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IN THE HIGH COURT OF DELHI AT NEW DELHI***JUDGMENT RESERVED ON: 21.12.2023******JUDGEMENT PRONOUNCED ON: 24.01.2024***

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ARB.P. 667/2023

VINGRO DEVELOPERS PVT. LTD.

..... Petitioner

Through: Mr. Mohit Potalia, Adv. (VC)

versus

NITYA SHREE DEVELOPERS PVT. LTD. THROUGH ITS
PRINCIPAL OFFICER & ORS. RespondentsThrough: Mr. Nityanand Singh and Ms. Aachal
Sah, Advs.**CORAM:****HON'BLE MR. JUSTICE DINESH KUMAR SHARMA****J U D G M E N T****DINESH KUMAR SHARMA, J.**

1. The present petition has been filed under section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator for adjudication of the disputes *inter-se* having been arisen between the parties out of agreements dated 18.11.2016 and 08.02.2017 with respect to the purchase of plots in the Respondent's project.
2. A bare perusal of the material on record reflects that Respondent No.1 being engaged in the business of development and construction of real estate entered the two Builder Buyer Agreements dated 18.11.2016 and



08.02.2017 with the Petitioner with respect to the Respondent's Residential Township Project namely "RLF City" situated at Khasra No. 118, Khasra No. 120 & Khasra No. 431/119 at Village Salarpur, Tehsil Tijara, District Alwar Rajasthan 301019. The Respondent no. 2 and 3 are the directors and authorised representatives of Respondent No.1 and thereby, in this capacity, Respondent No.2 signed the Builder Buyer Agreements on behalf of Respondent no.1.

3. The parties executed 8 Builder Buyer Agreements dated 18.11.2016 for 8 plots of land admeasuring 125 sq. yds each and subsequently, 4 additional Builder Buyer Agreements dated 8.02.2017 were executed for four plots of land measuring 125sq. yds each. In total, agreements were executed with respect to 12 plots of land in the project.

4. The clause 29 and 30 of the Builder Buyer Agreements holds as is under:

"29. The Developer shall complete the development of the plot/project latest by December 30, 2016, except for any delay of not more than 60 days due to forcemajeure conditions as mentioned in clause 30 hereunder."

"30. The Developer shall not be held responsible or liable for not performing any of its obligations or undertaking provided for in this Agreement if such performance is prevented, delayed or hindered by an act of God, Fire, Flood, Explosion, War, Riot, Terrorist acts, Sabotage. The Developer shall not be held liable for any delay in delivery or possession of the said plot to the BUYER if the delay is caused due to carrying out any alternate/ additional work demanded by the BUYER in the said plot at any point of time during development of the said plot."

If for Force Majeure reasons, the whole or part of the project is abandoned or delayed beyond 60 days, no other claim will be preferred except that BUYER will be refunded all amounts paid on demand along with interest @ 10% p.a. (calculated on monthly basis)."



5. In contravention of the terms stipulated within the agreements, the respondent no.1 has not yet handed over the possession of the plots to the petitioners despite many reassurances from the former's end. Pursuant to non-delivery, the petitioner sent a legal notice dated 12.10.2022 asking for a refund of the amount paid by the petitioners along with interest. Being not satisfied with the respondent's reply, the petitioner sent another notice dated 10.12.2022 for the same, which remained unacknowledged. The petitioner invoked arbitration vide notice dated 16.01.2023 as under Section 21 of the Arbitration & Conciliation Act, 1966 and as stipulated in the arbitration clause of the agreements dated 18.11.2016 and 08.02.2017 which provides as under:

“47. (c) All or any disputes arising out of or touching upon or in relations to the term of this Letter of Allotment including the interpretations and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through Arbitrations. The arbitrations proceeding shall be governed by the Arbitration & Conciliations Act, 1996 and/or any statutory amendments/ modifications thereof for the time being in force. The arbitrations proceedings shall be held at an appropriate location in Gurgaon/Delhi. The courts at Delhi or Rajasthan only shall have jurisdiction in all the matters arising out of/ or touching upon and/ or in connections with this Allotment.”

6. Perusal of the record indicates that since no reply was received by the Petitioner, the present petition under Section 11 of Arbitration & Conciliation Act, 1966 has filed.
7. Learned Counsel for the petitioner submits that the Respondents represented to the petitioner that investing in their project would be very



profitable as they had already purchased and registered the land of 10,700 sq.mts and that they will obtain all the requisite approvals from the government authorities to develop the project in the stipulated time period.

