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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION NO. 195 OF 2020**

Rajesh K Shah, Karta and Manager of RK Shah (HUF) & Ors ...Petitioners

Versus

Sabari Developers LLP & Ors ...Respondents

Mr Shailesh Shah, Senior Advocate, with Mr Zubin

Behramkamdin, i/b Kalpesh Nansi, for the Petitioners.

Mr Mayur Khandeparkar, with Ms Deepa Pohuja & Ms Manshi

Vora, i/b J Law Associates, for Respondents Nos. 1 and 2.

Mr Laxman Kanai, for Respondents Nos. 5 to 7.

**CORAM: G.S. PATEL, J
(Through Video Conference)**

DATED: 25th November 2020

PC:-

1. Heard through video conferencing.
2. This order will dispose of the present Section 9 Petition between the Petitioner and Respondents Nos. 1 to 4. It also contains a direction for reference of the disputes to arbitration. The disputes are said to arise under an agreement dated 11th October 2018. This contains the arbitration provision in clause 5. The reference is to be

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to a sole Arbitrator and parties agree that the arbitration will be based in Mumbai.

3. According to Mr Shah, learned Senior Advocate for the Petitioner, the transaction was a simple loan transaction in the principal amount of Rs. 4,31,75,000/-. This was to carry interest at the rate of 1.5% per month. Mr Khandeparkar on behalf of the Respondents contests this. According to him, this MoU was merely a 'comfort or security document'. The real transaction between the parties was for the allotment of Flat No. 1402 at Sabari Horizon in Deonar, Mumbai in the project being developed by the 1st Respondent.

4. Before I proceed further, Mr Khandeparkar points out that there is a question of stamp duty. In response Mr Shah and Mr Behramkamdin for the Petitioner draw my attention to a document annexed to the Additional Affidavit. This shows that the Petitioners submitted the agreement for adjudication. That has been done and an additional stamp duty of about Rs. 10.58 lakhs has been paid on it. Whether this is or is not sufficient stamp duty is not a question that I am called upon to decide at this stage. If Mr Khandeparkar believes that the document is insufficiently stamped he will of course be at liberty to take that plea before the learned sole Arbitrator.

5. Mr Khandeparkar also makes it clear that the Respondents not only have a counter-claim, but in addition intend to urge that the MoU with its arbitration agreement is not the true agreement between the parties at all. This will of course necessarily be a question

of jurisdiction under Section 16 of the Arbitration and Conciliation Act 1996.

6. Mr Shah maintains that while the claim is for a return of money with interest at a specified rate, he is nonetheless entitled to security until the full amount is paid. He is entitled to make a claim in that regard before the learned sole Arbitrator in addition to any monetary claim.

7. For the purposes of the Section 9 Petition, the question is whether the Petitioners have made out a case for security for the whole or any part of its claim, and if so, what form that security should take. Mr Shah has drawn my attention to a letter at page 259 in which the 1st Respondent has stated that it is prepared to cancel the alleged letter of allotment and return an amount of Rs. 4,13,28,000/- but retaining an amount of Rs. 4.47 lakhs as cancellation charges and Rs. 14 lakhs as interest for alleged delay of payment under the allotment letter (said to be dated 15th April 2014). There is, therefore, no dispute that an amount of Rs.4,31,75,000/- was paid by the Petitioners to the contesting Respondents. Whether this was an interest-bearing loan as the Petitioners contend, or was towards purchase of the flat in question is the second question. Consequently, there should be no difficulty in making provision for some level of security at least in this amount of Rs. 4,31,75,000/-; more particularly in view of the statement of the 1st Respondent that it is willing to return it (though for the present I will treat that as being entirely without prejudice and subject to determination of all contentions in arbitration.)

