



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 24.08.2021	Orders pronounced on 12.11.2021
----------------------------------	------------------------------------

Coram

THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN

C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

1. Army Welfare Housing Organisation
South Hutments, Kashmir House
Rajaji Marg
New Delhi – 110 011.

2. Project Director,
Army Welfare Housing Organisation
Raman Vihar, Anna Nagar
Chinnavedam Patti Post
Coimbatore

... Petitioners

Vs

Col. R. Ganesan

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India, against the order dated 18.03.2021 made in S.R.No.08 of 2021 in unnumbered I.A.No.(blank) of 2021 in CCP No.95 of 2020 (impugned order) by the Adjudicating Officer, Tamil Nadu Real Estate Regulatory Authority (TNRERA), Egmore, Chennai (“AO TNRERA”)



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

For Petitioners .. Mr.Thriyambak J. Kannan
For Respondent .. Mr.K.R.Samratt

ORDER

This petition is filed to set aside the impugned order dated 18.03.2021 passed in S.R.No.08 of 2021 in unnumbered I.A.No.(blank) of 2021 in CCP No.95 of 2020 (impugned order) by the Adjudicating Officer, Tamil Nadu Real Estate Regulatory Authority (TNRERA), Egmore, Chennai (“AO TNRERA”).

2. Learned counsel for the petitioners submitted that the respondent filed the complaint before the Adjudicating Officer of Tamil Nadu Real Estate Regulatory Authority (TNRERA) alleging certain deficiencies of services and claiming interest from the petitioners for the delayed handing over possession of DU for an amount of Rs.25,87,059/-, refund of entire cost of car park at Rs.5,81,377/-, costs of litigation and other expenses at Rs.2,00,000/-, Facility Management charges Rs.65,360/-, Rs.5,65,305/- towards mental agony, loss of rental value at Rs.6,32,333/-, to an extent of total compensation of Rs.39,99,101/- and for other reliefs.



WEB COPY



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

3. The case of the petitioners is that the respondent is governed by Army Welfare Housing Organisation Rules. Rules 89 to 91 provide for arbitration.

'89. All matters of disputes, differences relating to the registration, booking, allotment and cancellation and in all such other matters as are incidental to these and are likely to affect the mutual rights, interest, privileges, claims of the Registrant vis-a-vis the Organisation, may be referred to the Chairman of the Organisation, who shall appoint a sole arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 and/or such provisions as may be amended from time to time, whose award shall be final and binding on both the parties. The arbitration proceedings shall be held in Delhi only regardless of where the property under dispute is located.

90. Appointment of an arbitrator will not be objected to on the grounds that he is subordinate to the Chairman, is a member of the Board of Management or Executive Committee or is a registrant of the Organisation.

91. No request for arbitration or adjudication of a dispute will be entertained by the Chairman unless it is made within two months of the cause of action and prior to taking possession of dwelling unit. Possession will not be



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

given till the arbitration proceedings are complete

92. *No request for arbitration will be entertained by the Chairman unless he is convinced that the dispute warrants recourse to arbitration.”*

Therefore, the petitioners filed an application under Section 8 of the Act before the Adjudicating Officer, Tamil Nadu Real Estate Regulatory Authority (TNRERA) to direct the respondent to seek appropriate remedy from the Chairman of the first applicant in terms of Rule 89 of Army Welfare Housing Organisation Rules, 1987. Master Brouchure, 1987, forms part and parcel of the booking letter dated 31.07.2012, entered into between the petitioners and respondent.

4. Learned counsel for the petitioners submitted that the Adjudicating Officer of the Tamil Nadu Real Estate Regulatory Authority (TNRERA) dismissed the petition on the ground that Section 88 of RERA Act makes it clear that the provisions of the Act shall be in addition to and not in derogation to the provisions of any other law for time being in force. Relying on the judgment in ***M/s.Emaar MGF Land Limited ..vs.. Aftab Singh reported in (2019) 12 SCC 751***, that consumer disputes are non-arbitrable, learned Adjudicating Officer held that the



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

jurisdiction of RERA cannot be fettered by the existence of arbitration clause in the agreement or brochure of the applicant and in this view of the matter, dismissed the petition filed by the petitioners. Against the said order, this Civil Revision Petition is preferred.