8. It is submitted that the Petitioner agreed to buy a total of 12 Plots of land from the Respondents in the above-mentioned project measuring 125 square yards each at the fixed rate of Rs. 10,300 per sq. yd. having a price of Rs. 12,87,500/- per plot. It is further submitted that in furtherance of this, the respondent demanded an advance payment before the execution of the Builder Buyer Agreements. Learned counsel submits that the petitioner made the following payments to the respondent through RTGS mode the record of which is duly reflected in the Bank Statements of the Petitioner:

- a) Rs 24,00,000/- (Rupees Twenty Four Lakhs Only) dated 08.09.2014 as already mentioned above in para no. 7,
- b) Rs 16,00,000/- (Rupees Sixteen Lakhs Only) dated 30.06.2016 having reference no. RTGS/BKIDH16182738403,
- c) Rs. 10,00,000/- (Rupees Ten Lakhs Only) dated 18.07.2016 having reference no. RTGS/BKIDH16200722812,
- d) Rs 20,00,000/- (Rupees Twenty Lakhs Only) dated 31.08.2016 having reference no. RTGS/BKIDH16244327873,
- e) Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) dated 31.10.2016 having reference no. RTGS/BKIDH16305261930,
- t) Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) dated 01.12.2016 having reference no. RTGS/BKIDH16336960364,
- g) Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) dated 06.01.2017 having reference no. RTGS/BKIDH17006258435,



h) Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) dated 01.02.2017 having reference no. RTGS/BKIDHL 70324 74233,

i) Rs. 9,05,000/- (Rupees Nine Lakhs and Five Thousand Only) dated 01.03.2017 having reference no. RTGS/BKIDHL 7060844670

9. Learned counsel submits that the petitioner has made a total payment of amount Rs.1,39,05 ,000/- (Rupees One Crore Thirty Nine Lakhs and Five Thousand Only) to the Respondent no. 1 till date and executed 8 Builder Buyer Agreements dated 18.11.2016 for 8 plots of land and 4 Builder Buyer Agreements dated 08.02.2017 for subsequent 4 more plots of land; all measuring 125 sq. yds. each. Moreover, it is submitted that the petitioner has completely fulfilled their contractual duty whereas the Respondents have failed to do so in terms of clauses 29 and 30 of the Builder Buyer Agreements dated 18.11.2016 and 08.02.2017.
10. It is further submitted that the petitioner made many attempts to contact the respondents and was falsely reassured that the possession of the plots would be delivered on time. It is submitted that after the agreed upon date of delivery was past, the parties met on 20.12.2023, the Respondents maintained that a full refund would be initiated. However, due to steps being taken by the Respondents, the Petitioners sent a legal Notice dated 12.10.2022 asking the Respondents to refund the amount of Rs.1,39,05,000 along with interest.
11. To buttress the contention that Respondent no. 2 and Respondent no.3 are necessary parties to the suit, the court's attention is brought to the fact that they are the directors of the Respondent no.1 and that the Supreme Court vide their judgment dated 06.12.2023 in the matter titled "*Cox and*



Kings Limited v. SAP India Private Limited” 2023 SCC OnLine SC 1634, upheld the “Group of Companies Doctrine” and its application to bind non-signatories to an arbitration agreement. It is further submitted that the Constitutional Bench in this matter stated that at the referral stage of Section 11, the High Courts must let the arbitral tribunal decide whether non-signatories are bound by the arbitration agreement or not. It is submitted that it was moreover observed that under Section 2(1) read with Section 7 of the Act, ‘Parties’ include both Signatories and non-Signatories. Moreover, it was held that there exists a difference between non-signatories and third-parties as non-signatories are those who express consent through means other than signatures.

12.Learned counsel submits that the Respondent No. 2 is a signatory on all the 12 agreements executed between the parties and the Petitioner’s statement of account maintained with the Respondents also bears the signatures of Respondent no. 2. It is further submitted that since the respondents have filed a combined reply rather than individual replies, it goes to show that the Respondent No. 2 and 3 cannot be separated from Respondent No.1.

13.Learned counsel for the respondent submits that Respondent No 2 and 3 are not parties to the agreements and therefore, the present petition is liable to be dismissed. It is submitted that in ***Sundaram Finance Ltd. v. T. Thankam***, (2015) 14 SCC 444, the Apex court held that in the case of more than one party to a petition, if there are those not covered under the arbitration agreement or those not party to the arbitration agreement, then such matter cannot be referred to Arbitration against such parties.



14. It is submitted that the Petitioner only paid Rs. 1,39,05,000/- out of a total of Rs.1,54,50,000/- due for the 12 plots and thus, cannot expect to be given possession for the same without full payment. Reliance is placed upon clause 19 of the Builder Buyer Agreements wherein the necessity of timely instalments is emphasised upon as reproduced under:

“19. Timely payment of instalments and other allied charges indicated herein is the essence of this Agreement. It shall be incumbent on the BUYER to comply with the terms of payment. If payment is not received by the company within the period as invoiced as per the payment plan opted by the BUYER or if there is any other breach of terms of this Agreement, then this Agreement may be cancelled.”

