Prajakta Vartak

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION APPLICATION NO. 155 OF 2021

Madhav Corporation through its
Partner Raja Gope Rochlani ..Applicant
Vs.
Anabar Properties Pvt. Ltd. ..Respondent

Ms. Ankita Singhania with Mr. Ranjit Shetty, Mr. Prakash Panjabi and Mr. Jonathan Jose i/b. Argus Partners for Applicant.
Mr. Aloukik Pai with Mr. Akshay Pai and Mr. Atharva Sane i/b. Apurva Bhat for Respondent.

CORAM : G.S. KULKARNI, J.
DATE : JULY 04, 2022.

P.C.:

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the applicant has prayed for appointment of an arbitral tribunal for adjudication of the disputes and differences which have arisen between the parties under a Joint Development Agreement dated 25 April, 2018 (for short the "**2018 agreement**"). The respondent is the owner of certain land. By virtue of such agreement entered with the applicant, the respondent assigned the development rights qua the land in favour of the applicant under the terms and conditions as provided under the agreement.

2. It is stated that prior to the 2018 agreement, there was an agreement between the parties, namely, the Development Agreement

dated 22 April, 2013 (for short the "**2013 agreement**") under which the parties had interalia agreed for joint development of the property in question. It is the case of the applicant that the 2013 agreement stood superseded by the 2018 agreement as entered between the parties. The applicant also contends that the respondent has also accepted as seen from its letter dated 11 April, 2016 addressed to the applicant, that the 2013 agreement stood cancelled. Such assertion of the respondent as contained in its letter dated 11 April, 2016 needs to be noted, which reads thus:-

> "Date*:* 11th April 2016
>
> To,
> Madhav Corporation,
> White Field, Ground Floor,
> Block No. C-15/30,
> Opp. Brahmakumari Peace Park; Netaji
> Ulhasnagar – 421 004.
>
> Dear Sir,
>
> **<u>Kind Atn. : Mr. Raja Rochlani / Mr. Ravi Chawla</u>**.
>
> This is, in response to the letter dated 07th April, 2016 received from your advocates by us on the 9th April, 2016, regarding the development agreement.
>
> **You are well aware that the development agreement dated 22nd April, 2013 has already been cancelled in view of your Affidavit with the Adjudicating Authority**. Furthermore, the above stated Joint Development Agreement was not registered and the same cannot be registered now as per the provisions of Indian Registration Act, 1908. Any document must be registered within 4 months from the date of execution or another 4 months with penalty i.e. latest within eight months.
>
> <u>As the main Joint Development Agreement itself is not registered, executing a supplementary agreement for new negotiation terms does not arise. Therefore as already discussed between us the proper course of action would be to execute a fresh Joint Development Agreement incorporating the terms now negotiated and registering the same.</u> You had also promised to mail us the draft of the fresh Joint Development Agreement now to be executed latest by

Monday 4th April, 2016 however till date we have not received the draft of Joint Development Agreement.

Without receiving the draft of the fresh Joint Development Agreement and finalizing the terms of the Joint Development Agreement we cannot fix the date for registration of the agreement as stated in your letter.

Therefore you are requested to send us fresh draft of the Joint Development Agreement as per the newly negotiated terms and the fresh JDA should now be finalized and registration of the same should be completed immediately without any further delay.

Thanking you,

Anabar Properties Pvt. Ltd.

Sd/-
Director"

(emphasis supplied)

3. It needs to be stated that the 2013 agreement also had an arbitration clause (clause no.12), however, according to the applicant, the said arbitration clause would not be of any relevance in the context of the present proceedings, as also, in view of the clear stand taken by the respondent that the 2013 agreement stands cancelled. This, even assuming that prior to the applicant and the respondent entering into the 2018 agreement, the applicant had taken a stand that the 2013 agreement was relevant and it would continue to operate. However, according to the applicant, such assertions of the applicant and counter assertions of the respondent on the 2013 agreement stood concluded once the 2018 agreement was entered between the parties, as such contentions of the parties pertained to the year 2016 that is prior to the 2018 agreement being entered between the parties.

4. On the backdrop of certain issues, which the applicant contends, may not be relevant in the context of the present application, the applicant contends that the 2018 agreement came to be entered between the parties under which disputes and differences have arisen between the parties relevant for the purpose of the present Section 11 application.

5. The arbitration agreement as contained in clause 12 of the 2018 agreement reads thus:-

> "**12. ARBITRATION**
> In case of any disputes, doubts or differences arising between the parties hereto, in respect of any of the terms and conditions of this agreement or in respect of interpretation of any of the terms or conditions of these presents or in respect of any other matter, cause or thing whatsoever not contained herein otherwise provided for the same, shall be referred to adjudication to the Arbitration of a sole arbitrator to be appointed mutually by both the parties and failing such agreement to be appointed by the court, subject to the provisions of the Arbitration & Conciliation Act, 1996 or any statutory modifications or re-enactment thereof for the time being in force. Such arbitration shall be conducted in English, and be held at Mumbai."

