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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.55 OF 2021

Ranjit Kantilal Shah & Anr.

...Petitioners

Versus

Kruti Infrastructure & Ors.

...Respondents

Mr. Sachin Punde for the Petitioners.

Girish Godbole, Senior Advocate i/b. Parag Tilak, Ketki Gadkari and
Nishikant Degaonkar for the Respondents.

CORAM : R.I. CHAGLA J.

DATE : 15 JUNE 2023.

ORDER :

1. By this Arbitration Petition, the Petitioner has applied under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Sole Arbitrator for resolving the dispute between Petitioners and Respondents in furtherance of the arbitration clause entered between the parties as per the Clause 11(f) of the Partnership Deed dated 21st October, 2014.

2. The Petitioners who are the partners of the partnership firm Kruti Infrastructure had retired from the partnership firm on 31st March, 2016.

3. The Petitioners have in the Petition relied upon the original partnership Deed dated 17th January, 2006 executed between the Petitioners to form the Respondent No.1 partnership firm which was from 18th November, 2005. Thereafter subsequent Partnership Deed dated 29th November, 2010 was executed between the Petitioners and Respondent Nos.2 to 5 to form Partnership Firm. The Petitioners and Respondent Nos.2 to 5 thereafter admitted Respondents Nos.6 to 8 as partners in the Respondent No.1 partnership firm from 1st April, 2012 and a supplementary partnership deed dated 1st April, 2014 and partnership deed dated 21st October, 2014 was executed by the Petitioners and Respondent Nos.2 to 8.

4. In view of dispute that arose between the Petitioners and Respondent Nos.2 and 3, Respondent No.1 through Respondent Nos.2 and 3 filed Civil Miscellaneous Application No.286 of 2016 under Section 9 of the Arbitration and Conciliation Act, 1996 before the District Judge, Solapur. The Civil Miscellaneous Application had been opposed by the Petitioners and by judgment and order dated 6th March, 2017, the Principal District Judge, Solapur rejected the Civil Miscellaneous Application. Thereafter, the Respondent No.1

through Respondent Nos.2 and 3 preferred Arbitration Appeal No.13 of 2017 before this Court under Section 37 of the Arbitration and Conciliation Act, 1996 challenging the said judgment and order dated 6th March, 2017.

5. By an order dated 30th June, 2017, this Court had recorded the statement of the Petitioners herein that they accept that they stood retired from partnership business of the Respondent No.1 firm w.e.f. 1st April, 2016 and that they will not claim any share in the immovable properties of the partnership firm. They are entitled to share of 11.11% and 11.12% respectively. A joint request was made for appointment of valuer for ascertaining the valuation of the unsold properties set out in paragraph 3 of the said order and submit report to the Court.

6. Thereafter by a subsequent order dated 20th July, 2017, it was again accepted by the Petitioners herein that they stood retired from partnership business of Respondent No.1 firm w.e.f. 1st April, 2016 and they will not claim any share in the immovable properties of the partnership firm. A statement made by the Advocate Mr. Phatak on behalf of Respondents herein was recorded as that the

Respondents herein will not dispose of the property mentioned in paragraph 3 of the said dated 30th June, 2017. The statement was accepted as an undertaking to this Court.

7. By an order dated 28th August, 2019, the Arbitration Appeal No.13 of 2017 was disposed of. This Court had recorded that the Appeal had been listed before this Court on several occasions. On 30th June, 2017, an endeavour was made to resolve the disputes between the parties. The Valuer had then carried out the valuation which was opposed by the learned Counsel for the Respondents herein on the ground that the valuation was on an extremely higher side and not agreeable to the Respondents. This Court had noted that the proceedings have been pending since 2017 and admittedly the business of the partnership firm was also at a stand still. It was accordingly held that it would be appropriate for the parties to commence arbitral proceedings and if possible make an endeavour to arrive at amicable settlement. This Court was mindful of the fact that these proceedings cannot be converted into a mini trial or a mini arbitration and there is also no useful purpose to keep this Appeal pending under Section 9 of the Act any further. By the said Order dated 28th August, 2019, this Court had directed parties to

commence the arbitral proceedings within thirty days of the said Order. Liberty had been granted to the parties to move an appropriate application under Section 17 of the Arbitration and Conciliation Act, 1996 before the Arbitral Tribunal, seeking such interim measures. The interim order dated 20th July, 2017 passed in terms of the said statement made on behalf of the Respondents herein shall continue till the decision by the Arbitral Tribunal on the Section 17 application. This Court had clarified in the said Order that in case arbitral proceedings are not commenced within thirty days of the said Order, this protection shall cease to have any effect. All contentions of the parties were expressly kept open.

