$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on:- 27th May, 2024

Pronounced on:-9th July, 2024

\+ **ARB.P.1241/2023**

NISHESH RANJAN & ANR. ..... Petitioners

Through: Mr. Rajnish Ranjan, Adv.

versus

INDIABULLS HOUSING FINANCE LTD. & ANR...... Respondents

Through: Ms Sangeeta Sondhi with Mr Shashwat Roy, Advs. for R-1. (M-9899109926), Mr. Kapil Madan, Mr. Vansh Bajaj, Advs. and AR Ms. Surabhi Kapur. AR for R2 (M-7011730738)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

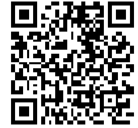
1. This hearing has been done through hybrid mode.

Background Facts

2. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 *(hereinafter, '1996 Act')* filed by the Petitioners-Nishesh Ranjan and Vandana Srivastava seeking appointment of an Arbitrator.

3. The present petition reveals a stark situation in which a flat buyer couple i.e., Nishesh Ranjan and Vandana Srivastava is faced with –

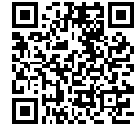
- conflicting dispute resolution clauses,
- conflicting territorial jurisdiction clauses, and
- conflicting arbitration clauses.



4. The Petitioners booked flat bearing no. ***'802, 8th Floor, Tower-A1, Godrej Nest Phase-1, Plot No. SC-02/H&I Sector 150, Noida, Uttar Pradesh-201301'*** *(hereinafter, 'subject flat')* as per Allotment Letter dated 26th March, 2018. The said project is stated to have been duly registered with Uttar Pradesh Real Estate Regulatory Authority *('UP RERA')* vide registration number UPRERAAPRJ13521. The total cost of the subject flat was Rs.77,87,257.46/-. Payment was to be made as per construction linked payment plan as provided in Schedule VI of the Builder Buyer Agreement dated 29th May, 2018.

5. Vide communication dated 26th March, 2018, the Petitioners had paid a sum of Rs.7,68,832/- on their own, following which the Builder Buyer Agreement *(hereinafter, 'BBA')* dated 29th May, 2018 was executed with the Respondent No. 2- Brick Rise Developers Pvt. Ltd. *(hereinafter, 'the Developer')*. The said BBA, consisted of a jurisdiction clause and an arbitration clause which reads as under:

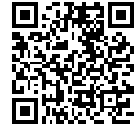
32. GOVERNING LAW	*35. DISPUTE RESOLUTION*
*That the rights and obligations of the parties under or arising out of this Agreement shall be construed and enforced in accordance with the laws of India for the time being in force and the **Uttar Pradesh courts will have the jurisdiction for this Agreement**. Further, all the terms & conditions, rights and obligations of the parties as contained hereunder shall be subject to the provisions of the Act and the Rules and the exercise of such rights and*	*All or any disputes arising out or touching upon or in relation to the terms and conditions of this Agreement, including the interpretation' and validity of the terms thereof and the respective rights and obligations of the Parties, shall be settled amicably by mutual discussion, failing which (i) the Parties shall in the first instance, if permitted under Relevant Laws, have the option to settle through arbitration in accordance to the procedure laid down under the Relevant Laws.*



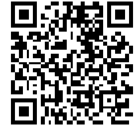
obligations shall be subject to the provisions of the Act and the Rules and Regulations made thereunder. Any change so prescribed by the Act shall be deemed to be automatically included in this Agreement and similarly any such provision which is inconsistent or contradictory to the Act shall not have any effect.	*Costs of arbitration shall be shared equally by the parties. The award of the Arbitrator shall be final and binding on the parties to the reference.* ***The arbitration proceedings shall be conducted in English only and be held at an appropriate location in Mumbai, (ii) or if not permitted under the prevalent law to adjudicate the dispute through arbitration, the said dispute shall be settled through the adjudicating officer appointed under the Act.*** *"*

6. Subsequently, the Petitioners availed themselves of a loan from Respondent No.1-Indiabulls Housing Finance Ltd. *(hereinafter, 'Indiabulls')* in terms of the Loan Agreement dated 12th July, 2018. The said Loan Agreement, for the purchase of the subject flat, was also linked to the construction of the same flat. It also included a dispute resolution clause and an arbitration clause, in the following terms:

ARTICLE 11: GOVERNING LAW AND JURISDICTION	*ARTICLE 12: ARBITRATION*
11.1 This Agreement, including all matters relating to its validity, construction. performance and enforcement, shall be governed by and construed in accordance with Indian law. ***The courts of New Delhi will have exclusive jurisdiction in relation to any***	*12.1 This Loan Documents is/shall be governed by Indian laws and the courts at New Delhi shall have exclusive jurisdiction relating to any matter/issue under or pursuant to the Loan Documents. Notwithstanding anything to the contrary, if any*



matter arising under or In connection with this Agreement or any agreement entered into pursuant to this Agreement. *However, the Parties hereby agree, confirm and undertake that IHFL has a right to file its claim in relation to Outstanding Amount or any other connected matter(s) as mentioned in this Agreement in any other competent Court in India at its sole discretion.*	*dispute/ disagreement/ difference ("Dispute") arise between the Parties (including any Borrower(s)) during the subsistence or the Loan Documents and/or thereafter, in connection with, inter alia, the validity, interpretation, implementation and/or alleged breach of any provision of the Loan Documents, jurisdiction or existence/appointment of the arbitrator or of any nature whatsoever. Then, the Dispute shall be referred to a sole arbitrator who shall be appointed by IHFL only. In any circumstance, the appointment of the sole arbitrator by IHFL shall be and shall always be deemed to be the sole means for securing the appointment/nomination of the sole arbitrator without recourse to any other alternative mode of appointment of the sole arbitrator.* ***The place of the arbitration shall be New Delhi or such other place as may be notified by IHFL and the arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 (or any statutory reenactment thereof, for the time being in force) and shall be in the English language***. *The award shall be binding on the Parties subject to the applicable laws in force and*



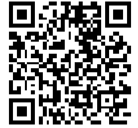
	the award shall be enforceable in any competent court of law;"

7. In the meanwhile, when the Loan Agreement was approved, a Tripartite Agreement was also executed between three parties i.e., the Petitioners, Respondent No. 2- Brick Rise Developers Pvt. Ltd. and Indiabulls. The said Tripartite Agreement had another jurisdiction clause which reads as under:

> *"18.* ***Any or all disputes arising out of or in connection with this Tripartite Agreement shall be subject to exclusive jurisdiction of the Courts at New Delhi****."*

8. On 22nd March, 2022, Respondent No.2 issued a demand notice for Rs. 25,95,460.48/-. Vide email dated 20th April, 2022, Respondent No.1 refused to disburse the amount, citing a discrepancy between the current construction stage and the demanded percentage, though it was explained that the said demand was in accordance with the construction-linked plan. Further issues continued with Indiabulls of not fulfilling the payment obligations, leading to another demand being raised by the Respondent No.2 on 16th June, 2022, for Rs. 41,40,249.37/- as per the construction-linked plan. Respondent No.1 failed to make the necessary payments as noted in an email dated 21st June, 2022.

9. It is claimed by the Petitioners that in June 2022, following assurances from an official of Respondent No.1 that they would release payments to Respondent No.2, the Petitioners paid the June Pre-EMI. However, as per the Petitioners on 6th July, 2022, the Respondent No.1 again refused to disburse funds due to the fact that the current construction stage was at 89%, whereas the demand was for 95%. As per the petition, the Petitioners repeatedly made



efforts to ensure prompt disbursement from Indiabulls to Respondent No. 2, however without any success.

