



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO.20483 OF 2023

WITH

ARBITRATION APPLICATION (L) NO.21860 OF 2023

Ketan Champaklal Divecha ... Petitioner / Applicant
Vs.
DGS Township Pvt. Ltd. & another ... Respondent

Mr. Kunal Mehta a/w. Mr. Harsh L. Behany, Ms.Saloni Manjrekar, Ms.Prachi Sanghvi and Ms.Sailee Rane i/b. HN Legal of Petitioner and Applicant.

Mr. Mayur Khandeparkar a/w. Mr. Rohan Sawant, Mr. Santosh Pathak, Ms.Archana K. and Ms.Purva Naik i/b. Law Origin for Respondent No.1.

Mr. Karl Tamboly a/w. Mr. Nirav Marjadi, Mr. Ameet Mehta and Ms.Nikita Deora and Ms.Shweta Chopra i/b. M/s. Solicis Lex for Respondent No.2.

CORAM : MANISH PITALE, J.

Reserved on : 20TH DECEMBER, 2023

Pronounced on: 02ND JANUARY, 2024

ORDER :

. A fundamental objection is raised on behalf of the respondents as regards the very maintainability of the present petition and application filed on behalf of the petitioner - applicant under Sections 9 and 11 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the 'Arbitration Act'). According to the respondents, the arbitration clause, in the present case, is so worded and structured that the petitioner, being a member of the respondent No.2 - Co-operative Housing Society, alone cannot seek resolution of disputes under the arbitration clause. It is indicated that the disputes capable of resolution under the arbitration clause are disputes between the Society and the respondent No.1- Developer. It is claimed that the petitioner as a lone member of the Society, is incapable of invoking arbitration. Consequently, it is alleged

that since the invocation itself is defective, the proceedings cannot continue in the present case.

2. Shorn of unnecessary details, the facts leading to filing of the present proceedings are that a development agreement was executed on 25.03.2021 for re-development of the property of the respondent - society, of which, the petitioner is one of the members. There are 216 members of the society. The development agreement shows that the respondent No.2 - Society, 216 members of the Society and the respondent No.1 - developer are signatories to the said agreement. Simultaneously, with the execution of the Development Agreement, a Power of Attorney was executed by the respondent - society in favour of the respondent - developer to undertake development in terms of the said development agreement.

3. As per the development agreement, the respondent - developer was to undertake re-development of the property in accordance with Regulation 33(7)(B) of the Development Control and Promotion Regulations for Greater Mumbai, 2034 (DCPR 2034). The respondent - developer was to develop the property and utilize the permissible Floor Space Index (FSI) as per the DCPR 2034, read with the terms and conditions of the development agreement. It was further agreed that if the development potential was to increase beyond the permissible FSI under Regulations 33(7)(B), such increase would be shared between the respondent - developer and respondent - society in a ratio of 50:50.

4. It is the case of the respondents that after the possession of the property was handed over to the respondent - developer and the old structure was demolished, it was found that the actual area of the plot was less than the area on the basis of which the development agreement was executed. In this backdrop, the respondents i.e. the Developer and the Society, reflected upon the effect of such reduction in the size of the

plot. After deliberations, the society passed a unanimous Resolution on 12.06.2022, allowing the respondent - developer to change the scheme to carry out re-development under Regulation 33(11) of DCPR 2034. By the said resolution the Managing Committee of the respondent - society stood authorized to sign a supplemental development agreement in the light of the change in the re-development scheme.

5. Pursuant thereto, a supplemental development agreement was executed between the Managing Committee of the respondent - society and the respondent - developer. In the said supplemental development agreement, the developer agreed to pay an additional sum of ₹ 750/- per square meter of carpet area as additional corpus or one mechanical car parking space. The members could opt for either benefit. It was also stipulated that the Respondent-developer would ensure that the new building to be constructed on the property would not have any PTC units/members and that it will also not have any marking of Slum Rehabilitation Authority (SRA) logo on the project. It was also agreed that the respondent - developer shall be entitled to utilize the FSI available at present on the said property due to change of the scheme to Regulation 33(11) of DCPR 2034.