8. The Petitioners issued notice dated 27th September, 2019 invoking arbitration. After receipt of Notice invoking arbitration, meetings took place between the parties on 19th September, 2019 and 24th October, 2019 which resulted in a settlement being arrived at, the terms of which have been recorded in the minutes annexed at Exhibit A to the Affidavit in Reply. The Petitioners have in the Petition not disclosed the meetings or the minutes recorded but on the contrary after referring in general to meetings held between the parties to amicably settle the dispute,

stated that they now realize that the settlement meetings were nothing but an attempt to protract the arbitral proceedings.

9. The Petitioners have contended that after receipt of notice dated 27th September, 2019, arbitral proceedings stand commenced and accordingly as per order dated 6th September, 2019, the Respondents were bound by the undertaking and are prohibited from disposing of the immovable properties mentioned in paragraph 3 of order dated 30th June, 2017 till the decision by the arbitral tribunal on Section 17 of the Act.

10. The Petitioners have further contended that in breach of the undertaking given to this Court, the Respondents executed sale deeds in respect of the unsold properties of the partnership firm and therefore the Petitioners filed a Contempt Petition against the Respondents. The Petitioners have accordingly submitted that there are disputes and differences between the Petitioners and Respondents and for which the present Application has been made for appointment of Sole Arbitrator under Clause No.11(f) of the Partnership Deed dated 21st October, 2014.

11. The Respondents have filed their Affidavit in Reply wherein they have contended that the Petitioners and the Respondents have settled their disputes vide agreements dated 19th September, 2019 and 24th October, 2019 and therefore there does not exist any dispute to refer to arbitration. The Respondents have further contended that the arbitration notice was issued on 27th September, 2019 and the present Petition filed almost two years after the invocation of the arbitration notice which shows that the disputes were settled in 2019 and there was no real intention on the part of the Petitioners to file the present proceeding under Clause 11 of the Act. Annexed to the Affidavit in Reply are the minutes of the meetings wherein the settlement is contended to have been arrived at and which minutes have been signed by the Petitioners and Respondents. The first of the meetings was held prior to the Advocates notice dated 19th September, 2019 and thereafter meeting was held on 24th October, 2019, the minutes of which record the settlement. There are accounts which have been drawn up by the accountant of the Respondent No.1 firm which show that certain payments are due and payable to the Petitioners.

12. There are additional Affidavits which have been

filed by the Petitioners and Respondents which show further negotiations towards the implementation of the settlement arrived at between the Petitioners and Respondents. This includes the division of plots of Akshat Green being one of the properties of the Respondent No.1 firm. There is reference also to a suit having been filed by the Respondents for specific performance in respect of one of the other properties of the Respondent No.1 firm.

13. Mr. Sachin Punde, the learned Counsel appearing for the Petitioners submits that there is no official settlement which has been arrived at between the parties and that from the additional Affidavit filed by the Petitioners there are disputes which are referable to arbitration under Clause 11 (f) of the Partnership Deed dated 21st October, 2014. He has submitted that in view of the arbitration notice dated 27th September, 2019 invoking the arbitration having been sent to the Respondents and received by them, there is commencement of arbitration under Clause 21 of the Arbitration and Conciliation Act. Accordingly, the disputes between the parties being alive are referable to arbitration.

