



Arb.O.P.(Com.Div.)No.342 of 2023

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.342 of 2023

and

O.A.Nos.108, 109 and 110 of 2023

M/s.Sreshta Sumanth Builders Private Limited,
Represented by its Director
Sumanth Subramanian

... Petitioner

Vs.

N.V.S.Ramakrishnan

... Respondent

Prayer: Original Petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 as amended Act, 2019, praying to appoint an Arbitrator(s) to decide the disputes and differences between the Petitioner and Respondent in terms of Joint Venture Development Agreement dated 29.11.2019, Supplemental Agreement dated 31.07.2020 and Second Supplementary Joint Venture Development Agreement dated 16.10.2020.

For Petitioner

: Mr.Abdul Hameed
Senior Counsel
Assisted by
Mrs.Anbarasi Rajendran
for M/s.AAV Partners



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For Respondent : Mr.R.Parthasarathy
Senior Counsel
for Ms.S.Tanushree Aravind and
Ms.Rekha

ORDER

This petition has been filed by the petitioner pursuant to a Joint Venture Development Agreement signed between the petitioner and the respondent herein dated 29.11.2019.

2. The said Joint Venture Development Agreement contemplates resolution of dispute between the parties through arbitration.

3. Relevant clause in the Joint Venture Development Agreement dated 29.11.2019 reads as under:-

"33. Any dispute between the parties to this agreement in regard to the interpretation of this agreement or any other agreements supplementary to this agreement and of any matter arising out of this agreement or any supplementary agreement shall be referred to arbitration under the provisions of the Indian Arbitration and Conciliation Act, 1996 (Act No.26 of 1996) to two arbitrators, each party nominating one arbitrator, who shall appoint a third arbitrator as prescribed under the Act. Any award given in any such arbitration proceedings shall be followed as per law. The venue of the arbitration proceedings shall be in Chennai only and the proceedings in English only."



4. Pursuant to the aforesaid Joint Venture Development Agreement, two Supplementary Agreements have been signed on 31.07.2020 and 16.10.2020.

5. The respondent has also executed a Power of Attorney in favour of the petitioner on 12.04.2021.

6. It appears that in accordance with the above mentioned documents, the petitioner had also commenced the construction. The sister of the respondent namely Pattu Vaidhyanathan wife of Late Arun Vaidhyanathan issued a notice to the petitioner, to the respondent, the respondent's wife and the respondent's son, the trustee, the sisters, the children of the deceased sister and some of the prospective purchasers of the flat that was being promoted by the petitioner and to the Joint No.1 Sub Registrar, Nandanam, Chennai claiming 1/6th share in the property being developed by the petitioner.

7. Under these circumstances, the petitioner appears to have approached the respondent. A dispute has arisen.



8. It appears that the respondent had threatened to cancel the Agreements mentioned above and also the Power of Attorney.

9. Under these circumstances, the petitioner had filed O.A.Nos.108 to 110 of 2023 and secured an interim order dated 15.02.2023 under Section 9 of the Arbitration and Conciliation Act, 1996.

10. The respondent's sister namely Pattu Vaidhyanathan has also filed a Civil Suit in C.S.No.32 of 2023 before this Court. In the said suit, she has also taken out O.A.No.97 of 2023.

11. On 28.04.2023, the following order was passed by this Court in O.A.No.97 of 2023 and A.No.874 of 2023 in C.S.No.32 of 2023:

"7. Considering the statement made by the learned senior counsel for the fourth respondent/fourth defendant that as per the Joint Development Agreement, the first respondent/first defendant is entitled to have four apartments bearing No.Flat 1A, Flat 1B, Flat 2C and Flat 4C measuring to an extent of 7,704 sq.ft. (5,155 sq.ft. in UDS), the fourth respondent/fourth defendant shall not hand over the above apartments to the first respondent/first defendant, on completion of construction.

8. Keys of the above apartments shall be handed over to the Registrar of this Court to be kept in safe custody to the account of the suit. There shall be an order of ad-interim injunction restraining the 1st to 3rd respondents/1st to 3rd defendants from dealing with the property which has been settled



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by the first respondent/first defendant in favour of the 2nd/2nd defendant."

12. The said Civil Suit is still pending. In the said Suit, the respondent had also filed A.No.3286 of 2023 and had raised certain preliminary objections regarding maintainability of the suit on the ground of limitation/deficit Court fee etc.

13. This Court by its order dated 23.08.2023 passed the following order in A.No.3286 of 2023:

"13. Even for the sake of arguments, if it is right for the applicant/1st defendant to claim that the 1st respondent/plaintiff and all other siblings have been ousted from the suit property and their right to sue did not subsist until the suit was filed, they are more matter of facts than matter of law. Unless the parties are allowed to go for trial and agitate their claim in a manner known to law, it cannot be presumed at the threshold itself that the suit is barred by limitation.

