

Prajakta Vartak/PVR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION APPLICATION NO. 205 OF 2021

Vidyadhar Sakharam Khare & Anr. ..Applicants
Vs.
Aravvy Realtors & Entertainment Pvt. Ltd. & Ors. ..Respondents

Mr. Ashraf Shaikh for applicants.
Mr. Brijesh Nittekar i/b. R.V.J. Associates for Respondent Nos.5 and 6.

CORAM : G.S. KULKARNI, J.
DATE : 25 July, 2022.

P.C.:

1. This is an application filed under Section 11 of Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the applicants have prayed for appointment of an arbitral tribunal for adjudication of the disputes and differences which have arisen between the parties under an agreement titled as “Development Agreement” dated 28 July, 2011 (for short, “the said agreement”), which is annexed at Exhibit “A” to the application.

2. At the outset, learned counsel for the applicants states that respondent nos.5 and 6 are not parties to the said agreement, hence he seeks leave to delete respondent nos.5 and 6 who are represented by Mr. Nittekar. Accordingly, the applicants are permitted to delete respondent nos.5 and 6. Amendment be carried out during the course of the day. Re-verification is dispensed with.

3. It is the applicants’ case that under the agreement in question, the applicants being the owners of the land and the structures, had assigned

the development rights to respondent nos.1 to 4. It is contended that respondent nos.1 to 4 did not take any steps whatsoever to undertake any work as per the agreement and failed to comply with the terms and conditions of the said agreement.

4. It is contended by the applicants that as respondent nos.1 to 4 by themselves were unable to undertake the redevelopment work as agreed under the agreement, including for want of resources, respondent nos.1 to 4 entered into a Joint Venture Agreement dated 06 March, 2012 with respondent nos.5 and 6. However, even under such agreement, no progress whatsoever could be made and things have remained at a standstill. Consequently, by a notice dated 07 February, 2017, the applicants terminated the development agreement. There was a second notice dated 15 October, 2020 reiterating the termination (Exhibit "F").

5. It is the case of the applicants that the building in question, subject matter of redevelopment, is in dilapidated condition and now the applicants intend to appoint a new developer and proceed with the redevelopment. However, apprehension of the applicants is that respondent nos.1 to 4 are likely to cause obstruction in such process proposed to be undertaken by the applicants and therefore, it is necessary that a relief of declaration that in view of the termination of the said agreement by the applicants by their notice dated 07 February, 2017 addressed to respondent nos.1 to 4, they ought not in any manner obstruct the applicants who by way of reliefs intend to seek for arbitration.

6. Learned counsel for the applicants has drawn the Court's attention to the arbitration agreement as contained in clause 31 of the said agreement which reads thus:-

“31. All dispute and questions whatsoever which shall arise between “THE OWNERS” & “THE DEVELOPER”, shall be referred to Arbitrator(s) to be appointed jointly by consensus of “THE OWNERS” & “THE DEVELOPER”. The Arbitrators shall be dealt in accordance with and subject to the provision of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. The decision of the Arbitrator(s) will be binding on both parties. The place and jurisdiction of Arbitration shall be Mumbai.”

7. Learned counsel for the applicants has also drawn the Court’s attention to the termination notice and also the notice invoking arbitration dated 31 March, 2021 wherein setting out the nature of the disputes, the applicants also suggested the name of the proposed arbitrator. Such notice was replied by respondent nos.1 to 4 through their advocate’s letter dated 21 June, 2021 in which in paragraphs 2 and 3 the following stand was taken:-

“2. Without prejudice, with reference to your above referred notice and without going into the merits of the alleged dispute/allegations, our clients do not agree for the proposed name of sole arbitrator MR. AMURT JOSHI whose office is situated at 302, B-Wing, Fort Chambers, above Stock Exchange post office, Homi Modi Cross Lane Fort, Mumabi 400001. Our clients do not consent for the name of MR. AMRUT JOSHI as our clients apprehend of being influence by your client hence the arbitration proceeding may not be fair enough to give the equal opportunities to both the parties before the said sole Arbitrator.

3. As due to current pandemic our clients are unable to function regularly with their routine business hence they reserve their right to reply your above referred notice in details in future till then none of the contention, statements, allegation or averment of your client are deem to be accepted by our clients, unless specifically admitted herein.”

Perusal of the above reply clearly shows that the name of the proposed arbitrator was not agreeable to respondent nos.1 to 4. It is clear that respondent nos.1 to 4 have not disputed the existence of the arbitration agreement.

8. This application was filed on 08 September, 2021. The respondents are already served and this is quite some time back.

Affidavit of service of Mr. Nitin B. Pawar dated 07 October, 2021 is placed on record by which respondent nos.1 to 4 are stated to be served. It is pointed out by the learned counsel for the applicants that respondent no.2, Chairman and Managing Director of respondent no.1 as also respondent nos.3 and 4 are served by all permissible modes and service of the proceedings has been acknowledged. However, respondent nos.1 to 4, who are contesting respondents, are not represented. Hence, it appears that they are not interested to contest the present proceedings.

9. In these premises, as there exists an arbitration agreement, as also there is a lawful invocation. It is also clear that there was no consensus between the parties to appoint an arbitral tribunal. There is hence sufficient cause for this Court to exercise jurisdiction under Section 11(6) of the Act. Hence, the following order:-

ORDER

- (i) Smt. Vaishali Chaudhari, Advocate of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the Development Agreement dated 28 July, 2011.
- (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 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;

- (v) All contentions of the parties are expressly kept open;
- (vi) The application is disposed of in the above terms. No costs.
- (vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

“Smt. Vaishali Choudhari, Advocate

Address 219, Shati Niwas (Backside)
Opp. New Naigaon Municipal School,
Near Hindmata Cinema,
Dadar (E), Mumbai – 400 014.
(M) – 9821932716/9833309662
E-mail : choudhari.vaishali77@gmail.com ”

[G.S. KULKARNI, J.]