8. Having taken instructions, Mr Khandeparkar states that on a without prejudice basis and leaving open all rights and contentions of the Respondents, the Respondents are prepared to deposit an amount of Rs. 4,31,75,000/-in Court. This amount will be paid in instalments. An amount of Rs. 44 lakhs will be paid by 30th November 2020. An amount of Rs. 75 lakhs will be paid by 31st December 2020. A further amount of Rs. 1 crore will be paid by 31st January 2021 and the balance amount will be paid no later than by 31st March 2021. The statement is accepted as an undertaking to the Court.

9. On deposit of each of these amounts, the Prothonotary and Senior Master will invest the amounts in accordance with the usual practices of his office.

10. I am making it clear that if there is a single default in payment of any one of these instalments, the amount of Rs. 4,31,75,000/- less any amount already deposited will become immediately due and payable by the Respondents to the Petitioners as an enforceable order. Any amount deposited will be allowed to be withdrawn by the Petitioner on an application made to the Prothonotary and Senior Master for that purpose. That withdrawal will include any interest accrued on an investment made by the Prothonotary and Senior Master.

11. On the basis that the amount is deposited on schedule without default, the amount will remain deposited with the Prothonotary and Senior Master pending a decision of the arbitral tribunal. The Petitioner may apply to the arbitral tribunal for leave to withdraw the

whole or part of the amount, whether on terms or unconditionally. Any such application will be decided on its own merits.

12. Similarly, the Respondents will be entitled to apply for a withdrawal of the amount and that application will also be decided on its own merits.

13. Mr Shah states that he may apply before the learned sole Arbitrator for an additional security for the entire amount. He is at liberty to do so subject to leave of the Arbitrator. Any such application will be dealt with on its own merits.

14. Subject to these conditions, parties are agreed that the disputes and differences between the parties in regard to the MoU dated 11th October 2018 (and of necessity, the defence in regard to the letter of allotment dated 15th April 2014) are referred to the sole arbitration of Ms Manjari Shah, learned Advocate of this Court.

15. So far as Respondents Nos. 5 to 7 are concerned, I am told that they have retired from the Respondent No. 1 partnership firm and it has been reconstituted. It is on this basis alone that they are not joined to the arbitration. If it is found that they are indeed continuing partners, the Petitioners will be at liberty to join them to the arbitration proceedings. Mr Khandeparkar makes a statement on instructions that Respondent No. 4 is not a partner of the 1st Respondent firm. It is again on that statement being noted and accepted that Respondent No. 4 is not joined as a party to the

arbitration. Equally, if he is found to be a partner, the necessary amendments will be permitted in arbitration.

16. All contentions between the Petitioner and Respondent No. 8 are left open for appropriate proceedings.

TERMS OF APPOINTMENT

(a) **Appointment of Arbitrator:** Ms Manjari Shah, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under MoU dated 11th October 2018 (and of necessity, the defence in regard to the letter of allotment dated 15th April 2014).

(b) **Communication to Arbitrator of this order:**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Petitioner within one week from the date this order is uploaded.

(ii) The Advocates for the Petitioner will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s Ms Manjari Shah, Advocate

Address Flat No. 19, 5th Floor,
Dhanvantari Bhavan,
143B, August Kranti Marg,
Mumbai 400 036.

Mobile 98211 15928

Email manjaridshah@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward, in hard copy or soft copy (or both), the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to Advocates for the parties as soon as possible. The Advocates for the Petitioners will arrange to file the original statement in the Registry. If the statement is forwarded in soft copy, a print out of the covering email is also to be filed in the registry.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. The information is to include functional email addresses and mobile numbers.
- (f) **Section 16 application:** The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.
- (g) **Interim Application/s:**

- (i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.
 - (ii) The present Petition under Section 9 of the Arbitration Act will be treated, heard, and disposed of as an application under Section 17 of the Act. All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application. Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits.
 - (iii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.
- (h) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

- (j) **Consent to an extension if thought necessary:** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (k) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.
- (l) **Determination of Procedure:** Notwithstanding anything in these directions, it is always open to the learned Sole Arbitrator to determine the procedure governing the arbitration.

17. The Petition is disposed of in these terms. No costs.

18. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)