

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.09.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.711 of 2017
and O.A.Nos.454 and 455 of 2019
and A.Nos.245, 246 of 2017, 645 to 650 of 2018
and 3317 to 3319 of 2019

Mrs.Subha Gopalakrishnan

.. Petitioner

Vs.

M/s.Karismaa Foundations
Private Limited rep. by its
Managing Director Mr.Rakesh
P.Sheth, First South Main Road,
Kapaleeswarar Nagar,
Neelangarai, Chennai-600 041.

.. Respondent

* * *

Prayer : Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying to appoint a Sole Arbitrator to decide the dispute between the petitioner and respondent in accordance with Clause 29 of the Joint Development Agreement dated 15.03.2015.

* * *

For Petitioner : Mr.R.Thiagarajan

For Respondent : Mr.Nithyaesh (for R1 in OA Nos.454
and 455 of 2019)
(Ms.G.Sumitra for R2 in OA Nos.454
and 455 of 2019)

ORDER

The petitioner instituted O.P.No.711 of 2017 seeking to appoint a Sole Arbitrator to decide the dispute between the petitioner and respondent in accordance with Clause 29 of the Joint Development Agreement dated 15.03.2015.

2. The background facts of the case would run infra:

(i) The petitioner is the absolute owner in respect of the property in Plot No.3, Old Door No.3, New No.2, Hanumanthan Street, T.Nagar, situated in R.S.No.102/1 (Part), T.S.No.5096, Block No.118, in T.Nagar Village, Mambalam-Guindy Taluk, Chennai, measuring an extent of 2 grounds 80 sq.ft., having purchased the same under the sale deed dated 14.09.2009. With an intention to develop the above said property, the land owner entered into a Joint Development Agreement dated 15.03.2015 (in short, "JDA") with the respondent, who is a Developer.

(ii) Besides the terms and conditions laid down in the JDA, Clause 29.2 provides for a dispute resolution through a Sole Arbitrator to be appointed by the respondent Developer.

(iii) On 19.03.2015, pursuant to the JDA, a General Power of Attorney was executed by the petitioner in favour of the respondent to obtain necessary permission from the statutory authorities for the development of the property and also to execute the sale deeds with respect to the agreed 1/4th share of the total property. On 22.06.2005, the respondent had entered into an agreement for sale with one R.Sathyam agreeing to convey the built-up area and proportionate UDS earmarked for the respondent under the JDA, i.e., 1/4th share of the total property.

(iv) According to the petitioner, the respondent had not proceeded as per the terms of the JDA and delayed in obtaining even the planning permission from the CMDA. However, even without the obtaining the planning permission, the respondent had commenced the construction by putting up the basement in the subject property, which is in violation of the conditions set out in the JDA. As the respondent had failed to obtain the planning permit, the petitioner revoked the General Power of Attorney executed in favour of the respondent dated 19.03.2015 under the Deed of Revocation on 02.02.2017 nearly after two years from the date of execution of the same. There were exchange of several legal notices between the parties.

(v) In the meanwhile, the respondent herein had filed O.A.Nos.245 and 246 of 2017 against the petitioner seeking for the relief of interim injunctions restraining her from disturbing peaceful possession of the Developer and also restraining them from alienating the property, wherein, an interim order was passed on 16.03.2017 and it was extended until further orders on 06.04.2017.

(vi) While so, the petitioner, who is the land owner, filed a civil suit in O.S.No.1318 of 2017 on the file of the City Civil Court, Chennai, seeking the relief of injunction against the developer. Upon notice, the respondent filed I.A.No.9054 of 2017 invoking Section 8 of the Arbitration and Conciliation Act, 1996 (in short, "A & C Act") seeking to refer the matter to arbitration in terms of the arbitration clause contained in the JDA. The said application was allowed on 18.08.2017 by the XVII Assistant Judge, City Civil Court, Chennai, referring the matter to arbitration.

(vii) In the interregnum, on 18.03.2017, the respondent sent a notice nominating one Mr.Kripanithi, Advocate, as the sole Arbitrator and there was no response from the petitioner within a period of 30 days. Therefore, on 25.04.2017, the respondent appointed one Mr.S.A.Gandhi, Advocate, as the sole Arbitrator and sent the notice to

the petitioner and the Arbitrator, which was accepted by the Arbitrator. However, the said appointment of Mr.S.A.Gandhi as the sole Arbitrator was not agreeable to the petitioner, as the respondent had not kept up any of the promises resulting in losing faith on them.

(viii) In the said backdrop, the present O.P.No.711 of 2017 under Section 11(6) of the A & C Act praying this Court to appoint an Arbitrator was filed by the petitioner on 31.08.2017.