15. It is further submitted that the Respondent No.1 has completed the project and handed over the possession to many other bona-fide purchaser who paid up the complete cost of the plots. Moreover, it is submitted that the respondent no.1 offered possession of the plots in question to the petitioner in 2017 within the promised time period and requested for a full payment however, the petitioner did not pay the balance amount of Rs.15,45,000/- which was due on 30.12.2016. Further, it is submitted that the Respondents only received the notice dated 12.10.2022 to which they duly replied.

16. Learned counsel submits that Respondent No. 2 and 3 have only acted in their capacity as directors of Respondent No.1 and cannot be held personally liable. Reliance is placed on ***Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar***, (2011) 11 SCC 375 wherein reference was made to ***Jagdish Chander v. Ramesh Chander*** 2007 (5) SCC 719, ***Yogi Agarwal v. Inspiration Clothes & U*** 2009 (1) SCC 372 and ***S.N.***



Prasad v. Monnet · Finance Ltd. (2011) 1 SCC 320. It is submitted that since Arbitration Agreement was only executed between the Petitioner and Respondent No. 1, there exists no arbitration agreement wherein Respondent No. 2 and 3 are parties, therefore, the name of Respondent No. 2 and 3 may be deleted from the array of parties before referring the matter for arbitration.

17. In the present case, the main challenge raised by the respondent is that Respondent No. 2 and 3 are not parties to the Arbitration Agreements and thus, the matter cannot be referred to arbitration. It is pertinent to mention that the existence of an arbitration agreement, arbitrable dispute and territorial jurisdiction of this court have not been disputed.
18. Before the court proceeds to examine the merits of the contentions raised by the parties, an examination into its scope of power under Section 11 is required to be undertaken.
19. It is a settled proposition that the scope of exercising jurisdiction of the High Court as under Section 11 is limited to looking into the aspect of the existence of the arbitration agreement which requires the examination as to whether the agreement contains a clause providing for arbitration pertaining to any disputes having been arisen between the parties out of the said agreement. In ***Emmar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751*** it was clarified that upon arbitration being invoked, the only valid reasoning for a court's refusal to refer the matter to arbitration is the non-existence of an arbitration agreement.
20. In ***DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743*** and it was *inter alia* held as under:



*“21. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-Judge Bench **Vidya Drolia v. Durga Trading Corpn.**, (2021) 2 SCC 1, has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct “prima facie review” at the stage of reference to weed out any frivolous or vexatious claims.”*

21. Therefore, the jurisdiction of this court at this stage is very limited and confined to only examining the existence of a prima facie arbitration agreement and not other issues.
22. In the present case, it is not disputed that the petitioner and respondent No.1 had entered into an agreement which contains an arbitration clause. Perusal of the record also indicated that there is an arbitrable dispute between the parties. Thereby, a prima facie examination makes it apparent that the current dispute may be referred to arbitration. However, as the main contention of the respondents is with respect to the Respondent no.2 and 3 being made party to the arbitration, the court must delve into scrutiny in that regard.
23. It is amply evident from the record that the Respondent No.1 is the principal and Respondent No. 2 and 3, being directors, are only agents of the former. In order to make the latter, parties of the arbitration, the petitioner has relied on **Cox and Kings Limited** (*supra*) wherein the Constitution Bench made the “group of companies doctrine” applicable to the Indian jurisprudence and held that ‘parties’ as defined under



Section 2(1)(h) read with Section 7 includes non-signatories as well as signatory parties. Further, the judgment stipulates that the underlying application of this doctrine is contingent to the common intention of the parties to bind the non-signatories by the arbitration agreement as held in para 172(e). The same view has also been taken in ***Cheran Properties Ltd. v. Kasturi & Sons Ltd.***, (2018) 16 SCC 413 wherein it was interalia held as under:

“23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

....

25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate



to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

“... The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways : first, by operation of the ‘group of companies’ doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession.... [Id at p. 99.] ”

The group of companies doctrine has been applied to pierce the corporate veil to locate the “true” party in interest, and more significantly, to target the creditworthy member of a group of companies [Op cit fn. 16, 2.40, p. 100.]”

