

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO.17 OF 2023

Sita Pukhraj Bafna Through POA Holder] .. Applicant

vs.

Empress and Hammer Realty LLP] .. Respondent

WITH

COMMERCIAL ARBITRATION APPLICATION NO.18 Of 2023

Sita Pukhraj Bafna Through POA Holder] .. Applicant

vs.

Empress and Adishakti J V] .. Respondent

Mr.Kunal Kataria a/w Shraddha Jadhav i/b Aagam Doshi for the Applicant.

Ms.Nehaa Shah i/b Dhiren Shah for the Respondent.

CORAM : BHARATI DANGRE, J

DATE : 25th January, 2024.

P.C.

1] The Two Arbitration Applications filed under Section 11 of the Arbitration and Conciliation Act, 1996, seek appointment of an Arbitrator in the wake of fact that the Applicant in both the Applications is the same, and as far as Respondents are concerned, they belong to the same group.

In CARAP No.17/2023, the Agreement is in form of a Communication/letter dated 01.09.2018 in relation to plot bearing cadastral survey No.355 (part of Malbar and Cumbala Hill Division) together with the structure known as “Rungata Chawl” situated at Nepeansea Road Mumbai and it is a communication address by the owners of the property, during the process of obtaining MHADA NOC for its redevelopment and for submitting the plans proposed for approval.

2] Pursuant to the interest being shown by the Applicant, the owners/Respondents agreed to sell the property on ‘as is where is basis’ for a consideration of Rs.12,50,00,000/-, with the obligations to be discharged by them, subject to certain stipulations and tranches of payment.

The communication also provide that if there is a failure to pay the amount towards consideration as stipulated they shall be entitled to cancel and terminate the transaction and refund the payment within 6 months. If the NOC of MHADA is not obtained within 6 months, the right was conferred upon the Purchaser to terminate and cancel the transaction and even in this case, it would result in refund.

Para 7 and 8 of the said writing record thus :

“ 7. This writing shall be governed by and construed in accordance with laws of India. We will resolve all disputes arising out of in relation to or in connection with this writing by negotiation and in the event of the same not being resolved then in such even this writing shall stand cancelled and we shall refund all moneys as may have been received by us within six months from the date of cancellation and termination.

8. It is agreed that in case of any dispute between us the same shall be referred to the arbitration. The seat of arbitration will be Mumbai language of arbitration shall be English and the arbitration will be in accordance with the Arbitration and Conciliation Act 1996 as amended from time to time.”

Apart from this, the communication also record that the terms mentioned therein are the basic terms and conditions and that writing by itself shall not create any right, title and interest of whatsoever nature in favour of the Addressee of the communication and it contemplated execution of an Agreement for Sale on obtaining MHADA NOC.

3] On 25.05.2019 another communication is addressed with reference to the arrangement recorded in the letter dated 01.09.2018 and this time by a partner of Empress and Hammer Realty LLP since it was subsequently converted into an LLP.

The said communication recorded thus :

“2. Pursuant to the said arrangement, we record that till date you have paid sum of RS.7,70,00,000/- (Rupees Seven Crores Seventy Lakhs only) to us.

3. As we both failed to comply with our respective obligations due to which transaction could not be completed, hence it has been mutually agreed between us to cancel and terminate the arrangement arrived between us vide letter dated 1st September 2018 in respect of said property.

4. In the above circumstances, we shall refund you the abovementioned sum of RS.7,70,00,000/- (Rupees Seven Crore Seventy Lacs only) within three months from the date hereof without any interest and/or any compensation thereon.

5. In view of the above, it is mutually agreed that the arrangement arrived between us vide the aforesaid letter dated 1st September 2018 stands cancelled and terminated and you shall have no right, title, interest and claim of whatsoever against us and/or the said property or any part thereof.”

4] Admittedly, there is no payment made as assured till date and this constrained the Applicant to forward a demand notice on 11.10.2021 calling upon the Respondent to pay a sum of Rs.7,70,00,000.- alongwith interest at the rate of 12% till date of its payment.

