

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION APPLICATION NO.220 OF 2019**

Atithi Builders and Constructors Pvt. Ltd. ... Applicant
versus
Xanadu Realty Pvt. Ltd. ... Respondent

Mr. Viraj Gami with Ms. Ketaki Deshpande i/by DSK Legal, for Applicant.

Mr. Ashish Kamat with Ms. Pooja Kothari, Ms. Aakanksha Saxena i/by Rashmikanth and Partners, for Respondent.

**CORAM: S.J. KATHAWALLA, J.
DATE: 11st SEPTEMBER, 2019**

P.C.:

1. The Applicant has filed the above Arbitration Application against the Respondent under Section 11 of the Arbitration and Conciliation Act, 1996, as amended by Arbitration and Conciliation (Amendment) Act, 2015 (the Act) for appointment of a sole arbitrator to resolve the disputes that have arisen between the parties under the "Services Agreement dated 21st February, 2017".

2. Clause 9.9 of the Services Agreement dated 21st February, 2017 pertains to disputes resolution/arbitration and is reproduced hereunder :

"9.9 Dispute Resolution

(a) It is expressly agreed by the Parties that any and all disputes or differences between the Parties arising

out of or in connection with this Agreement or its performance shall, so far as it is possible, be settled amicably by negotiations between the Parties through consultation. If the dispute is still not settled through consultation within 30 (thirty) days of the date of such meeting between the nominees of the Parties, then the dispute or claim shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1999.

(b) Any dispute or difference submitted to arbitration shall be considered by a sole arbitrator and the place of such arbitration shall be Mumbai. The language of arbitration shall be English. This Agreement and the rights and obligations of the Parties contained in this Agreement shall remain in full force and effect pending issuance of the award in such arbitration proceedings.

(c) Each Party shall bear and pay its own costs and expenses in connection with the arbitration proceedings unless the arbitrators direct otherwise.

(d) The Parties agree that their consent for resolution of the dispute through arbitration shall not preclude or restrain either of them from seeking suitable injunctive relief in appropriate circumstances.”

3. Since disputes arose between the parties, the Applicant under the hope of resolving the matter amicably addressed letters

dated 5th February, 2018, 8th September, 2018 and 21st September, 2018 to the Respondent requesting them to fix the schedule of meeting for amicable settlement of disputes. Though the Applicant and Respondent had several meetings, they failed to resolve their disputes. The Applicant by their letter dated 23rd October, 2018 addressed to the Respondent invoked the arbitration clause. In response thereto, the Respondent by their Advocate's letter dated 13th November, 2018 denied the existence of any disputes between the parties which could be referred to arbitration. The Applicant was therefore, constrained to file the above Arbitration Application seeking appointment of a sole arbitrator in the matter.

4. The learned Advocate for the Respondent has referred to the Affidavit in Reply of the Respondent and has submitted that the present Application is not bonafide and the same is nothing but a belated attempt of the Applicant to undermine the Respondent's Company Petition No.3992 of 2018 seeking initiation of the Corporate Insolvency Resolution Process (CIRP) which is filed before the National Company Law Tribunal (NCLT) under Section 9 of the Insolvency and Bankruptcy Code of 2017 (the IBC) in respect of a default amount in the sum of Rs.4,12,51,224/- plus taxes and interest thereon payable by the Applicant to the Respondent

pursuant to the Agreement.

5. Admittedly, the Company Petition No.3992 of 2018 filed by the Respondent is not even admitted till date. Mere filing of the Company Petition cannot be raised as a defense to the above Application which is filed under Section 11 of the Act for appointment of the sole arbitrator under the Services Agreement dated 21st February, 2017, wherein the parties have admittedly agreed to refer their disputes to arbitration. It is therefore, clear that despite the agreement, the Respondent-Company has failed to appoint an Arbitrator to resolve the disputes. Hence, the following order :

(i) Mr. Venkatesh Dhond, Senior Advocate, is appointed as the sole Arbitrator to decide the disputes between the parties arising out of the Services Agreement dated 21st February, 2017.

(ii) The learned Arbitrator shall within a period of two weeks from today file his disclosure under Section 11 (8) read with Section 12 (1) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) with the Prothonotary and Senior Master of this Court.

(iii) The venue of Arbitration shall be at Mumbai.

(iv) The parties and/or their Advocates shall appear before

the learned Arbitrator in his chambers, on 23rd September, 2019 at 5.00 p.m. and obtain necessary directions.

(v) All contentions of the parties are kept open.

(vi) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.

(vii) The cost of arbitration shall initially be borne by the parties equally.

(viii) In view of this order, the above Arbitration Application is disposed of.

(S.J.KATHAWALLA, J.)