6. There are other clauses in the agreement which are also of some relevance in the context of the opposition to the present proceedings on as urged on behalf of the respondent, which also need to be noted. These clauses read thus:-

> "9. PROHIBITION ON TRANSFER AND ASSIGNMENT
>
> The Developers shall not directly or indirectly transfer or assign, sell or encumber their interest and benefits under this Agreement in favour of any other party or parties in any manner whatsoever save

> and except the sale/transfer of Developers' Area. Mr. Raja Rochlani and Mr. Ravi Chawla, two of the partners of the Developers and their respective immediate families (i.e.) wife/s and/or children/s and/or parent/s and/or brother/s) shall hold minimum of 45% share in the Developers' firm at all times till completion of development of the said property and the same shall not be diluted below 45% without prior written permission of the Owner. Admission of any new partner(s) in the Developers shall be with written permission of the Owner in advance. PROVIDED THAT only Mr. Raja Rochlani, Partner of the Developers and no other person on behalf of the Developers shall deal with the Owner in relation to the said property and development thereof at all times.
>
> 10. STAMP DUTY AND REGISTRATION
>
> Save and except what is provided hereunder, all costs, charges and expenses, search fees, advertisement charges in connection with and/ or incidental to these presents including the stamp duty registration fees that become due and payable in respect of this agreement or any subsequent writings or any other document/s to be executed in consequences of these presents shall be borne and paid by the Developers alone, to the total exclusion of the Owner.
>
> 11. ENTIRE AGREEMENT
>
> The said Development Agreement as amended and restated herein, together with all Agreements and documents executed contemporaneously with it or referred to herein, constitutes the entire Agreement between the Parties in relation to development of the said Property and supersede all prior agreements and understandings whether oral or written with respect thereto and no variation of this Agreement shall be effective unless reduced to writing and signed by or on behalf of a duly authorized Representative of each of the Parties."

7. As disputes and differences had arisen between the parties, the applicant by its advocate's letter dated 26 March, 2021 invoked the arbitration agreement [clause 12 of the 2018 agreement (supra)]. It may be stated that the applicant's invocation is confined to the 2018 agreement and no other agreement, as is clear from the contents of the said invocation letter, which reads thus:-

“ **<u>BY EMAIL/COURIER/ SPEED POST A. D.</u>**

March 26, 2021
RMS/JJ
192/2021

ANABAR PROPERTIES PRIVATE LIMITED
Flat No.3, Sai Dham Building,
Poddar Road, Malad (East)
Mumbai 400 097
Email: sunil kedia@yahoo.com

<u>Kind Attn: Mr. Sunil S. Kedia, Director</u>

Dear Sirs,

Re: <u>Joint Development Agreement dated April 25, 2018</u> between Anabar Properties Pvt. Ltd. and M/s. Madhav Corporation registered with the Sub-Registrar, Kalyan-4, under No. KLN-4/4097/2018 (**“JDA”)**.

We are concerned for our clients M/s. Madhav Corporation (**“Client”**) and in reference to the JDA executed between you and our Client and vide various communications addressed to you on behalf of our client Calling upon you to comply with your obligations under the JDA as setout therein we write to you as under:

1. Despite receipt of various communications/correspondence addressed to you on behalf of our Client, you have failed to take necessary steps to perform your obligations under the JDA. On the contrary, you have raised/made various baseless contentions and allegations in response to communications addressed to you on behalf of our Client. This led to our Client having to file Commercial Arbitration Petition (L) No. 4875 of 2021 before the Hon’ble High Court of Bombay under Section 9 of the Arbitration and Conciliation Act, 1996 (as amended) (**“Petition”**) for reliefs prayed therein. The grant of reliefs prayed therein was also opposed by you.

2. In the circumstances aforesaid, it is evident that disputes/differences have arisen between the parties to JDA. **In para 18 of the Petition, our Client had invoked arbitration as contemplated in Clause 12 of the JDA** and proposed the name of Mr. Pradeep Sancheti, Senior Advocate, Bombay High Court to act as a Sole Arbitrator to resolve and adjudicate upon the disputes between the parties. However, you did not consent to the same.