3. This petition is also opposed by the respondent contending that the Arbitrator was already appointed and it is not the case of the petitioner that she was not called upon by the respondent to appoint an Arbitrator and the same was done within a period of 30 days. As pointed out earlier, Clause 29.2 stipulates that the Arbitrator should be appointed by the respondent. Therefore, the respondent contended that when the Arbitrator has already been appointed, the petition filed under Section 11(6) of the A & C Act is not maintainable.

4. At that juncture, this Court referred the matter to mediation to resolve the disputes amicably between the parties.

5. A.No.645 of 2018 was filed by the petitioner seeking to suspend the interim order granted by this Court on 16.03.2017 in A.No.245 of 2017, while A.No.646 of 2018 was filed praying to vacate the said order.

5.1. Similarly, A.No.648 of 2018 was filed by the petitioner seeking to suspend the interim order granted by this Court on 16.03.2017 in A.No.246 of 2017, while A.No.649 of 2018 was filed praying to vacate the said order.

5.2. The prayer made by the petitioner in A.Nos.647 and 650 of 2018 was to direct the respondent to handover the possession of the properties to the petitioner/the applicant therein.

5.3. In O.A.No.454 of 2019, the petitioner sought a mandatory injunction directing the Escrow Agents Mr.Rakesh P.Sheth, the Managing Director of the respondent company and Mr.P.Subash Kumar, Garnishees, to open the Locker, held in Corporation Bank Limited, Adyar Branch, Chennai-600 020, and deliver the original title deeds and documents pertaining to the property.

5.4. She also filed O.A.No.455 of 2019 praying an order of interim injunction restraining the respondent or anyone authorized by them from encumbering or dealing with the property.

5.5. The petitioner instituted A.No.3317 of 2019 seeking for a direction to the respondent to cancel the Agreement of Sale dated 22.06.2015 and registered as document No.1591 of 2015 on the file of the Sub Registrar Office, T.Nagar, entered into between the respondent and Mr.R.Sathyam, by rescinding the contract.

5.6. In A.No.3318 of 2019, the petitioner sought for a direction to the respondent to furnish security to the extent of Rs.2,00,00,000/- (Rupees Two Crores Only) towards damages caused to her as enunciated under clause 13.1. of the JDA, pending preferring a claim before the Arbitral Tribunal.

5.7. The petitioner filed A.No.3319 of 2019 seeking for appointment of an Advocate Commissioner to inspect and note down the physical features of the property and submit a report before this Court along with a detailed plan and photographs to facilitate this court to appreciate the rival contentions of the parties for effective adjudication of the matter.

6. In the meanwhile, the Arbitrator appointed by the respondent Mr.S.A.Gandhi had recused himself from the arbitration vide letter dated 02.06.2019. Hence, on 03.06.2019, Hon'ble Mr.Justice

M.Jaichandren was appointed as the sole Arbitrator to adjudicate the disputes between the parties by virtue of Clause 29.2. of the JDA and the same was duly communicated to the Arbitrator also. The learned Arbitrator also vide communication dated 17.06.2019 intimated both the parties the date of first hearing as 24.06.2019. The petitioner herein, who is the owner of the land, had appeared before the learned Arbitrator on 24.06.2019 and requested further time and accordingly, the matter was adjourned to 03.07.2019, about which time, a doubt was raised by the learned counsel for the petitioner, i.e., with respect of the date of hearing. However, the e-mails exchanged between the parties and the learned Arbitrator make it clear that the date of hearing was fixed only on 03.07.2019. As the matter was being heard by this Court, the learned Arbitrator had adjourned the matter *sine die* subject to the result of this petition.

7. In the above factual matrix, the issue that arises for determination is whether the petition filed under Section 11(6) of the A & C Act is maintainable, when an Arbitrator has already been appointed by the respondent, as required by the JDA.

8. Heard the learned counsels for the parties and perused the materials placed before this Court.

9. The facts are not in dispute. This petition is filed under Section 11(6) of the A & C Act, which reads as follows :

"Section 11. Appointment of arbitrators -

(6) Where, under an appointment procedure agreed upon by the parties,—

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

10. A reading of Section 11(6) of the A & C Act makes it clear that whenever there is a demand from one party to the opposite party to appoint an Arbitrator and the opposite party does not make an appointment within 30 days from the date of receipt of such demand, it may be open to the person to move a petition under Section 11(6) of the A & C Act, whereas, in this case, as agreed in the JDA, the

respondent had already appointed Hon'ble Mr.Justice M.Jaichandren, a retired Judge of this Court, as the sole Arbitrator and both the parties have also appeared before the Arbitral Tribunal on the date fixed and it was adjourned at the request of the petitioner herein.

