

**HON'BLE SRI JUSTICE K. LAKSHMAN**

**ARBITRATION APPLICATION No.147 OF 2021**

**ORDER:**

The present Arbitration Application is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act, 1996') for appointment of a sole arbitrator to resolve the disputes between the parties.

2. Heard Mr. Kishore Rai, learned counsel for the Applicant and M/s. Joshi Law Chambers, learned counsel for the Respondents.

**3. Contentions of the Applicant**

i) The Applicant is a developer and had entered into a development agreement dated 11.05.2018 with the Respondents to develop property bearing No. 8-2-403/2/A/2 admeasuring 400 Sq. Yds. situated at Road No. 4 Banjara Hills, Hyderabad (hereinafter 'subject property').

ii) As per the terms of the agreement dated 11.05.2018, the Applicant shall complete construction of 50% of the built-up share of the Respondents within 15 months from the date of obtaining sanction from the GHMC with a grace period of 3 months.

iii) The Applicant states that he has incurred huge amounts to obtain sanction for construction of a complex. However, when the sanction was in its final stages, a dispute arose between the parties regarding the sharing of built-up area. The Respondents addressed a letter to the GHMC not to accord sanction to the Applicant. Therefore, disputes arose between the parties.

iv) The Applicant filed A.O.P. No. 126 of 2019 under Section 9 of the Act, 1996 on the filed of X Addl. Chief Judge, City Civil Court, Hyderabad.

v) In view of the disputes, the Applicant invoked Clause 28 of the agreement dated 11.05.2018 and issued an arbitration notice dated 24.07.2021 to Respondent No. 1 and an arbitration notice dated 03.08.2021 to Respondent No. 2. In the said notices, the Applicant

nominated its nominee arbitrator. However, the said notices were returned with an endorsement 'not claimed returned to sender'.

vi) Therefore, the present arbitration application is filed seeking to appoint an arbitrator.

#### 4. **Contentions of the Respondents**

i) The Applicant cannot invoke arbitration as it failed to obtain sanction in terms of Clause 2 of the agreement dated 11.05.2018. Obtaining sanction is a pre-condition for the other terms to become binding on parties. The agreement dated 11.05.2018 though executed was never acted upon by the Applicant. Therefore, no arbitral dispute exists and Clause 28 cannot be invoked.

ii) The Applicant failed to obtain sanction even after lapse of 18 months and never came forward to cancel the agreement dated 11.05.2018. Therefore, the Respondents addressed a letter dated 17.10.2019 to the GHMC not to accord sanction in respect of the subject property to the Applicant. However, the sanction was not

rejected due to the representation of the Respondents on account of short-falls committed by the Applicant.

### 5. **Findings of the Court**

i) It is clear from the facts of the case that the execution of agreement dated 11.05.2018 is not disputed by any of the parties. The only contention raised by the Respondents is that the agreement dated 11.05.2018 was never acted upon by the Applicant as no sanction as required under the agreement was obtained.

ii) The argument of the Respondent supposes existence of contingent contract. It is relevant to note that Section 31 of the Indian Contract Act, 1872 defines "Contingent contract" as "a contract to do or not to do something, if some event, collateral to such contract, does not happen". A contingent contract to do or not to do anything, if an unforeseen future event happens, cannot be enforced by law, under Section 32, unless and until that event has happened. If the event becomes impossible, such contract becomes void.

iii) In the present case, according to the Respondents the agreement dated 11.05.2018 would have commenced only after the Applicant had obtained sanction from the GHMC. As sanction was never obtained as per the terms of the agreement dated 11.05.2018, the agreement dated 11.05.2018 was not acted upon.

iv) At this juncture, it is relevant to note that the scope of interference by the Courts under Section 11 of the Act, 1996 is extremely limited. The Court cannot decide issues of jurisdiction which are to be decided by the arbitrator. The Hon'ble Supreme Court in **Vidya Drolia v. Durga Trading Corporation**<sup>1</sup> laid down the test to exercise power under Section 11 of the Act, 1996. In his separate opinion, Sri Justice N.V. Ramana held as follows:

“244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

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<sup>1</sup>. (2021) 2 SCC 1

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

**244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.**

**244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:**

**244.5.1. Whether the arbitration agreement was in writing? or**

**244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?**

**244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?**

**244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?”**

v) In the present case, there is no dispute that the parties by incorporating Clause 28 had agreed to resolve their disputes through arbitration. The said clause is extracted below:

"In the case of any dispute between the parties hereto touching these presents, the matter shall be referred to arbitration one chosen by each parties and in the case of any

difference of opinion between the arbitrators, they shall nominate a common umpire and the award of such an umpire if so appointed shall be final and binding on both the parties and the relevant provisions of the arbitrations act shall apply in the event of having to go to the court of law for getting disputes it should be done within the jurisdiction".

vi) Given the limited jurisdiction of this Court under Section 11 of the Act, 1996, the question whether the agreement dated 11.05.2018 was acted upon or not and whether the sanction was rejected because of the Respondents is to be decided by an arbitrator. Therefore, it is appropriate to refer the dispute to arbitration. The parties are free to raise all the available defences before the learned arbitrator.

## 6. Conclusion

In light of the aforesaid discussion and the law laid down by the Supreme Court, the present arbitration application is allowed. Accordingly, Sri Justice G.V. Seethapathy, Former Judge, erstwhile High Court of Andhra Pradesh, Hyderabad, is appointed as the sole arbitrator to resolve the disputes between the parties.

As a sequel, the miscellaneous applications, if any, pending in the Arbitration Application shall stand closed.

**25<sup>th</sup> July, 2022**  
Mgr

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**K. LAKSHMAN, J**