5. Learned counsel for the petitioners submitted that there is a specific agreement, when the dispute arises, to refer the matter to arbitration. In this regard, he submitted the judgment of Hon'ble Supreme Court in ***Vidya Drolia and others ..vs.. Durga Trading Corporation and others reported in 2020 SCC Online SC 1018*** for the proposition that when there is an arbitration agreement, the dispute should be referred to arbitration. He also relied on the judgment reported in ***2019 SCC Online Mad 38921 in the matter of Lifestyle Equities CV v. QD Seatoman Design Private Limited and others*** in this regard. Relying heavily on ***Vidya Drolia case***, that was followed by High Court of Delhi in ***Hero Electric Vehicles Private Limited and another ..vs.. Lectro E-Mobility Private Limited and another reported in 2021 SCC Online Del 1058***, he submitted that insofar as Section 8 is concerned, the following principles emerge:-



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

“(i) The ambit of the jurisdiction of the High Court, under Sections 8 and 11 of the 1996 Act, is identical.

(ii) The parties can be relegated to arbitration, in respect of a dispute regarding which the suit is pending, only if the entire subject matter of the suit is arbitrable under the arbitration agreement between the parties, who are bound by the said arbitration agreement. The cause of action in the suit cannot be bifurcated and referred, in part, to arbitration.

(iii) Section 8 jurisdiction cannot be exercised to compel third parties, who are not privy to, or bound by, the arbitration agreement, to submit themselves to arbitral proceedings. This violates the principle of party autonomy and the consensual nature of arbitral proceedings.

(iv) The arbitrability of the dispute forming subject matter of the suit, and the arbitrability of the claim, are different. A claim may be non-arbitrable because of the scope of the arbitration agreement, not because the subject matter of the claim is essentially not amenable to arbitration. On the other hand, the subject matter of the suit is normally non-arbitrable only if it is not amenable to resolution by arbitration, in law.

(v) Non-arbitrability may be said to exist



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

- (a) where the cause of action, and the subject matter of the dispute, related to actions in rem, which do not pertain to subordinate rights in personam arising from rights in rem,*
- (b) where the cause of action and subject matter of the dispute affects third party rights, or has erga omnes effect, i.e. affects rights owed to all,*
- (c) where the cause of action and subject matter of the dispute require centralised adjudication, and for which mutual adjudication would not be appropriate or enforceable,*
- (d) where the cause of action and subject matter of the dispute relate to inalienable sovereign and public interest functions of the State, not amenable to adjudication by the arbitral process, or*
- (e) where the subject matter of the dispute is non-arbitrable by mandatory statutory fiat.*

These principles are, however, not watertight, and have to be applied with care and caution.

(vi) Specific instances of non-arbitrable disputes are

- (a) insolvency disputes,*
- (b) internal company disputes which have to be addressed by a centralised forum, which would be more efficient and have complete jurisdiction to dispose of the entire matter, being actions in rem,*



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

- (c) grant and issue of patents and registration of trademarks being exclusive matters falling within the sovereign or government function, having erga omnes effect, conferring monopoly rights,*
- (d) criminal cases, as they relate to sovereign functions of the State,*
- (e) violations of criminal law, as they are offences against the State and not just against the victim,*
- (f) matrimonial disputes relating to dissolution of marriage, restitution of conjugal rights, etc., which have no commercial or economic value and have erga omnes effect, and*
- (g) matters relating to probate or testamentary disposition, which are actions in rem, resulting in a declaration to the world at large.*
- (vii) Landlord-tenant disputes to be decided as per the [Transfer of Property Act](#), 1882, are arbitrable, as they*
- (a) pertain to subordinate rights in personam arising from rights in rem,*
- (b) do not normally affects third party rights, or have erga omnes effect, requiring centralised adjudication,*
- (c) do not relate to inalienable sovereign functions of the State,*
- (d) are not excepted from resolution by arbitration, by the provisions of the [Transfer of Property Act](#), and*



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

(e) result in a resolution which can be executed and enforced like a decree of a civil court.