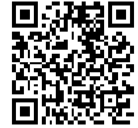
10. On 26th September, 2022, the Petitioners emailed Respondent No.1 stating that heavy interest charges have been imposed by the Respondent No.2 due to delayed payments and inquired about the procedure to settle the principal amount, but received no response. As per the Petitioners, Indiabulls repeatedly refused to disburse the amounts. On 21st November, 2022, the Petitioners received the following email from Indiabulls:

> *"Dear Customer,*
> *LAN: HHLNOI00461428*
> *Greetings from Indiabulls!*
>
> *We value your relationship with Indiabulls Housing Finance Limited. It has always been our endeavor to provide you with best of services and products most suited to cater to your various needs.*
>
> *This is with reference to your query IHF-3956498-N6N0B7.*
>
> ***We wish to clarify you that on the basis of documents and information submitted by you, we have appraised you request for disbursement of Loan amount and we are constrained to inform you we will not able to process your request for further disbursal since authority dues are pending from builder. Moreover as per our records an amount of INR 122393/- is overdue and payable by you towards your captioned Loan Account****.*
>
> *In the view of above it is to informed you that your request for further disbursement has been declined.*

Also, you are requested to refer the clause no. 2.6 (J) which states that lender have rights to start the EMis in partially disbursed Loan Account."

11. Notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest *('SARFAESI')* Act, 2002 dated 8th December, 2022 was issued by Indiabulls. The relevant portion of the said notice is as follows:

> *"3. That in terms of the said Loan Agreement, you the Addressee(s) with an intention to create security interest in respect of Secured Asset, had inter-alia deposited Title documents of Secured Asset, with the Secured Creditor and executed a Declaration in this regard.* ***<u>You the Addressee(s) alongwith Brick Rise Developers Pvt. Ltd. and with the Secured Creditor, executed Tripartite Agreement in furtherance of creation of security interest in favour of the Secured Creditor</u>****.*
>
> *4. That further an Addendum Agreement dated 06.08.2018 was executed and as per the said Addendum Agreement, revised ICLR (rate of interest) was applicable. Therefore, ICLR at time of execution of Addendum Agreement was 12.90%p.a. minus margin (being -3.80%) aggregating 9.10% p.a.*
>
> *5. That in terms of the Loan Agreement, the Secured Creditor disbursed a sum of Rs.27,67,549 /- (Rupees Twenty Seven Lakh Sixty Sevens Thousand Five Hundred Forty Nine Only).*
>
> *6. That however, you the Addressee(s) have committed breach of the terms and conditions of the Loan Agreement by inter-alia defaulting in payment of the monthly instalments due and payable by you to the Secured Creditor, under the Loan Agreement.*



XXXXX

11. 'That in view of aforesaid default and classification of account as Non-Performing Asset, the Secured Creditor by means of the present notice, do hereby recall the Loan Facility and ***call upon all of you Borrower(s) to jointly and severally pay the Outstanding Amount of Rs.29,02,671.21/· (Rupees Twenty Nine Lakh Two Thousand Six Hundred Seventy One And Twenty One Paisa Only) as on 16.11.2022 along with applicable future interest in terms of the loan agreement w.e.f. 17.11.2022 till actual date of payment within 60 (sixty) days from the date of receipt of this notice, together with any interest, penal interest****, Payment Bouncing Charges, cost and other charges which may fall due, failing which the Secured Creditor will exercise its power provided under the Act.*
...”

12. The said notice was replied to by the Petitioners vide letter dated 4th January, 2023. In response, Respondent No.1 issued a demand for Pre-EMI interest on 23rd January 2023. According to the petition, the Petitioners attempted to amicably resolve the issues, contemplating the sale of the subject flat at a rate below the market price to mitigate the situation and requested a No Objection Certificate *(‘NOC’)* from Respondent No.1, which was not given.

13. The lack of cooperation from Respondent No.1 led the Petitioners to invoke arbitration proceedings vide notice dated 13th March, 2023. However, instead of engaging in the arbitration proceedings, as per the petition, Respondent No.1 responded by seeking to cancel the loan facility and the flat allotment offered to the Petitioners, as detailed in a notice dated 20th March, 2023. The relevant portions of this notice read as follows:

"6. That despite reminders being sent to you including our demand notice dated JANUARY 23,2023(copy enclosed), you the Borrower(s) have miserably failed to maintain financial discipline and have defaulted in the payment Pre- EMI Interest/ EMIs in terms of the Loan Agreement. Thus, in view of the failure of you the Borrower(s) to pay the Pre-EMI Interest / EMI in terms of the written understanding, an event of default has arisen in terms of the Loan Agreement, and we hereby recall the Loan Facility.

7. That as per the foreclosure statement maintained by us in the ordinary course of business, as on MARCH 20,2023 a total balance outstanding amount of Rs 3054302.06 (Rupees Thirty Lakh Fifty-Four Thousand Three Hundred Two and Paise Six Only) by way of Outstanding Principal, Arrears (including accrued late charges) and interest till MARCH 20,2023 is due and payable by you along with future interest w.e.f. MARCH 21,2023. The copy of the foreclosure sheet is annexed herewith for your reference.

***8. That in terms of the Tripartite Agreement/ Permission to mortgage, upon occurrence of event of default under the Loan Agreement, and upon intimation by IHFL to Builder, the Builder is bound to cancel the allotment of the Property and the Builder is liable to refund the outstanding amount under the Loan Facility to IHFL as per the Tripartite Agreement**.*

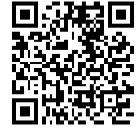
*9. That since event of default has occurred and you, the Borrower(s), have failed to comply with the Demand notice, the Loan Facility stands recalled and Rs 3054302.06 (Rupees Thirty Lakh Fifty-Four Thousand Three Hundred Two and Paise Six Only) (hereinafter referred to as "Due Amount") has become due and payable as on MARCH 20,2023 along with applicable future interest **We hereby call upon you the Builder to***

> ***cancel the allotment of the Property under intimation to IHFL and remit the sum of Rs 3054302.06 in favor of IHFL. It is pertinent to mention here that the remittance of aforementioned sum is without prejudice to the rights of IHFL to be entitled to future interest and other charges, as applicable, pursuant to the provisions of the Loan Agreement till the actual date of payment in terms of the Loan Agreement***."

14. Thus, according to the Petitioners, since disputes have arisen between the parties, the matter ought to be referred to arbitration for a comprehensive resolution in terms of the arbitration clause contained in the Loan Agreement.

15. The total cost of the subject flat initially booked by the Petitioners was Rs.77,87,257.46/-. Of this amount, the Petitioners claim to have paid Rs.7,68,832/- directly to Respondent No.2, while Respondent No.1 disbursed Rs.27,67,549/- from a sanctioned loan of Rs.57,99,804/-. The remaining balance due to Respondent No.2 is Rs.42,50,876.46/-. It is the Petitioners' case that if the subject flat is sold at the existing offering price by Respondent No.2, the Petitioners could receive Rs.87,49,123.54/-, which would cover the outstanding loan to Respondent No.1. Additionally, the Petitioners claim entitlement to an adjustment of Rs.8 lakhs for Pre-EMI payments and Rs. 4 lakhs for insurance payments made to Respondent No.1, asserting that Respondent No.1's refusal to provide a NOC and release documents is based on oblique considerations.

16. The petition also discloses the fact that upon learning that Indiabulls intended to sell the subject flat, the Petitioners filed a Section 9 petition before the ld. District Judge (Commercial Court)-02, Patiala House Court, New Delhi, registered as ***OMP (I) (COMM) 35/2023***. This petition was withdrawn on 10th May, 2023, with the liberty to file afresh due to an issue with the Loan



Agreement and Tripartite Agreement not being stamped in accordance with Article 5(c) of the Delhi Stamp Act.

Procedural History

17. Notice in the present petition was issued on 24th November, 2023. On 31st January, 2024, this Court was inclined to appoint a Sole Arbitrator in the matter, however the matter was adjourned in order to enable the parties to seek instructions. The matter was then referred to mediation on 4th March, 2024 under the aegis of the Delhi High Court Mediation and Conciliation Centre to enable the parties to explore the possibility of an amicable resolution of disputes. The matter was again adjourned on 13th May, 2024 as it was stated that the matter was likely to be settled. However, on 27th May, 2024, the parties stated that mediation talks had broken down.