24. Consequently, in the view of the court, to bind a non-signatory to an arbitration agreement, there must exist a common intention between the parties to do so. Moreover, the court must examine the relationship of the parties and the circumstances of the same to competently impute to them the intended meaning behind them. In the present case, the respondent no.2 is a signatory to the agreement in his capacity as the authorised signatory of Respondent no.1 being its director, similarly, whilst Respondent no. 3 is a non-signatory to the agreement. They have been made a party to the present petition in their capacity as the director of Respondent no.1. At the outset, it seems that the relationship between Respondent No. 1 with Respondent 2 and 3, beings it directors, is that of Principal and Agent as specified under Section 182 of the Indian



Contract Act, 1872. Hence, no intention to bind a non-signatory to the agreement between the parties can be discerned and the reliance placed on *Cox and Kings Limited* (*supra*) is respectfully distinguished. In this context, it is relevant to probe into the Section 230 of the Indian Contract Act, 1872, which holds as under:

“S.230 Agent cannot personally enforce, nor be bound by, contracts on behalf of principal- In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary—Such a contract shall be presumed to exist in the following cases:—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;*
- (2) where the agent does not disclose the name of his principal;*
- (3) where the principal, though disclosed, cannot be sued.”*

25. The legislature categorically prescribes that subject to a contract to the contrary, an agent cannot be held liable for the acts done of a known principal. A similar view was taken in *Vivek Automobiles Ltd. v. Indian Inc.*, (2009) 17 SCC 657 wherein it was held that the agent could not be sued when the principal had been disclosed. Further, the co-ordinate bench of this court in *ACE Innovators (P) Ltd. v. Hewlett Packard India Sales (P) Ltd.*, 2013 SCC OnLine Del 4019 inter alia held as under:

“6. It is thus evident that in terms of Section 230 of the Contract Act, in the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by him. Further there is no



presumption to the contrary as the name of the principal is known to the Plaintiff. In the present case, the agent, that is Defendant No. 3 has not entered into the contract with the Plaintiff and thus cannot be sued for the damages for breach of contract by Defendant No. 1. In Prem Nath Motors Limited (supra) the Hon'ble Supreme Court held:

“7. Section 230 of the Contract Act categorically makes it clear that an agent is not liable for the acts of a disclosed principal subject to a contract of the contrary. No such contract to the contrary has been pleaded. An identical issue was considered by this Court in the case of Marine Contained Services South (P) Ltd. v. Go Go Garments, where a similar order passed under the Consumer Protection Act was set aside by this Court. It was held that by virtue of Section 230 the agent could not be sued when the principal had been disclosed. A similar view has been expressed by a three judge Bench of this Court in Civil Appeal 6653/2005 arising out of S.L.P. (C) No. 19562/2004.”

This court in Tristar Consultants (supra) held:

“26. A perusal of Section 230 of the Indian Contract Act, 1872 shows that unless an agent personally binds himself, an agent is not personally liable for contracts entered into by him on behalf of his principal.

27. I may note an exception. The exception is that where an agent has contracted on behalf of a principal who is unnamed and undisclosed, on properly constituted pleadings and on so establishing, such an agent who acts on behalf of a undisclosed principal may be personally liable for a contract entered into by him.

28. To interpret the law as is sought to be projected by the petitioner would mean negation of the concept of a company being limited by its liability as per the memorandum and articles of association of the company. Other than where directors have made themselves personally liable i.e. by way of guarantee,



indemnity etc. liabilities of directors of a company, under common law, are confined to cases of malfeasance and misfeasance i.e. where they have been guilty of tort towards those to whom they owe a duty of care i.e. discharge fiduciary obligations. Additionally, qua third parties, where directors have committed tort. To the third party, they may be personally liable.”

26. In light of the relationship of principal, agent existing between the respondent no.1 and respondent 2, 3 respectively as under Section 182 and Section 230 and the jurisprudence stemming from the same, it is abundantly clear that in absence of the conditions under the proviso being fulfilled, the agent cannot be held liable for or be bound by contracts entered into on behalf of the principal. Hence, Respondent no. 2 and 3 cannot be made parties to the arbitration.
27. The dispute arising out of Builder Buyer Agreements dated 18.11.2016 and 08.02.2017 between the Petitioner and Respondent No.1 is referred to Arbitration without Respondents no. 2 and 3 being made party to it.
28. In view of the above, this Court considers it apposite to allow the present petition. Arbitration has duly been invoked and therefore Mr. Siddharth Sharma, Advocate (Mobile No. 7400111111), is appointed as the sole Arbitrator to adjudicate the disputes between the parties with respect to the Agreements. The arbitration is to be conducted under the aegis of DIAC.
29. Both parties shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability before the learned arbitrator, which shall be decided by the learned arbitrator, in accordance with law.



30. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing the requisite disclosures as required under Section 12 of the Arbitration and Conciliation Act, 1996 to the parties.
31. The learned Sole Arbitrator shall be entitled to a fee in accordance with the Fourth Schedule to the Arbitration and Conciliation Act, 1996; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator
32. The Parties shall share the fee of the learned sole Arbitrator and arbitral costs, equally.
33. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned sole Arbitrator on their merits, in accordance with law.
34. Needless to say, nothing in this order shall be tantamount to an expression of this court on the merits of the case.
35. The present petition stands disposed of in the above terms.

DINESH KUMAR SHARMA, J

JANUARY 5, 2024

Pallavi/Aj