3. In terms of order dated March 23, 2021 passed by the Hon’ble Court in the above mentioned Petition, **we are once again Invoking the said arbitration clause 12 of the JDA to refer all claims arising out**

> **of the JDA to arbitration to be conducted in accordance** with the Arbitration and Conciliation Act, 1996 (as amended and additionally propose the appointment of any one of the following persons as a Sole Arbitrator:
>
> a. Senior Advocate Mr. Rahul Narichani, High Court, Bombay;
> b. Senior Advocate Mr. Snehal Shah, High Court, Bombay;
> c. Advocate Mr. Nimay Dave, High Court, Bombay
>
> In the event of your failure to appoint one of the aforesaid persons, our Client shall be constrained to file appropriate proceedings for appointment of an Arbitrator by Hon'ble High Court of Bombay.
>
> Yours truly,
> For Argus Partners
>
> sd/-
> Ranjit Shetty
> Senior Partner"
>
> (emphasis supplied)

8. The applicant's invocation notice was replied by the respondent's advocates letter dated 14 April, 2021 in which the respondent *inter alia* raised a contention referring to a petition filed by the applicant under Section 9 of the Act [Arbitration Petition (Lodging) No. 4875 of 2021). The respondent contended that the respondent had taken a stand in the said proceedings, of the applicant having not stamped the 2013 agreement and it is for such reason, the respondent would not consent to refer the matter to arbitration. Such assertion of the respondent as contained in its reply to the invocation letter needs to be noted from its relevant contents which read thus:-

> "1. Firstly, in the above referred Notice dated 09/04/2021, you have alleged that my client is deliberately trying to avoid / evade the reference to arbitration as alleged therein. Any such allegation is vehemently denied. **You are aware that my client has consistently taken the stand in the present arbitration proceedings that your client is liable to pay the deficient stamp duty and penalty on**

Development Agreement dated 22/04/2013 and connected documents. In fact, for this reason my client is unable to consent to refer the matter to arbitration. It is the specific contention of my client that till such deficient stamp duty and penalty is paid by your client; the matter cannot be referred to arbitration. By my referred notice dated 29/03/2021, my client had specifically called upon your client to either admit or deny the facts stated therein. However, since your client has neglected to do either, my client is entitled to presume that your client has admitted the facts stated therein. In any case, without even a specific admission of your client in reply to my notice, it is demonstrable that the Development Agreement dated 22/04/2013 has been treated to be continued by Joint Development Agreement dated 25/04/2018 and this was the only intention of the parties. At this stage, I would also like to remind you of the letter dated 12/04/2016 bearing no. Anabar/Madhav/JDA/13-14 sent by your partner Mr. Prakash Panjabi through P & P Legal to my client on behalf of your client. Due to paucity of time in filing affidavits and documents in Commercial Arbitration Petition (L) No. 4875 of 2021, my client was unable to locate this letter or otherwise produce it earlier. Now, my client has placed this letter dated 12/04/2016 in my hand, and I am instructed to point out the contents of this letter. The 3rd unnumbered para of this letter date 12/04/2016 which makes an interesting reading and is reproduced hereunder :

"*With regards to second para of your letter under reply, our clients deny your claim that the Development Agreement dated 22nd April, 2013 has been cancelled and say that as you are very well aware, the said Agreement continues to be in full force and effect as set out in our client's Affidavit dated 22nd June, 2015 filed in the said OA (sic, should read as AO), in the Hon'ble High Court (a copy of whereof is enclosed for your ready reference and the contents whereof are self explanatory), which has also been recorded in the Hon'ble Court's order dated 04th February, 2016 and the said fact was never denied by you before the Hon'ble Court.*"

Furthermore, the last sentence in the 4th unnumbered para of the said letter dated 12/04/2016 read as under:

".....Therefore, as discussed between your Mr. Sunil Kedia and Mr. Raja Rochlani of our clients, supplementary agreement is required to be executed to revise the timeline wherever required, which supplementary agreement will be duly stamped and presented for registration along with the said Development Agreement dated 22nd April, 2013."

2. A copy of the case status of Appeal from Order No. 1233 of 2014 showing the record of filing of Vakalatnama and Affidavit on behalf of your client is enclosed herewith for your ready reference.

3. Thus in these circumstances, the Development Agreement dated 22/04/2013 was treated as continued by incorporation in the Joint Development Agreement dated 25/04/2018. **It may not be out**

> **of place to mention that on the same basis the stamp duty was also earlier paid by your client on the Development Agreement dated 22/04/2013 although your client unilaterally claimed refund thereof on misleading and fictitious grounds without the consent of my client.**
>
> 4. Your client is therefore called upon to abide by its statements in its Advocate's letter 12/04/2016 and the Affidavit dated 22/06/2015 filed in Appeal from Order No. 1233 of 2014, by paying the deficit stamp duty and penalty before making a request for referring the matter to arbitration."
>
> (emphasis supplied)

