

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO.372 OF 2025
WITH
COMMERCIAL ARBITRATION PETITION (L) NO.2311 OF 2023
(NOT ON BOARD)

Harshad B. Shah & Anr.

....Applicants

Versus

A V S Realtors & Anr.

....Respondents

Mr. Anand Pai *i/b. Mr. Pratik Kothari, Advocate for Applicants.*

Mr. P.Y. Shankar, *Advocate for Respondent No.2.*

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE : SEPTEMBER 25, 2025

ORDER :

1. This is an Application under Section 11 of the Arbitration and Conciliation Act, 1996 (***“the Act”***) seeking appointment of an arbitral tribunal in reference of disputes and differences between the parties that are said to have arisen in connection with the redevelopment of the premises owned by the Applicants, namely, Flat Nos.3 and 4 in lieu of which the Applicants have been provided with Flat Nos.601 and 602 in the building redeveloped under these instruments.

2. The grievances essentially center around a shortfall in payment of transit rent for the period between May 2020 and January 2022; an alleged shortfall in area handed over to the Applicants and certain amenities allegedly not provided for as promised. The redevelopment was governed by a development agreement (“*Development Agreement*”) dated August 6, 2015 which, in the facts of this case, is a tripartite agreement between the Developer, the Society and its members.

3. The Permanent Alternate Accommodation Agreement (“*PAAA*”) is also a tripartite agreement with the individual members signing their respective PAAAs. The PAAA does not have an arbitration clause, whereas the Development Agreement has an arbitration clause. The disputes and differences between the parties relate to the redevelopment per se and the entitlements flowing under the PAAA would flow from the entitlements originally emanating from the Development Agreement.

4. The objection to this application from the Respondents is premised on the fact that the PAAA does not have an arbitration clause at all, while it indeed has a provision stating that all provisions of the Development Agreement stand reiterated and incorporated. Learned Advocate for the Respondents would rely on the judgment of the

Supreme Court in *NBCC (India) Limited*¹ to state that an arbitration clause cannot be merely incorporated by reference. Unless it is explicitly reproduced or agreed upon, he would submit that it cannot be said that the parties had agreed to submit themselves to arbitration. This is strongly countered by the Learned Counsel on behalf of the Applicants. He would point to not only Clause 2 of the PAAA, but also to Clause 42 of the Development Agreement to indicate that the said two clauses not only stood incorporated, but also that the reference to parties in the Development Agreement would bring within its ambit, the members of the society as well.

5. On the face of it, these Applicants have not executed the Development Agreement while all other members of the sSociety have. This is sought to be explained by stating that the Applicants are residents (not nationals) of the United States of America, and therefore, they were not physically present to sign the PAAA, but they have bound themselves and conducted themselves in accordance with the Development Agreement.

6. In the peculiar factual matrix of this case, both the agreements being tripartite in the manner they were envisaged, although the Applicants are not physically signatories to the development agreement, they have indeed signed the PAAA which contains an

¹ *NBCC (India) Limited v. Zillion Infraprojects Private Limited* – 2024 SCC Online SC 323.

incorporation by reference. Not only are the two agreements inter-linked and complementary to each other, but also the privity of the parties is identical. Therefore, this is not a case that rests solely on the existence of the arbitration agreement in terms of incorporation by reference, the original Development Agreement containing the arbitration clause is the instrument that entails flow of specific benefits to the Applicant and that is firmed up further in the PAAA.

7. In these circumstances, the Applicants, if they have a grievance, being part of the parties, the only shortcoming would be that they have not physically signed the Development Agreement. Learned Counsel for the Applicants would point to the judgment of the Supreme Court in ***Advaya Projects Private Limited*²** and ***ASF Buildtech*³** to contend that the absence of the physical signature should not stand in the way of the Applicants' entitlement to get the benefits as a party to the Development Agreement. The entitlements flow from the Development Agreement and the Applicants, as members of the Society, were placed on par with all other members of the Society and therefore, he would contend that he has privity to the arbitration agreement.

8. In the peculiar facts and circumstances of the case, since the intended execution of both the agreements were meant to be by the

² *Advaya Projects Pvt. Ltd. v. M/s Vishal Structurals Pvt. Ltd.* – 2025 SCC OnLine SC 806

³ *ASF Buildtech Pvt. Ltd. Vs. Shapoorji Pallonji and Co. Pvt. Ltd.* – 2025 INSC 616

same parties, it cannot be discerned that the Developer and the Society intended to arbitrate with every other member save and except for those who were physically unavailable and could not sign. That they had a commitment to arbitrate is writ large on the record. Hypothetically even if the Applicants were to affix their signatures on the Development Agreement today, in the placeholders where their signatures are missing, it would complete execution of that agreement on their part and merely being a non-signatory ought not to stand in the way in the specific factual matrix of this case.

9. Paragraph 166 of ***ASF Buildtech*** is reproduced below:

166. In Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477, this Court has held that signature is not a formal requirement under Section 7(4)(b) or 7(4)(c) or under Section 7 (5) of the 1996 Act. This position is further supported by the definition of a 'party' in Section 2(h) of the 1996 Act to include a 'party to an arbitration agreement' and not a signatory to an arbitration agreement. Section 7 of the 1996 Act also does not stipulate a qualification that a party must be a signatory to the arbitration agreement or the principal agreement containing the arbitration clause. This was also reiterated in Cox and Kings Ltd. (I) (supra).

10. For the aforesaid reasons, I am satisfied that a case has been made out to refer the parties to arbitration in the specific and peculiar facts of this case without the need to be bogged down by whether the non-incorporation of the arbitration agreement in the PAAA has any adverse consequence for the Applicants. The non-incorporation of the explicit clause in the PAAA is also attributable to the fact that although

all the members were in any case meant to be signatories to the Development Agreement, these Applicants could not affix their signature merely because of their physical absence from the country.

11. Merely being a non-signatory despite being bound by the Development Agreement and conducting themselves in accordance with the Development Agreement, in my opinion, it cannot be said, applying the principles in *Cox and Kings*⁴ to hold that there was never an intention to arbitrate with any member.

12. Considering the nature of the disputes, the effect of this order is deferred by a period of four weeks from the upload of this order to enable the parties to explore a resolution by way of mediation. The agreement has a named arbitrator and therefore, the parties would need to proceed to arbitration by the named arbitrator. Should the named arbitrator refuse to act as the arbitrator, then the Arbitral Tribunal shall stand constituted in the following terms:-

A] Mr. Vishwajit Kapse, a learned advocate of this Court is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;

Office Address:- Chamber No.5, Ground Floor,
Bombay Mutual Chambers,
Ambalal Doshi Marg, Fort,
Next to Bombay Stock Exchange,

⁴ *Cox and Kings v. SAP India Pvt. Ltd. & Anr.* – 2023 INSC 1059

Mumbai 400001.
Email ID :- vskapseoffice@gmail.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from the date of upload of this order. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

13. ***Commercial Arbitration Petition No.2311 of 2023*** (Section 9) is not on Board. By consent of the parties, taken on Board. This Petition stands converted into an application under Section 17 for appropriate consideration by the arbitral tribunal. The parties shall approach the named arbitrator forthwith to communicate the passing of this order so that, should any interlocutory arrangement be felt necessary, it shall be open to the arbitral tribunal to examine the same.

14. Both the captioned proceedings are hereby ***finally disposed of***.

15. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

16. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]