants delineate different disputes existing between them and respondents 4 to 7 relatable to Development Agreement-cum-General Power of Attorney documents entered into between different applicants on one hand and the respondents 1 and 2 on the other. The existence of arbitration clause is evidenced by those documents.

4. In opposition to this Application, the respondents 1 and 2 have filed a counter affidavit. The respondents 4 and 5 have filed a separate counter affidavit. The respondents 6 and 7 have filed yet another counter affidavit.

5. The pleadings of the respondents do not stand to contest the existence of the transactions between the applicants and the first respondent, which company in turn has pleaded to have authorized the respondents 4 and 5; and 6 and 7 directly or through some among them, to carry out the activities in relation to the Development

Agreement entered into by the applicants, who are the owners of the land and the first respondent, which is a Projects and Infrastructure Development Company, going by the pleadings. The existence of disputes at least at the instance of the applicants is demonstrated on the basis of the pleadings and materials.

6. One of the defences set up by some other respondents is that the arbitration agreement is such that it provides for pre arbitral modality of amicable resolution and therefore, without recourse to such provision, the Application for appointment of an Arbitrator is premature. Similarly worded arbitration clause reads as under.

“3. Arbitration Clause:-

In the event of any dispute arising between the parties the same shall be resolved amicably. If the parties fail to resolve the dispute amicably, the matter should be referred to arbitration and the provisions of Arbitration and Conciliation Act, 1996 shall apply to the arbitration proceedings.”

7. The respondents have relied on the proceedings between the parties under Section 9 of the Act. Apart from pleading that there were certain *interlocutory* orders or final orders in those proceedings, nothing is shown in law to hold that those orders would in any manner dwindle the efficacy of the arbitration clause as between the parties. This is all the more so because the scope of authority of a Court under Section 9 of the Act is only to apply for such interim measures as are provided for that provision of law. Such power is fundamentally akin to that emanating out of Section 94 of the Code of Civil Procedure, 1908. This principle is inbuilt in the last part of sub-section (1) of Section 9 of the Act. The mere institution of any proceedings or any order by way of interim measure under Section 9

of the Act cannot, therefore, be treated as decisive to exclude the arbitral proceedings in terms of the arbitration agreement.

8. It is evident from the materials on record that at least some other respondents have pleaded that there is a novation of the transaction and therefore, the arbitration agreement itself fails. It is also the plea that the transactions between the applicants on one hand and the first respondent on the other do not bring home any liability on the other respondents. Notwithstanding the plea of novation of contract having been taken, the question whether there is novation of contract, which would be the substance of the arbitration agreement, is itself an issue relating to the enforceability of the agreement or agreements as between the parties. That itself is an issue, which is an arbitrable one. Since arbitrability of issues relating to the novation and therefore, non-availability of the contract for enforcement, is itself a question, which would be arbitrable. The effect of novation, rescission and alteration of contract are matters, which would fall within the scope of an arbitration since in such situations, the question would be whether the original contract needs to be performed or not, as is discernible from Section 62 of the Indian Contract Act, 1872.

9. The sum and substance of the pleading on either side would show that the first respondent, represented by the second respondent as its Managing Director, had entered into Development Agreement-cum-General Power of Attorney transactions with each of the applicant and the first respondent thereafter, to carry forward different activities in furtherance of that Development Agreement-cum-General Power of Attorney through those among the

respondents. Obviously, therefore, any claim of the applicants in relation to the transactions, which stemmed out of the Development Agreement-cum-General Power of Attorney transactions entered into between each of them and the first respondent, could be subjected to arbitration in terms of the arbitration clause relied on by the applicants.

10. Obviously, all questions relating to arbitrability of any issue raised as well as the eligibility of any of the applicants for any relief in the course of and as a result of the arbitral proceedings, is a matter within the domain of arbitration. Similarly, the eligibility of any other respondents to contest the enforceability of the transactions on a plea referable to novation or other elements, which would result in discharge of the contract are also matters which would fall for determination as disputes between the parties. Therefore, any such dispute will also be arbitrable on the basis of the arbitral agreements between the parties.

11. In the aforesaid view of the matter, it cannot but be held that the Application under Section 11(5) and (6) of the Act succeeds particularly when the appointment of Arbitrator by the applicants has not been accepted by the respondents. Hence, this Application is eligible to be allowed by appointing an Arbitrator taking a requisite measure accordingly.

12. In the result, this Arbitration Application is allowed appointing an Arbitrator.

13. Accordingly, Sri Justice Nisar Ahmad Kakru, former Chief Justice of this Court, is appointed as Arbitrator to arbitrate on the

disputes between the applicants and the respondents, including the claims and counter claims of both sides. The said Arbitrator shall enter on reference and proceed with, as enjoined by the Arbitration and Conciliation Act, 1996. No order as to costs.

02.11.2018
pln

THOTTATHIL B. RADHAKRISHNAN, CJ