Indiabulls' reply to the present petition

18. In the reply to the present petition dated 3rd February, 2024, Indiabulls contests the petition on the ground that the Petitioners had previously filed a Section 9 petition which was dismissed, and subsequently filed another Section 9 petition ***(OMP (I) (COMM) No. 46/2023)*** before the Patiala House Courts in New Delhi. According to Indiabulls, this subsequent petition was also dismissed by the ld. Commercial Judge on 8th December, 2023.

19. Moreover, maintainability of the present petition is challenged on the grounds that there is no arbitration clause in the Tripartite Agreement. The Tripartite Agreement explicitly states that disputes shall fall under the exclusive jurisdiction of the Courts at New Delhi. Although the Loan Agreement between the Petitioners and Indiabulls contains an arbitration clause, Respondent No. 2, who is not a party to the Loan Agreement, is implicated in the dispute which the Petitioners insist on resolving through

arbitration. According to Indiabulls, as the allegations primarily concern the terms of the Tripartite Agreement, particularly clauses relating to the cancellation of allotment, reference to arbitration under the Loan Agreement is unfounded.

Respondent No. 2's reply to the present petition

20. As per reply dated 4th February, 2024, the Respondent No. 2 submits that there is no arbitration agreement specifically in the Tripartite Agreement. The terms of the tripartite agreement suggest that the parties did not intend to resolve their disputes through arbitration. Additionally, it is argued that merely referencing a previous agreement does not automatically incorporate an arbitration clause into the Tripartite Agreement. Reliance is placed on the decision of the Supreme Court in ***Elite Engineering & Construction (Hyd.) (P) Ltd. v. Techtrans Construction India (P) Ltd. [(2018) 4 SCC 281]***, where it was held that such a reference does not inherently extend an arbitration clause to subsequent agreements.

21. The second submission is that the dispute in question is not arbitrable as subject matter of the present dispute relates to a mortgage agreement, and the same is not arbitrable in view of the following decisions:

- ***Vidya Drolia v. Durga Trading Corpn. , (2021) 2 SCC 1.***
- ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.***
- ***Sapna Gupta v. Ajay Kumar Gupta (2021:DHC:4018).***

Submissions of the parties

22. Mr. Rajnish Ranjan ld. Counsel for the Petitioners submits that the Loan Agreement contains an arbitration clause specifying the jurisdiction of

Delhi Courts. Accordingly, he prays for the appointment of a ld. Sole Arbitrator. It is contended that the terms of both the BBA and the Loan Agreement are incorporated by reference into the Tripartite Agreement. The said submission is based on Clause 1 of the Tripartite Agreement, which states as follows:

> *"1. **The foregoing recitals as mentioned above are incorporated herein by this reference and constitute an integral part of this Agreement**."*

23. Ld. counsels for the Petitioners further submits that the decision in ***Elite Engineering (supra)*** is not good law. He relies on the decision in ***Inox Wind v. Thermocable (2018 INSC 4)*** in support of his position that the arbitration proceedings would continue to survive even in respect of the Tripartite Agreement.

24. On behalf of Indiabulls, ld. Counsel Ms. Sangeeta Sondhi submits that the only relevant agreement in this matter is the Tripartite Agreement, which does not contain an arbitration clause, thereby rendering the petition non-maintainable. It is also submitted that since the last agreement is the Tripartite Agreement, the matter ought not to be referred to arbitration.

25. Similarly, ld. Counsel Mr. Kapil Madan for Respondent No. 2 argues that the only relevant agreement is the most recent Tripartite Agreement, dated 30th July, 2018, which also does not contain an arbitration clause. It is submitted that there is an arbitration clause in the BBA which cannot be disputed. However, since there is no arbitration clause in the Tripartite Agreement which is the last agreement, disputes cannot be referred to arbitration. Reliance is placed upon the recent decision of the Supreme Court in ***NBCC (India) Limited v. Zillion Infraprojects Pvt. Ltd. [2024 SCC***

OnLine SC 323] to argue that general reference in the Tripartite Agreement cannot be taken to mean that the arbitration clause in the Loan Agreement has also been automatically incorporated.

Analysis and Conclusions:

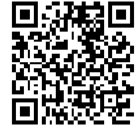
26. The Court has perused all the three agreements *viz.*, the BBA, Loan Agreement and the Tripartite Agreement. A perusal of the said agreements reveals that there are conflicting clauses in all the three agreements, relating to the same subject flat allotment, loan transaction and payment terms. In such cases, the flat allottee hardly has any room for negotiation, as these agreements are **'standard form agreements'** used by banks, builders, etc. While there is an existing BBA dated 29th May, 2018, however the clauses of the BBA do not align with those in the Tripartite Agreement. Similarly, Indiabulls' Loan Agreement dated 12th July, 2018, contains clauses that do not match those in the Tripartite Agreement. Each of these agreements specifies different jurisdictions, namely Uttar Pradesh, Delhi, and Mumbai. Furthermore, the final Tripartite Agreement, despite referencing the earlier agreements, does not contain an arbitration clause but a jurisdiction clause vesting jurisdiction in Courts in Delhi.

27. Thus, the Petitioners and similarly situated individuals often find themselves in a state of utter confusion when a dispute arises, uncertain about which Court's jurisdiction should be invoked, whether to initiate arbitration, or whether to pursue civil proceedings. Such a state of confusion ought not be allowed to be perpetuated by the Respondents.

28. This Court notes that clearly at the time of execution of the Tripartite Agreement, both the BBA and the Loan Agreement were within the knowledge of all the three parties. Further, both the BBA and the Loan

Agreement are also mentioned in the recitals and have been incorporated by reference in terms of clause 1 of the Tripartite Agreement. The relevant portions of the Tripartite Agreement read as follows:

> *"A. WHEREAS the Developer is the owner and is seized and possessed of or otherwise well and sufficiently entitled to all those pieces or parcels of lands, hereditaments and premises situate at Plot No. SC-02, H&I, Sector - 150, Naida, Admeasuring 72,000 sq mtrs Appx. (Total Lands)*
>
> *B. the Builder is developing a Group Housing Society in the name and Style of "Godrej Nest" (Project), in 36,000 sq mtrs of land out of the Total Lands (Project Lands).*
>
> ***C. AND WHEREAS the Builder has agreed to sell Unit No. 802 in Tower No. A-1 to the Borrower in Godrej Nest being developed and constructed by the developer under the Agreement for Sub- Lease dated 29-5-18 (herein after referred to as the said "Agreement") entered into between the Builder and the Borrower, which contains the terms and conditions for sale of the Unit in favour of the Borrower. As per the terms and conditions contained therein and in furtherance thereof, the Borrower has already paid to the Builder a sum of Rs.- (Rupees---) only) being part of the Booking/Earnest money. The balance of sale consideration is payable by the Borrower in instalments based on the stages of construction or on or before-. which are detailed in the aforesaid Agreement****.*
>
> *AND WHEREAS the Builder has invited applications for allotment by sale of residential unit in the said project for which various payment options have been offered to the customers;*

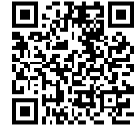


> *AND WHEREAS the Builder herein confirms that all approvals, permissions and clearances pertaining to the said Project, its operation and land underneath have been duly obtained as per applicable laws from the respective authorities.*
>
> ***AND WHEREAS the Developer and the Borrower have entered into an agreement dated 20-5-18 ("Agreement to Sub- Lease") for the purchase of Unit bearing No. 802 in Tower No. A-1, having carpet area of 83.26 square meters and exclusive area of 18.70 square meters; total area of 101.96 square meters (total of carpet area and exclusive area) in the said Project as per the terms of the Agreement to Sub-Lease ("Unit")****;*
>
> *…*
>
> ***1. The foregoing recitals as mentioned above are incorporated herein by this reference and constitute an integral part of this Agreement.****"*

Thus, the Tripartite Agreement references the two agreements i.e., the BBA and the Loan Agreement and Clause 1 of the Tripartite Agreement (extracted above) incorporates the earlier agreements by reference.