6. It appears that subsequently the petitioner and some other members of the respondent - society believed that the rights available to the society and its members under clause 3.2 of the development agreement, were wrongly / unfairly given up by the respondent - society, to the detriment of the members. On this basis, the petitioner raised a dispute. There were communications exchanged between the petitioner and the respondents. Eventually, on 03.01.2023, a notice was issued on behalf of some members of the society including the petitioner, raising such disputes and invoking clause 35 of the development agreement pertaining to arbitration, further suggesting the name of a sole arbitrator

to adjudicate such disputes. Subsequently, on 29.04.2023, a fresh notice was issued on behalf of the petitioner and some other members of the respondent - society, stating that the notice dated 03.01.2023, issued on behalf of some members of the society nominating a sole arbitrator, was not in accordance with clause 35 of the development agreement. On this basis, the said notice dated 03.01.2023 was withdrawn and instead, in the aforementioned fresh notice, arbitration clause under clause 35 of the development agreement was again invoked, suggesting a panel of three names from amongst whom the respondents could agree upon appointment of a sole Arbitrator. It was specified that in the event the respondents did not agree or respond, proceedings under Sections 9 and 11 of the Arbitration Act would be initiated. In this backdrop, the present proceedings came to be filed, wherein the respondents entered appearance and raised their objections.

7. Mr. Kunal Mehta, the learned counsel appearing for the petitioner - applicant, submitted that the objections raised on behalf of the respondents were completely misplaced. It was submitted that the development agreement specifically recorded that it was executed between the respondent No.1 - developer, respondent No.2 - society and all the 216 members of the respondent - society. Much emphasis was placed on the fact that they were all referred to as '*parties*' in the said development agreement. Thereupon, the learned counsel appearing for the petitioner invited attention to clause 35 of the development agreement and submitted that clause 35.1 clearly stipulates resolution of disputes between the parties through arbitration under the Arbitration Act and that clause 35.2 merely provides the mechanism through which arbitration could be invoked. It was conceded that the initial invocation notice issued on 03.01.2023 was not in consonance with clause 35.2 of the development agreement but, at the same time, it was submitted that the defect was cured for the reason that the society was then approached

for raising the dispute pertaining to grievances of the petitioner and other members, with the developer. It was when the respondent - society failed to respond that the petitioner and some other members had no alternative, but to invoke the arbitration clause, by proposing a panel of three names in terms of clause 35.2 of the development agreement.

8. It was emphasized that the supplemental development agreement, apart from being executed in an unauthorized manner by only the managing committee, wrongly gave up the benefits available to the members of the society under clause 3.2 of the development agreement. It was submitted that an arbitrable dispute had arisen between the parties, which could be resolved only through arbitration. It was submitted that the petitioner was ready to convert the petition filed under Section 9 of the Arbitration Act into an application under Section 17 thereof, which could be placed before the arbitrator to be appointed by this Court. According to the learned counsel appearing for the petitioner, once an arbitrable dispute has arisen, in the face of the aforesaid arbitration clause in the development agreement, read with the supplemental development agreement and, in the backdrop of aforesaid invocation of the arbitration clause, this Court ought to exercise power under Section 11(6) of Arbitration Act for appointment of an arbitrator. It was submitted that the objections raised on behalf of the respondents ought to be rejected and the present proceedings may be disposed of in favour of the petitioner.

9. On the other hand, Mr. Mayur Khandeparkar, learned counsel appearing for the respondent No.1 - developer, submitted that the petitioner was misreading the arbitration clause contained in the development agreement. It was submitted that clauses 35.1 and 35.2 of the said development agreement ought to be read in conjunction. Upon being properly read, the disputes that can go to arbitration are only those

disputes raised by the society and its members on the one hand and the respondent - developer on the other. It was submitted that the individual 216 members of the respondent - society were made signatories to the development agreement, only to save stamp duty, which obviously inured to the benefit of the members. It was further submitted that a proper reading of the entire development agreement along with the supplemental development agreement and particularly the arbitration clause, would show that each individual member was not entitled to raise disputes in such a manner. If the contentions raised on behalf of the petitioner were to be accepted, the respondents would have to face 216 arbitration proceedings, which is not a situation contemplated under the aforesaid agreement.

