



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM. ARBITRATION APPLICATION (L.) NO. 21070 OF 2023

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1. SHANKAR VITHOBA DESAI
2. VIPUL KALYANJI LALAN
3. PRITI VIPUL LALAN
4. LIYAN FER.NANDEZ
5. MANOHAR GANGARAM MADAV
6. DILIP KUMAR GANPAT KAMBLI
7. SANJAY TULSIRAM PILWALKAR
8. DEREPIE PAUL LOBO
9. DEEPAK VINAYAK MEDEKAR
- 10.SAVTA SOPAN BHUJBAL
- 11.CHANDRAKANT M. FANSEKAR ... APPLICANTS

Versus

1. GAURI ASSOCIATES
2. DAHISAR CHUNNABHATTI
PANCHTANTRA CHS LTD. ... RESPONDENTS

Mr. Aadil Parsurampur *a/w. Ms. Pragya, Mr.Sumeet Tirthani*
i/b M/s. Legal Vision, Advocates for Applicants.

Mr. Rubin Vakil, *a/w. Dimple Vora i/b Markand Gandhi & Co.,*
Advocates for Respondent No.1.

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : June 27, 2024

Pronounced on : July 16, 2024

Judgement :

1. This Application has been filed by eleven members of a co-operative housing society, seeking to invoke Section 11 of the Arbitration and Conciliation Act, 1996 (“*Arbitration Act*”) in connection with disputes and differences under an agreement for re-development of a building they reside in.

2. The agreement in question is a Development Agreement dated 29th June, 2018 (“*Development Agreement*”) executed between the Dahisar Chunabhatti Panchratna Co-operative Housing Society Limited (“*Society*”) and M/s Gauri Associates AOP (“*Developer*”). The Applicants are among the 40 members of the Society. A notice dated 31st March, 2023 from 13 members addressed to both the Society and the Developer, purporting to invoke arbitration, was issued by advocates for these members. The Society has not provided consent to the members on whose behalf the notice was issued, to invoke arbitration on its behalf. The Developer has questioned the authority of those on whose behalf the notice has been issued *vide* a reply dated 18th April, 2023.

3. Upon hearing the Learned Counsel for the parties and review of

the record, in this Court's opinion, arbitration cannot be invoked by individual members or groups of members of the Society for resolving the disputes emanating from the conduct of the Developer, even if such disputes arise out of the import of the Development Agreement. This is for the simple reason that individual members are not parties to the arbitration agreement contained in the Development Agreement.

4. The arbitration agreement contained in Clause 28 of the Development Agreement, is reproduced below, for convenience:-

All disputes, differences and / or claims, arising out of this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provision of Arbitration and Conciliation Act, 1996 or any other statutory amendments or re-enactment thereof as applicable and shall be referred to the arbitration of arbitrator or arbitrators nominated by the parties herein. In the event of disarrangement in nomination of Sole Arbitrator each party shall appoint one Arbitrator and then all the Arbitrators with each other's consent appoint presiding Arbitrator meaning that there shall be an Arbitral Tribunal of three Arbitrators. The venue of the arbitration proceedings shall be exclusively at Mumbai as agreed by and between both the parties.

[Emphasis Supplied]

5. Even a plain reading of the foregoing would show that the disputes and differences arising out of the Development Agreement can

be referred to arbitration by a sole arbitrator to be appointed by consent of the “parties”. If there is no consent among the parties, an Arbitral Tribunal “of three Arbitrators” with “each party” appointing one arbitrator and all the arbitrators “with each other’s consent” appointing the presiding arbitrator.

6. The very usage of the phrase “each other” and the concept of “an Arbitral Tribunal of three Arbitrators”, would point to the arbitration agreement being a bilateral contract between two parties – the Society and the Developer. The term “all Arbitrators” is a reference to two arbitrators. The Development Agreement itself is between two parties – the Society and the Developer. Indeed, the Development Agreement is signed by only two parties. Every member of the Society is neither an independent party nor an independent signatory to the Development Agreement.

7. Faced with this situation, the Learned Counsel for the Applicants submitted that the expression “THE SOCIETY” in the title clause of the Development Agreement is deemed to mean and include, among others, all its members.

8. This Court is unable to be persuaded by this novel argument. The very same title clause also makes it clear that such deeming inclusion of members within the meaning of the expression “THE SOCIETY” would apply unless it is repugnant to the context and meaning of the term. Indeed, if this phrase used in the title clause is to be interpreted in the manner canvassed, it would mean that the arbitration agreement in Clause 28 would be among 42 parties, namely, the Society, the Developer, and 40 members. Such a meaning would be belied by the phrase “each other”, and the concept of the Arbitral Tribunal of three arbitrators, as analysed above. The import of having 42 parties to the arbitration agreement and the scheme of two parties envisaged in the arbitration agreement, would lead to the inclusion of each of the members into the import of the arbitration agreement, resulting in such meaning of the term “THE SOCIETY” to be repugnant to its context and meaning.

9. Therefore, the reference to the term “each Party” in the arbitration agreement would never be able to partake the meaning of each of the 42 parties. The position obtaining from having 42 parties cannot co-exist with the position of two arbitrators, (one of which is nominated by each party), appointing the presiding arbitrator to form a

three-member Arbitral Tribunal.

10. It being an admitted position that the individual members are not signatories to the arbitration agreement, the fundamental requirement under Section 7 of the Arbitration Act, that the arbitration agreement has to be in writing among the parties to the arbitration proceedings, has also not been met..

11. In this view of the matter, to avoid prolix elaboration on a rather short issue, no further discussion is warranted. A near-identical situation emerged in the case of *Ketan Champaklal Divecha vs. DGS Township Pvt Ltd. and Another*¹ (“*Divecha*”) in which, a Learned Single Judge of this Court (*Manish Pitale J.*) has declared the law on the subject and articulated it threadbare, including facets of how individual members give up their individual desires and identity by submitting to the collective will of a housing society. This Court is in respectful agreement with the position articulated in paragraphs 13, 15, 19 and 21 in *Divecha*.

12. Consequently, the Applicants would not be able to invoke the

¹ 2024 SCC OnLine Bom 1

jurisdiction of this Court under Section 11 of the Arbitration Act. Therefore, the Application being incapable of being considered by this Court, stands rejected and *disposed of*. No costs.

13. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]