14. Admittedly, the plaintiff has challenged some seven transactions which were made by the applicant/1st defendant between the period from 2021-2022. According to the 1st respondent/plaintiff such kind of action upon the 1st applicant/1st defendant in creating interest in favour of the third parties by executing documents is the starting point for limitation. Even if the Article 113 is considered to be applicable to the case of 1st respondent/plaintiff, the 1st respondent has file a suit within 3 years from the year 2021 and hence, the 1st applicant/1st defendant cannot claim that the suit is barred by limitation or the 1st respondent/plaintiff and all other siblings have been ousted from the joint possession of the suit property.



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15. *In view of the above stated reasons, this application is dismissed.*

However, it is up to the applicants/defendants to raise whatever contentions now raised in this application, as his defense in the suit and cause the relevant issues framed for trial and agitate."

14. In this background, the present Original Petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996. It is opposed by the respondent on the ground of *erga omnes* effect i.e., the dispute is not arbitrable as there are other parties to the dispute on account of a suit filed in C.S.No.32 of 2023 by the respondent's sister Pattu Vaidhyanathan for partition of the property.

15. The learned Senior Counsel for the respondent has drawn attention to the decision of the Hon'ble Supreme Court in **Vidya Drolia and others Vs. Durga Trading Corporation**, (2021) 2 SCC 1.

16. A specific reference is made to Paragraphs 46, 48, 49 and 154.4 from the said decision. It reads as under:-

"46. Having examined and analysed the judgments, we would coalesce and crystalize the legal principles for determining non-arbitrability. We begin by drawing principles that draw distinction between adjudication of actions in rem and adjudication of actions in personam.



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48. *A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment “settles the destiny of the res itself” and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. By contrast, a judgment in personam, “although it may concern a res, merely determines the rights of the litigants inter se to the res”. Distinction between judgments in rem and judgments in personam turns on their power as res judicata, i.e. judgment in rem would operate as res judicata against the world, and judgment in personam would operate as res judicata only against the parties in dispute. Use of expressions “rights in rem” and “rights in personam” may not be correct for determining non-arbitrability because of the inter-play between rights in rem and rights in personam. Many a times, a right in rem results in an enforceable right in personam. Booz Allen & Hamilton Inc. refers to the statement by Mustill and Boyd that the subordinate rights in personam derived from rights in rem can be ruled upon by the arbitrators, which is apposite. Therefore, a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem. Arbitration by necessary implication excludes actions in rem.*

49. *Exclusion of actions in rem from arbitration, expositis the intrinsic limits of arbitration as a private dispute resolution mechanism, which is only binding on ‘the parties’ to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The arbitral tribunals not being courts of law or established under the auspices of the State cannot act judicially so as to affect those.*



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who are not bound by the arbitration clause. Arbitration is unsuitable when it has erga omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Equally arbitration as a decentralized mode of dispute resolution is unsuitable when the subject matter or a dispute in the factual background, requires collective adjudication before one court or forum. Certain disputes as a class, or sometimes the dispute in the given facts, can be efficiently resolved only through collective litigation proceedings. Contractual and consensual nature of arbitration underpins its ambit and scope. Authority and power being derived from an agreement cannot bind and is non-effective against non-signatories. An arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. Prime objective of arbitration to secure just, fair and effective resolution of disputes, without unnecessary delay and with least expense, is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise.

50.

154.4 Rarely as a demurrer the court may interfere at the [Section 8](#) or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are



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plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

17. The learned Senior Counsel has further referred to the decision of the Hon'ble Supreme Court in **Indian Oil Corporation Limited Vs. NCC Limited**, (2023) 2 SCC 539.

18. A specific reference is made to Paragraphs 70, 71, 72 and 99 from the said decision. It reads as under:-

"70. At this stage, a recent decision of this Court in the case of Vidya Drolia (supra), which, as such, is post-insertion of [Section 11\(6-A\) of the Arbitration Act](#), is required to be referred to. In the said decision it is observed and held that the issue of non-arbitrability of a dispute is basic for arbitration as it relates to the very jurisdiction of the Arbitral Tribunal. An Arbitral Tribunal may lack jurisdiction for several reasons and non-arbitrability has multiple meanings. After referring to another decision of this Court in the case of [Booz Allen & Hamiltan Inc. v. SBI Home Finance Ltd.](#) [(2011) 5 SCC 532 (Para 34)], it is observed and held that there are facets of non-arbitrability, namely (Vidya Drolia case, SCC p.47, para 15)

"15. ... "(i) Whether the disputes are capable of adjudication and settlement by arbitration? That



is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of an arbitration agreement, will not be “arbitrable” if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such a joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.”

71. After referring to and considering in detail the earlier decisions on the point, more particularly, with respect to non-arbitrability and the ‘excepted matters’, it is ultimately concluded in para 76 as under: (Vidya Drolia case, SCC p. 72)

“76. In view of the above discussion, we would like to propound a four-fold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:



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76.1. (1) *When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*

76.2. (2) *When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable.*

76.3. (3) *When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.*

76.4 (4) *When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*

76.5 *These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.*

76.6 *However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures (P) Ltd.: (SCC p. 669, para 35)*

“35. ...Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot



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be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst, [Wilson v. Wilson](#) and [Cahill v. Cahill](#)).”

