

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO. 93 OF 2023

Mr. Shailesh Rajaram Puneekar & Ors. ...Petitioners

Vs.

M/s. Fortune Infracreators Pvt. Ltd. & Ors. ...Respondents

Mr. Ashish Gogare a/w. Mr. Ashutosh R. Gole, for the Petitioners.
Mr. Girish Rao a/w. Mr. Rajmani Varma i/b. Navdeep Vora and
Associates, for the Respondent No.1.

**CORAM : MANISH PITALE, J.
DATE : 20 FEBRUARY 2023**

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. By this petition, ten members of the respondent No.2 – Co-operative Society have filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of arbitrator. It is claimed that there are disputes between the petitioners and the respondent No.1 – Developer in the context of a re-development agreement executed between the respondent Nos.1 and 2, which need to be sent for arbitration in the light of Clause 23 of the re-development agreement dated 30/6/2016.

2. The respondent No.1 has appeared through counsel and opposed the prayers made in the present petition. The prayers are opposed on the basis that only the respondent No.2 – Co-operative Society is a party to the re-development agreement with the respondent No.1-Developer and that so long as the society has not come forward raising any dispute, much less invoking the arbitration clause, the present petition cannot be entertained at the behest of only 10 members of the society, which admittedly consists of 40 members.

3. This Court has heard the learned counsel for the parties at some length. Certain admitted facts are that the re-development / development agreement dated 30/6/2016 is executed between the respondent No.1 – Developer and the respondent No.2 – Society. The said document clearly refers to only the respondent No.1 – Developer and the respondent No.2 – Society as the parties to the agreement.

4. It is an admitted position that there are 40 members in the respondent No.2 – Society, of whom only 10 members i.e. the petitioners before this Court are raising certain grievances against the respondent No.1 – developer.

5. The arbitration clause in the said agreement reads as follows:

23. Arbitration : Any dispute or differences arising

out of or in connection with this Agreement (including the validity or interpretation hereof) shall be referred to the arbitration of Sole Arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or reenactment thereof for the time being in force. Sole Arbitrator will be appointed with mutual consent by the all parties herein, if parties fail to arrive at the mutually acceptable, Arbitrator, then Arbitrator will be appointed on as per Arbitration and Conciliation Act, 1996. The Award of the Arbitrator/s shall be final and binding on the parties. The venue of the arbitration shall be at Thane. It is expressly agreed between the parties that even if this Agreement, is terminated, this Arbitration clause will survive and dispute will be referred to the Arbitrator.

6. The above quoted clause specifically stipulates that a sole arbitrator would be appointed with the mutual consent of the “parties” and if the parties fail to arrive at a mutually acceptable arbitrator, then the arbitrator shall be appointed under the provisions of the said Act.”

7. This Court exercising jurisdiction under Section 11 of the said Act is required to verify as to whether there is an arbitration agreement existing between the petitioners who have approached

this Court and the contesting party, as also whether any subsisting dispute exists between the parties, requiring resolution through the sole arbitrator specified in the agreement in question.

8. In the present case, as noted above, only the respondent No.1 – Developer and the respondent No.2 – Co-operative Society are parties to the agreement. None of the parties to the agreement are before this Court seeking appointment of an arbitrator. The invocation notice dated 14/10/2022, on which the petitioners have placed reliance, shows that it is issued only by the petitioners i.e. 10 members of the society, who are in an obvious minority, as the total members of society are 40. It is also relevant that the two noticees in the invocation notice are the respondent No.1 – Developer and respondent No.2 Co-operative Society.

9. This Court is of the opinion that in the present case, firstly the petitioners have failed to demonstrate the existence of an arbitration agreement between them as individual members and respondent No.1. The agreement is only between the respondent No.1- Developer and respondent No.2 – Co-operative Society. Secondly, the disputes, if any, could have been raised by the “parties” to the agreement, in order to invoke the arbitration clause. In the present case, the parties to the agreement are only the respondent No.1 – Developer and the respondent No.2 Society. None of them have raised any dispute

or invoked the arbitration clause, so as to create a situation where the present petition filed under Section 11 could be maintained. Since the petitioners are members of the Co-operative Society, they have agreed to their individual rights being subsumed in the rights of the society and their individuality and independent rights are eclipsed, to be espoused by the society they agreed to be members of. If the majority members of the society would have caused the society to raise grievance against the respondent No.1 – Developer and invoked the arbitration clause, a situation for exercising jurisdiction under Section 11 of the said Act would have been created. None of the pre-requisites necessary for this Court to exercise jurisdiction under Section 11 of the said Act are found to be existing in the present case.

10. At this stage, the learned counsel appearing for the petitioners submitted that as per law laid down by the Delhi High Court in *Shapoorji Pallonji and Co. Pvt. Ltd. Vs. Rattan India Power Ltd.*¹, and on the basis of law laid down by the Supreme Court, non-signatories to the arbitration agreement can be sent for arbitration. This Court is of the opinion that the said position of law laid down by the Supreme Court in various judgments, including in the present case of *Cheran Properties Ltd. Vs. Kasturi and Sons Ltd.*² is based on clearly distinguishable facts. These were cases where certain non-signatories to the agreement

¹ in Arbitration Petition I A (Interlocutory Application) No. 716/2019 decided on 7/4/2021 LAWS(DLH) -2021-4-62

² 2018 16 SCC 413

claiming “through and under” signatories to the agreement, were resisting the process of arbitration.

11. In the present case, the judgment relied upon by the learned counsel appearing for the respondent No.1 is apposite. In the case of *Mukesh Nanji Gala and Ors. Vs. M/s. Heritage Enterprises and Anr.*³, this Court in a similar situation where minority members of a society were raising disputes, took a view that so long as the society had not raised a dispute or invoked the arbitration clause, minority members could not claim any individual rights, to refer to or rely upon the arbitration agreement executed between the society on the one hand and the Developer on the other.

12. In view of the above, this Court is of the opinion that in the present case, jurisdiction under Section 11 of the said Act cannot be invoked by the petitioners, who are only 10 members of the respondent No.2 – Co-operative society. Hence, the petition is dismissed.

MANISH PITALE, J.

³2016(4) ALL MR 423