14. Mr. Girish Godbole, learned Senior Counsel

appearing for the Respondents has submitted that there is a settlement arrived at between the parties as reflected in the minutes of meetings dated 19th September, 2019 and 24th October, 2019 which settlement has been suppressed in the Arbitration Petition. He has submitted that in view of the settlement arrived at between the parties, there are no disputes which are referable to arbitration and accordingly the Arbitration Petition be dismissed.

15. There is reliance placed by the Counsel for the Petitioners and Respondents on the decision of the Supreme Court in *National Insurance Co. Ltd. Vs. M/s. Boghara Polyfab Pvt. Ltd.*¹, wherein the Supreme Court has referred to an arbitration agreement in contract and laid down that disputes under the agreement cannot be invoked to seek reference of any dispute to arbitration when the contract is discharged by performance, or accord and satisfaction, or mutual agreement and the same is reduced to writing signed by the parties to the arbitration agreement. This has been set out in paragraph 21 of the said decision. The Supreme Court has held that the Court exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or

¹ (2008) 13 S.C.R. 638.

discharge of contract by performance and if that is answered in the affirmative, the Court will refuse to refer the dispute to arbitration. Further, if the Court comes to the conclusion that the full and final settlement receipt was as a result of any fraud / coercion / undue influence, he will have to hold that there was no discharge of contract and consequently refer the dispute to arbitration.

16. In the facts of the present case and having considered the submissions, it does appear that there is a suppression of material facts by the Petitioner. It is necessary to note that in the Contempt Petition which had been filed by the Petitioners against the Respondents, this Court by order dated 19th January, 2023 had come to the conclusion that the material facts of the minutes of meetings / settlement dated 19th September, 2019 and 24th October, 2019 which had been executed by the Petitioners and Respondents had been suppressed. Further, this Court by order dated 19th October, 2022 had observed that, the Counsel appearing for the Petitioners is unable to dispute that there was indeed a meeting held on 19th September, 2019 between the parties wherein settlement terms were executed. This Court had in considering that there had been suppression of material facts dismissed the Contempt Petition on that

ground.

17. In the present Arbitration Petition which has been filed for reference of the alleged disputes to arbitration under Section 11(6) of the Act, there is similar suppression of the meeting held on 19th September, 2019 and subsequent meeting dated 24th October, 2019, wherein settlement terms were executed. Further, from the material on record it appears that the dispute between the parties is with regard to the implementation and / or execution of the settlement agreement. Having perused the prior order dated 28th August 2019 passed by this Court in Arbitration Appeal No.13 of 2017 referred to above, this Court had directed the parties to commence arbitration proceedings within 30 days from the date of the said order and for the parties to move appropriate application under Section 17 of the Arbitration and Conciliation Act, 1996 seeking such interim measures. In light of this, the Court had considered the statement made on behalf of the Respondents that they will not dispose of the properties mentioned in Paragraph 3 of the order dated 30th June, 2017 and which had been accepted as an undertaking to this Court. This was to continue to operate till decision of Arbitral Tribunal on Section 17 application, provided that

arbitral proceedings are commenced within 30 days from the date of the said order. The arbitration notice which has been issued on 27th September, 2019 by the Petitioners is on the last day of expiry of the thirty day period. This has been followed by the meeting held on 24th October, 2019 wherein settlement terms were arrived at. Thus, it can be held that the Petitioners have abandoned the arbitration notice and not taken further steps for two years till the present Arbitration Petition.

18. In my considered view, the Petitioners have not come with clean hands and have not taken steps in proceeding with arbitration in view of the settlement arrived at between the Petitioners and Respondents which are not only reflected in the meeting held on 19th September, 2019 but also subsequent meeting dated 24th October, 2019. Further, the settlement has been acted upon. The disputes now alleged between the Petitioners and Respondents is with regard to the implementation and / or execution of the settlement arrived at between Petitioners and Respondents. There is no arbitration clause in the settlement agreement. The Petitioners cannot fall back on Clause 11(f) of the Partnership Deed for referring the alleged disputes to arbitration.

19. In view thereof, no case is made out for reference of alleged disputes to arbitration and in view thereof, the Arbitration Petition is dismissed.

20. There shall be no order as to costs.

[R.I. CHAGLA J.]