

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO. 168 OF 2022

M/s. Choudhari Developers, Through partner
 Mr. Shashikant Raghunath Choudhari ... Petitioner

vs.

M/s. Nest India Builders & Developers, Through partner
 Zaheer Ahmed Abdul Hamid Kureshi and another ... Respondents

Mr. Vishal Kanade, i/by. Sidheshwar N. Birajdar for petitioner.

Mr. Kasim Sheikh for respondent No.1.

Mr. Yash Sonawane for respondent No.2.

CORAM : MANISH PITALE, J

DATE : 28th APRIL, 2023

P.C. :

. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator for resolution of disputes between the parties.

2. In the present case, the petitioner is relying upon an arbitration clause contained in a development agreement dated 23rd October, 2012 executed between the petitioner and respondent No.1. According to the petitioner, when disputes arose between the parties, a supplementary agreement dated 25th January, 2017 was executed. Thereafter, by a further agreement dated 21st May, 2018, the respondent No.2 entered into the picture and an agreement was executed between the petitioner, respondent No.1 and respondent No.2, in respect of development of the land in question.

3. The respondent No.1 issued a notice dated 6th September, 2019 to the petitioner and respondent No.2 raising certain claims against them.

4. On 7th October, 2019, a reply to the said notice was sent on behalf of the petitioner, disputing the claims raised by respondent No.1 and in turn, the petitioner raised certain claims against respondent No.1.
5. Thereafter, on 9th May, 2022, the petitioner sent a notice to the respondent No.1, invoking the arbitration clause contained in the agreement dated 23rd October, 2012. The respondent No.1 sent a reply on 30th May, 2022, contending that the dispute was not in the ambit of the arbitration agreement and therefore, the notice issued by the petitioner was to be treated as a frivolous notice.
6. In this backdrop, when the appointment of arbitrator could not take place between the parties, the petitioner was constrained to file the present petition. Upon notice being issued, respondent No.1 entered appearance and filed affidavit in reply. It was contended, *inter alia*, that respondent No.2 herein was not a party to all the agreements and that in any case, it was not made a party to the present petition filed under Section 11 of the said Act.
7. When the petition was taken up for hearing on an earlier date, the aforesaid aspect of the non-joinder of respondent No.2 was specifically raised, whereupon the learned counsel for the petitioner sought time to add respondent No.2 as party. This Court permitted amendment vide order dated 21st April, 2023. Accordingly, respondent No.2 was added as a party and today, the said respondent has appeared through advocate.
8. It appears that the name of respondent No.2 is not reflected on the online portal and this has created difficulty in filing *vakalatnama*. Therefore, the registry is directed to take necessary steps in the matter and the advocate for respondent No.2 is granted time of one week to file his *vakalatnama*.
9. When the petition was called out for hearing, learned counsel for the

respondent No.2 stated, on instructions, that the said respondent is ready and willing to go for arbitration, if this Court is inclined to appoint an arbitrator with regard to the prayer made in the present petition.

10. Learned counsel for the petitioner invited attention to all the three agreements and submitted that on a proper reading of the three agreements, it was obvious that the subsequent two agreements dated 25th January, 2017 and 21st May, 2018, were in the nature of supplementary agreements, to carry forward the project envisaged under the development agreement dated 23rd October, 2012. Reading the three agreements together, the learned counsel for the petitioner submitted that since disputes had arisen between the parties, in the light of the invocation of the arbitration clause on the part of the petitioner, this Court may exercise jurisdiction to appoint an arbitrator for resolution of disputes between the parties. It was submitted that since respondent No.2 was added as a party to the present petition and it has consented to the resolution of disputes through arbitrator, this Court may allow the present petition and appoint an arbitrator.

11. On the other hand, learned counsel for the respondent No.1 submitted that the disputes between the parties could not be said to be arbitrable, for the reason that the supplementary agreement dated 21st May, 2018 specifically referred to provisions of Maharashtra Ownership of Flats Act, 1963 and the obligations of the parties therein. It was further submitted that the arbitration clause is found only in the development agreement dated 23rd October, 2012 and thereafter, disputes that have arisen between the parties, in the context of subsequent two agreements, cannot be referred to arbitration, in the absence of arbitration clause. It is submitted that merely because respondent No.2 is added as a party, on an objection raised on behalf of respondent No.1, it cannot be said that this Court can exercise

jurisdiction under Section 11 of the said Act.

