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

ARBITRATION APPLICATION NO.217 OF 2019

Haji Baugh Co-operative Housing Society Ltd. & Ors.	..Applicants
Vs.	
Bhavya Infrastructures India Pvt. Ltd.	..Respondent

**WITH
ARBITRATION PETITION NO.763 OF 2019**

Haji Baugh Co-operative Housing Society Ltd. & Ors.	..Petitioners
Vs.	
Bhavya Infrastructures India Pvt. Ltd.	..Respondent

Mr.Ajit Tamhane with Ashish Ghadge i/b. M/s.Tamhane & Co. for Applicants/Petitioners.
 Mr.Animesh Singh i/b. Ms.Urvashi Nayak for Respondent No.1.
 Ms.Nikita Pawar with Ms.Jalpa Pithodia i/b. M/s.S.I. Joshi & Co. for Respondent No.4.
 Ms.Neha Mehta i/b. Neha Mehta & Co. for Respondent No.5.
 Mr.Anil Singh, Senior Advocate with Mr.Arsh Misra i/b. M.V. Kini & Co. for Respondent No.6(AAI).

CORAM : G.S. KULKARNI, J.

DATE : 6th AUGUST, 2019

P.C.:

Heard learned Counsel for the petitioners and learned Counsel for the respondent.

2. These are two proceedings. Arbitration Application No.217 of 2019 is filed under Section 11 of the Arbitration and Conciliation Act,

1996 (for short, “the Act”) whereby the applicants have prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences which are stated to have arisen between the parties under the Development Agreement dated 5 September 2006 (Exhibit “C”, page 32). Arbitration Petition No.763 of 2019 is filed under Section 9 of the Act whereby the petitioners have prayed for interim measures.

3. Clause 35 is the arbitration agreement between the parties. There is no dispute in regard to the existence of arbitration agreement which is contained in clause 35 of the development agreement.

4. As regards section 11 application of the applicants, the case of the applicants/petitioners is that the applicants have invoked the arbitration agreement by notice dated 27 September 2018 (Exhibit-K, page 664) nominating an arbitrator to adjudicate the disputes. As there was no response the petitioners have approached this Court by filing Section 11 application.

5. A reply affidavit has been filed on behalf of respondent No.1 raising contentions on the merits of the disputes under the development agreement entered between the parties. It is contended that respondent No.1 is still interested in completing the project. There are further affidavits filed by respondent No.1. Considering the tenor of the

affidavits, it can certainly be observed that this Court is not concerned with the adjudication of these disputes between the parties under Section 11 of the Act. The Court is required to merely consider whether arbitration agreement exists between the parties. If it so exists, the Court can certainly appoint an arbitrator to adjudicate the disputes between the parties. There is no dispute on the arbitration agreement between the parties which is contained in clause 35 of the development agreement, as noted above. There is also appropriate invocation of the arbitration agreement. In the circumstances, the arbitration application under Section 11 of the Act is required to be allowed.

6. In regard to the Section 9 Petition, the parties were heard by this Court initially on 1 November 2018 and thereafter on 2 November 2018 when this Court (S.J. Kathawalla, J.) passed the following order:-

1. The learned Advocate appearing for the Petitioners has tendered the Draft Amendment. He seeks to amend the Petition in terms of the Draft Amendment. The Draft Amendment is taken on record and marked 'X' for identification. The learned Advocate appearing for the Petitioners is allowed to amend the Petition in terms of Draft Amendment marked 'X'. Amendments to be carried out within a period of two weeks from today.
2. Parties shall maintain status quo in respect of the Suit project.
3. This Order will not preclude Respondent No. 1 from applying to and obtaining permissions from the statutory authorities without claiming any equities. However, Respondent No. 1 shall not sell any unsold flats nor shall recover any dues from the flat purchasers, who have to make balance payments to Respondent No. 1.
4. The Directors of Respondent No. 1 undertakes to file an Affidavit disclosing the assets (movable and immovable /

encumbered and unencumbered) of Respondent no.1 and also their personal assets and bank accounts on or before 12th November, 2018.

5. This Order shall not preclude CFM Asset Reconstruction Private Limited from taking appropriate proceedings as advised, which upon being taken out shall be decided on its own merits.

6. Stand over to 29th November, 2018.”

7. The said order continues to operate till date. Subsequent to this order, the petition was taken up for hearing on 13 February 2019 as an issue arose for discussion in regard to the NOC granted by Airport Authority of India. The petitioners were permitted to amend the petition and implead the Airport Authority of India as a party. In pursuance thereto Airport Authority had appeared before the Court on 20 February 2019. The Airport Authority of India was directed to file affidavit to place on record status of respondent No.1's application in regard to the re-verification of NOC which was stated as pending with the Airport Authority of India. On 27 February 2019 this Court after hearing the parties passed the following detailed order:-

“ Learned Counsel for the respondent No.6 states that his client intends to file a reply affidavit. Let the reply affidavit be filed in the office during the course of the day and copies be served on all the other parties.

2. Learned Counsel for the respondent No.6 would also submit that NOC for height clearance as issued to the project in question of respondent No.1 has already expired and thus, respondent No.1 will now have to make a fresh application for NOC to be granted by the Airports Authority. He states that if a fresh application is made by respondent No.1, then the same can be decided by the Airports Authority within 4 to 6 weeks.

3. Learned Counsel for respondent No.1 submits that his client would intend to submit a fresh application to the Airports Authority within one week from today. If that be so, then let the Airports Authority decide the same within a period of 4 to 6 weeks and the decision be placed on record of this application.