29. Under the terms of the BBA, the Developer could also, at the Buyer's request, enter into a tripartite agreement with the Buyer's bank or financial institution to facilitate loan procurement for the Buyer. However, the Developer retains the right to terminate the Agreement if the Buyer breaches terms stipulated in the Loan or the Tripartite Agreement.

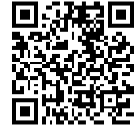
30. In order to decide whether the parties ought to be referred to arbitration, the nature of the transaction needs to be understood. The genesis of the transaction is the BBA, which is a standard form agreement wherein the Petitioners were allotted the subject flat in a residential project. The



entire BBA consisted of detailed recitals, definitions, terms etc. Under Clause 7 of the BBA, timely delivery of the possession of the unit is stated to be the essence of the agreement. The transfer of possession of the subject flat to the allottee is contingent upon the issuance of an occupation certificate by the competent authority. Clause 35 of the BBA (extracted above), the dispute resolution clause, specifies that the parties agreed to resolve disputes through arbitration. Although referred to as a 'Builder Buyer Agreement', this agreement involves three parties: the Developer, the Buyer, and the Development Manager. For convenience, Lotus Green Developer Private Limited is named as the Developer, and Godrej Developer Private Limited as the Development Manager. This agreement was executed on 29th May, 2018, the same day the project was taken over by Respondent No. 2-Brickrise Developers Pvt. Ltd.

31. The Loan Agreement is also a standard form agreement entered into with Indiabulls. It should be noted that the Loan Agreement dated 12th July, 2018 was executed only after the deed of assignment dated 11th July, 2017 had been entered into. Against the total dues for the subject flat, amounting to Rs.77,87,257.46/-, the Petitioners claim to have directly paid Rs.7,68,832/-. Subsequently, Indiabulls disbursed Rs.27,67,549/-. The outstanding amount payable is approx. Rs.42,50,876/-.

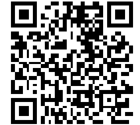
32. The Petitioners contend that due to non-disbursement by Indiabulls, their account has been treated as a Non-Performing Asset *('NPA')* and has been reported to CIBIL. A Tripartite Agreement was also executed between the Petitioners, the Developer, and Indiabulls. This Tripartite Agreement recognizes the allotment of the subject flat to the Petitioners in terms of the BBA and the sanctioning of the loan facility by the Loan Agreement.



33. The Tripartite Agreement merely links the three parties—the Petitioners, Indiabulls, and Respondent No. 2—while obligations between the Petitioners and Respondent No. 2 on one hand, and the Petitioners and Indiabulls on the other, are governed by their respective agreements. The Tripartite Agreement itself does not stand alone and is an inextricable, intricate, and inviolable link to the two other agreements. The absence of an arbitration clause in the Tripartite Agreement does not, therefore, reflect any intention by the parties to avoid arbitration, as this agreement is part of a series of agreements that form part of a single transaction, namely, the allotment of the flat.

34. In fact, the Tripartite Agreement references the BBA dated 29th May, 2018. It also mentions the sanctioning of the loan facility to the Petitioners, and the Loan Agreement. The reply of the Respondent No. 2 mentions the date of the Tripartite Agreement as 30th July, 2018. The petition itself does not contain any specific date of the Tripartite Agreement. None of the correspondence placed on record by the Petitioners and the Respondents state the date of the Tripartite Agreement. The way the date has been written in the Tripartite Agreement casts significant doubt on the actual date of signing. It cannot be definitively considered as the last agreement in the series of agreements entered into between the three parties.

35. The Loan Agreement is also presented in a manner that is unclear. The three relevant clauses that represent the dates in the Tripartite Agreement are excerpted below to demonstrate that there has, indeed, been some overwriting in the Tripartite Agreement. Some extracts are below:



TRIPARTITE AGREEMENT

THIS Agreement is made and executed at Noida... on this 30 day of ....Jul.... 2018

BETWEEN

Shri/Smt Vandana Srivastava & Nishesh Kanyam Son /daughter/wife of Shri/Smt ....-........ R/o ....C-129.... Pkt 7.... Krishna... Vihar,... Sec-82, Noida..... (hereinafter called the "BORROWER" which term so far as the context admits shall mean and include his/her heirs, executors, successors, administrators and legal representatives of the First Part.

AND

Brick Rise Developers Pvt Ltd regd office at Brick Rise Developers Pvt. Ltd. a company having it's registered address as [handwritten] (hereinafter referred to as the "Developer", which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include its successor-in-interest, and permitted assigns) represented by its authorized signatory Mr. ____-____ (PAN NO. ____-____ and Aadhaar No. ____-____) authorized vide board resolution dated ____-____ being party of the FIRST PART;

AND

INDIABULLS HOUSING FINANCE LIMITED, a company within the meaning and provisions of the Companies Act, 2013 and having its registered Office at "M – 62 & 63, First Floor, Connaught Place, New Delhi- 110001 [hereinafter called the "IHFL" which expression shall unless repugnant to the context shall include its successors or assigns] of the Third Part.

AND WHEREAS the Developer and the Borrower have entered into an agreement dated 29.5.1[illegible] ("Agreement to Sub- Lease") for the purchase of Unit bearing No. 802 in Tower No. A-1, having carpet area of 83.26 square meters and exclusive are of 18.70 square meters; total area of 101.96 square meters (total of carpet area and exclusive area) in the said Project as per the terms of the Agreement to Sub-Lease ("Unit");;

AND WHEREAS the Borrower has approached IHFL for a Loan of Rs ......5399304.......... towards payment of the sale / purchase consideration of the residential unit in the Project;

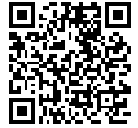
AND WHEREAS the Borrower has represented that the Builder is of his choice and that he has satisfied himself with regard to integrity, capability for quality construction of the Builder and the Builder's ability for timely completion and on time delivery of the Project;

AND WHEREAS the Borrower has agreed to secure with IHFL the said unit under finance as and by way of mortgage of all the rights, title, benefits that would accrue from the said unit till the currency and term of the said loan advanced / to be advanced. The Builder also agrees and confirms that they shall take note of the said mortgage/ charge created by the Borrower and undertake not to create any third party rights or security interest of any sort whatsoever on the said unit without the prior written consent of IHFL;

) AND WHEREAS the Builder assures that at present the said residential unit is not subject to any encumbrance, charge or liability of any kind whatsoever and the property is free and marketable. In case, the Builder avails project loan from any financial institution in future, the Builder shall give prior written intimation to IHFL in this regard and forthwith and provide NOC with respect to the said flat/ residential unit funded by IHFL from that financial institution in favor of IHFL acknowledging the first charge/ lien/ mortgage of IHFL.

AND WHEREAS based on several representations made by the Borrower, the Lender granted a loan of Rs. ...5799804......./- (Rupees Fifty Seven Lakh Ninety Nine Thousand Eight hundred Four only) to the Borrower, in terms of the Loan Agreement dated 12.07.18 (hereinafter referred to as the "Loan Agreement") duly executed by the Borrower;

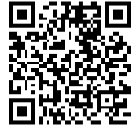
36. Independently, both the Respondents insist on applicability of their specific arbitration clause in their respective agreements with the Petitioners.



Thus, there can be no reason as to why it ought to be held that there is no intention to arbitrate under the Tripartite Agreement, since Petitioners are the common party in all the three agreements.