9. On the above factual backdrop, Ms. Singhania, learned counsel for the applicant in support of the prayers as made in the present application for appointment of an arbitral tribunal, has made the following submissions:-

(i) It is submitted that the disputes and differences have arisen between the parties under the 2018 agreement and it is only in the context of such agreement, the applicant has invoked clause 12, being the arbitration clause as contained in the 2018 agreement. It is submitted that the applicant's invocation letter dated 26 March 2021 (supra) is very clear, of the invocation being only in regard to the 2018 agreement. It is hence her contention that it is inappropriate and unfounded for the respondent to rope in the 2013 agreement, to oppose the present proceedings. It is submitted that the case of the respondent that the parties need to arbitrate on the cancelled 2013 agreement, is totally untenable and opposed to the 2018 agreement.

(ii) It is next submitted that even otherwise the respondent's case that at all material times and more particularly, as stated by the respondent in its letter dated 11 April, 2016, the respondent has taken a clear position that the 2013 agreement stood cancelled.

(iii) It is submitted that as the said 2013 agreement was appropriately stamped at the relevant time, as substantial stamp duty of Rs.1,70,98,000/- was paid on the said agreement and a refund of such stamp duty to the knowledge of the respondent was applied by the applicant by an application dated 17 December, 2014, as the 2013 agreement had stood cancelled. The stamp duty came to be refunded to the applicant, by the stamp authorities, which was received by the applicant on 09 April, 2015. Such refund of the stamp duty also was fully to the knowledge of the respondent.

(iv) It is submitted that as the respondent itself had conceded and/or accepted that the 2013 agreement stood cancelled. The respondent never asserted that the applicant ought not to seek a refund of stamp duty. It is hence, too late nay false, for the respondent to put up a case of the 2013 agreement being not stamped and that too as an opposition to the present proceedings.

(v) It is submitted that the 2018 agreement as invoked by the applicant is appropriately stamped, in as much as the stamp duty of

Rs.2,24,15,575/- has been paid, as also the document is registered with the Sub-Registrar of Assurances on 25 April, 2018, which is not disputed by the respondent.

(vi) It is lastly submitted that the invocation of the arbitration agreement being strictly in terms of the arbitration agreement as contained in clause 12 of the 2018 agreement has not been disputed by the respondent in its reply to the invocation notice. It is not the contention of the respondent that the 2018 agreement has not been invoked but the respondent's grievance is to the effect that the applicant has in fact invoked the 2013 agreement and has not raised disputes under the 2018 agreement, which is wholly without any basis. It is thus submitted that the application needs to be allowed as the respondent has not disputed the existence of the arbitration agreement as contained in the 2018 agreement.

10. Mr. Pai, learned counsel for the respondent referring to the reply affidavit filed on behalf of the respondent of Mr. Sunil S. Kedia, Director of the respondent, has limited submissions in opposing the present proceedings. Mr. Pai's opposition is primarily on two counts. Firstly, Mr. Pai would submit that a reference to arbitration under the 2018 agreement needs to be denied, in as much as, the 2013 agreement is not a stamped document. It is his contention that from the different clauses

of 2018 agreement, it is necessary to be presumed that the 2013 agreement becomes part and parcel of the 2018 agreement, hence it be held that the invocation is a composite invocation not only in regard to the 2018 agreement, but also in regard to the 2013 agreement. For such reason, a reference to arbitration ought to fail. In support of such contention, Mr. Pai has drawn the Court's attention to clause 10 pertaining to Stamp Duty and Registration, as also the wordings of clause 12 which is the arbitration clause of the 2018 agreement. Secondly, Mr. Pai's contention is in regard to the applicant acting in breach of clause 9 of the 2018 agreement, namely 'the prohibition on transfer and assignment, clause'. Such contention is to the effect that the applicant without the written permission of the respondent, has admitted new partners into the partnership firm. It is submitted that this plea is taken by the respondent in paragraph 4 of the respondent's reply to the present application. Mr. Pai has submitted that in the year 2013, the applicant's firm had 10 partners, thereafter in the year 2018, there was a reduction of 4 partners leaving the partnership comprising of 6 partners and thereafter in the year 2021, again 3 partners came to be reduced. In this context, Mr. Pai refers to the following contents of paragraphs 4, 5 and 6 of the reply affidavit which read thus:-

> "4. The following persons are partners of the Applicant in 2013, 2018 and 2021 (when the above application was filed.):-
>
> The partners of Applicant in 2013 :

Sr. No.	Name of the Partner	Share of the Partner
1	Raja Gope Rochlani	40%
2	Ravi Suresh Chawla	7%
3	Ajay Mahesh Khushalani	6%
4	Umesh Gurmukhdas Jagiasi	10%
5	Satish Gopidas Harchandani	8%
6	Naresh Sudama Khetwani	4%
7	Suresh Devchand Mehta	3%
8	Manish Jairam Doulatani	8%
9	Jagdish Kanayalal Khetwani	13%
10	Manoj Gidharilal Matlanias	1%