Since there was no response, ultimately on 30.11.2021 arbitration is invoked in the wake of the clause contemplated, in the writing dated 01.09.2018.

Admittedly, there is no response to the same, which has

constrained the Applicant to approach this Court seeking appointment of the Sole Arbitrator.

5] In CARAP No.18/2023 similar situation persist when in the similar manner, a communication dated 18.04.2013 in relation to a plot bearing CTS No.1720 of Village Chembur, Taluka Kurla, intimating that the Respondent, in the wake of Deed of Joint Venture dated 22.02.2018 was entitled for development of the property and the SRA had issued a letter of intent on 01.10.2009 in the name of Empress and Adishakti JV for the purpose of development. The rights of sub-development were agreed to be conveyed to the Applicant by specifically recording as under :

“2. We record and confirm that we have agreed to grant you sub-development right availing consumption and utilization of 10,000 sq. ft. FSI out of the total FSI available to us in respect of the said property and have agreed to transfer to you and in your favour our development, right and interest to the extent of 10000 sq. ft FSI in respect of the said property at and for the consideration of Rs.5,00,00,000/- (Rupees Five Crores only).

3. We further record and confirm that you have paid to us total sum of Rs.3,00,00,000/- (Three Crores only), Rs.2,00,00,000/- (Rupees Two Crores Only) on 18.03.2013 vide RTGS (Real Time Gross Settlement) clearance and Rs.1,00,00,000/- (Rupees One Crore Only) on 19.03.2013 also vide RTGS (Real Time Gross Settlement) clearance through Corporation Bank, Fort Branch, towards the total consideration of

Rs.5,00,00,000/- (Rupees Five Crores only), you have agreed to pay balance consideration of Rs.2,00,00,000/- (Rupees Two Crores Only) in the following manner.

Apart from this, several other stipulations were contemplated conferring rights upon the Applicant and Clause 11 contemplated reference of disputes/differences arising between the parties touching or relating to any of the the terms and conditions to the sole arbitrator.

Clause 13 clearly stipulated that in case the Respondents are unable to obtain the vacant possession of all the hutment structures and procure necessary NOC and sanctions and approvals for the proposed development on or before 30.04.2014, the party on the other side shall have an option to extend the time and continue the transaction or seek a refund of Rs.3 Crores with such agreed amount of compensation as may be mutually agreed.

Admittedly, there was no compliance, which resulted in notice being addressed to the Respondent on 08.12.2015, demanding sum of Rs.4 Crores, being the principal amount alongwith the compensation, but since there was no compliance, ultimately on 29.04.2022 arbitration was invoked against the Respondent, who failed to agree as to the appointment of Arbitrator in terms of the clause contained in the writing exchanged between the parties.

6] Heard the learned counsel for the parties.

The learned counsel for the Respondent do not dispute the factual aspects of the matter including the existence of an arbitration clause in the distinct writings/communications exchanged between the parties.

On 01.08.2023, while considering the applications, a reference was made to a communication dated 25.05.2019 where an indication was given to refund the amount and therefore the matter was adjourned and even the learned counsel for the Applicant was also directed to obtain necessary instructions, till the amount is paid without any interest or compensation or any reasonable amount of interest.

Till date no positive statement comes from the Respondent worth consideration by the Applicant and he has no option but to seek appointment of an Arbitrator in terms of prayer in the two Applications.

Since the invocation of the arbitration agreement between the parties is not in dispute and it was agreed as a mode of settlement of the disputes arising between the parties, which is evidently clear from the communications exchanged between them, and without conveying the property in the two applications, since despite the cancellation of the Agreement, the refund is not received by the Applicant, it is high time that the parties are referred to arbitration without waiting for any further response at the other end.

7] In the wake of the above, Mr. Justice Akil Kureshi (retired Chief Justice of Rajasthan High Court) is appointed as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent in the two applications.

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated under Section 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 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.

Since there are two references, it is open for the Arbitrator to charge the fees separately as per the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

All rights and contentions of the parties are kept open.

[BHARATI DANGRE, J]