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IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/496/2021
ARUN KUMAR SINGH
VS
SALVUS REALTY PVT LTD. AND ANR

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date : March 3, 2025

Mr. Rajarshi Dutta, Adv.
Mr. Dhilon Sengupta,...for petitioner.

Mr. Nilanjan Bhattacharyya, Adv. ...for respondents.

1. Affidavit-in-reply is taken on record.

2. This is an application for appointment of an Arbitrator, in terms of Article XVII of the development agreement entered into by and between the parties dated April 5, 2016. According to the petitioner, the respondent No.1 proceeded to sell flats to third parties, without discharging obligation to provide the owners' allocation. The allegation is that the respondent no.1 acted in breach of the said development agreement. The petitioner and the respondent no.2 are the owners. Despite service, the respondent no.2 is not represented. In any event, the petitioner does not have any claim against the respondent no.2 as the said respondent is also a co-owner of the property to be developed.

3. Mr. Rajarshi Dutta, learned advocate appearing for the petitioner submits that as disputes and differences arose, a deed of revocation of the power of attorney granted to the respondent no.1 was executed by the petitioner. The same was registered. The respondent no.1 challenged the said revocation by filing a suit vide Title Suit no.367 of 2021. The suit is pending before the learned civil judge, Senior Division, Second Court, Howrah. In the said suit, the petitioner had filed an application under section 8 of the Arbitration and Conciliation Act, 1996 for dismissal of the suit on the ground of

existence of an arbitration clause. The learned civil court rejected the said application on the ground that, although the existence of the arbitration clause was not in conflict with the lis to be decided by the learned civil court, but the arbitration clause contained in the development agreement did not take away the jurisdiction of the court to determine the issue as to the legality and validity of the impugned deed of revocation. Admittedly, the said order is under challenge in an appeal. According to Mr. Dutta, the pendency of the appeal should not come in the way of this court to refer the disputes to arbitration when the learned civil court was alive to the issue that Article XVII of the development agreement contained the arbitration clause and that the parties had agreed to refer all disputes arising out of the said development agreement for adjudication by an agreed sole arbitrator or in case of failure thereof, by a tribunal of three arbitrators.

4. Mr. Nilanjan Bhattacharyya, learned senior advocate submits that the learned civil court was of the view that the suit should proceed. The issues in the suit, should be left to be decided by the learned civil court. The rights and liabilities of the parties were also ancillary issues in the suit. Mr. Bhattacharyya relies upon the decision of the Hon'ble Madras High Court in the matter of Mr. T. Rajesh Prasad, Partner of M/s. R.K. Properties vs. Mr. K. Saji Kumar, decided in Arb.OP. (Com Div.) No. 678 of 2023 and submits that the application before this court is premature. The appeal court is yet to decide on the correctness of the order passed by the learned civil judge. The appeal will be rendered infructuous if this court refers the disputes to be settled by a learned arbitrator. This court would then step into the domain of the learned appeal court and pre-judge the issue pending in the appeal.

5. Heard learned advocates for the respective parties.

6. Admittedly, the parties entered into a development agreement on April 5, 2016. As disputes and differences cropped up between the parties, the

petitioner revoked the power of attorney. Clause 19.1 under Article XVII of the agreement provides that, any dispute or difference between the parties touching or arising out of or concerning the development agreement, shall be resolved amicably and even if the disputes continued and were not settled, reference shall be made to a single arbitrator, if the parties agree. In case of disagreement, the reference shall be made to three arbitrators, each party shall appoint one arbitrator and those arbitrators shall appoint the presiding Arbitrator.

7. The Second Schedule of the development agreement provides the owners' allocation and the third Schedule provides the developers' allocation. The petitioner raised dispute as the developer was parting with the flats without complying with the obligation to hand over the owners' allocation. Accordingly, the petitioner executed a deed of revocation of the power of attorney.

8. The Title suit no.367 of 2021 was filed by the respondent no.1 represented by its Director, challenging the deed of revocation of the power of attorney dated June 25, 2021. The respondent no.1 prayed for the following reliefs :

“a. a decree of declaration that the registered deed of revocation of Power of Attorney dated 25.6.2021 registered at the Office of DSR-I, Howrah, being no.050100062 for the year 2021 morefully and specifically described in the schedule-A hereinbelow is absolutely illegal, inoperative and not binding upon the plaintiff and the proforma defendant by any manner whatsoever.

b. a decree of declaration that the principal defendant has no manner of right to transfer, encumber, alienate and/or creation of third party interest in respect of the 'C' schedule noted property in favour of any third party stranger.

c. a decree of permanent injunction restraining the principal defendant and his men and agents from not to give effect in respect of the 'A' schedule noted impugned deed of revocation by any manner whatsoever

and/or to transfer, encumber, alienate and/or creation of third party interest in respect of the 'C' schedule noted property in favour of any third party stranger.

- d. a decree of temporary injunction in terms of prayer [c].
- e. all cost of the suit.
- f. any other relief/reliefs to which the plaintiff is entitled to both in law and in equity.
- g. leave under order 2 rule 2 of the Code of Civil Procedure.”