37. It is also relevant to note Clause 16.15 of the BBA, which is extracted below:

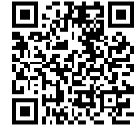
> *"16.15 The Buyer agrees and confirms that the present Agreement and the payment made hereunder do not create or bring into existence any lien/ encumbrance over the Unit in favour of the Buyer against the Developer other than rights and interests as contemplated under this Agreement. Further, the Buyer agrees that he shall not, without the written approval of the Developer, create any encumbrance, mortgage, charge, lien, on the Unit, by way of sale, agreement of sale, lease, license, loan, finance agreement, other arrangement or by creation of any third party interest whatsoever, till the date of execution and registration of the Sub-Lease Deed in his favour by the Developer.* ***However, the Buyer may, for the purpose of facilitating the payment of the Cost of Property and any other amounts payable under this Agreement apply for and obtain financial assistance from banks/financial institutions after obtaining prior written permission from the Developer. The Buyer may enter into such arrangements/ agreements with third parties, as may be required, which may involve creation of a future right, title, interest, mortgage, charge or lien on the Unit only when the ownership/title in the same is conveyed/ transferred in his favour by virtue of execution and registration of the Sub-Lease Deed****. Any such arrangement/ agreement shall be entered into by the Buyer at his sole cost, expense, liability, risk and consequences. In the event of obtaining any financial assistance and/or housing loan from any bank/financial institution, the Developer may issue the permission/NOC as may be required by the*



> *banks/ financial institution subject however, that the Developer shall by no means assume any liability and/or responsibility for any such loan and/or financial assistance which the Buyer may obtain from such bank/ financial institution. The Buyer shall, at the time of grant of permission or NOC by the Developer, furnish an undertaking / declaration to the Developer to indemnify the Developer for all costs, expenses, injuries, damages etc. which the Developer may suffer for any breach / default that may be committed by the Buyer to the third party(ties) / banks/ financial institution.* ***In this regard, the Developer may at the request of Buyer, enter into a tripartite agreement with the Buyer's banker / financial institution to facilitate the Buyer to obtain the loan from such bank / financial institution for purchase of the said Unit. The Buyer hereby agrees that the Developer shall be entitled to terminate this Agreement at the request of the Buyer's banker / financial institution in the event of any breach of the terms and conditions under the loan agreement / tripartite agreement committed by the Buyer****."*

38. Thus, Clause 16.15 of the BBA, which is a clause in the standard form contract, stipulates that the Developer may, at the Buyer's request, enter into a Tripartite Agreement with the Buyer's bank or financial institution to facilitate loan procurement for the Buyer. However, the Developer retains the right to terminate the Agreement if the Buyer breaches terms stipulated in the loan or Tripartite Agreement. This clause explicitly indicates that the possibility of entering into a Tripartite Agreement was well understood by both Indiabulls and Respondent No. 2, if not the Petitioners.

39. Further, the right to terminate the Tripartite Agreement was given to the Respondent No. 2. The involvement of Respondent No. 2 in such a Tripartite Agreement was not only contemplated but also authorised at the

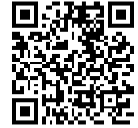


request of the Petitioners. The entering of the Tripartite Agreement, which did not contain an arbitration clause or a clear clause incorporating the other two agreements is clearly an attempt to conflate the issues and leave the Petitioners with no proper, ready remedy to be availed. If the Petitioners approach a civil Court, the Respondents would have challenged the maintainability of the same on the strength of the arbitration clause. If the Petitioners approached for arbitration in Delhi, they can cite the other clauses to contest the same. Either way, the Petitioners would be completely stuck in an unresolvable predicament.

40. Given this context, there is a lack of a clear explanation as to why the parties ought not to be referred to arbitration, especially when innocent flat allottees like the Petitioners are being adversely affected by such conflicting, confusing and deliberately inserted clauses. Further, the Respondents cannot argue that the Tripartite Agreement was an independent contract entered into between the parties, as the same did not have any distinct standing, but was fully dependent upon the other two agreements.

41. Further, the Petitioners' reply dated 4th January, 2023 explains the inter-connected nature of the transaction between the three parties. The Tripartite Agreement directly tied the Pre-EMI payments to the construction milestones of the subject flat, which is also the secured asset mortgaged to Indiabulls. Compliance with this payment plan was considered essential as any default not only affected the ownership rights of the Petitioners under the BBA, but also impacted the security of the mortgage held by Indiabulls. The relevant portion of the said reply read as follows:

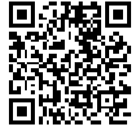
> *"That a Tripartite Agreement was also duly signed between our client, you (i.e. Indiabulls) and Developer.*



> *Thus, you were not only aware but also obligated to adhere to the payment plan and demands raised by the Developer in terms of the construction-linked payment plan. Thus, the PRE-EMI was directly linked with the terms of the Tripartite Agreement and construction liked payment plan in respect to the Subject Flat for the simple reason that Subject Flat is the Secured Asset and mortgaged with you. Hence payment as per the construction-linked payment plan is directly and intrinsically linked with the valid mortgage in respect of the Subject Flat.* ***Any default in payment of construction linked payment, will directly impact the ownership and right in the subject flat of our client under the Builder Buyer Agreement. Also payment made any delay arising out of delayed payment to the Developer and ensued consequences arising therefrom, was entirely at the risk and consequences of Indiabulls****."*

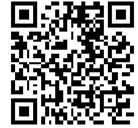
42. In the above context, the main issue that arises in the present petition is whether the parties ought to be referred to arbitration, and whether the three agreements can be considered as *'inter-connected agreements'* or *'inter-dependent agreements'*, so that the resolution of disputes under any one of the agreements might necessitate considering the terms and conditions of the others. If one of the agreements is breached, it triggers a chain reaction, affecting the obligations and rights under the others. For instance, a delay in construction can affect the mortgage payments scheduled under the Tripartite Agreement, which in turn could impact the ownership rights stipulated in the BBA. Therefore, resolution of any dispute under one agreement without considering the inter-linked nature of the others would lead to incomplete or inequitable outcomes.

43. On the issue of interpretation of several instruments,



contemporaneously executed, the following passage from ***'Chitty on Contracts' [Vol. 1 (Sweet & Maxwell, 32nd Edn, 2017)]*** is helpful and reads as follows:

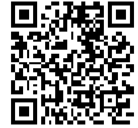
> *"Several instruments **made to effect one object may be construed as one instrument, and be read together, but so that each shall have its distinct effect in carrying out the main design**. Thus, a lease and counterpart are two documents relating to one transaction and a palpable mistake in the lease may be corrected by reference to the counterpart, just as it might be by reference to other parts of the lease itself 322:*
>
> ***"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to the case as if they were one deed**."*
>
> *Yet although the words "contemporaneously executed" have been used, **there is no doubt that this is not essential, so long as the court, having regard to the circumstances, comes to the conclusion that the series of documents represents a single transaction between the same parties**. So the articles of association of a company may be read to explain the memorandum and a prospectus which invited applications for deposit notes on certain terms could be read together with a deposit note from which one of those terms had been omitted.*
>
> *In Re Sigma Finance Corp the Supreme Court emphasised the need, when looking at a complex series of agreements, **to construe an agreement which was part of a series of agreements by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme. Contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and***



***<u>coherent manner</u>*.*”*

44. In ***Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr., 2023 INSC 1051*** the Supreme Court categorically held that if there is connection with the main agreement and the disputes are contemplating *‘composite performance’*, and there is no common performance, the parties can be referred to the arbitration. The relevant portion is set out below:

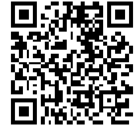
> *“116. In case of a composite transaction involving multiple agreements, it would be incumbent for the courts and tribunals to* ***<u>assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement</u>****. This Court in Canara Bank (supra) observed that a* ***<u>composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements</u>****.*
>
> *117. The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences “in connection with” the main agreement and also disputes “connected with” the subject-matter of the principal agreement. In Chloro Controls (supra),* ***<u>this Court clarified that the principle of “composite performance” would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the signatory and non-signatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement. Thus, the application of the group of</u>***



> ***companies doctrine in case of composite transactions ensures accountability of all parties who have materially participated in the negotiation and performance of the transaction and by doing so have evinced a mutual intent to be bound by the agreement to arbitrate***.”