4. As the NOC to be issued by the Airports Authority is the principal concern of the petitioners as also the respondent No.1 who is undertaking development depending on what the Airports Authority would decide the fresh application which may be filed by the respondent No.1, let the hearing of this petition be adjourned for eight weeks.

5. All contentions of the parties on merits of the matter are expressly kept open.

6. Learned Counsel for respondent No.1 on instructions submits that if the NOC is not granted by the Airports Authority beyond 39 meters, then the only recourse which is available to respondent No.1 is to have a discussion with the petitioner-society to amend the plan and explore the possibility of a development by undertaking construction at another location on the same project site and by utilizing FSI. At this stage the petitioners do not intend to comment on this contention as urged on behalf of respondent No.1 and rightly so.

7. Needless to observe that learned Counsel for the petitioners is at pains to point out that the construction as undertaken by respondent No.1 has come up upto 7 floors and 9 slabs and it is grossly incomplete and no progress whatsoever is being made, despite lapse of such substantial period of time. It is submitted that it is completely respondent No.1's fault and lapse that they could not complete the construction as per the first NOC, and for this reason the members of the petitioners are suffering.

8. Learned Counsel for the respondent No.1 has also stated that in regard to the arrears of rent from August 2018 of these accounts of respondent No.1 are already furnished to the petitioners and at present, there is no ready finance available. If this be the position, the parties would be required to be heard on this issue independently on the adjourned date of hearing.

9. Stand over to 24 April 2019.”

8. It needs to be noted that respondent No.1 at another point of time informed the Court that what was being pursued by respondent No.1 with the Airport Authority of India was not the renewal of the application, but an application whereby respondent No.1 intended to restore a permission for a larger height namely 51.20 sq. mtrs. and respondent No.1 in fact already possessed a revised permission granted by the Airport Authority of India on 21 June 2016 for a height of 36.49 sq. mtrs. This was never informed to the Court and the impression which was created by respondent No.1 was that respondent No.1 does not have any NOC from the Airport Authority of India and therefore, the respondent No.1 was unable to proceed with the construction under the development agreement. The Court was misled to believe that it was only an issue of renewal of application which was pending before the Airport Authority of India and it is on this premise, the Court had passed the orders. However, now the Airport Authority of India has clarified the position that respondent No.1 has valid permission to undertake construction upto 36.49 sq. mtrs. which is valid upto 20 June 2021. The Court had accordingly passed the order dated 25 June 2019 taking this position on record.

9. In the above premise, it is quite clear that the conduct of respondent No.1 even before this Court was not forthright. It clearly appears that there was an attempt on the part of respondent No.1 to mislead the Court when it was informed that the NOC of the Airports Authority had in fact expired.

10. Be that as it may, what needs to be noted is that when an ad-interim protection was already granted to the petitioners by an order dated 2 November 2018 passed by the Court on this petition, the proceedings of Section 9 cannot be converted into any mini arbitration. Even otherwise the provisions of sub-section (2) of Section 9 are required to be considered as relevant in such context namely that before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

11. This Court has already observed in this order that the arbitral tribunal would be required to be appointed. In the above circumstances, there is no useful purpose to keep the Section 9 petition pending and the petitioner can be permitted to pray for all appropriate reliefs in Section

17 application which can be moved before the arbitral tribunal.

12. In view of the above discussion, both the proceedings are required to be disposed of by the following order:-

ORDER

- (i) Smt. Justice Vasanti A. Naik (Retd.) is appointed as a prospective sole Arbitrator to arbitrate the disputes and differences between the parties under the development agreement dated 5 September 2006;
- (ii) The learned prospective sole arbitrator, before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;
- (iii) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;
- (iv) Arbitration Petition No.763 of 2019 filed under Section 9 of the Act is permitted to be converted into an application under Section 17 of the Act to be adjudicated by the arbitral tribunal, with such amended prayers as the petitioners think so necessary;

- (v) The pleadings of Section 9 petition are permitted to be treated as Section 17 proceedings before the arbitral tribunal. The parties are at liberty to file further affidavits;
- (vi) The petitioners are at liberty to file further application under Section 17 if so necessary;
- (vii) The arbitral tribunal shall decide Section 17 application as expeditiously as possible and in any event within 6 weeks from the date of presentation of the said application;
- (viii) All contentions of the parties are expressly kept open;
- (ix) The fees payable to the arbitral tribunal shall be in accordance with the Bombay High Court (Fee Payable to the Arbitrators) Rules, 2018;
- (x) The ad-interim orders passed by this Court shall continue to operate till Section 17 application is decided by the arbitral tribunal;
- (xi) Both the proceedings are disposed of in the above terms.

13. The Court, however in passing the above order cannot be oblivious of the conduct of respondent No.1 in the present proceedings and the substantial time taken by respondent No.1 for adjudication of non-issues, for which the Airport Authority of India was required to be impleaded as a party and now is represented by learned Additional Solicitor General. In the circumstances, respondent No.1 is required to

be saddled with costs. Respondent No.1 is accordingly directed to pay to the Airport Authority of India costs of Rs.50,000/- (Rupees Fifty Thousand only) within four weeks from today. Payment of costs is a condition precedent. If costs are not paid, the Court would be required to pass such further appropriate orders as permissible in law on any application as may be made by the Airports Authority;

(xiii) Office to forward a copy of this order to the learned Arbitrator on the following address:

“3rd Floor, Varma Chambers, Horniman Circle, 11,
Hanji Street, Fort, Mumbai – 400 001.
Contact No.9822472080
E-mail: vasantinaik@gmail.com”

[G.S. KULKARNI, J.]