(viii) The scope of examination by the Court exercising jurisdiction under [Section 8](#) or under [Section 11](#), is prima facie in nature. The Court is not to enter into the merits of the case between the parties. It is only to examine whether the dispute is prima facie arbitrable under a valid arbitration agreement. This prima facie examination is intended to weed out manifestly and ex facie non-existent or invalid arbitration agreements or non- arbitrable disputes, thereby cutting the deadwood and trimming off the side branches, in cases where the litigation cannot be permitted to proceed. The proceedings are preliminary and summary in nature and should not result in a mini-trial. Unless there is a clear case of non-existence of a valid arbitration agreement, or of the dispute being ex facie non-arbitrable, tested on the above parameters, the court should leave these aspects to be decided by a competently constituted arbitral tribunal. Relegation to arbitration should be regarded as a rule, and resolution by the civil court, where a valid arbitration agreement exists and is sought to be invoked by one of the parties, as an exception. The expression "chalk and cheese situation", as used by this Court has, in this background, been approved by the Supreme Court. "When in doubt," says Ramana, J., in his



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

concurring opinion, "refer". (Having said that, the "doubt", in my view, has to be real and substantial, and not merely an escape route to avoid examining the issue in perspective."

6. It is further submitted that the subject matter of arbitrability cannot be decided at the stage of Section 8 or 11 of the Act. Under Section 8 or 11 of the Act, the Court has to refer the matter to arbitrator and appoint an arbitrator as the case may be, unless the party establishes a prima facie case of non-existence of an arbitration agreement. "When in doubt do refer" is the dictum laid down now. When considering prima facie validity of an arbitration agreement, what is required to be considered is:-

- a) Whether the arbitration agreement was right.
- b) Whether the arbitration agreement has contained an exchange of letters, telecommunication etc.,
- c) Whether the contractual ingredients for the arbitration agreement were fulfilled; and
- d) Whether the subject matter of the dispute is arbitrable .



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

7. Thus, the learned counsel for the petitioners submitted that it is very well settled in *Vidya Drolia and others case* that when there is a valid arbitration agreement, the Court has no other option except to refer the matter for arbitration. However, the Adjudicating Officer of Real Estate Regulatory Authority, on the misconception that the jurisdiction of Real Estate Regulatory Authority cannot be fettered by the existence of arbitration agreement, dismissed the petition. Therefore, he prayed for setting aside the order of Adjudicating Officer, Tamil Nadu Real Estate Regulatory Authority (TNRERA), Egmore, Chennai and for referring the matter for arbitration.

8. In response, learned counsel for the respondent submitted that the respondent had never agreed for the draconian one sided terms of Master brochure, 1987. Tamil Nadu Real Estate (Regulation and Development) Rules, 2016 was notified. First petitioner was not prepared to register Raman Vihar Project under the Act before Real Estate Regulatory Authority. Respondent moved Tamil Nadu Real Estate Regulatory Authority (TNRERA) and the case was settled in favour of the respondent. First petitioner appealed to Tamil Nadu Real Estate