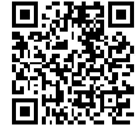
45. In ***Ameet Lalchand Shah v. Rishabh Enterprises [(2016) 6 SCR 1001]*** the Supreme Court was dealing with separate agreements, though related to one project. In the said judgment, the Supreme Court held that even if the agreement does not contain the arbitration clause, if it is integral and connected, the arbitration clause in the main agreement would apply. The relevant portion is extracted below:

> “*21. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project namely operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement – Equipment Lease Agreement (14.03.2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India:- (i) Equipment and Material Supply Contract (01.02.2012); and (ii) Engineering, Installation and Commissioning Contract (01.02.2012) and the Rishabh's Sale and Purchase Agreement with Astonfield (05.03.2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (Lessee). Even though, the Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the*



commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not a party to the suit and even though, Astonfield and appellant No.1 – Ameet Lalchand Shah are not signatories to the main agreement viz. Equipment
*Lease Agreement (14.03.2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per clause(v) of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (Lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. **What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration**.*

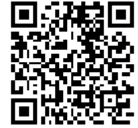
*22. **Parties to the agreements namely Rishabh and Juwi India:- (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement namely Equipment Lease Agreement (14.03.2012). All the four agreements are inter-connected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14.03.2012)**.*



23. Since all the three agreements of Rishabh with Juwi India and Astonfield had the purpose of commissioning the Photovoltaic Solar Plant project at Dongri, Raksa, District Jhansi, Uttar Pradesh, the High Court was not right in saying that the Sale and Purchase Agreement (05.03.2012) is the main agreement. The High Court, in our view, erred in not keeping in view the various clauses in all the three agreements which make them as an integral part of the principal agreement namely Equipment Lease Agreement (14.03.2012) and the impugned order of the High Court cannot be sustained."

46. Recently, a ld. Single Judge of this Court in ***Green Edge Infrastructure Pvt. Ltd. v. Magic Eye Developers Pvt. Ltd. (2024:DHC:1783)*** has also applied the concept of inter-connected nature of the agreements and has referred the parties to the arbitration. The relevant portion of the said decision is extracted below:

"38. Reliance placed on behalf of Magic Eye on the judgment of M.R. Engineers (supra), to contend that in absence of specific incorporation (by reference), of the arbitration clause in MOU-2, the disputes arising therefrom are non-arbitrable, is misconceived. The crux of Green Edge's argument does not hinge upon a direct incorporation of the arbitration clause found within SHA into MOU-2, as would be contemplated under Section 7(5) of the A&C Act. Instead, Green Edge posits that the expansively worded arbitration clause in the SHA, coupled with the fact that MOU-2 was executed specifically to further the objectives of SHA, necessitates that any disputes arising from MOU-2 be adjudicated through the arbitration mechanism stipulated in the SHA. ***<u>In essence, Green Edge asserts that the arbitration clause in SHA, due to its broad scope and the interconnected nature of the agreements, implicitly extends its reach to encompass disputes in respect of MOU-2, even in the absence of</u>***



__an explicit arbitration clause within MOU-2 itself. There is merit in this argument of the Green Edge__.

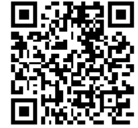
Xxx

42. __To summarise, prima facie, the broad and expansive arbitration agreement incorporated in the SHA, can be invoked to adjudicate disputes arising under MOU-2, which was evidently executed as part of the same composite transaction. In any event, the issue as to whether MOU-2 is in furtherance of the previous agreement/s between the parties, and consequent adjudication of disputes thereunder, is itself liable to be resolved by taking recourse to the arbitration clause contained in the SHA i.e. the parent agreement__. In this regard reference may be made to decision of Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, 2023 SCC OnLine SC 1666, where a seven-judge bench of the Supreme Court has held as under:
XXX

Who all are the parties to the arbitration agreement and/ or bound by the same?

__43. In ARB.P. 347/2019, Green Edge has invoked the arbitration clause contained in SHA; the signatories to SHA are Green Edge, Magic Eye, RKS and Spire. Therefore, these parties are liable to be referred to arbitration. Notably, the signatories to supplementary agreements are the same parties.__

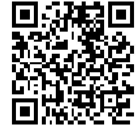
__44. In ARB.P. 753/2020, Magic Eye has invoked the arbitration clause contained in SPA; the signatories to SPA are Green Edge, Magic Eye and RKS. Therefore, these parties are liable to be referred to arbitration. However, apart from these parties Vera Edu and Vega Schools are also liable to be referred to arbitration in__



view of the judgment/order dated 21.05.2020 passed in CS(COMM) No.1290/2018. By the said judgment dated 21.05.2020, the application filed by Green Edge under Section 8 of the A&C Act seeking dismissal of the suit filed by Magic Eye against Green Edge, Vera Edu and Vega Schools, was allowed on the ground that there exists a valid arbitration agreement between the Magic Eye and Green Edge, and Vera Edu and Vega Schools, adjudged to be the group companies of the Green Edge, had shown intent to be bound by the said arbitration agreement. Relevant extract of the said judgment dated 21.05.2020 is as under:

> *"26. Considering the fact that there are valid agreements between the plaintiff and defendant No. 1 containing clauses for reference of disputes to arbitration and defendant Nos.2 and 3 being group companies of defendant No.1, from the intent of the parties as noticed from the agreements as also the averments in the plaint it is evident that not only would defendant No. 1 but also the defendant Nos. 2 and 3 companies be amenable to the jurisdiction of the arbitrator as per the arbitration clauses is the SHA, SPA and MOU. Consequently, the present application is disposed of holding that the present suit is not maintainable and the disputes between the parties are required to be referred to the arbitration"*

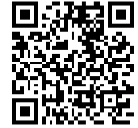
45. Notably, this judgment was not assailed by any party, rendering it final. Consequently, any attempt by Vera Edu and Vega Schools to resist impleadment in the proposed arbitration proceedings, claiming non-signatory status, is legally untenable. ***In any case, in terms of the judgement of Supreme Court in Cox & Kings (supra), the referral court should leave it for the arbitral tribunal to take a final view as to whether Vera Edu and Vega Schools can be brought within the fold of the proposed arbitration, and/or whether any relief/s***



<u>can be claimed therefrom. For the purpose of the present proceedings, in view of the findings in the aforementioned judgment dated 21.05.2020, and in view of the prima facie findings rendered hereinabove, this Court is inclined to accept the plea of Magic Eye in ARB.P. 753/2020, seeking constitution of an arbitral tribunal qua disputes sought to be raised against Green Edge, Vera Edu and Vega Schools</u>."

47. Recently, the Gujarat High Court has applied the test of '*interdependent relationship between agreements'* in ***Instakart Services Private Limited v. Megastone Logiparks Pvt. Ltd. [2023 LiveLaw (Guj) 168].*** In this decision, the Gujarat High Court laid down the test of *'linkage'* between the performance under the separate agreements as being one criterion to determine the connected nature of transactions between the parties. The relevant portion of the said judgment is extracted below:

> *"18. Learned Senior Counsel for the petitioner has further relied upon the decision in the* ***State of M.P. and another versus Mahendra Kumar Saraf and Others reported in 2005 (3) M.P.L.J. 578****, to submit the meaning of co-terminus as it should mean to imply two things or objects having the same end, same finishing point or same terminating point.* ***<u>It is argued that both the agreements namely Lease Agreement and M & E Agreement have 'co-terminus' and integrally related to each other, performance of Lease Agreement being dependent upon the M & E Agreement, both being part of the same transaction, the arbitration clause '25' in the Lease Agreement will have to be invoked to refer the dispute to the Arbitrator</u>****.*
>
> *19. From the above noted discussion, taking note of the decisions of the Apex Court, this Court finds itself in complete agreement with the contention of the learned Senior Counsel for the petitioner that performance of*

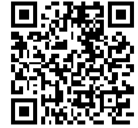


the Lease Agreement was not possible without performance of the M & E Agreement. ***They being integrally related to each other, even if there is no separate arbitration clause in M & E Agreement, the intention of the parties can be ascertained from the Lease Agreement that they had agreed to refer the disputes arising out of the transaction, which is lease of the premises-in-question to arbitration. The petitioner cannot be forced to submit to two different Forums to determine the disputes arising out of one single transaction. The arbitration clause '25' of the Lease Agreement is a conscious acceptance of the agreement clause as part of the M & E Agreement between the parties in view of the above noted facts and the language employed in Section 7(5) of the Act, 1996. The objections raised by the learned Counsel for the respondent with regard to invocation of Clause '25' of the Lease Agreement seeking to refer the disputes arising out of the M & E Agreement to the Arbitrator, therefore, is liable to be turned down***."

