

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: October 31, 2022

+ ARB.P. 312/2021 & I.A. 12501/2021

MUKUT HOUSE DEVELOPERS PRIVATE LIMITED

..... Petitioner

Through: Ms. Astha Garg, Adv.

versus

GURINDER SINGH KAIRON & ANR.

..... Respondents

Through: Mr. Ashok Mahajan, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

I.A. 12501/2021

1. This is an application filed by the petitioner under Order 1 Rule 10 read with Order XXII Rule 4 of CPC, 1908, for impleadment of legal heirs of the deceased respondent No.1. The prayers made in the application are the following:-

“In light of the foregoing submissions, it is prayed that this Hon'ble Court may be pleased to:

a) Take on record Respondent No.2, namely Shri Harpratap Singh as the legal heir of the deceased Respondent No.1, namely Shri Gurinder Singh Kairon in this petition;

b) Direct the Respondent No.2 to file on affidavit the particulars of any other legal heirs of the deceased Respondent No.1 and permit the Petitioner to file an amended memo of parties thereafter;

c) Pass such other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. It is the case of the petitioner, in this application, that the respondent No.1 has expired on December 31, 2020. It is also the case of the petitioner that both the respondents i.e., the respondent No.1 viz. late Sh. Gurinder Singh Kairon and the respondent No.2 viz. Harpratap Singh, were signatory to the Collaboration Agreement dated September 07, 2011. It is also stated that the respondent No.2, is the son of the deceased respondent No.1 and the petitioner and its Counsels do not have any information pertaining to any other legal heirs of the deceased respondent No.1. It is also stated that the respondent No.2 substantially represents the estate of the deceased respondent No.1 and shall continue to defend the present petition on behalf of the late respondent No.1. So, it is prayed before this Court that the respondent No.2 be taken on record as the legal heir of the deceased respondent No.1.

3. In view of the stand of the petitioner, the present application is allowed and thus the deceased respondent No.1 shall be represented through his legal heir i.e., respondent No.2. Accordingly, the amended memo of parties be filed by the petitioner within the period of 10 days from today.

4. Application stands disposed of.

ARB.P. 312/2021

5. The present petition is filed by the petitioner under Section 11(5) of the Arbitration and Conciliation Act,1996 (hereinafter referred to as ‘A&C Act,1996’) with the following prayer:

“In view of the facts and circumstances of the present case, it is respectfully prayed that this Hon'ble Court may be pleased to:

- a) Appoint a neutral Sole Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 pursuant to Arbitration Clause in the Collaboration Agreement dated 07.09.2013;*
- b) Grant the cost of the present Petition to the Petitioner;*
- c) Pass any other order/s that this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”*

6. It is a case where the petitioner is a company incorporated under the provisions of the Companies Act, 1956, entered into the ‘Collaboration Agreement’ (hereinafter, referred to as the ‘Agreement’) dated September 07, 2011, with the respondents.

7. As per the Agreement, the respondents, *inter alia*, had to provide the ‘Project Land’ i.e., the land comprising of ‘Building No.3 bearing Corporation No.362/XII—min. along with land underneath measuring 6675 sq. yards bearing khasra no.1312 and 1315, situated at THE MALL, Amritsar, Punjab’, at the complete disposal of the petitioner for the construction and development of the ‘Complex’ (i.e., the commercial complex comprising of shopping mall and two basements to be constructed on the ‘Project Land’) and whereas the

petitioner's primary obligation *inter alia* was to pay the amounts and refundable sums/deposits to the respondents as a consideration for the development and construction of the afore-said 'Complex'.

8. It is the case of the petitioner that it had paid an amount of ₹10,25,00,000/- as the total consideration amount under the 'Agreement', in the following manner:

- i) ₹6,75,00,000/- was paid as an interest free refundable deposit to the respondents;
- ii) ₹3,50,00,000/- was paid directly to Parsvnath, towards execution of the Sale deed/Conveyance Deed for the undivided share of the petitioner in the Project Land.

9. It is stated that as per the said 'Agreement', the afore-said Deposit of ₹6,75,00,000/- and some 'Direct Payments' of ₹3,50,00,000/- were to be refunded by the respondents to the petitioner at the time of handing-over of the possession of the respondents' share in the built-up spaces of the 'Complex'.

10. It is further stated that the 'Agreement' contains Clauses 7.5 and 7.6, which provide certain remedies and modes to recover damages by the petitioner, in the event of the failure or inability on the part of the respondents to refund the gross amount of ₹10,25,00,000/- along with other expenses to the petitioner. It is further stated that the petitioner also has a right of lien over the exclusive area reserved for the respondents, as well as a right to recover the outstanding payments from the respondents by selling the reserved units and also by leasing out and receiving the rentals out of the respondents' areas in the 'Complex'.