72. On the question, who decides on non-arbitrability of the dispute, after referring to and considering the earlier decisions on the point, more particularly, the decisions in the case of *Garware Wall Ropes Ltd. (supra)*; *Hyundai Engg. & Construction Co. Ltd. (supra)* and *Narbheram Power & Steel (P) Ltd. (supra)*, it is observed and held that the question of non-arbitrability relating to the inquiry, whether the dispute was governed by the arbitration clause, can be examined by the Courts at the reference stage itself and may not be left unanswered, to be examined and decided by the Arbitral Tribunal. Thereafter, in para 153, it is observed and held that the expression, “existence of arbitration agreement” in [Section 11](#) of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the reference stage would apply the prima facie test. It is further observed that in cases of debatable and disputable facts and, good reasonably arguable case etc., the Court would force the parties to abide by the arbitration Agreement as the Arbitral Tribunal has the primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability. Ultimately in para 154, the proposition of law is crystallized as under: (*Vidya Drolia case*, SCC p. 121)



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“154. Discussion under the heading ‘Who decides Arbitrability?’ can be crystallized as under:

154.1. Ratio of the decision in Patel Engineering Ltd. on the scope of judicial review by the court while deciding an application under [Sections 8](#) or [11](#) of the [Arbitration Act](#), post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under [Section 8](#) and [11](#) of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of [Section 34\(2\)\(a\)](#) or sub-clause (i) of [Section 34\(2\)\(b\)](#) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at the [Section 8](#) or [11](#) stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the



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deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

99. In that view of the matter, the High Court has misread and misinterpreted the clauses 9.0.1.0 and 9.0.2.0 and has seriously erred in holding that where there is contestation or the decision rendered by the General Manager leaves scope for argument as to whether the claims alleged by the contractor can be categorized as Notified Claim is best left to the Arbitral Tribunal. The dispute whether the claim is a Notified Claim or not is specifically excluded from the scope, purview and ambit of the arbitration agreement. Therefore, once such a dispute falls within the 'excepted matters', any decision by the General Manager on the issue of Notified Claims cannot be the subject matter of arbitration proceeding."

19. I have considered the arguments advanced by the learned Senior Counsel for the petitioner and the learned Senior Counsel for the respondent.

20. The facts are not in dispute. The dispute between the petitioner and



the respondent is arbitrable in terms of the Agreements referred to supra.

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21. The respondent's sister namely Pattu Vaidhyanathan is only asking for share in the property in C.S.No.32 of 2023. In the claim petition, the respondent has not articulated his claim before the learned Arbitrator. However, being threatened by the proposed action of the respondent, the present Original Petition has been filed by the petitioner for appointment of an Arbitrator.

22. The Civil Suit that has been filed by the respondent's sister Mrs.Pattu Vaidhyanathan is only for a share in the property comprised in Old Survey No.158/10, T.S.No.28/0, Block No.54, Thiruvanmiyur Village, measuring an extent of 8.65 Grounds situated at New Door No.52, Old Door No.36, M.G.R. Road, Kalakshetra Colony, Besant Nagar, Chennai - 600 090. In the Civil Suit, the preliminary decree will have to be passed and thereafter the final decree will have to be passed.

23. The property being an immovable property which is under development in terms of the above mentioned Agreements, In my view, there is an arbitrable dispute between the petitioner and the respondent. The interest of third party i.e., parties to suit in C.S.No.32 of 2023 which is sought to be



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projected as an excuse is secured by the interim order dated 28.04.2023 in

O.A.No.97 of 2023 and A.No.874 of 2023 in C.S.No.32 of 2023.

24. It is open for the petitioner to articulate the claim before the Arbitral Tribunal. There can be no impediment for resolving the *inter se* disputes between the petitioner and the respondent. Although the rights of the third parties are involved, the rights of the third parties are to be decided in C.S.No.32 of 2023 filed by the respondent's sister Pattu Vaidhyanathan for partition of the immovable property.

25. Considering the above, Court is inclined to appoint **The Hon'ble Mr.Justice T.Ravindran (Retd.,) Former Judge of Madras High Court residing at New No.27, Old No.12, 3rd Avenue, Indira Nagar, Adyar Chennai - 600 020 (Cell No.9941350926)**, as an arbitrator to enter upon reference and resolve the *inter se* disputes between the parties.

26. The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably



within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order touching on the limitation.

27. The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondent remains *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the learned Arbitrator and later recover the same from the respondent.

28. Since this Court has appointed the Arbitrator, it is open for the petitioner as well as the respondent to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

29. In addition, the interim protection granted to the petitioner in O.A.Nos.108 and 110 of 2023 shall continue for a period of three months from today.



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30. In O.A.No.109 of 2023, there shall be an interim protection as well for a period of three months from today.

C.SARAVANAN, J.

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31. It is open for the petitioner to move appropriate application under Section 9 of the Arbitration and Conciliation Act, 1996, for continuance of the aforesaid order.

18.10.2023

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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