

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO. 210 OF 2022

Rafia Irfan Sarole and another .. Petitioners
Versus
Rais Abdul Ajiz Qureshi and ors .. Respondents

...

Mr.Onam Hingorani with Ms.Pragati Patil for the petitioners.
Ms.Sushma Mishra for respondent no.1.
Adv Joytitus S. for respondent nos.2 to 7.

CORAM: BHARATI DANGRE, J.
DATED : 1st MARCH, 2024

P.C:-

1 The present petition filed, seek reference of the disputes that have arisen between petitioner and respondent, who are parties to a Development Agreement executed on 16/10/2014, being referred to a Party No.1 i.e. the developer and the party no.2 as the owners.

Apart from this, the agreement also refer to two conforming parties, being third party and the fourth party, who had accorded their consent to the execution of Development Agreement.

Clause No.43 of the said Agreement contemplate that if any dispute arises between the first party and second party, and third party, or between two of them/three of them, it shall be taken to two known reputed persons and the decision given, shall be final and binding.

The clause, however, clearly stipulate that it shall not have participation of party no.4.

Learned counsel for the respondent has tendered an affidavit which is taken on record. An Affidavit in rejoinder is also taken on record.

2 Since certain disputes arose between the petitioner and the respondent, on 4/2/2021, under the instructions of five of the respondents, a notice was forwarded on 4/2/2021, with reference to the Development Agreement dated 16/10/2014 and the nature of dispute was set out, calling upon the notice to resolve the disputes by referring the same before two arbitrators; one to be appointed for each party.

3 Paragraph no.4 of the said notice, suggested the name of a retired Judge, an experienced person to be appointed as an Arbitrator from their side as per the provisions of the Arbitration Agreement and suggestion was given for consenting to the appointment of the retired Judge as an Arbitrator.

This notice received response on 15/2/2021, where the arbitration clause was not disputed, and paragraph no.6 and 7 of the said communication specifically record thus :-

(6) *My client says that as per the terms of agreement, my client is ready and willing to get the disputes arbitrated through the process of arbitration. The Arbitral Tribunal should consist of a sole Arbitrator as per Section 10(2) of the Arbitration Act.*

(7) *My client says that he is also ready and willing for any pre-litigation mediation to sort out the differences and if your clients are ready and willing then the same can be implemented as a pre arbitration measure between out clients.”*

Once again, on 4/8/2022, there was exchange of notice between the parties and paragraph no.7 thereof, record as under :-

“7 *In respect of your reply letter dated 15/02/2021, my clients agree that there is dispute and differences between the parties arisen and requires to be adjudicated by the Sole Arbitrator as suggested in your said reply letter but my clients disagree on the name of Arbitrator proposed by your clients in the said reply letter and calls upon you to either accept the name of Retired Judge, Shri Gulabrao Awasarmol provided by my clients earlier dated 04/02/2021 or to provide a new name of any competent person to act as Sole Arbitrator for adjudication of dispute as stated above immediately, failing which my client will be constrained to approach competent court of law for appointment of independent Arbitral Tribunal of Sole Arbitrator at your risk, cost and consequences which may please be noted.”*

4 In the light of the aforesaid communication exchanged, when the respondent has specifically confirmed to the existence of the Arbitration Agreement between the parties, though no consensus was arrived upon the name of the Arbitrator, to be appointed for adjudicating the disputes, the petitioner is constrained to approach this Court, seeking

appointment under sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996.

5 Learned counsel for the respondent would however, submit that her client has already instituted a Civil Suit and the objection raised by her for making over the dispute to arbitration, in particular, is that everyone is not today on board and this is specifically as regards party no.3, who is a necessary party in the arbitration proceedings.

I see no difficulty in impleading him as party to the proceedings, if his interest is specifically evident in the Development Agreement and particularly, when clause no.43 contemplate about the disputes which might arise between party no.1 and party no.2 and third party or any two of them, being referred to Arbitration and therefore, this objection shall not detain me, from making a reference to the Arbitration in existence of an arbitration clause in the Development Agreement between the parties.

6 Section 7 of the Arbitration Act make it clear that the arbitration agreement shall be in writing, and if it is to be reflected by exchange of letters, telex, telegrams or other means of communications, it shall provide a record of the agreement. The parties must however agree to be referred to arbitration, as a mode of resolution of their disputes and this is clearly evident from the communication to which I have made reference. Hence, I deem it

appropriate that in the wake of the existence of the Arbitration clause and since the arbitration has been invoked, the dispute deserve a reference to a Sole Arbitrator, as is reflected from the exchange of communication between the parties.

In any case, the principle in law as laid down in case of *Vidya Drolia Vs. Durga Trading Corporation*,¹ 'when in dispute, do refer' the dispute definitely deserve a reference to Arbitration.

7 In the wake of the above, Advocate Mandar Soman is appointed as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent.

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 Registrar Judicial-I of this Court to be placed on record.

The address of the Arbitrator is as follows :

Advocate Mandar Soman
Office No.21, 3rd floor,
Bombay Mutual Building,
P.M.Road, Fort, Mumbai.
Email : mandar.soman82@gmail.com
Cell : 9967911201

¹ (2021) 2 SCC 1

The Arbitrator, shall after entering the reference fix the date of first hearing 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.

In the wake of the aforesaid reference being made to the Arbitrator, pending Section 9 Petition before the Thane Court shall also be transferred to the Arbitrator and the Arbitrator is at liberty to permit the parties to take out appropriate applications, if desired for praying any interim reliefs.

(SMT. BHARATI DANGRE, J.)