10. The learned counsel for the respondent No.1 referred to Sections 2(1)(h) and 7 of the Arbitration Act to support the aforesaid contention. Reliance was also placed on the judgment of the Supreme Court in the case of **Daman Singh & Ors. vs. State of Punjab & Ors.**¹, to contend that once a person becomes a member of a Co-operative Society, he loses his individuality qua the society and he has no independent rights. It was emphasised that a member must act and speak through the society. The learned counsel for the respondent No.1 also relied upon the judgment of this Court in the case of **Arohi Infrastructure Private Ltd., & Ors. vs. Tata Financial Services Limited, Mumbai**², to contend that if the invocation notice is defective, an application under Section 11 of the Arbitration Act cannot be maintained. On this basis, he submitted that the present Petition and application deserve to be dismissed.

11. Mr. Karl Tamboly, learned counsel for the respondent No.2 - Society, supported the contentions raised on behalf of the respondent

1 1985(2) SCC 670

2 2015 SCC OnLine Bom 5883

No.1 - developer. It was further submitted that the unanimous resolution dated 12.06.2023 was passed by the Society authorising the managing committee to execute the supplemental development agreement, wherein terms beneficial to the members were incorporated. It was submitted that the petitioner and a few other members cannot be permitted to resort to arbitration, for the reason that arbitration can be invoked under clause 35.2 of the development agreement only by the society along with members and not by an individual member or members. On this basis, he submitted that the present petition and application, both deserve to be dismissed.

12. This Court has considered the rival submissions on the basis of the material available on record and the contentions raised by the learned counsel in that context.

13. In the present case, since the petitioner has emphasized upon individual members of the respondent - society being signatories to the development agreement and hence, being entitled to invoke arbitration, it would be appropriate to refer to the relevant sections of the Arbitration Act. Section 2(1)(h) of the said Act defines 'party'. Section 7 thereof defines an 'arbitration agreement', as an agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship. The arbitration clause in the present case has to be interpreted on the basis of the aforesaid definition of 'party' and 'arbitration agreement'. The arbitration clause in the present case, contained in the development agreement, reads as follows:

“35.1 All disputes, claims and questions whatsoever which may arise with respect to this Agreement between the Parties hereto touching or relating to or arising out of these presents or the construction or application thereof or any clauses or thing herein contained or in respect of the duties responsibilities

and obligations of either party hereunder or as to any act of omission of any party or as to any other matter in anywise relating to these presents or the rights, duties, and liabilities of either party under these presents shall be referred to arbitration under Arbitration and Conciliation Act, 1996 or any statutory modification and/or re-enactment thereof in the following manner:

35.2 The Society and the Members as one Party and the Developer as the other Party may forward a panel of names to facilitate the task of selection of the Sole Arbitrator, and a Sole Arbitrator shall then be appointed jointly by the Society and the Developer;”

14. The above quoted arbitration clause does indicate that the disputes, claims and questions arising with respect to the agreement between the ‘*parties*’, shall be referred to arbitration under the Arbitration Act. It is relevant that in the aforesaid clause, the expression either ‘*party*’ is used more than once. Clause 35.2 of the Development Agreement specifically stipulates that the ‘*Society and the members*’ as one party and the ‘*developer*’ as the other party, can forward a panel of names to facilitate selection of a sole arbitrator. What is of significance is that under the aforesaid clause 35.2, a sole arbitrator can be appointed ‘*jointly by the Society and the developer*’. The peculiar stipulation under the said clause clearly indicates that an eventual appointment of a sole arbitrator can take place only when the society on the one hand and the developer on the other jointly agree for such an appointment.