9. The cause of action in paragraph 13 of the plaint also indicates that the suit was restricted to the deed of revocation of the power of attorney with interim prayers restraining the petitioner as the principal defendant from transferring, encumbering, alienating or creating third party interest in respect of 'C' schedule property and for a permanent injunction restraining the petitioner from acting in further to the deed of revocation of the power of attorney. The petitioner filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 which was rejected on the ground that, although the plaintiff/respondent no.1, did not dispute the existence of an arbitration clause, the issue before the civil court in the suit was different from the issues covered by the development agreement. The learned Judge relied upon a decision of the Hon'ble Apex Court being *SBP & Co. Vs. Patel Engineering Ltd. & Anr., reported in 2005 (8) SCC 618* and held that the civil court was empowered to ascertain whether the existence of the arbitration agreement would cover the issue which was in dispute in the title suit. Applying the said decision the learned court fixed the following issues ;

- (i) Whether the parties to the suit were parties to the arbitration agreement?
- (ii) Whether the disputes which were the subject-matters of the suit fell within the scope of arbitration agreement?
- (iii) Whether the defendant had applied under Section 8 before submitting its written statement?
- (iv) Whether the reliefs sought for in the suit were those could be adjudicated and granted in arbitration?

10. The learned civil court was of the view that the challenge in the suit was the legality and validity of the deed of revocation of the power of attorney which was granted in favour of the plaintiff. Although Mr. Dutta submits that the revocation of the power of attorney was also an act following the development agreement and, as such, the civil court ought to have allowed the application under Section 8 of the Arbitration and Conciliation Act, 1996 but this Court is of the view that the question is now pending adjudication before the appropriate forum. Article XX of the agreement vests the jurisdiction on the Howrah court to adjudicate the matters arising out of the agreement. The trial court held as follows:-

“Now, so far as the Judgment of the Hon’ble Supreme Court as referred by the petitioner/defendant no. 1 is concerned (**AIR 2015 SC 1306**), this Court is of the humble view that the same is not in conflict with the judgments of the Hon’ble Court as referred above and nor does to say that the court has no authority to look into the real controversy between the parties before referring them to arbitration. This judgment says that the court must see if its jurisdiction is ousted by the arbitration clause. To my understanding of the nature of the case in hand I firmly find that the Arbitration Clause contained in the Development Agreement does not take away the jurisdiction of this Court in determining the issue as to the legality and validity of the impugned Deed of Revocation and giving verdict on it.

Hence, in view of the discussion made hereinabove, the application u/s. 8 of the Arbitration and Conciliation Act, 1996 is liable to be rejected.”

11. Accordingly, the application filed under Section 8 of the Arbitration and Conciliation Act, 1996 was rejected. In the appeal which is pending from the said order, what will fall for decision is whether the deed of revocation of

power of attorney shall be decided in the suit or by the learned arbitrator. Whether the validity of the deed would be covered by the arbitration clause. Apart from the deed of revocation of the power of attorney, other disputes which arose out of the said development agreement are outside the scope of the suit.

12. The notice invoking arbitration was issued on July 19, 2021. Thus, the existence of the arbitration clause and the notice invoking arbitration are sufficient reasons to refer the dispute to arbitration.

13. To the understanding of the learned Civil Court as well, the arbitration clause covered other issues arising out of development agreement but not the issue with regard to unilateral execution of the deed of revocation of the power of attorney. Even if the petitioner is unsuccessful in the appeal, the suit will proceed on the plaint case which, according to the learned Civil Judge was restricted to the deed of revocation of power of attorney. If the petitioner is successful, then all issues arising out of the alleged breach and the right of the petitioner to unilaterally revoke the power of attorney shall be decided by the learned Arbitrator. In any event, these are all prima facie observations, as the question with regard to the arbitrability of the issues arising out of the arbitration agreement and the contention of Mr. Bhattacharya that there were overlapping issues etc. can be raised before the learned Arbitrator. The learned Arbitrator has ample authority to decide not only to his own jurisdiction, but also the objections relating to the arbitrability of issues. Accordingly, the application is allowed.

14. The decision relied upon by Mr. Bhattacharya does not apply, for the following reasons:-

- a) The application under Section 8 had not been disposed by the learned Civil Court.

- b) In the Civil Suit, the very existence of the agreement which contained the arbitration clause was the subject matter of challenge on the ground of forgery and fabrication.
- c) The reliefs overlapped.

On such counts, the Hon'ble Court was of the view that allowing the application under Section 11 of the Arbitration and Conciliation Act, 1996 would be affirming the existence of the agreement which was challenged before a Civil Court on the ground of the same being forged and fabricated.

- 15. All points raised by Mr. Bhattacharya are kept open to be decided by Learned Arbitrator, independently.
- 16. Parties, however, agree before this Court that the matter be referred to a sole Arbitrator as provided in the first part of the arbitration clause.
- 17. The learned District Judge before whom the appeal is pending, shall not be influenced by this order.
- 18. Accordingly, this application is disposed of by appointing Mr. Sakya Sen, learned Senior Advocate as an Arbitrator to arbitrate upon the disputes between the parties.
- 19. This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.
- 20. The learned Arbitrator shall fix his remuneration in terms of the Schedule of the Act.
- 21. The application being AP/496/2021 is accordingly disposed of.

(SHAMPA SARKAR, J.)