12. As noted hereinabove, learned counsel for respondent No.2, on instructions, has made statement that the said respondent is ready and willing to go for arbitration for resolution of disputes between the parties.

13. This Court has considered the rival contentions, in the backdrop of the material placed on record. It is undisputed that the development agreement dated 23rd October, 2012, provides for an arbitration clause at Clause No.34. It specifically provides for resolution of disputes between the parties through arbitration, as per the provisions of the said Act.

14. The subsequent agreement dated 25th January, 2017 specifically refers to the development agreement dated 23rd October, 2012. It also records the reason why the said supplementary agreement was required to be executed, indicating that certain obligations of the parties could not be fulfilled within the stipulated period of time for certain reasons and that therefore, supplementary agreement had to be executed in furtherance of the development agreement dated 23rd October, 2012.

15. It appears that even thereafter, certain issues arose in the context of the project to be executed as per the development agreement, due to which respondent No.2 had to be brought into picture, necessitating execution of a further agreement dated 21st May, 2018, between the petitioner, respondent No.1 and respondent No.2. This agreement also specifically refers to the development agreement dated 23rd October, 2012 and further records the obligations of the parties in pursuance of the clauses of the said agreement dated 21st May, 2018. It is relevant that all the three agreements are

registered agreements.

16. On a conjoint reading of the three agreements, this Court is convinced that the arbitration clause contained in the development agreement dated 23rd October, 2012 applies to the two subsequent (supplementary) agreements executed for taking forward the project envisaged under the development agreement dated 23rd October, 2012.

17. The learned counsel for the petitioner is justified in relying upon judgment of the Supreme Court, in the case of *Sanjiv Prakash v/s. Seema Kukreja and others* [(2021) 9 SCC 732], wherein the Supreme Court dealt with a situation where subsequent agreements were executed and the question of novation had arisen. Applying the position of law indicated in the said judgment, this Court is satisfied that the arbitration clause contained in the development agreement dated 23rd October, 2012, provides for an arbitration clause and mandates reference of disputes to arbitration, which would extend to disputes that arose between the parties, in the context of the aforesaid supplementary agreements also. Therefore, the objection raised on behalf of respondent No.1, to that extent, is rejected.

18. As regards the aspect of non-arbitrability of the disputes, raised on behalf of respondent No.1 with reference to Maharashtra Ownership Flats Act, 1963, suffice it to say that the dispute as to whether the parties had abided by the requirements of the said Act, can also be decided by the arbitrator, during the course of the arbitral proceeding.

19. The objection raised on behalf of respondent No.1 with regard to non-joinder of respondent No.2 in the present petition, has been taken care of by

addition of respondent No.2 as party to the present petition. Therefore, there is no impediment for this Court to exercise jurisdiction under Section 11 of the said Act to appoint arbitrator for resolution of disputes between the parties.

20. In view of the above, Advocate Mr. Surel Shah, is appointed as the sole arbitrator for resolution of disputes between the parties. The details of the learned arbitrator are as follows:

304-A, 3rd floor, Veena Chambers,
Opp. B.S.E., 21, Dalal Street,
Fort, Mumbai-400 001.
Mob.: 98211 45720
E-mail: surelshah@yahoo.co.in

21. The parties undertake to inform the learned arbitrator about the order passed today, at the earliest.

22. The learned arbitrator is requested to submit his consent and disclosure statement in terms of Sections 11(8) and 12(1) of the aforesaid Act within four weeks from today to the Registrar (Judicial) of this Court. The fees of the learned arbitrator shall be as per the Fourth Schedule to the said Act.

23. All questions are left open for determination by the learned arbitrator.

24. The petition stands disposed of.

(MANISH PITALE, J)

Priya Kambli