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

Appellate Tribunal and the appeal was rejected on 20.03.2019. First petitioner filed Second Appeal before this Court in CMSA. No.1 of 2020. This Court directed Tamil Nadu Real Estate Regulatory Authority (TNRERA) to proceed with the pending cases against the petitioners. First petitioner filed SLP No.2637 of 2021 before the Hon'ble Supreme Court and that was dismissed on 17.02.2021. The Second Appeal filed by the first petitioner was also dismissed. Petitioner registered Army Welfare Housing Organisation Raman Vihar Project at Coimbatore under Tamil Nadu Real Estate Regulatory Authority (TNRERA). When the first petitioner already submitted to jurisdiction of Tamil Nadu Real Estate Regulatory Authority (TNRERA), the respondent's claim is maintainable under the provisions of the Act. Tamil Nadu Real Estate Regulatory Authority (TNRERA) Act is a self-contained Act. It has inbuilt dispute redressal mechanism by constituting Real Estate Regulatory Authority, Adjudicating Officer and Appellate Authority for every State in the country. The object of this Act is to ensure speedy and expeditious disposal of the redressal of promoters and allottees. When this special Act provides special provisions and remedies, petitioners cannot take umbrage under arbitration clause. In ***Emmar MGF Land Limiter ..vs..***



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

Aftab Singh case, it was observed that the intent of the legislature is to protect the interest of workmen and consumers and larger public interest in the form of special rights and by constituting a judicial forum, with powers of a Civil Court. Neither the workmen nor the consumers can waive their rights to approach the statutory judicial forums by opting for arbitration. Therefore, the dispute between the petitioners and respondent has to be resolved only before Real Estate Regulatory Authority and not before an arbitrator.

9. Considered the rival submissions and perused the records. It appears from the complaint of the respondent that he has some serious grievances against the petitioners in the matter of completion of project and resultant handing over of possession belatedly. That was the reason why he filed a complaint for the aforesaid relief. It is seen from the counter filed by the respondent that though the first petitioner has not registered under Tamil Nadu Real Estate Regulatory Authority (TNRERA) and has taken up the matter to the Hon'ble Supreme Court, finally registered Army Welfare Housing Organisation Raman Vihar Project at Coimbatore under Tamil Nadu Real Estate Regulatory



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

Authority (TNRERA) vide No.TN/11/Building/0130/2021 dated 22.04.2021.

10. In *Booz Allen and Hamilton Inc. ..vs.. SBI Home Finance Limited and others reported in (2011) 5 SCC 532*, the following issues are held non-arbitrable.

- (i) disputes relating to rights and liabilities which give rise to arising out of criminal offences;
- (ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
- (iii) Guardianship matters;
- (iv) Insolvency and winding up matters;
- (v) Testamentary matters (grant of probate, letters of administration and succession certificates);
- (vi) Eviction or tenancy matters governed by special statute where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide disputes.



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

11. Then in *A.Ayyasamy ..vs.. A.Paramasivam and others reported in (2016) 10 SCC 386*, one more addition is made with regard to the dispute in trust matters. From these rulings, it is clear that if adjudication of any issue is covered under special statute, that issue cannot be referred for arbitration.

12. It is further submitted by the learned counsel for the respondent that Tamil Nadu Real Estate (Regulation and Development) Act, 2016 was enacted with an object for regulation and promotion of real estate sector and to ensure sale of plots, apartments, buildings, as the case may be, or sale of real estate project in an efficient and transparent manner and protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish Appellate Tribunal to hear appeals from the decisions, directions or orders from the Real Estate Regulatory Authority and from Adjudicating Officer and for matters connected therewith or incidental thereto. This Act provides for registration of real estate project and registration of real estate agents and establishment of Real Estate Regulatory Authority, Real Estate Appellate Tribunal and procedure for



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

adjudication and imposing penalty for offences committed under the Act.

It is a self contained Act providing an adjudication mechanism for redressal of the dispute between the consumers and promoters. Therefore, the dispute between the parties have to be resolved only under the special forum constituted under Tamil Nadu Real Estate (Regulation and Development) Act, 2016. The petition filed by the petitioners under section 8 of the Arbitration and Conciliation Act was rightly dismissed and he prayed for the dismissal of this petition.

