IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 8 OF 2022

(corrected as per order 14/2/2024)

Nikita Builders and Developers thru its Partner Mukesh G. Kimtani .. Applicant

Versus

Ali Jaffari .. Respondents

…

Mr.Sanjay Jain with Gauri Mestha i/b LJ Law for the petitioner.
Mr.S.C. Wakankar for the respondent.

CORAM: BHARATI DANGRE, J.
DATED : 4th JANUARY 2024

P.C:-

1 A Joint Venture Agreement dated 3/2/2006 and a Supplementary Deed dated 3/02/2006 for development of immovable property came to be executed between the applicant, a partnership firm and one Mr.Ali Jaffari, the respondent, as regards development of the property, situated within the limits of Pune Municipal Corporation, the details of which are set out in the agreement.

The above agreement comprise of clause 34, which provide for reference for disputes and differences arising between the parties touching the presents or the construction or application thereof or any clause or thing contained therein, including the performance of the respective obligations of each of the party, during the subsistence of the agreement for Arbitration.

Clause no.34 captioned as 'Arbitration' also named the Arbitrator, who is empowered to appoint the Umpire. The award of the Arbitrator was assigned finality and binding effect.

2 When the disputes arose between the applicant and respondent, invoking the arbitration clause contained in the Joint Venture Agreement, a petition was filed before this Court, seeking appointment of an Arbitrator and under the directions of the Court, the Arbitral Tribunal was constituted.

In the reference, on 12/2/2019, the Tribunal declared its award in respect of 19 claimants and ultimately, recorded a finding that the termination of Joint Venture Agreement by notice of termination dated 26/2/2010 is illegal but it stand terminated as of 30/3/2010 and amongst other reliefs, permitted the Joint Venture to sell the balance flats and realize the proceeds. The income accruing therefrom was directed to be shared in the proportion of 73% : 27% between the applicant and the respondent. The Arbitrator also ordered that on the flats being sold, monies realized and accounts being made-up, the Joint Venture will stand dissolved.

Several other directions came to be issued in the Award and in wake of the claims staked before the Arbitrator, this dispute came to an end.

3 On the declaration of Award, some other disputes arose between the parties and this time, it is in relation to the outstanding of Municipal taxes payable to Pune Municipal Corporation, to the tune of Rs.10,44,85,220/-, income Tax liability of Rs.28,02,08,973/- being the Minimum Alternate Tax payable by the Joint Venture on account of the default attributed to the respondent and a claim for loss, to the tune of Rs.2,24,28,00,000/- suffered by the applicant on account of the alleged breach committed by the respondent in performing the subject agreement and expenses incurred.

For this purpose, on 27/05/2022, the applicant addressed a communication to the respondent, claiming the aforesaid amounts and also seeking direction to provide the KYC documents to the Bank so as to activate the bank account to make the necessary payments. It was communicated that in case there is failure to respond, the Arbitrator shall be appointed for resolving the discord. Since there was no response at the end of the respondent, the applicant has moved the present application, seeking appointment of an Arbitrator in the wake of clause 34 of the Joint Venture Agreement in respect of the development of the property, by taking benefit of the stipulations therein.

4 Learned counsel for the respondent has raised an issue of the arbitrability of the dispute and it is his specific submission that the applicant has already filed a Suit before the Civil Judge, Junior Division, Pune being RCS No.668/2021, for declaration and injunction and thereafter, even he has instituted Special Civil Suit No.2083/2022, seeking distinct reliefs, as it was noticed that when the injunction was granted in the Suit filed by the Plaintiff/Applicant, the flats were already sold and therefore, a declaration is prayed that the auction sale is void *ab initio* and for setting aside the sale certificates issued in favour of the purchaser of the flats.

5 Perused the plaint in both the Suits and on careful reading of the same as well as perusal of the reliefs sought therein, I have arrived at a conclusion that the payment of municipal tax to the Corporation and the Income Tax dues in any case, is not subjudice in the two suits, seeking counter reliefs, as in the Suit filed by the applicant, what is assailed is the auction notice published by the Corporation in respect of nine flats, for recovery of the arrears of tax due and payable.

The applicant/plaintiff staked his claim that the attachment is bad in law and it is not at the hands of the competent authority, and apart from this, a stand is taken that there is no demand as regards the said arrears and the auction of flats is illegal since it is in excess of the amount, which may be due and payable to the Corporation, as the cost of the said flat which are sought to be auctioned would be more than what the Corporation is seeking to recover from it.

In the wake of the pleading, the applicant's Suit seeks a declaration that the notice of auction published by the Corporation is illegal, null, void *ab initio, ultra vires,* and actuated with malafides.

The applicant therefore, prayed for a restrain order against the Corporation from acting upon the auction notice.

6 Worth it to note that in the applicant's Suit, there is no challenge to the recovery notice issued by the Municipal Corporation nor is any such challenge raised in the Suit filed by the respondent, which seek a relief of setting aside the sale certificates of the flats pursuant to the auction sale of the suit property and seek deposit of the amount paid by the auction purchasers.

Evidently, there is no challenge to the notice by the Corporation seeking recovery of arrears of tax and since now the question has arisen as to who shall bear the liability.

The understanding between the parties as regards the liabilities to be discharged is contained in the Joint Venture Agreement.

On an earlier occasion when the dispute arises, the matter was referred for Arbitration and the Award is declared.

In the interregnum, since the liability of Income tax and the tax liability on the Corporation has accrued, the question arises as to who shall discharge the liability and in what proportion, and this is a dispute which must be referred to Arbitration, in the wake of clause no.34, since it relate to performance of the respective obligations of the parties.

Hence, being unable to persuade myself to consider the objection about the arbitrability of the dispute, in view of the existence of the arbitration clause in the Joint Venture Agreement dated 3/2/2026, a case is made out for appointment of a Sole Arbitrator to resolve the said dispute.

7 In the wake of the above, Justice Sandeep Shinde (Retired Judge of Bombay High Court) is appointed as a Sole Arbitrator to adjudicate the disputes between the applicant and the respondent under the Joint Venture Agreement dated 3/2/2006 and the Supplementary Agreement dated 03/02/2005. It is for the learned Arbitrator to determine the place where the arbitration proceedings shall be conducted as the respondent informs that the earlier arbitration proceedings were conducted in Pune.

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s.11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record.

The Arbitrator, shall after entering the reference fix the date of first hearing in the week commencing from 23/1/2024 and issue further directions as are necessary.

The Sole Arbitrator shall be entitled for the fees as per Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

All rights and contentions of the parties are kept open.

(SMT. BHARATI DANGRE, J.)