The partners of the Applicant in 2018:

Sr. No.	Name of the Partner	Share of the Partner
1	Raja Gope Rochlani	45%
2	Ravi Suresh Chawla	16%
3	Umesh Gurmukhdas Jagiasi	5%
4	Manish Jairam Doulatani	8%
5	Haresh Gurdino Harisinghani	5%
6	Gope Madhav Rochlani	21%

The partners of the Applicant in 2021 :

Sr. No.	Name of the Partner	Share of the Partner
1	Raja Gope Rochlani	63%
2	Ravi Suresh Chawla	32%
3	Rajesh Suresh	5%

5. Upon a bare perusal of the said 2018 agreement (the agreement under which the applicants are claiming rights under the present application), and more particularly recitals (u),(v), and (w) as well as clause No. 11 thereof, it is evident that the said 2018 Agreement is completely dependent on the said 2013 Agreement. Clause (u), (v) and (w) in turn state that the parties thereto are to be governed not only by the terms and conditions of the said 2018

Agreement but also the terms and conditions of the said 2018 Agreement. As also clause No. 11 makes it amply clear that both the said development agreements constitute the entire Agreement between the parties in relation to development of the subject properties. In addition to the above, clause 4.2 of the said 2018 Agreement spells out the monetary consideration to be paid to the Respondent thereunder, wherein sums of monies paid by the Applicant to the Respondent under the said 2013 Agreement are to be adjusted with the consideration payable under said clause 4.2 above. Thus the said agreements, though being separate and distinct transactions, yet are completely interdependent on each other. It is submitted that any party claiming rights under one of the said agreements cannot claim such rights exclusively under one such agreement, but has to claim under both. This will obviously also include claiming rights under the said Arbitration clause. That is to say that any party raising a dispute under the said clause 12 will have to raise such dispute in respect of both the said agreements i.e. the said 2013 and the said 2018 agreement. Pertinently the Applicants have suppressed the said 2013 agreement or the relevant facts in respect thereof. The Respondent is thus producing a copy of the said Development Agreement dated 22/04/2013 herewith which is annexed hereto and marked as **Exhibit - "B".**

6. In light of the above the present application cannot be proceeded with and this Hon'ble Court ought to impound the said 2018 agreement along with the said 2013 agreement thereby directing the applicant to cure the defect i.e. to pay the adequate stamp duty in respect of the said 2013 Agreement. The law in respect of the same is very well settled and it has been held that no arbitration in respect of an unstamped agreement can proceed. The Correct course of action would be to impound the concerned document and direct the parties to pay the adequate stamp duty especially when no stamp duty has been paid on the said 2018 Agreement, like the present case. Although, it is admitted that the jurisdiction of this Hon'ble Court at the "pre-arbitration stage" is very limited, yet when there is no stamp duty paid in respect of the Arbitration Agreement, this Hon'ble Court has to impound the said document for proper adjudication and payment of stamp duty before the arbitrator can adjudicate upon the contract. It is also an admitted position that the said 2013 Agreement is in fact unstamped. In fact when the 2013 Agreement was executed the Applicant had paid the requisite stamp duty for the same however, since certain disputes arose, the Applicant made an application to the concerned authorities for refund was duly allowed in the year 2014 itself and the said 2013 Agreement remains unstamped till date. Hereto annexed and marked as **Exhibit- "C"** is a true copy of the Application for refund of stamp duty made by the Applicant."

Mr. Pai thus submits that such reduction in the number of partners is an apparent breach of what was agreed between the parties in terms of clause 9 providing for “prohibition on transfer and assignment”. According to Mr.Pai, such breach as asserted by the respondent brings about a legal consequence namely that applicants are originally and truly not the parties to the arbitration agreement when they seek a reference of disputes to arbitration, which in law, would amount to third parties to the 2018 agreement seeking a reference of disputes to arbitration.

In support of submissions in the context of the first submission, Mr. Pai has placed reliance on the decisions of the Supreme Court in **N. N. Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd. & Ors.**[1] **and InterContinental Hotels Group (India) Pvt. Ltd. & Anr. vs. Waterline Hotels Pvt. Ltd.**[2]. In support of the second submission on the change in number of partners by the applicant, reliance is placed on the decision of the Supreme Court in **Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. & Ors.**[3] and the decision of the learned Single Judge of the Calcutta High Court in **M/s. Hindustan Steel Works Construction Ltd. vs. M/s. Bharat Spun Pipe Co.**[4].

