

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.46 OF 2012

M/s. H.H. Infrastructure Pvt. Ltd.

Through its Authorized Signatory,
Mr. Sunil Varma, Major of age,Petitioner
son of Net Ram Varma, married, (Original
business, c/o. Alfran Plaza, S-70, (Original
Panaji- Goa. Defendant)

V/s.

Mr. Allan James Taylor,

Major age, son of Mr. Albert
Taylor, Married, British National,
Holder of Passport
No.800169406, R/o 37, Halstead
Rd. Liverpool, L98BG, England,
duly represented through His
Attorney holder Mr. Kanta
Mukund Palni, Aged 42 years, Respondent
Son of late Mukund Palni, Married, (Original Plaintiff)
Pvt. Business, r/o H.No.888, (Original Plaintiff)
Naikawaddo, Aldona, Bardez-Goa.

Mr. Sahish Mahambrey, Advocate for the applicant.

None for the respondent.

Coram:- SMT. M.S. JAWALKAR, J.

Reserved on : 16th October,2020

Pronounced on: 22nd October,2020.

JUDGMENT :

The present Civil Revision Application is filed by the Original defendant being aggrieved by the order dated 03/07/2012 passed by the Court of Civil Judge, Junior Division at Pernem in Regular Civil Suit No.121 of 2011.

2. For the sake of convenience, the parties will be described as per their nomenclature in the plaint.

3. By this order the learned Trial Court dismissed the application dated 22/03/2012 (Exh-9) filed by present applicant under Section 8 of Arbitration and Conciliation Act,1996 seeking reference of dispute raised in the suit to the arbitration. The original plaintiff filed a Regular Civil Suit No.121 of 2011 before the CJJD, Pernem praying for perpetual and permanent injunction

restraining the defendant from interfering with the property in respect of which a project by name "Sea Breeze" was proposed to be constructed in village Chopdem, Pernem, Goa and also to maintain status quo till disposal of the suit. It was prayed for directions to the defendants to pay an amount of ₹15,04,949/- along with interest of 25% p.a. From 19/01/2010 till its realisation.

4. The plaintiff had entered into an Unit Buyer's Agreement dated 19/01/2010 to book a flat admeasuring 450 sq.ft. The defendant after service of notice filed an application under Section 8 of Arbitration and Conciliation Act, 1996 for reference of the dispute to the arbitration by invoking clause 42 of the Unit Buyer's Agreement. The learned Trial Court vide its order dated 03/07/2012 dismissed the application as not maintainable.

5. It is the contention of the learned Counsel for the applicant that the impugned order is erroneous, illegal and without application of mind. The learned Trial Court has not considered the case of the defendant properly and gave unwarranted findings. The findings recorded by the learned Trial Court is erroneous in coming to a conclusion that since the plaintiff did not spell out which condition of the said Unit Buyer's Agreement was not fulfilled by the defendant, therefore, it is difficult in ascertaining the dispute whether it falls within the frame work of Clause 42 of the said Agreement. It is further submitted that the plaint and the documents annexed thereto are indicating that the plaintiff is claiming breach/non-fulfillment of the Unit Buyer's Agreement. The whole plaint is based on that Agreement. The learned Counsel therefore prayed to allow the application and to set aside the order passed by the learned Trial Court.

6. It appears that in spite of service of notice the respondent/plaintiff remained absent in the present matter. It appears that while issuing notice on 28/08/2012 the proceedings in Regular Civil Suit No.121 of 2011 were stayed until returnable date. However, the interim order continued subsequently and the same was continued till the service on 27/04/2017. Permission was granted to serve the respondent/plaintiff by paper publication, however, subject to costs of ₹25,000/-. In spite of service by paper publication the plaintiff chose to remain absent.

7. I heard the learned Counsel for the applicant Shri Sahish Mahambrey and perused the copy of the Unit Buyer's Agreement dated 19/01/2010 and copy of the plaint, application and order thereon.

8. Clause 42 of the said Agreement which is also reproduced by the learned Trial Court in his order, reads as under :

" In case any dispute arises about the interpretation of the clauses and conditions of this agreement and about the performance of these present, The developer can change any of the above terms and conditions without giving any prior notice as per company discretion referred to an Arbitration which shall be appointed by the Builders Under the Arbitration Consultation Act, 1996 (new Act)"

9. I have perused the plaint and from the pleadings it appears that the plaintiff entered into Unit Buyer's Agreement dated 19/01/2010 for the flat which was proposed to be constructed by the developer. As per the plaintiff the defendant has totally failed to fulfill the terms and conditions of the said Unit Buyer's Agreement

and violated the very purpose of the same. In spite of repeatedly approaching to the defendant and legal notice, reminders, only on 25/08/2011, the defendant replied and assured that they will settle the entire claim in two months. However, no such promise was fulfilled. The defendant committed fraud and as there is no development, claim for an amount of ₹15,04,959/- along with interest @25% p.a. He also prayed for permanent and perpetual injunction from interfering with the said property and direct to maintain status quo.

10. The learned Trial Court while disposing the application for referring the matter for arbitration held that the plaintiff did not spell out to which of the condition of the said Unit Buyer's Agreement was not fulfilled by the defendant. Therefore, it is difficult in ascertaining whether the dispute i.e. the claim of the plaintiff falls within the frame work of Clause 42 or not.

11. In my considered opinion finding recorded by the learned Trial Court is erroneous. The wording of clause 42 though not drafted meticulously still it covers interpretation of the clauses and the condition of the Agreement as well as about the performance of the said Agreement. As such the suit is on the basis of non-performance of the Agreement and therefore, it would definitely can be referred to the Arbitrator.

12. The learned Trial Court further observed that in the notice dated 14/02/2011 plaintiff has asserted that defendant has not undertaken any work at the site in terms of the said Agreement. There is no construction undertaken and negligently committed fraudulent act. It is pointed out by the applicant that these averments are not at all in the pleadings. In my considered opinion even if it is presumed that it is the contention of the plaintiff which can be gathered from his notice still it

covers under Clause 42 as it related to the performance of the Developer as per the Agreement.

13. Section 8 of the Arbitration and Conciliation Act, 1996 reads as under :

8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court of any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by

the original arbitration agreement or a duly certified copy thereof.

2[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

14. Thus, the application for arbitration can only be rejected on the ground that there is no valid Arbitration Agreement exists, when the plaintiff is relying on the

same Unit Buyer's Agreement in which clause 42 is in respect of arbitration. There was no reason for the trial Court to reject the application for referring the matter to arbitration. In view of Clause 3 of Section 8, even if there are any issues which are not covered by the arbitration clause those can be adjudicated by the Civil Court but the reason for which the application is rejected cannot sustain in the eye of law. The learned lower Court ought to have refer the issue to the Arbitrator in respect of the performance of the said Agreement. Other issues can be dealt with if required by the CJJD.

15. Hence, the order passed by the learned CJJD needs to be set aside. The application dated 22/03/2012 (Exh-9) is required to be allowed. Accordingly, I proceed to pass the following:

O R D E R

1. The application is hereby allowed.

2. The order dated 03/07/2012 passed by the learned CJJD in Regular Civil Suit No.121 of 2011 below application dated 22/03/2012 (Exh-19) is hereby set aside.

3. The defendant is hereby directed to suggest the name of the Arbitrator within a period of one month to the learned CJJD after due notice to the plaintiff. The learned CJJD thereupon to take steps as per the provisions of the Arbitration and Conciliation Act, 1996.

4. Interim order, if any, is hereby stands vacated.

5. There shall be no order as to costs.

SMT. M.S. JAWALKAR, J.