48. The Respondents have primarily placed reliance on the following decisions:

- ***Elite Engineering (supra)***
- ***NBCC (India) Limited (supra)***

49. In ***Elite Engineering (supra)***, NHAI awarded a contract to M/s. T.K. Toll Road Pvt. Ltd. in respect of a highway project on a BOT basis connecting Coimbatore and Nagapattinam. This Concessionaire subcontracted the work to M/s. Utility Energytech and Engineers Private Limited on a fixed lump sum turnkey basis, who then subcontracted part of the construction to M/s. Teachtrans Construction India Pvt. Ltd. Subsequently, M/s. Teachtrans subcontracted the structural work to M/s. Elite Engineering following a tender process.



50. Disputes arose regarding the execution of the work, leading to arbitration under 1996 Act with issues about the existence of an arbitration agreement between the involved parties. Elite Engineering contended that the agreement entered into between the parties (Elite and Teachtrans), by implication, incorporated the arbitration agreement contained in the agreement entered into between the EPC Contractor and the M/s. Teachtrans. After considering the scope of Section 7 of the 1996 Act, the Supreme Court observed as follows:

> *"18. When we apply the aforesaid ratio, **we find that the High Court has correctly held that, in the instant case, it was not intended to make the arbitration clause as a part of the contract between the appellant and the respondent**. Clause 2 and clause 9.10 are given correct interpretation by the High Court and discussion in this behalf has already been extracted above. By these clauses, only those conditions and subconditions of the contract, specification etc. which relate to the works and quality are incorporated. **Clause 9.10 only talks of 'items' which are not mentioned in the contract and terms and conditions relating to the execution of those items are to be taken from the main contracts. Reference to clause 8.7 is also inconsequential. By this clause only, those terms contained in the main agreement which relate to 'terms of work' are incorporated. Procedure relating to 'termination' is altogether different from resolution of disputes. Dispute may arise even de hors the termination of the contract and is an altogether different aspect, not necessarily connected with the termination of work**."*

51. The decision of the Supreme Court in ***Elite (supra)*** is clearly distinguishable on facts, as well as on applicable principles. Firstly, in the present petition, no subcontracts have been entered into between different

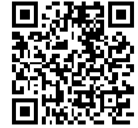
parties. All the three parties, independently, have entered into different agreements *inter-se*. Further, the Tripartite Agreement makes a specific reference to the other agreements in Clause 1, and the recitals of the Tripartite Agreement contain all the background of transactions entered into between the parties. Further, Clause 16.15 of the BBA makes it clear that there was a specific intention of the Developer i.e., Respondent No.2 to enter into such a Tripartite Agreement. The nature of the agreements in the present petition is such that if there is a default committed by one of the parties, consequences would affect all the three agreements. In the opinion of this Court, the law in ***Elite (supra)*** is limited to the issue of incorporation by reference, whereas in the present case, the issue not only is about incorporation by reference, but also regarding the nature of 'composite transactions' entered into between the parties.

52. In ***NBCC (India) Ltd. (supra)***, NBCC issued a tender for the construction of a weir with allied structures across the Damodar River at DVC, CTPS, Chandrapura in Jharkhand. Zillion submitted a Techno Commercial Bid and was subsequently awarded the contract. Following the award, disputes arose, leading Zillion to invoke arbitration per Clause 3.34 of the tender documents. Zillion sought the appointment of a former High Court Judge as the Sole Arbitrator, relying on Clause 2[1] of the Letter of Intent, which applied all conditions from the original tender except those expressly modified. NBCC did not respond to the arbitration notice, leading to further disputes between the parties.

53. Before the Supreme Court, the issue that arose concerned whether a

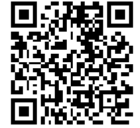
---

[1] *"All terms and conditions as contained in the tender issued by DVC to NBCC shall apply mutatis mutandis except where these have been expressly modified by NBCC."*



general reference in the second contract to the terms and conditions of the first contract meant that the arbitration clause in the first contract was *ipso facto* applicable to the second contract. The Supreme Court held that general reference would not lead to incorporation of the arbitration clause, and the reference to arbitration clause in another contract ought to be specific. The relevant extract of the said decision read as follows:

> *"10. It could thus be seen that this Court has held that when the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties.* ***It has been held that the arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause. It has further been held that where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also****.*
>
> *11. This Court further held that where the contract provides that the standard form of terms and conditions of an independent trade or professional institution will bind them or apply to the contract,* ***such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. It has been held that sometimes the contract may also say that the parties are familiar with those terms and***



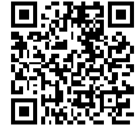
conditions or that the parties have read and understood the said terms and conditions. It has also been held that where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract, the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.

12. A perusal of sub-section (5) of Section 7 of the Arbitration Act itself would reveal that it provides for a ***conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties***.

13. It is thus clear that a reference to the document in the contract should be such that ***shows the intention to incorporate the arbitration clause contained in the document into the contract***.

14. The law laid down in the case of M.R. Engineers and Contractors Private Limited (supra) has been followed by this Court in the cases of Duro Felguera, S.A. vs Gangavaram Port Limited2 and Elite Engineering and Construction (Hyderabad) Private Limited represented by its Managing Director vs Techtrans Construction India Private Limited represented by its Managing Director3 .

15. No doubt that this Court in the case of Inox Wind Limited vs Thermocables Limited4 has distinguished the law laid down in the case of M.R. Engineers and Contractors Private Limited (supra). In the said case (i.e. Inox Wind Limited), ***this Court has held that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard***



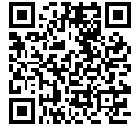
form would be enough for incorporation of the arbitration clause. Though this Court in the case of Inox Wind Limited (supra) agrees with the judgment in the case of M.R. Engineers and Contractors Private Limited (supra), it holds that general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause. *In the said case (i.e. Inox Wind Limited), this Court found that the purchase order was issued by the appellant therein in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The respondent therein by his letter had confirmed its acceptance. This Court found that the case before it was a case of a single-contract and not two-contract case and, therefore, held that the arbitration clause as mentioned in the terms and conditions would be applicable. 16. The present case is a 'two-contract' case and not a 'single-contract' case.*

…

18. No doubt that Clause 3.34 provides for a reference of the dispute to the sole arbitration of the Secretary, CEO of Damodar Valley Corporation, Kolkata-54 or to a person appointed by him for that purpose.

…

20. In view of Clause 1.0, the documents stated therein shall also form part of the agreement. In view of Clause 2.0, all terms and conditions as contained in the tender issued by the DVC to the NBCC shall apply mutatis mutandis except where these have been expressly modified by the NBCC. ***Clause 7.0 specifically provides that the redressal of dispute between the NBCC and the respondent shall only be through civil courts having jurisdiction of Delhi alone. Clause 10.0 further provides that the L.O.I. shall also form a part of the agreement. 21. It is thus clear that the intention between the parties is very clear***. *Clause 7.0 of the*



L.O.I. which also forms part of the agreement specifically provides that the redressal of the dispute between the NBCC and the respondent shall only be through civil courts having jurisdiction of Delhi alone. It is pertinent to note that Clause 7.0 of the L.O.I. specifically uses the word "only" before the words "be through civil courts having jurisdiction of Delhi alone".

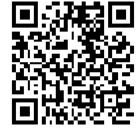
22. As already discussed herein above, when there is a reference in the second contract to the terms and conditions of the first contract, the arbitration clause would not ipso facto be applicable to the second contract unless there is a specific mention/reference thereto.

