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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO.105 OF 2018

M/s.Choice	..Petitioner
Vs.	
M/s.Gagan Ace Developers & Ors.	..Respondents

Mr.Vivek Patil with Mr.Amit Singh i/b. M/s.Abhay Nevagi & Associates
for Petitioner.

CORAM : G.S. KULKARNI, J.

DATE : 3rd JULY, 2019

P.C.:

Heard learned Counsel for the petitioner. None appears for the respondents.

2. Record indicates that on 14 December 2018 respondent No.5 was represented.

3. On 7 December 2018 the Court (S.J. Kathawalla, J.) has recorded that the respondents were not present despite service and accordingly the Court had passed the following order:-

“1. The Respondents are not present despite service. In view thereof, the Respondents are directed to remain present before this Court on 14th December, 2018 at 11.00 a.m. failing which the Court shall proceed to pass necessary orders to ensure their presence before the Court.

2. A copy of this Order shall be forthwith served on the Respondents by hand delivery by the Advocate for the Petitioner. In the event of any of the Respondents refusing to accept service, the Inspector incharge of the local police station shall render all assistance to the Advocate for the Petitioner in serving a copy of this Order on the Respondents

and to obtain their acknowledgements.

3. Stand over to 14th December, 2018.”

4. Thereafter the petition was listed on 14 December 2018 when this Court (S.J. Kathawalla, J.) passed a further order:-

“ The Order dated 7th December, 2018 is yet to be complied with by the Advocate for the Petitioner. He shall comply with the same before the adjourned date by serving a copy of the order dated 7th December, 2018 as well as a copy of this order on the Respondents by hand-delivery except Respondent No.5 who is represented by his advocate. In the event, if Respondent Nos.1 to 4 refusing to accept service, the Inspector In-charge of the local Police Station shall render all assistance to the Petitioner and/or their Advocates and/or their representatives in serving a copy of this order on the Respondent Nos.1 to 4 and obtaining their acknowledgements. Stand over to 20th December, 2018”

5. It is on the above backdrop, the petition is listed today. There are four affidavits of service on behalf of the petitioner namely affidavit of Mr.Madhukar Shinde dated 21 March 2018, affidavit of Mr.Satish L. Patil dated 24 November 2018, affidavit of Mr.Madhukar Baburao Shinde dated 11 December 2018 and affidavit of Mr.Madhukar Baburao Shinde dated 18 December 2018. Perusal of the said affidavits clearly indicates that the respondents are served with the proceedings. It appears that the respondents are not interested to appear in the proceedings. Accordingly, the petition is taken up for hearing.

6. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the petitioner has prayed that an arbitral tribunal be appointed to adjudicate the disputes which are arisen between the petitioner and the respondents under the Agreement for Sale cum Transfer of Development Rights and Transfer of Right to use TDR dated 17 November 2015. A copy of the agreement is placed on record (Exhibit I, page 76 of the paperback). The dispute

between the parties is stated to have arisen in respect of the development of the land in question which is described in the schedule-1 and schedule-2 of the agreement in question (Final Plot No.153 of Sangamwadi Town Planning Scheme, old survey No.203, 104A and 104B corresponding CTS No.38, 38/1, 38/2, 39 and 40 within the limits of Pune Municipal Corporation, District – Pune. There is also a dispute in regard to the utilization of the TDR as agreed in the agreement.

7. The case of the petitioner is that the respondents are in breach of the obligations and in fact, having undertaken construction on the premises of sub plot Nos.5 and 6 which was contrary to the terms and conditions of the agreement and utilization of the TDR thereof. It is the case of the petitioner that there is also a breach of the orders passed by the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976. Accordingly, the petitioner by its Advocate's notice dated 15 May 2018 (Exhibit-K, page 192 of the paperbook) inter-alia made the grievance as set out in paragraphs 14 and 15 which read thus:-

“14. Our Client states that it was agreed in the Agreement dated 17/11/2018 that besides construction on Sub Plot No.5 Nos.1 to 3 of you also agreed to honor commitment of Government of Maharashtra to give 8 residential units under ULC. Our Client was informed that the said ULC flats would be constructed on the 7th and 8th floor. It now appears to our Client that your intention is not to handover the flats in compliance with the ULC Order. You had made our Client to believe that you will construct residential unit on the 7th and 8th floor. However, from perusal of the plans of the 7th and 8th floor it can be seen that your intention is otherwise. It appears that you have violated all building rules and regulations for construction of residential units. Our Client states that all building rules and regulations of residential units in respect of light, ventilation and basic rules of planning are violated. The construction on 7th and 8th floor is not as per specifications provided under the ULC. Perusal of the plan show that you intend to construct toilets over habitable area, there is no provision for connecting toilets to the drainage. Therefore, in case of violation of ULC Orders,

our Client may be held responsible for malicious acts on your part. It appears that your intention is not to honor obligation under ULC but to appropriate the flats for your purpose. Therefore, it appears that Nos.4 to 9 of you are keeping quiet and supporting the malicious acts of Nos.1 to 3 of you. Our Client has instructed us to inform you and which we do by this notice that the said acts on your part amounts to various offences under the IPC, you will be solely responsible for its consequences.