11. That the petitioner vide notice dated July 18, 2018, informed the respondents that it has filed an application dated July 06, 2016 to the Executive Officer, Municipal Court, Amritsar, seeking grant of an 'Occupation Certificate' qua the 'Project' completed by the petitioner and soon expecting the said certificate from the concerned authority. The petitioner had also called upon the respondents to pay the due amount in conformity with the terms of the 'Agreement' entered between the parties.

12. It is stated that even after sending the afore-said notice dated July 18, 2018, neither any payments were released by the respondents towards their outstanding payment nor any response was received by the petitioner.

13. That subsequently, the petitioner, on May 07, 2019, received the 'Occupation Certificate' and the said fact was duly brought to the notice / knowledge of the respondents vide letter dated July 31, 2019. Through that letter, the petitioner once again called upon the respondents to clear the outstanding amount along with an interest of 14 % per annum, from the date of offer of possession of respondents' share of built area, i.e., from December 20, 2018, till the date, payment is made by the respondents.

14. It is further the case of the petitioner that it was only after October 2019 that the respondents started making some payments against the outstanding amounts.

15. It is stated that despite making some payments, the respondents have yet to clear the outstanding amount aggregating to ₹4,98,20,250/-.

16. That because of non-payment of the afore-mentioned

outstanding amount, the petitioner issued a letter dated July 07,2020, calling upon the respondents to clear the following dues:

- a) An amount of ₹3,91,13,774.00/- towards refundable deposit;
- b) An amount of ₹2,40,39,700.00/- towards interest @14% per annum on the unpaid/delay in refund/payment of refundable security deposit, cost of construction, marketing costs and GST in terms of the 'Agreement' as mentioned in Clause 7.7 of the 'Agreement' dated September 07, 2011;
- c) An Outstanding marketing cost of ₹2,65,50,000.00/-.

17. It is stated that despite multiple reminders, the respondents have miserably failed in making the payments and clearing the outstanding amount. As a result, the petitioner sent a Legal Notice dated November 04, 2020 calling upon the respondents to pay the petitioner the sum of ₹8,97,03,475/- along with an interest @14% per annum from the date of offer of possession of respondents' share of built area till the date of its release. The said Notice was duly served upon the respondents, however, the respondents never replied to the same.

18. It is stated that because of the failure on the part of the respondents to clear the due and outstanding amount, disputes and differences have arisen between the parties. Therefore, the petitioner invoked the arbitration clause, i.e., Clause 19, stipulated in the 'Agreement' and issued an Arbitration Notice dated December 11, 2020, invoking the said Arbitration Clause.

19. The Clause 19 of the 'Agreement' is reproduced as follows:

19. ARBITRATION

"19.1 "Disputes, if any, which may arise between the parties with respect to this Agreement, or interpretation of terms, or its performance or execution, shall be settled by reference to Arbitration under the provisions of Arbitration and Conciliation Act of 1996 and the rules made thereunder or any amendments made thereof ("Arbitration Act "). For the purposes of such arbitration, the dispute shall be referred to a sole Arbitrator to be appointed mutually by the Parties. Failing such mutual agreement between the Parties, the dispute shall be referred to a sole Arbitrator to be appointed by the Court in accordance with the Arbitration Act. For this purpose the owners shall be considered jointly as One Party. The venue of Arbitration shall be New Delhi. "

20. That the petitioner through the invocation notice had also recommended the names of the former judges of this Court for the appointment as Sole Arbitrator.

21. It is stated that the said invocation Notice was duly sent to the respondents through Courier and Registered Post at the residence addresses of the respondents and despite the service of the Legal Notice as well as Notice invoking the Arbitration, the respondents never replied to any of them.

22. It is stated that since both the parties are unable to appoint the Sole Arbitrator by mutual consent, the petitioner has filed the present petition seeking indulgence of this Court for the purpose of appointment of a Sole Arbitrator to adjudicate the disputes and differences which have arisen between the parties.

23. On the other hand, Mr. Ashok Mahajan, learned counsel for

the respondents would challenge the very maintainability of the petition on the ground that the 'Agreement' executed between the parties, which contains the arbitration clause, is not duly stamped and thus this Court cannot act upon the said document or enforce the arbitration clause contained therein unless the stamp duty and penalty due in respect of the said document is paid. He stated that as per Section 35 of the Indian Stamp Act, 1899, instruments which are not duly stamped are inadmissible in evidence and thus cannot be acted upon. He states that the defects are required to be cured by the petitioner and the document need to be impounded and should be dealt with, in the manner specified under Section 38 of the Indian Stamp Act, 1899. In support of his submission, he has relied upon the judgment of the Supreme Court in *SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited*, (2011) 14 SCC 66. He has also relied upon the judgment of the Supreme Court in *Garware Wall Ropes Ltd. vs. Coastal Marine Constructions and Engineering Limited* (2019) 9 SCC 209, to contend that 'when this Court considers an application under Sections 11(4) to 11(6) of the 'A&C Act,1996' and comes across an arbitration clause in an agreement or a conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act, 1899, to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon'.