11. At this juncture, it is to be stated that the Hon'ble Apex Court in **Data Switchgears Limited V. Tata Finance Limited, 2000 (8) SCC 151**, held as follows :

"19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, *so far as Section 11(6) is concerned*, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments

that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

* * * *

23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.

25. Lastly, the appellant alleged that "nomination" mentioned in the arbitration clause gives the 1st respondent a right to suggest the name of the arbitrator to the appellant and the appointment could be done only with the concurrence of the appellant. We do not find any force in the contention."

12. In **Braithwaite and Co. Ltd. v. Central Organisation for Modernisation of Workshops, 2008 SCC OnLine 470**, the Delhi High Court made the following observations :

"7. This petition has been founded on the premise, as noted above, that there is an agreement between the parties that arbitration is to be conducted by a tribunal comprising of three arbitrators. But there is nothing on record to show that such an agreement existed between the parties. In fact, what the parties had agreed was that the proceedings be conducted under the new

Act and, that is it. They did not have any agreement with regard to the change in the constitution of the arbitral tribunal. Since there is no agreement with regard to the constitution of the arbitral tribunal comprising of three arbitrators, the invocation of Section 11(6) of the said Act would be bad. As per the arbitration clause, which still governs the parties, the arbitration is to be conducted by a sole arbitrator. The sole arbitrator is to be appointed by the Chief Executive Officer, MCD. Mr. Arun Bhatnagar had earlier been appointed and, on termination of his mandate, Mr. Narottam Dass has been appointed by the persona designata. Since the arbitrator is already in place, the question of invoking the provisions of Section 11(6) of the said Act does not arise. This petition is not maintainable. It is dismissed."

13. In the judgment of the Allahabad High Court in **Abdul Rashid V. National Building Construction Corporation, New Delhi, 2012 SCC OnLine 730**, it has been held as follows :

"9. In view of the aforesaid appointment, when the Arbitrator has been appointed as per the procedure before the invocation of arbitration clause by the petitioner, there is no occasion justifying the appointment of arbitrator in exercise of power under Section 11 of the Act."

14. The Hon'ble Apex Court in **Antrix Corporation Limited v. Devas Multimedia Private Limited, (2014) 11 SCC 560**, held as follows :

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"28. As will be evident from the aforesaid provisions, when any of the parties to an arbitration agreement fails to act in terms thereof, on the application of the other party, the Chief Justice of the High Courts and the Supreme Court, in different situations, may appoint an arbitrator.

29. * * *

30. In the instant case, the arbitration agreement provides that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL. Rightly or wrongly, Devas made a request for arbitration to the ICC International Court of Arbitration on 29-6-2011, in accordance with the aforesaid agreement and one Mr V.V. Veedar was appointed by Devas as its nominee arbitrator. By the letter written by the International Chamber of Commerce on 5-7-2011, the petitioner was required to appoint its nominee arbitrator, but it chose not to do so and instead made an application under Section 11(6) of the 1996 Act and also indicated that it had appointed Ms Justice Sujata V. Manohar as its arbitrator in terms of Article 20(9) of the agreement.

31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way

of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement.

32. * * *

33. *Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.*

34. *The law is well settled that where an arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an arbitrator is not maintainable. Once the power has been exercised under the arbitration agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In **Som Datt Builders (P) Ltd. v. State of Punjab [AIR 2006 P&H 124]**, the Division Bench of the Punjab and Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the*

disputes between the parties to the arbitration agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction.”

15. A perusal of the above referred to catena of decisions makes it clear that once the Arbitrator is appointed as per the procedure agreed upon and the Arbitral Tribunal so constituted is already seized of the disputes between the parties to the arbitration agreement, constitution of another Arbitral Tribunal in respect of the same issues, which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction.

16. In the light of the above judgments, as the respondent herein had already appointed an Arbitrator before whom, the petitioner also had submitted herself and the proceedings stood adjourned waiting the orders of this Court, the instant petition filed under Section 11(6) of the A & C Act is not maintainable. As the Arbitral Tribunal is in place in terms of the JDA, there is no necessity for this Court to appoint another Arbitrator. Thus, this petition is liable to be dismissed.

17. The other applications are pending and the interim orders are operating against the petitioner herein by virtue of the orders passed in A.Nos.245 and 246 of 2017. Accordingly, there shall be an order of status quo with regard to the properties in question and the same shall be maintained for a period of eight weeks from the date of receipt of a copy of this order and it is open to the parties to move appropriate applications before the learned Arbitrator under Section 17 of the A & C Act, in the meanwhile.

18. In the result, the petition is dismissed as devoid of merits. All these applications are disposed of in terms of the aforesaid order.

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and A.Nos.245 of 2017, etc. batch

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