11. In rejoinder, Ms. Singhania would submit that the contentions as urged on behalf of the respondent are totally unacceptable, firstly for the reason that the invocation of the arbitration agreement is only under the

1 (2021) 4 Supreme Court Cases 379
2 2022 SCC OnLine SC 83
3 (2013) 1 Supreme Court Cases 641
4 1974 SCC OnLine Cal 59

2018 agreement and not under the 2013 agreement which is not the subject matter of the invocation. She would submit that as understood by the respondent, the 2013 agreement had stood cancelled. It is submitted that in the respondent's reply to the invocation notice of the applicant (dated 26 March, 2021) by the respondent's advocate's letter dated 14 April, 2021, it is not the respondent's case that the invocation as made by the applicant is not under the 2018 agreement, but under the 2013 agreement. This according to Ms. Singhania, is crucial leading to a conclusion that the contentions as urged on behalf of the respondent are wholly untenable. Ms.Singhania would next submit that even otherwise it is clear from the correspondence between the parties and more particularly the letter dated 30 December, 2020 of the respondent (page 101 of the paper-book) and the subsequent letter dated 11 January, 2021 of the respondent, that no issue whatsoever under the 2013 agreement was mentioned or even remotely recorded in the said letter, which according to Ms. Singhania, would demonstrate that such assertion of the respondent is a sham defence. It is also her contention that none of the decisions as relied by Mr. Pai would be applicable in the facts of the present case as neither there is any dispute in regard to the 2018 agreement being sufficiently stamped, nor there is any dispute on clause 9 of the 2018 agreement on the applicant changing the nature of the partnership firm in terms of what has been agreed between the parties under clause 9. It is her submission that on the respondent's own showing the present partners of the firm, both Mr. Raja Gope Rochlani and Mr. Ravi Suresh Chawla continue to be partners. It is hence submitted that such defence as taken by the respondent for the first time before this Court which was never the case of the respondent in any prior correspondence between the parties, cannot be accepted. Ms. Singhania accordingly submits that the present application needs to be allowed.

12. I have heard learned counsel for the parties and with their assistance, I have perused the documents placed on record.

13. At the outset, it needs to be observed that clearly there is an arbitration agreement between the parties as contained in the 2018 agreement as noted above. It is also submitted by Mr. Pai that the respondent would not dispute the existence of the arbitration agreement as contained in clause 12 of the 2018 agreement as also that the 2018 agreement has been appropriately stamped.

14. It is seen from the invocation notice dated 26 March, 2021 invoking the arbitration agreement, that the invocation is solely under the 2018 agreement. There is no reference even remotely to the 2013 agreement in such invocation notice. What is interesting is the respondent's reply to the invocation notice, namely the respondent's

letter dated 14 April, 2021, in which the respondent has clearly not taken a position or asserted that the invocation is not in the context of the 2018 agreement and in fact, the dispute being raised by the applicant is under the 2013 agreement. What has been set out in the reply is a defence referring to the 2013 agreement to be not stamped, as if the invocation in question by the applicant is not under the 2018 agreement, but under the 2013 agreement. Thus, the respondent's case, as seen from the reply to the invocation, is to the effect that for the purposes of the 2018 agreement, the 2013 agreement would be required to be considered to be in existence and not cancelled and nonetheless has some relevancy. It is thus the respondent's contention before the Court that the 2013 agreement necessarily forms an integral part of the 2018 agreement and it is for such reason, the 2013 agreement being not stamped, becomes relevant, even if dispute is raised under the 2018 agreement. This also for the reason that the 2013 agreement contained an arbitration clause.

15. In my opinion, the above contention as urged on behalf of the respondent is not well founded and cannot be accepted for more than one reason. Firstly, the consideration the Court would bear in mind in exercising jurisdiction under Section 11 of the Act, would be, to not look at the merits of the respondent's defence in the arbitral proceedings, but confine the enquiry to the examination of the existence of an arbitration

agreement between the parties and its invocation. In such context, it would be required to be observed that in the present case, there is no dispute in regard to the existence of an arbitration agreement as contained in clause 12 of the 2018 agreement. It is quite clear and as rightly contended by Ms. Singhania, that disputes and differences between the parties have arisen under the 2018 agreement as specifically set out in the notice invoking the arbitration. She would also be correct in her contention that the invocation under the 2018 agreement is not disputed by the respondent. The respondent however, has raised a contention that for the purposes of the 2018 agreement, the 2013 agreement is relevant, which is not sufficiently stamped. In my opinion, such contention as urged on behalf of the respondent is totally irrelevant and, alien in the context of what has been urged by the applicant, in invoking the arbitration agreement, which is by confining the applicant's case only to the 2018 agreement. The applicant in fact has proceeded on the respondent's own stand as taken by it in its letter dated 11 April, 2016, that the 2013 agreement stands cancelled.