13. Learned counsel for the petitioners relied on the following judgments for the proposition of scope of judicial authority under Section 8 of the Arbitration Act and arbitrability of disputes :-

(i) 2020 SCC Online SC 1038 (Suresh Shah ..vs.. Hipad Technology India Private Limited). The relevant portions reads as under:-

*“17. On the other hand, the disputes arising under the **Rent Acts** will have to be looked at from a different view point and therefore, not arbitrable in those cases. This is for the reason that notwithstanding the terms and conditions entered into between the landlord and tenant*



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

to regulate the tenancy, if the eviction or tenancy is governed by a special statute, namely, the [Rent Act](#) the premises being amenable to the provisions of the Act would also provide statutory protection against eviction and the courts specified in the Act alone will be conferred jurisdiction to order eviction or to resolve such other disputes. In such proceedings under special statutes the issue to be considered by the jurisdictional court is not merely the terms and conditions entered into between the landlord and tenant but also other aspects such as the bonafide requirement, comparative hardship etc. even if the case for eviction is made out. In such circumstance, the Court having jurisdiction alone can advert into all these aspects as a statutory requirement and, therefore, such cases are not arbitrable. As indicated above, the same is not the position in matters relating to the lease/tenancy which are not governed under the special statutes but under the [TP Act](#).

18. In the backdrop of the above discussion, we are of the considered view that insofar as eviction or tenancy relating to matters governed by special statutes where the tenant enjoys statutory protection against eviction whereunder the Court/Forum is specified and conferred jurisdiction under the statute alone can adjudicate such matters. Hence in such cases the dispute is non-



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

arbitrable. If the special statutes do not apply to the premises/property and the lease/tenancy created thereunder as on the date when the cause of action arises to seek for eviction or such other relief and in such transaction if the parties are governed by an Arbitration Clause; the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke the Arbitration Clause. This view is fortified by the opinion expressed by the Co-ordinate Bench while answering the reference made in the case of Vidya Drolia wherein the view taken in Himangni Enterprises is overruled.”

(ii) 2020 SCC Online SC 1018 (Vidya Drolia and others ..vs..

Durga Trading Corporation), wherein it is held as follows:-

“This judgment decides the reference to three Judges made vide order dated 28th February, 2019 in Civil Appeal No. 2402 of 2019 titled [Vidya Drolia and Others v. Durga Trading Corporation](#),¹ as it doubts the legal ratio expressed in [Himangni Enterprises v. Kamaljeet Singh Ahluwalia](#)² that landlord-tenant disputes governed by the provisions of the Transfer of Property Act, 1882, are not arbitrable as this would be contrary to public policy.



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

2. A deeper consideration of the order of reference reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:

(i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and

(ii) the conundrum – “who decides” – whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability. The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short, the ‘[Arbitration Act](#)’).

.....

37.....

“36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offenses; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

.....

40.

38. Hence, in addition to various classes of disputes which are generally considered by the courts as appropriate for decision by public fora, there are classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinarily civil court. That such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration.”

41. In Vimal Kishor Shah disputes relating to private trusts, trustees, and beneficiaries of the trust and the [Trusts Act](#) were held to be non-arbitrable.



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

(iii) In 2021 SCC Online Del 1058 (*Hero Electric Vehicles Private Limited and another ..vs.. Lectro E-Mobility Private Limited and another*), it is held as follows:-

“39.

.....

82. Issue of non-arbitrability can be raised at three stages. First, before the court on an application for reference under [Section 11](#) or for stay of pending judicial proceedings and reference under [Section 8](#) of the Arbitration Act; secondly, before the Arbitral Tribunal during the course of the arbitration proceedings; or thirdly, before the court at the stage of the challenge to the award or its enforcement. Therefore, the question -- "Who decides non-arbitrability?" and, in particular, the jurisdiction of the court at the first look stage, that is, the referral stage.