***23. We are of the considered view that the present case is not a case of 'incorporation' but a case of 'reference'. As such, a general reference would not have the effect of incorporating the arbitration clause. In any case, Clause 7.0 of the L.O.I., which is also a part of the agreement, makes it amply clear that the redressal of the dispute between the NBCC and the respondent has to be only through civil courts having jurisdiction of Delhi alone**.*

24. In that view of the matter, we find that the learned single judge of the Delhi High Court has erred in allowing the application of the respondent. The appeals are accordingly allowed. The impugned orders are quashed and set aside. There shall be no order as to costs.

25. Pending applications, if any, shall stand disposed of."

54. The decision of the Supreme Court in ***NBCC (India) Ltd. (supra)*** is also distinguishable on the following grounds:

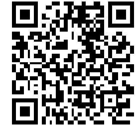


(i) In the present petition, all the three contracts involved i.e., the BBA, the Loan Agreement and the Tripartite Agreement are all standard form contracts, which form part of a single transaction between the parties. In these three contracts, there are different dispute resolution and jurisdiction clauses, which is not the case in ***NBCC (India) Ltd. (supra).***

(ii) Secondly, in ***NBCC (India) Ltd. (supra)***, the standard form tender document entered into between the parties was expressly modified by the Letter of Intent issued by NBCC, which specified the manner in which disputes have to be resolved between the parties. However, in the present case, there is no clear indication as to which is the last agreement entered into between the parties. The date on the Tripartite Agreement cannot be deciphered. Thus, the fact situation in the present petition is different.

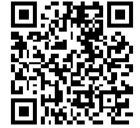
(iii) ***NBCC (India) Ltd. (supra)*** is not applicable to the facts of the present case where there are three different agreements connected to the same subject flat. The said decision has been rendered in the context of 'reference of clauses', whereas in the present petition, the intention of the parties has to be inferred from the nature of correspondence and agreements entered into between them. The present case also highlights the plight of innocent flat buyers who are made to sign such standard form contract, without being made to understand the clear nature of each of the agreements. The factual matrix in ***NBCC (India) Ltd. (supra)*** does not concern itself with such considerations at all.

55. In the facts of the present petition, the decision of the High Court of



Singapore in ***Econ Piling Pte Ltd v NCC International AB [2007] SGHC 17*** delivered by Justice Sundaresh Menon *(as he then was)* is relevant. It is observed that it is generally unexpected for two closely related contracts involving the same parties and subject matter to have differing dispute resolution mechanisms. Consequently, unless explicitly stated otherwise, it is usually assumed that parties intend for disputes arising from both contracts to be resolved in the same manner. In ***Econ Piling (supra)***, parties initially entered into a joint venture agreement that included an arbitration clause. Subsequently, within less than a year, Econ Piling Pte. Ltd. experienced financial troubles, leading the parties to sign a variation agreement that designated the Singapore Courts as having exclusive jurisdiction. Disputes emerged, questioning which of the two dispute resolution agreements was applicable. The relevant observations of the Court read as follows:

> *"16 The second reason I am persuaded that cl 22.5 of the JVA was superceded by cl 11.1 of the Variation Agreement is that it is counterintuitive for two contracts that are meant to be read together to have different dispute resolution regimes.* ***<u>Therefore, unless there is a clear and express indication to the contrary, it may usually be assumed that parties to two closely related agreements involving the same parties and concerning the same subject matter would not have intended to refer only disputes arising under one contract to court and not those arising under the second contract</u>****. In this respect, I refer to the decision of Tay Yong Kwang J in Mancon (BVI) Investment Holding v Heng Holdings SEA [2000] 3 SLR 220 where he noted as follows at [30]:*
>
> ***<u>If the two contractual documents had to be read together, it would be totally illogical to have the arbitration clause apply to one but not the other unless</u>***



> ***<u>that was explicitly agreed upon</u>*** *…*
>
> *17 In my judgment, this is correct.* ***<u>A different approach would result in the wholly uncommercial position that some disputes under what is in substance a composite agreement between the parties, are to be referred to arbitration while others are to be resolved in court. This difficulty becomes especially acute, even impossible, in situations such as the present where a subsequent agreement varies an earlier agreement, and where it is therefore conceivable, even likely, that many disputes might straddle both contracts</u>****. Therefore, in my judgment, any contention that cl 11.1 of the Variation Agreement should be construed as applying only to disputes arising from that document while cl 22.5 of the JVA should continue to govern disputes arising under the latter document is misconceived."*

<u>56. Thus, the test of 'uncommercial' nature of the interpretation is one which would persuade the Court to take into commercial and practical realities while interpreting such clauses. Even hypothetically speaking, in the present case, if the Court accepts the arguments of the Respondents, then the Petitioners would be running from pillar to post for several years to even finalise a remedy that can be availed of, let alone achieving closure to the dispute. If the Petitioners invoke arbitration, the Respondents argue that there is no clause for referring disputes to arbitration. If the Petitioners file a civil suit, then the Respondents can argue that there is an arbitration clause. If the Petitioners approach courts in Delhi, they may have to do so only in respect of one agreement. For the second agreement, they have to approach Courts in Mumbai and for the final tripartite agreement, they have to knock the doors of Courts in UP. Such an anomalous situation cannot be accepted or acceded</u>

to by any Court. The clauses have to therefore be reconciled to decipher the core intention of the parties and give meaning to ensure a reasonable dispute resolution mechanism.

57. In the present petition, the BBA and the Loan Agreement are integrally connected. One is dependent on the other. The Tripartite Agreement, in fact, links the three parties to each other. The Petitioners are the common feature in all the three agreements. Further, all the three agreements have been entered into with one object - to carry out the payment plan in respect of the subject flat.

58. As far as the Petitioners and the Respondent No.1 are concerned, they have agreed to arbitration under the BBA. The Petitioners and the Respondent No.2 have agreed to the arbitration under the Loan Agreement. Both the said Respondents are, therefore, bound to honour the arbitration agreement in their respective agreements entered with the Petitioners. Since they are interlinked, multiple arbitrations could also result in multiplicity of proceedings, heavier costs and conflicting rulings.

59. Furthermore, clauses in all three agreements lack any consistency whatsoever. The subject project is located in Noida, but there is no arbitration clause specific to Noida, Uttar Pradesh. Instead, the arbitration clauses prescribe arbitration either in Delhi or Mumbai. Additionally, the Tripartite Agreement specifies the exclusive jurisdiction of the Courts in New Delhi. Under these circumstances, this Court is of the opinion that a substantial cause of action has arisen in Delhi, and thus, this Court has jurisdiction to appoint the Arbitrator.

60. In the unique facts and circumstances of this case, **Mr. Gautam Narayan, Advocate (M:9811411735)** is appointed as the ld. Sole Arbitrator

to adjudicate upon the disputes between the Petitioners- Nishesh Ranjan and Vandana Srivastava, Respondent No.1 i.e. IndiaBulls Housing Finance Limited and Respondent No.2 i.e. Brickrise Developers Pvt. Ltd. arising out of and in connection with the following agreements –

i. Loan Agreement dated 12th July, 2018

ii. Builder Buyer Agreement dated 29th May, 2018 and

iii. Tripartite Agreement.

61. The arbitration proceedings shall be comprehensive in nature. The arbitration proceedings shall take place under the aegis of the Delhi International Arbitration Centre *(hereinafter, 'DIAC')*. The arbitration proceedings shall be conducted under the Rules of DIAC. The fee of the ld. Sole Arbitrator shall be as per the Fourth Schedule of the Act, as amended by the DIAC Rules, 2023.

62. List before the DIAC on 6th August, 2024. Let a copy of the present order be emailed to Coordinator, DIAC on the email id: delhiarbitrationcentre@gmail.com.

63. The petition is, accordingly, allowed with costs of Rs.50,000/- each to be paid by the Respondent No.1 and Respondent No.2 to the Petitioners within two weeks.

PRATHIBA M. SINGH
JUDGE

JULY 9, 2024
dk/dn