

**IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE**

Present :

Hon'ble Justice Moushumi Bhattacharya

AP 557 of 2023

Sarika Bhoot

vs

Soumitra Projects Private Limited

For the petitioner	:	Mr. Rahul Karmakar, Adv. Mr. Jibantaraj Dan Roy, Adv. Mr. Rittick Chowdhury, Adv. Ms. Champa Pal, Adv. Mr. Nishant Choudhary, Adv.
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For the respondent	:	Mr. Shuvasish Sengupta, Adv. Mr. Samrat Mukherjee, Adv. Ms. Ledia Dasgupta, Adv.
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Last heard on	:	18.10.2023
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Delivered on	:	24.11.2023
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Moushumi Bhattacharya, J.

1. The petitioner's application is under section 11 of The Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. The petitioner has prayed for the appointment by reason of disputes and differences having arisen

between the petitioner and the respondent out of an agreement for sale dated 7.9.2012 and a Memorandum of Settlement dated 29.9.2016.

2. First, a brief statement of the background to the dispute.

3. The petitioner was interested in purchasing a flat in a multi-storeyed building complex constructed by the respondent in New Town, Kolkata. The parties executed an agreement for sale on 7.9.2012. This agreement for sale contained an arbitration clause at clause 18.1. The respondent, being the developer, however failed to deliver the flat on time which would be evident from the correspondence disclosed in the application from 30.10.2015 – 2.12.2015. The respondent could not make the flat ready for transfer and failed to honour the timelines fixed for delivery of the flats to the petitioner. The petitioner, through her lawyer, cancelled the agreement dated 7.9.2012 under cover of a letter dated 21.1.2016 which records the claims of the petitioner under various heads. The petitioner invoked the arbitration clause contained in the agreement dated 7.9.2012 by a letter dated 11.3.2016. The respondent's reply to the invocation on 22.3.2016 indicated that the flat was ready for delivery and there was no requirement to proceed with the arbitration. The respondent however failed to deliver possession of the flat to the petitioner.

4. The parties executed a Memorandum of Settlement dated 29.9.2016 recording that the earlier agreement of 7.9.2012 was cancelled / rescinded, which was also recorded by a Co-ordinate Bench in AP No. 293 of 2016. The order dated 3.11.2016 is part of records. The parties thereafter executed 6 supplementary Memoranda of Settlement on 9.11.2017, 3.3.2018, 27.4.2018,

31.7.2018, 1.1.2019 and 1.4.2019. The Memorandum of Settlement is supplementary to the agreement of 7.9.2012. Each of these 6 supplementary Memoranda of Settlement mention that the agreements are supplementary to the parent Memorandum of Settlement dated 29.9.2016.

5. The respondent's resistance for opposing the application for appointment of an arbitrator is primarily on the ground that the arbitration agreement dated 7.9.2012 as well as 29.9.2016 is insufficiently stamped and the agreements should be impounded for assessment on stamp duty. Learned counsel for the respondent relies on the Supreme Court decision in *N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited; (2023) 7 SCC 1*

6. Learned counsel appearing for the petitioner seeks to argue that the first agreement dated 7.9.2012 was novated by the Memorandum of Settlement dated 29.9.2016 and further that the petitioner is not required to pay any stamp duty in respect of the latter.

7. From the arguments advanced by counsel appearing for the parties, the first issue which falls for adjudication is whether the Memorandum of Settlement executed on 29.9.2016 novated the agreement dated 7.9.2012. If the answer is in the affirmative, the Court would then have to consider whether the petitioner is under an obligation to have the agreement impounded and assessed for stamp duty.

8. The Memorandum of Settlement (MoS) dated 29.9.2016 is the best guide to answer the first question, that is, whether the MoS novated the agreement dated 7.9.2012. Although the MoS describes itself as supplemental to the

agreement dated 7.9.2012, the recital to the agreement clearly records that the petitioner cancelled the earlier agreement of 7.9.2012. The recording of cancellation and the petitioner's looking back to the earlier agreement fits in with the sense of "DEJA - VU" - which happens to be the name of the building complex.

9. Further, clause 1 of the MoS records that the "petitioner (purchaser)" agreed to surrender her right and interest in respect of the flat by cancelling the earlier agreement subject to the "respondent (developer)" paying a sum of Rs. 4800/ sqft. to the petitioner on account of refund of the advance money alongwith penalty and refund of cost paid by the petitioner. Clause 2(a) further records that the respondent would pay a sum of approximately Rs. 96.99 lakhs within 31.3.2017. Clause 3 of the MoS is also significant and records the following :

"That the said Agreement dated 07.09.2012 upon completion of the financial commitments as aforesaid shall automatically stand cancelled, void, ineffective and inoperative and shall have no effect and none of the parties shall be liable to perform anything in any manner or nature whatsoever in terms of the said Agreement and none of the parties shall have any claim, demand, right or interest arising out of the same against the other party. However, in case the developer fails and/or neglects to pay the amount within the stipulated time as aforesaid, this memorandum of settlement shall stand cancelled at the discretion of the purchaser and in such event this memorandum of settlement would no more be enforceable by the party of the first part."

10. Clause 3 makes it clear that the Memorandum of Settlement will stand cancelled at the discretion of the purchaser (the petitioner herein) and if the purchaser does so, the MoS would no longer be enforceable by the respondent / developer. Admittedly, the petitioner did not cancel the MoS and instead relies on it to say that there is an existing dispute between the parties. The petitioner also invoked the arbitration clause in the MoS as well as in the other agreements including of 7.9.2012 in its letter of invocation dated 25.7.2022.