15. Nos. 1 to 3 of you have also entered into mortgage and have raised huge financial liability by mortgaging the constructions and unutilized FSI of 9150 Sq. Ft. (which was kept for compliance of the order under ULC) and raised Rs. 100 Crore in contravention of the terms of the Agreement. In the said Mortgage Deed, you have shown the portion of 7th and 8th floor which were to be utilized for ULC Order compliance to be commercial one by suppressing the material facts. This also supports apprehension of our Client that your intention is not to honor obligations under ULC but to use the place for commercial purpose. The Act of yours in constructing 7th and 8th floor as commercial shows that your intention is not to honour statutory & contractual obligations and commit fraud on the Government as well as on our Client. You are under obligation to give flats to the Government & you have built commercial premises. Therefore, your intention to commit offence is apparent from the beginning.”

8. It appears from paragraph 17 of the said letter that the petitioner called upon the respondents and informed the respondents that disputes have arisen between the parties and in facts and circumstances, the same are required to be settled in accordance with the terms contained in clause 18 of the agreement being the arbitration agreement. The petitioner invoking the arbitration agreement as expressly stated in paragraph 18 called upon the respondents to refer the disputes for adjudication by a sole arbitrator. The letter of the petitioner's Advocate was responded by the Advocate for the respondent No.1 by letter dated 29 May 2018. The said letter is of simplicitor denial of the contentions and in fact by the said reply, the Advocate for respondent No.1 has

stated that he would require time to collect information and forward a detailed reply to the notice of the petitioner's Advocate and that such a reply will be forwarded within 30 days. Thereafter no reply was forwarded. On this background, the petitioner is before the Court.

9. At the outset, it needs to be noted that the jurisdiction of this Court is limited to examine as to whether there is an arbitration agreement between the parties. The documents placed on record contain the arbitration agreement. As also there is an invocation of the arbitration agreement by the petitioner setting out the nature of disputes which have arisen between the parties. Clause 18 of the agreement in question being the arbitration clause reads thus:-

“18. In case of any disputes and differences arising out of this Agreement in any way relating hereto or any term, condition or provision herein mentioned or the construction or interpretation thereof or otherwise in relation hereto, shall be referred to a common arbitrator if mutually agreed, failing which one arbitrator shall be appointed by Owners/ and the Erstwhile Developer / Stakeholder/and the Consenting Party (collectively), the second arbitrator shall be appointed by the Purchasers / Developers hereto and the arbitrators appointed by the parties shall appoint a third arbitrator. The arbitration proceedings shall be in English and the venue of the same shall be at Pune. The decision/award of the arbitrators shall be final and conclusive and binding on the parties. The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996.”

10. As noted above, there is proper invocation of the arbitration agreement by the petitioner's Advocate's letter dated 15 May 2018 which has not been responded, much less in agreeing for appointment of a sole arbitrator by the respondents. In fact, the letter of the Advocate for respondent No.1 would indicate that the arbitration agreement is not categorically disputed.

11. In the above circumstances, considering the nature of arbitration agreement, as the respondents having not agreeing for arbitration of a sole arbitrator and having failed to nominate an arbitrator on their part, the petitioner would be required to be permitted to nominate an arbitrator and as regards the nomination of the arbitrator on behalf of respondents, the Court would require to nominate arbitrator under the provisions of Section 11 sub-section (4) and sub-section (6) of the Act. The respondents having not appeared and not chosen to appear despite notice, all averments as made in the petition are required to be treated as uncontroverted. The petition is accordingly required to be allowed. Hence the following order:-

ORDER

- (i) Mr.Pradeep V. Bavkar (Retd. Principal District & Sessions Judge) is proposed to be appointed as a nominee Arbitrator on behalf of the petitioner;
- (ii) The Court appoints Mr.Anurag Jain, Advocate of this Court, having address at Varun Capital, Office No. 501, CTS No.364+365/13, Next to Hotel Sudama, Oppo. Jangli Maharaj Temple, Shivajinagar, Pune – 411 005, contact No.9833759856 and email ID: ajassociateslaw@gmail.com, as a nominee arbitrator on behalf of the respondents.
- (iii) The prospective arbitrators appointed by the Court shall appoint the Presiding Arbitrator in accordance with the provisions of the Act;
- (iv) The prospective arbitrators before entering a reference, shall make a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, and forward the same to the Registrar (Judicial-I) of this Court, to be placed on record of this petition with a copy to be forwarded to both the parties;
- (v) At the first instance, the parties shall appear before the

prospective arbitrator within 3 weeks from today on a date which may be mutually fixed by the prospective sole arbitrator;

(vi) All contentions of the parties are expressly kept open to be urged before the arbitral tribunal;

(vii) The fees payable to the arbitral tribunal shall be in accordance with the Bombay High Court (Fee Payable to the Arbitrators) Rules, 2018;

(viii) The petition is disposed of in the above terms. No costs.

[G.S. KULKARNI, J.]