16. On a query as to the relevancy of the 2013 agreement to the invocation in question, Mr. Pai is not in a position to justify, in any manner, that the notice invoking the arbitration agreement does not invoke the arbitration agreement as contained in the 2013 agreement and/or makes no reference to the disputes under the 2013 agreement.

If that be the case, it is surprising as to how the respondent is asserting on the 2013 agreement being not stamped, as a defence in contending that an arbitral tribunal be not appointed.

17. Even otherwise, as noted above, it appears from the record that at the relevant time, namely in the year 2016, as seen from the respondent's letter dated 11 April, 2016 (supra) the respondent itself had taken a position that the 2013 agreement stood cancelled. The respondent hence contended that a fresh joint development agreement is required to be entered between the parties and ultimately the parties entered into the 2018 agreement, under which the disputes have arisen. Thus, with certainty it can be observed that the respondent's case that the 2013 agreement is relevant for the purposes of the present proceedings, and that the same being not stamped becomes relevant, cannot be accepted, not only on the face of the invocation, but also for the reason that it can at the most be a defence of the respondent before the arbitral tribunal on merits and hence, would not be relevant when the Court is called upon to exercise its jurisdiction under Section 11(6) of the Act.

18. To my mind, the 2013 agreement being not stamped is certainly not relevant in the context of what is before the Court, namely the arbitration agreement as contained in the 2018 agreement and the plain

and clear invocation of the 2018 agreement by the applicant. As to what is the purport and effect of the 2013 agreement, in so far as the parties asserting their rights under the 2018 agreement is concerned, is purely a matter for the arbitral tribunal to consider in the adjudication of the rival claims/rights of the parties. Once the 2018 agreement is stamped under which the arbitration agreement (clause 12) finds its place, and which is invoked by the applicant for appointment of an arbitral tribunal, the decisions of the Supreme Court in **N. N. Global Mercantile Pvt. Ltd.** (supra) and **InterContinental Hotels Group (India) Pvt. Ltd.** (supra) are totally inapplicable to the facts in hand.

19. The second contention as urged on behalf of the respondent is to the effect that as there was a change in the number of partners from what they stood in the year 2013, thereafter in 2018 and again at the time of invocation in 2021, be held to be in breach of clause 9 of the 2018 agreement. According to the applicant, such change in the number of partners has brought about a situation that the applicant, who is before the Court is not party to the arbitration agreement, hence, the present proceedings at the behest of such party would not be maintainable. In my opinion, such contention of the respondent cannot be accepted and is stated to be rejected. This, firstly for the reason that the arbitration agreement between the parties is required to be considered to be an independent agreement. The position in law in this

regard is well settled [see:- **N. N. Global Mercantile Pvt. Ltd.** (supra)]. Secondly, the arbitration clause in the present case (clause 12) under the 2018 agreement is in no manner, dependent on what has been agreed between the parties in clause 9. In fact, the arbitration agreement in the very first sentence specifically refers that when disputes and differences are to arise between the "parties hereto", which would mean as to how the parties are described in the agreement namely in paragraph no.2 of the agreement as noted above, which includes the partners of the applicant referred to as "developers", which expression is understood to mean *"unless it be repugnant to the context or meaning thereof, would mean and deem to mean and include the Partners of the said Firm for the time being and their survivor/s and the respective legal heirs, administrators, executors and permitted assigns of the surviving partners".*

20. I do not find that there is any infirmity or inconsistency in the applicant invoking the arbitration agreement with the configuration of the partners as they stand at the time of invocation. It is too far fetched for the respondent to contend that merely because the number of partners were reduced to 3, this would be required to be presumed something contrary to clause 9 of the 2018 agreement so as to have a bearing on the Court exercising jurisdiction under Section 11 of the Act. As noted above it is

