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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL WRIT PETITION NO. 2896 OF 2015

MR. CONRAD CYRIL LUCAS

....PETITIONER

V/s.

**M/S. UNITY BUILDERS THROU
GH PARTNER MR. MADHUSUDAN
N. YEOLE AND ANR**

.....RESPONDENTS

**Mr. Shreyas S. Adyanthaya advocate for the Petitioner
Mr. Rajesh Dubey for Respondent no. 1
Mr. Sumit V. Khaire for Respondent no. 2**

CORAM : NITIN W. SAMBRE, J.

DATE: FEBRUARY 10, 2022.

P.C.:

1) Petitioner initiated R.C.S. No. 2010/2013 for declaration, injunction and possession. Suit is based on flat purchase agreement dated 06/07/2005 between Petitioner and Respondent no. 1 builder. It is further claimed in the suit that Respondent no. 2 who is Defendant no. 2 to the Suit has encroached on the parking space of the Petitioner and that being so, prayer for declaration, injunction and possession is made against Respondent-Defendants.

2) Respondent-Defendant no. 1 took out an Application Exh. 25 claiming existence of arbitration agreement based on clause 38 of the arbitration agreement dated 06/07/2005 and sought reference to the arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. Said prayer is allowed vide impugned order dated 02/12/2014.

3) The contentions of the learned counsel for the Petitioner are, considering the nature of prayer in the Complaint, there does not exist any contract or arbitration agreement between Petitioner and Defendant no. 2. Defendant no. 2, even if purchased the property from Defendant no. 1, still it is claimed that same can only be resolved by competent Civil Court, particularly when by consent of the parties, in this case Defendants, jurisdiction cannot be conferred. Counsel would further urge that so as to resolve the dispute, it is necessary that proceedings be conducted by Civil Court and not by the Arbitrator.

4) While countering the aforesaid submissions, counsel for Respondent-Defendants would urge that apart from availability of alternate remedy of preferring Appeal against the impugned order before the District Judge, it is claimed that Trial Court has

considered the gamet of the matter, having regard to the pleadings and has specifically recorded a finding that dispute between the parties to the Suit over the parking space can be resolved by the Arbitrator. According to him, the foundation for referring the matter to the Arbitrator is very much reflected in the order impugned which demonstrates application of mind and that being so, this Court, in absence of any illegality, may not show indulgence in extraordinary jurisdiction.

- 5) Considered rival submissions.
- 6) Order impugned was passed on 02/12/2014 and I am informed that Respondent-Defendant no. 1 has already appointed Arbitrator in terms of arbitration agreement referred above.
- 7) Arbitration agreement reads thus:

“38. In case of any dispute between the Promoter and the Purchaser regarding interpretation of any of the terms of this Agreement or regarding an aspect of the transaction including quality of construction work, defective service by the Promoter, delay in construction work and/or sale deed, alterations in the plan, parking arrangement, grant of exclusive uses, rendering of account etc. then such dispute shall be referred to the arbitration of a single Arbitrator to be

appointed by the Promoter whose decision shall be final and binding on both the parties.”

8) Plain reading of the aforesaid clause in clear terms demonstrates that the matter can be referred to the Arbitrator nominated by Respondent-Defendant no. 1, provided the dispute between the Petitioner and Defendant no. 1 is as regards interpretation of the terms of the agreement or regarding aspect of transaction including quality construction work, defective services, delay in construction and sale deed. Though it is specifically mentioned that dispute in regard to the parking arrangement can be looked into by the Arbitrator, however, it is required to be noted that Defendant no. 2 is not party to the said arbitration agreement as could be inferred from the very contents of the arbitration agreement.

9) The aforesaid aspect cannot be disputed by either of the parties as could be verified and inferred from the record. As such, it has to be inferred that there does not exist any arbitration agreement inter-se between the Petitioner-Plaintiff and Defendant no. 2 against whom a relief of possession is claimed.

10) In that view of the matter, finding recorded by the trial Court that pursuant to provisions of Section 8 of the Arbitration and

Conciliation Act, dispute can be resolved or settled by the Arbitrator is contrary to the very scheme of said provisions, particularly in absence of any agreement of arbitration between Plaintiff and Defendant no. 2.

11) Merely because dispute as regards parking space is sought to be co-related between Defendant nos. 1 & 2, that by itself will not bind the Petitioner to take Arbitration proceedings against both parties. In my opinion, the Court below while considering the aforesaid aspect of the matter has mis-interpreted the Judgment of this Court in the matter of **Shah & Mody Developers Vs. Alka Ketan Shah**¹.

12) Though a contention is raised by the learned counsel for Respondent no. 1 that already Arbitrator is appointed, that by itself will not preclude this Court from exercising jurisdiction vested in it. The Arbitration proceedings have not progressed an inch ahead. Though it is claimed that there is alternate remedy available, the Court is required to be sensitive to the fact that present Petition was initiated in 2015 and is pending adjudication for last more than 7 years before this Court.

¹ Writ Petition No. 1022 of 2013

- 13) In the aforesaid background, order impugned is not sustainable and as such accordingly quashed and set aside. Application Exh. 25 moved by Defendant no. 1 stands rejected.
- 14) Hearing of the R.C.S. No. 2010/2013 is expedited as Suit is pending for last more than 5 years.
- 15) Petition stands allowed in the above terms.

[NITIN W. SAMBRE, J.]