14. He relied on the following judgments for the proposition that incorporation of arbitration clause by reference:-

(a) (2019) 5 SCC 192 (*Giriraj Garg ..vs.. Coal India Limited and others*) and the relevant portions are extracted hereunder:-

“6. In the instant case, the learned Single Judge in the impugned Order has erroneously taken the view that



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

an arbitration clause would not stand incorporated in the individual sale orders entered into by the Respondent No. 2 – Coal Company and the Appellant. The individual sale orders emanate out of the 2007 Scheme. The sale orders specifically state that they would be governed by the guidelines, circulars, office orders, notices, instructions, relevant law etc. issued from time to time by Coal India Limited or Bharat Coking Coal Limited etc. As a consequence, the arbitration clause (i.e. Clause 11.12) in the 2007 Scheme would stand incorporated in the sale orders issued thereunder.”

and

(b) In (2018) 2 SCC 519 (Inox Wind Limited ..vs.. Thermocables Limited), it is held as under:-

“Though a general reference to an earlier contract/some other contract (two-contract case) is not sufficient for incorporation of an arbitration clause in the contract between the parties, where contract provides by general reference that a standard form contract will bind the parties or apply to the contract (single contract case), such standard form contract, including any provision for arbitration in such standard form contract, shall be deemed to be incorporated by reference.”



WEB COPY



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

15. Learned counsel for the respondent relied on the judgment reported in **2019 (12) SCC 751 M/s.Emaar MGF Land Limited ..vs.. Aftab Singh** for the proposition that the matters concerning special enactments are not arbitrable.

42. In Emaar MGF Land Limited, the Division Bench referred to the object and the purpose behind the [Consumer Protection Act, 1986](#) as a law that meets the long-felt necessity of protecting the common man as a consumer against wrongs and misdeeds for which the remedy under the ordinary law has become illusory as the enforcement machinery does not move, or moves ineffectively or inefficiently.

.....

43. Reference was made to an earlier decision in [Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and Others](#)¹⁹ wherein examining Section 9 of the Code of Civil Procedure in the context of rights and remedies under [Industrial Disputes Act, 1947](#) it was observed that the legislature has made provisions for the investigation and settlement of industrial disputes between unions representing the workmen and the management. The authorities



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

*constituted under the Act have extensive powers in the matter of industrial disputes. Labour Court and Tribunal can lay down new industrial policy for industrial peace and order, or reinstatement of dismissed workmen, which no civil court can do. For this, the provisions of **Industrial Disputes Act** completely oust the jurisdiction of the civil court for trial of the industrial disputes. The intent of the legislature is to protect the interest of workmen and consumers in larger public interest in the form of special rights and by constituting a judicial forum with powers that a civil court or an arbitrator cannot exercise. Neither the workmen nor consumers can waive their right to approach the statutory judicial forums by opting for arbitration.*

This proposition was approved in the judgment reported in **2021 (2) SCC 1 (Vidya Drolia and others ..vs.. Durga Trading Corporation)**.

16. It is observed in **2020 SCC online SC 1038 (cited supra)** that insofar as eviction or tenancy, matters governed by special statutes, where the tenant enjoys statutory protection against eviction, where under the court/forum is specified and conferred jurisdiction under the statute, that alone can adjudicate such matters. In such cases the disputes



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

are non-arbitrable. If the special statute do not apply to the premises/property and the lease/tenancy created thereunder as on the date when the cause of action arises to seek for eviction or such other relief and in such transaction if the parties are governed by arbitration clause, the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke arbitration clause. This view is fortified by the view expressed by the coordinate bench while answering the reference made in the case of ***Vidya Drolia (cited supra)***.

17. It is clear from these observations that when the issues governed by special statutes like the issues relating to labour, consumer, landlord and tenant protected by statute, trust matters, the matters of right-in-rem, criminal matters are non-arbitrable. It was reiterated in ***Vidya Drolia case (cited supra)*** and it was observed that,

45. In view of the above discussion, we would like to propound a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable: (1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

from rights in rem. (2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable; (3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and (4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

18. *Vidya Drolia case* was followed in *2021 SCC Online Delhi 1058 (Hero Electric Vehicles Private Limited and another ..vs.. Lectro E-Mobility Private Limited and another) (cited supra)* and in *2019 SCC Online Madras 3892 (Lifestyle Equities CV v. QD Seatoman Design Private Limited and others) (cited supra)*. The ratio of these rulings is



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

that the matters governed by special statutes are generally non-arbitrable.