15. The aforesaid clause has to be read in the backdrop of the settled position of law that when a Co-operative Housing Society enters into a development agreement with a developer, the will of the majority members prevails. The individual desire or identity of the member is subsumed within the will of the Co-operative Housing Society, which collectively represents the aspirations and the cause of its members. There is substance in the contention raised on behalf of the respondents,

by placing reliance on the judgment of the Supreme Court in the case of **Daman Singh & Ors. vs. State of Punjab & Ors.** (*supra*), wherein it is specifically laid down that the Society alone can act and speak for an individual member and that the member loses his individuality qua the Society, having no independent rights. Clause 35.2, quoted herein above, clearly encapsulates the said status of a member of a co-operative housing society and thereby indicates that even if clause 35.1 uses the plural '*parties*', the same has to be interpreted as referring to the society and members on the one hand and the developer on the other. Clause 35.2 cannot be relegated to being merely a mechanism because the very invocation of arbitration and appointment of a sole arbitrator is governed by the said clause. For a valid invocation of arbitration, in the facts and circumstances of the present case, notice will have to be issued by the society along with its member or members on the one hand or the developer on the other. An individual member simply does not have the capacity to invoke arbitration under clause 35.2 of the development agreement. Once this conclusion is reached, it becomes clear that the arbitration clause in the development agreement signifies an arbitration agreement for resolution of disputes between the society with its members on the one hand and the developer on the other. The society espouses the cause of its own members, which in turn, as per settled law, is based on the will of the majority members of the Society.

16. This conclusion is supported by the other clauses of the development agreement, including a specific clause which authorizes only the society to execute a Power of Attorney simultaneously with the Development Agreement for undertaking the re-development project. Clauses 16.17 and 16.18 of the development agreement specifically stipulate that the members of the society shall not cause or create any impediments or obstructions in the re-development of the Society as per the development agreement.

17. It is also an admitted position, that a unanimous resolution dated 12.06.2023 was passed authorizing the managing committee of the society to execute the supplemental development agreement, in the light of the situation that arose due to reduction in size of the plot. There is nothing to indicate that either the petitioner or some of the other minority members of the society, whose cause the petitioner claims to espouse, took any objection when the resolution dated 12.06.2022 was passed in the Special General Body Meeting of the society.

18. The supplemental development agreement records agreement between the society and the developer for inclusion of further benefits to the members of the society in the light of change in the development scheme from Regulation 33(7)(B) of the DCPR 2034 to Regulation 33(11) thereof.

19. This Court is not going into or commenting upon the grievance sought to be raised by the petitioner in that regard. It would amount to entering into the merits of the dispute, which is not warranted in the facts and circumstances of the present case, particularly in the light of the fundamental objection to the very maintainability of the present proceedings raised on behalf of the respondents.

20. This Court is of the opinion that the petitioner may have a grievance against the respondent No.1 - developer and even the respondent No.2 - society, of which he is a member, but such a grievance and the dispute arising therefrom, is not amenable to arbitration under the peculiar arbitration clause contained in the development agreement. There is substance in the contention raised on behalf of the respondents that 216 arbitration proceedings may arise if each individual member was to invoke arbitration for perceived grievances in the context of the development agreement. Clauses 35.1 and 35.2 have to be read together and the only conclusion that this Court can reach upon a conjoint

reading of the two, is that an individual member like the petitioner cannot invoke arbitration for redressal of grievances. Arbitration can be resorted to only upon a proper invocation of arbitration under clause 35.2 of the development agreement for disputes that may arise between the society and its members on the one hand, espousing the cause of its members on the basis of the will of majority of its members, and the developer on the other hand. In other words, the grievance of the petitioner as an individual member, without the society joining in, cannot give rise to an arbitrable dispute with the developer.

21. Therefore, this Court finds that the invocation of arbitration in the present case itself is rendered defective. The arbitration agreement is not for each individual member of the respondent - society to raise a dispute and seek appointment of an arbitrator, thereby indicating that neither the petition under Section 9 nor the application under Section 11 of the Arbitration Act, can be entertained by this Court. This goes to the very root of the matter. In this context, the respondents are justified in relying upon the judgement of this Court in the case of **Arohi Infrastructure Private Ltd., & Ors. vs. Tata Financial Services Limited, Mumbai** (*supra*). The petitioner may initiate such steps as available in law to seek redressal of his grievance, but in the facts and circumstances of the present case, he or other minority members of the Society cannot invoke arbitration.

22. In view of the above, the Petition as well as the Application stand dismissed.

(MANISH PITALE, J.)

Andreza