24. That apart, he also relied upon the judgment of the Supreme Court in *N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and others* (2021) 4 SCC 379, wherein the Supreme

Court while referring to *SMS Tea Estates Private Limited (supra)* and *Garware Wall Ropes Ltd. (supra)*, has held that the finding in the said judgments to the effect that the non-payment of stamp duty on the commercial contract would invalidate the arbitration agreement and render it non-existent in law and unenforceable, is not the correct position in law. In fact, by referring to paragraphs 146 and 147 of the judgment in *Vidya Drolia and Others vs. Durga Trading Corporation (2021) 2 SCC 1*, which has affirmed the judgment in *Garware Wall Ropes Ltd.(supra)*, the Supreme Court has referred the matter to a Larger Bench for consideration. According to Mr. Mahajan, the ratio in *SMS Tea Estates Private Limited (supra)*, *Garware Wall Ropes Ltd.(supra)* and *Vidya Drolia and Others (supra)*, as far as the issue, whether the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement and render it non-existent in law and unenforceable is concerned and the same having been referred to a Larger Bench, this Court should not appoint an Arbitrator, as the ‘Agreement’ containing the arbitration clause involved in the present case is not duly stamped.

25. He has also relied upon the judgment in the case of *State of Maharashtra and another vs. Sarva Shramik Sangh, Sangli and others (2013) 16 SCC 16*, to contend that once a judgment has been referred to a Larger Bench, that in itself, does not render it not binding, until the reference is answered by the Larger Bench. It is his case that until the reference is answered, the interpretation of law presently holding the field will have to be followed. So it is urged that the ratios as laid down in *SMS Tea Estates Private Limited (supra)*,

Garware Wall Ropes Ltd.(supra) and ***Vidya Drolia (supra)*** should be followed by this Court and the present petition need to be dismissed.

26. On the other hand, learned counsel for the petitioner has drawn my attention to the latest judgment of the Supreme Court in the case of ***Intercontinental Hotels Group (India) Pvt. Ltd. and Ors. vs. Waterline Hotels Pvt. Ltd., MANU/SC/0085/2022***, to contend that the Supreme Court in this case, whilst taking into consideration the decision in ***N.N. Global Mercantile Private Limited (supra)***, has held that until the Larger Bench settles the issue, all the matters at pre-appointment stage, cannot be left hanging and ensured that the arbitrations are carried on and disputes be referred to arbitration. The relevant paragraph of ***Intercontinental Hotels Group (India) Pvt. Ltd. and Ors.(supra)*** is reproduced as follows:

“22. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court - until the larger Bench decides on the interplay between Sections 11(6) and 16 - should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.”

27. Having heard the learned counsel for the parties, at the outset, I may state though the parties were earlier relegated to the process of mediation however no headway could be made before the mediation centre. The Learned counsels for the parties have argued their respective cases, as it can be seen from the above. Accordingly, I

proceed to decide the present petition.

28. There is no dispute that the 'Agreement' dated September 07, 2011, has been executed between the petitioner and the respondents. The 'Agreement' also consists of an arbitration clause, being Clause 19, which I have already reproduced above, wherein 'New Delhi' is stipulated as the venue of arbitration. It is the case of the petitioner that it had issued communication dated July 31, 2019, the legal notice dated November 04, 2020 and the arbitration notice dated December 11, 2020, calling upon the respondents to pay the amount due and payable on their part. It is also the case of the petitioner that despite invoking the arbitration clause and proposing the names of the three retired Judges to the respondents for the appointment of a Sole Arbitrator, no response has been received to the same.

29. In view of the aforesaid position of law, more particularly in view of the judgment in *Intercontinental Hotels Group (India) Pvt. Ltd. and Ors. (supra)*, the process of arbitration need to be taken forward as an alternate dispute resolution mechanism in terms of Clause 19 of the 'Agreement', this petition is required to be allowed. This Court accordingly appoints Justice Badar Durrez Ahmed, a Former Chief Justice of J&K High Court (Mob. No.9910615334), as the sole Arbitrator, who shall adjudicate the disputes between the parties, through claims and counter claims, if any. The fee of the learned Arbitrator shall be regulated in terms of Fourth Schedule of the A&C Act, 1996. He shall give his disclosure under Section 12 of the Act.

30. A copy of this order shall be sent to Justice Badar Durrez

Ahmed (Retd.) through WhatsApp.

31. This petition is disposed of.

V. KAMESWAR RAO, J

OCTOBER 31, 2022/ak