“34.

When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or public forum is either completely denied or could be curtailed. In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed. When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable.

19. As already stated learned counsel for the respondent submitted that the Real Estate (Regulation and Development Act 2016) is a special statute to deal with the disputes arise out in the real estate sector. It is a complete Act to deal with any contingency arises in real estate sector in the dispute between the parties. It is further submitted that the arbitration agreement relied by the petitioners is an one sided



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

agreement giving absolutely no option to the respondent, in the matter of appointment of an arbitrator. It is a standard form contract annexed with the allotment order. Based on this one sided arbitration agreement, petitioners cannot seek to enforce arbitration.

20. In reply, learned counsel for the petitioners submitted that it is not necessary to execute a separate arbitration agreement. It is enough if a reference is made in a contract with regard to arbitration clause and that would constitute a valid arbitration agreement. In support of his submissions, he relied on the following judgments:-

(i) In ***(2019) 5 SCC 192 (Giriraj Garg ..vs.. Coal India Limited and others) (cited supra)***, when a question arose about whether the arbitration clause contained in 2007 scheme would stand incorporated by reference in each of the sale orders, it was observed that individual sale orders emanate out of 2007 schemes. The sale orders specifically state that they would be governed by the guidelines, circulars, office orders, notices, instructions, relevant law etc., issued from time to time by Coal India Limited or Bharat Coking Coal Limited etc. As a consequence, the arbitration clause in the 2007 Scheme would



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

stand incorporated in the sale orders issued thereunder.

(ii) It was observed in ***(2018) 2 SCC 519 (Inox Wind Limited ..vs.. Thermocables Limited) (cited supra)*** that though a general reference to an earlier contract/some other contract is not sufficient for incorporation of an arbitration clause in the contract between the parties, where the contract provides by a general reference that a standard form contract will bind the parties or apply to the contract, such standard form contract including any provision for arbitration in such standard form contract, shall be deemed to be incorporated by reference.

(iii) In ***(2019) 5 SCC 192 (Giriraj Garg ..vs.. Coal India Limited and others) (cited supra)***, it was observed that arbitration agreement need not necessarily be in the form of clause in a substantive contract itself and it could be an independent agreement or it could be incorporated by reference either from parent agreement or from reference to a standard form contract.

21. It is no doubt that as per Section 7(5) of Arbitration and



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

Conciliation Act, “The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and reference is such as to make that arbitration clause part of the contract”. Thus it is clear that it is not necessary to execute a separate arbitration agreement along with the contract. It is enough the contract contains an arbitration clause. The relevant rules of Army Welfare Housing Organisation have been already extracted above. Rules 89 to 92 deal with arbitration.

22. The reading of Rule 89 shows that all disputes may be referred to the Chairman of the organisation, who shall appoint a sole arbitrator under the provisions of the Arbitration and Conciliation Act 1996 and or such provisions as may be amended from time to time. The award of the arbitrator shall be final and binding on both the parties. Rule 90 reads that appointment of an arbitrator will not be objected to on the grounds that he is subordinate to the Chairman, is a member of the board of management or executive committee or is a registrant of the organisation.



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

23. Rule 91 reads that no request for arbitration or adjudication of a dispute will be entertained by the Chairman unless it is made within two months of the cause of action and prior to taking possession of dwelling unit. Possession will not be given till the arbitration proceedings are complete. Rule 92 reads that no request for arbitration will be entertained by the Chairman unless he is convinced that the dispute warrants recourse to arbitration.