paramount for the Court to keep in mind the existence of the arbitration agreement in exercising jurisdiction under Section 11(6) of the Act to appoint an arbitral tribunal. This more so, as it is clearly agreed between the parties that Mr. Raja Gope Rochlani and Mr. Ravi Chawla have continued to remain as partners except for small deviation of 5% being assigned in 2021 to Mr. Rajesh Suresh. From the respondent's own showing Mr. Raja Gope Rochlani is a 63% partner and Ravi Chawla is a 32% partner, who are the signatories to the 2018 agreement. Further, in clause 9 of the 2018 agreement it has been agreed between the parties that the respondent would deal only with Mr. Raja Gope Rochlani who is described as the partner and no other person on behalf of the respondent who has continued to be a 63% partner. In fact, on the respondent's own showing (see paragraph 4 of the reply affidavit) in 2018, Mr. Raja Gope Rochlani was a 45% partner and Mr. Ravi Chawla was a 16% partner, who is now a 32% partner. It is not the case of the respondent that Mr. Raja Gope Rochlani or Mr. Ravi Chawla have ceased to be partners. If that be the case, as clearly seen from clause 9 read with clause 12 (arbitration agreement) of the 2018 agreement, the invocation being at the behest of these continuing partners, it cannot be accepted that the present invocation is at the behest of parties who are not parties to the arbitration agreement. Such contention on the face of the record ought to fail being totally unfounded. If this is the position on record, in my opinion, the reliance of Mr. Pai on the decision of the Supreme Court in **Chloro Controls India Private Limited** (supra) in so far as it expounds the group of companies doctorine is totally unfounded. Also the reliance of Mr. Pai on the decision of the learned Single Judge of Calcutta High Court in the case of **M/s. Hindustan Steel Works Construction Ltd.** (supra) is not well founded. Moreover in such decision, the Court has observed that the question whether an arbitration clause prevented a contract from being assignable would depend on the intention of the parties and the nature of the contract. In the present case, reduction in the number of the partners in no manner whatsoever has affected the arbitration agreement, considering the terminology and the language of the arbitration clause as noted above. If such contention of the respondent is examined from the context of the arbitration agreement namely clause 12, it is clearly seen that the invocation of the arbitration agreement is materially by the persons who are parties to the 2018 agreement. Mere reduction in the number of partners or admitting a partner with 5% interest, in no manner would derail and/or label the arbitration agreement to be non-invocable at the behest of the original parties.

21. Even on the examination of clause 9 of the 2018 agreement, on the face of such clause, such contention as urged by Mr. Pai referring to

this clause, needs to fail. On a holistic reading of the clause, it is clear that what is agreed between the parties is that the developer (applicant) shall not directly or indirectly transfer or assign, sell or encumber their interest and benefits under the agreement in favour of any other party or parties in any manner whatsoever, save and except the sale/transfer of developers' area i.e. the area of the applicant. Thus, such part of clause 9 is not relevant and is also not the bone of contention of Mr. Pai. In so far as the next part of clause 9 is concerned, the parties have agreed that Mr. Raja Rochlani and Mr. Ravi Chawla, two of the partners of the developers and their respective immediate families (i.e.) wife/s and/or children/s and/or parent/s and/or brother/s) shall hold minimum of 45% share in the developers' firm (applicant) at all times till completion of development of the said property and the same shall not be diluted below 45% without prior written permission of the owner and in such context, it is next provided that "admission of any new partner(s) in the developers shall be with written permission of the owner in advance". In regard to the second part of clause 9, it is not the respondent's case that the share holding of Mr. Raja Rochlani and Mr. Ravi Chawla together has reduced below 45% and it is in such context when the admission of any new partner(s) in the applicant firm was to fall below 45%, only in that event written permission of the owner, in advance, was to be obtained as agreed. There can be no other reading of such clause when it uses the words "*admission of any new partner(s) in the developers shall be with written permission of the owner in advance*". Thus on a careful and meaningful reading of clause 9, the contention of Mr. Pai that the applicant has in any manner breached clause 9 in admitting a 5% partner i.e. Mr. Rajesh Suresh which has affected the arbitration agreement, is wholly untenable to say the least. Even otherwise, such defence is taken for the first time in the reply affidavit and it is not an assertion of the respondent in any of the correspondence, much less in its reply to the invocation notice.

22. In the aforesaid circumstances, in my opinion, a case has been made out by the applicant for an arbitral tribunal to be appointed for adjudication of the disputes and differences which have arisen between the parties under the 2018 agreement. The application is accordingly disposed of by the following order:-

ORDER

(i) Mr. J. P. Sen, Senior Advocate of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the Joint Development Agreement dated 25 April, 2018.

(ii) The learned prospective sole arbitrator, before entering the reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

(iii) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.

(iv) At the first instance, the parties shall appear before the prospective arbitrator within a period of two weeks from the day a copy of the order is made available which may be mutually fixed by the prospective sole arbitrator;

(v) All contentions of the parties on merits of the disputes are expressly kept open;

(vi) The application is disposed of in the above terms. No costs.

(viii) Office to forward a copy of this order to the learned Arbitrator on the following address:

"Address: 26, 4th Floor, Kamer Building, 38, Cawasji Patel Street, Fort, Mumbai – 400 001.

Phone No. 9820070691

E-mail ID jpsen1@gmail.com".

23. At this stage, learned counsel for the respondent has prayed for stay of this order.

24. In my opinion, considering the nature of the order, the request for stay cannot be entertained. The same is rejected.

[G.S. KULKARNI, J.]