11. Hence, the respondent's argument that the parties did not give effect to the MoS or that the MoS did not novate the agreement dated 7.9.2012 is not acceptable. The terms of the MoS including the first part of clause 3 that the agreement dated 7.9.2012 shall automatically stand cancelled, void, ineffective and inoperative upon completion of the financial commitments of the MoS is further testimony to this view. The terms of the MoS shows that the parties entered into a new agreement with a set of fresh obligations upon the respondent's failure to honour the terms of the first agreement dated 7.9.2012. The fact that the MoS was treated as a new agreement would also appear from the order of the Co-ordinate Bench dated 3.11.2016. The order records that the disputes between the parties were settled in terms of the Memorandum of Settlement and that there was no live dispute by reason of the MoS.

12. The intention of the parties, as reflected in the MoS, was to completely detach themselves from the original agreement and a complete severance from the original agreement of 7.9.2012. The termination letter issued by the petitioner on 21.1.2016 of the agreement dated 7.9.2012 makes the intention

of the parties specific. The parties intended that the parties would enter into a fresh agreement by way of the MoS and jettison the earlier agreement.

13. The intention of the parties as revealed from the MoS is also significant. The subject matter of the MoS was no longer the sale and purchase of the flat as under the agreement dated 7.9.2012 but the mode and manner of payment of money by the respondent to the petitioner. As stated above, the MoS records that the petitioner / purchaser had relinquished her right in respect of the purchase of flat by cancelling the previous agreement and was now only interested in the money which was to be paid by the respondent to the petitioner on account of the respondent's failure to deliver possession of the flat to the petitioner within the agreed time-frame.

14. It is also of utmost importance that by the time the petitioner invoked the arbitration agreement contained in the MoS, the said flat had already been sold by the respondent to the third party. Hence, the subject matter of the first agreement dated 7.9.2012 had already been frustrated and the substratum demolished (building analogy) at the time of invocation i.e. on 25.7.2022.

15. The above reasons lead to the definite conclusion that the parties agreed to substitute the agreement dated 7.9.2012 by the MoS dated 29.9.2016. The agreement dated 7.9.2012 was thus novated by the agreement dated 29.9.2016.

16. Section 62 of the Contract Act, 1872 gives primacy to the intention of the parties to agree to substituting a contract with a new one where the earlier contract is rescinded with the intention that the earlier / original contract need

not be performed at all. In *Heyman vs. Darwins*; 1942 AC 356, *The House of Lords* held that the arbitration clause in the contract perishes with the contract where the parties thereto agree to bring the contract to an end. The Supreme Court in *Young Achievers vs. IMS Learning Resources Private Limited*; (2013) 10 SCC 535 held that the arbitration clause also falls with the superseded contract where the arbitration clause is a component of the earlier contract. The Supreme Court relied on *Heyman vs. Darwins* in that decision. *Lata Construction vs. Dr. Rameshchandra Ramniklal Shah*; (2000) 1 SCC 586 also came to the same view where the substitution of a new contract in place of the old contract would have the effect of rescinding or completely altering the terms of the original contract.

17. Since the Court is of the view that the Memorandum of Settlement novated the agreement dated 7.9.2012, the second issue would be whether the petitioner would be required to pay the requisite stamp duty for the new contract/MoS.

18. The MoS contains an arbitration clause. The Court is in agreement with the contention of the petitioner that the MoS does not create any right and interest on any property and instead it is concerned with payment of money. Therefore, the MoS would not fall under Schedule I-A to the Indian Stamp Act, 1899 which provides for stamp duty for instruments in West Bengal. Article 5(d) of Schedule I-A relates to agreements for sale or lease-cum-sale of immovable property and provides for payment of stamp duty. Schedule I-A however does not provide for payment of any stamp duty for a Memorandum of

Settlement. Article 55(b) of Schedule I-A relates to release of title and is hence not applicable to this case.

19. The Court is therefore of the view that the petitioner cannot be brought within the four corners of the Supreme Court judgment in *N.N. Global* where the document in question was a Work Order which contained a bank guarantee and was an unstamped document. The document hence fell under Schedule 1-A of the Indian Stamp Act. Since, the petitioner has not relied on the agreement for sale dated 7.9.2012 in the present case, which was novated by the Memorandum, the petitioner would not come within the stranglehold of *N.N. Global*.

20. There is admittedly an existing dispute between the petitioner and the respondent which would be evident from the petitioner's payment of purchase money to the respondent for delivery of the flat. The respondent failed to deliver the flat and the parties entered into a Memorandum of Settlement thereafter. Several supplementary Memoranda of Settlement were also executed between the parties culminating in the notice dated 25.7.2022 invoking the arbitration clause. The entire dispute is set out in that notice. Admittedly, the respondent issued a post-dated cheque dated 30.6.2019 of Axis Bank for payment of the admitted dues of approximately Rs. 87 lakhs to the petitioner but the cheque was dishonoured upon presentation. It is relevant that the respondent's reply to the petitioner's section 21 notice does not dispute the arbitration agreement but simply states that the respondent is not agreeable to the petitioner's choice of arbitrator.

21. The dispute between the parties is directly relatable to the arbitration agreement in the Memorandum of Settlement and subsequent Memoranda executed between the parties. The dispute is required to be resolved as the respondent is in admitted default of its obligations under the MoS and the arbitration agreement contained therein.

22. AP 557 of 2023 is accordingly allowed and disposed of by appointing Ms. Urmila Chakraborty, Advocate, to act as the learned Arbitrator for resolving the disputes and differences between the parties. This judgment and order shall be communicated to the learned Arbitrator within 3 weeks from the date of this judgment and the learned arbitrator shall communicate her consent to the Registrar, Original side of this Court within 3 weeks from the date of such communication in accordance with the prescribed format under the 1996 Act and the Schedules thereto. The petitioner shall also communicate the particulars of the contact person of the petitioner to the learned Arbitrator.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)