24. These rules are clearly lopsided and one sided, giving no option to the allottees in the matter of appointment of arbitrator. The rule that only if the Chairman is convinced, he would entertain the request for arbitration, possession will not be given till the arbitration is completed, allottees have no option to object to the appointment of an arbitrator are draconian and autocratic rules aimed to thrust the arbitration on the allottees. There is no doubt that Rules 89 to 92 are one sided, lopsided and not intended to have a level playing field. Very idea of arbitration is that it has considerable advantages as it gives freedom to the parties to choose an arbitrator of their choice and it is informal, legible and quick. Simplicity, informality and expedition are hallmarks of arbitration.



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

Arbitrators are required to impartial and independent, arbitrate natural justice and follow a fair and just procedure. These very basic concepts of arbitration is missing in Rules 89 to 92. Therefore, there is a substance in the submissions of learned counsel for the respondent that the arbitration agreement relied by the petitioners is one sided and thrust upon the respondent and other allottees and therefore, it is not enforceable. Though an arbitration agreement may form part of a contract, what we have to consider is the fairness of the arbitration agreement. The aforesaid judgments relied by the learned counsel for the petitioners can only help to understand that it is not necessary to execute a separate arbitration agreement and it is enough that the arbitration agreement forms part of the main contract, and not more than that.

25. It is already found that if a special statute creates a special right or liability and provides for the determination of each right and liability for the specified Court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the Civil Courts are prescribed and the answer is affirmative, the dispute is not arbitrable.



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

WEB COPY

26. It is the contention of the learned counsel for the respondent that the dispute between the parties squarely covered by the Real Estate (Regulation and Development) Act 2016. Perusal of the Real Estate (Regulation and Development) Act 2016 shows that this Act provides for

- i) Registration of real estate project and registration of real estate agents,
- ii) Defines the functions and duties of promoters,
- iii) Defines the Rights and duties of allottees,
- iv) Real Estate Regulatory Authority is established and their functions, powers are defined,
- v) Real Estate Appellate Tribunal is established and powers of Tribunal are defined.
- vi) Provisions for imposing penalties for the offences committed under the Act are made.

27. The statement of objects and reasons shows that this Act is enacted for establishing the Real Estate Regulatory Authority for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

manner and to protect the interest of consumers in the real estate sector and to establish a Real Estate Appellate Tribunal to hear the appeals from the decisions, directions or orders of the Real Estate Regulatory Authority. It is to ensure greater accountability towards consumers and would significantly reduce frauds and delays as also current high transaction cost. It attempts to balance the interest of consumers and promoters by imposing certain responsibilities on both.

28. Thus, this Act has provisions for registration of real estate project and real estate agents, definitions of the functions and duties of promoters, rights and duties of allottees, establishment of Real Estate Regulatory Authority and Real Estate Appellate Tribunal, defining their functions and powers and importantly providing penalties for the offences committed under the Act. Sections 59 to 69 of the Real Estate (Regulation and Development) Act, 2016 deals with the offences, penalties and adjudication. Section 70 deals with compounding of offences. Certainly arbitrators cannot impose penalty and imprisonment.

29. Therefore, considering the nature of the dispute involved in



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

WEB COPY

this case between the petitioners and the respondent that the arbitration agreement is an one sided agreement giving no option to the respondent in the choice of appointment of arbitrator, the dispute involved in this case is covered under Real Estate (Regulation and Development) Act 2016, and when this statute provides special provisions for dealing with the dispute arises under the Act and those remedies cannot be granted by arbitrator, this Court is of the concerned view that the dispute between the parties in this case is not arbitrable. Therefore, this Court finds there is no reason to interfere with the finding of the learned adjudicating officer and the order of the learned adjudicating officer is confirmed and this Civil Revision Petition is dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

Mra

12.11.2021

Index : **Yes**
Internet : Yes / No
Speaking order : Yes / No

To,

1. The Adjudicating Officer,
Tamil Nadu Real Estate Regulatory Authority (TNRERA),
Egmore, Chennai



WEB COPY



C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

G.CHANDRASEKHARAN, J.

mra

order in
C.R.P.(NPD) No.817 of 2021
and
C.M.P.No.6771 of 2021

12.11.2021