IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on ::: 08.01.2016

Pronounced on ::: 19.02.2016

C O R A M

The Hon'ble Mr. **SANJAY KISHAN KAUL**, Chief Justice

Original Petition Nos.808 and 824 of 2012

Andal Dorairaj ... Petitioner in both OPs

Vs.

1.M/s.Hanudev Infopark (P) Ltd.,
represented by its Director Mr.R.Ravi
R.R.Towers – III,
Thiru-vi-Ka Industrial Estate,
Guindy, Chennai 600 032.
2.M/s.Rithwik Infrastructure Pvt. Ltd.,
represented by its Director Mr.R.Ravi
R.R.Towers – III,
Thiru-Vi-Ka Industrial Estate,
Guindy, Chennai 600032.

3.M/s.Rithwik Infopark Pvt. Ltd.,
represented by its Director Mr.R.Ravi
R.R.Towers – III,
Thiru-Vi-Ka Industrial Estate,
Guindy, Chennai 600 032.

4.Vidhya Sharthram

5.Sharathram
6.D.Dhorrairaaj
(6th respondent's name deleted
as per order Dated 27.11.2015
in OP.Nos.808 and 824 of 2012) ... Respondents in both Ops

Prayer : Petitions filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator to resolve the disputes between the parties arising out of the Joint Development Agreements dated 06.07.2006 and 24.03.2006.

For Petitioner ::: Mr.S.R.Raghunathan in both OPs
For Respondents ::: Mr.Vineet Subramani
for R.1 to R.3 in both OPs

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O R D E R

The present petitions are filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator to resolve the disputes between the parties arising out of the Joint Development Agreements dated 06.07.2006 and 24.03.2006.

2. The petitioner was the owner of properties admeasuring 2 acres 51

cents and 333 sq.ft and 55 cents in Coimbatore Taluk, Sowripalayam village. The first respondent approached the petitioner with a proposal for constructing an I.T. Park over the said property. The petitioner and respondents 4 to 6 entered into Joint Development Agreements dated 06.07.2006 and 24.03.2006 with the first respondent. The first respondent assured to give 80,175 sq.ft., of built up area in the proposed I.T.Park to the petitioner as consideration for transferring 80% of the undivided share of land in her property. Pursuant to the Joint Development Agreements, the first respondent agreed to pay an advance of Rs.50 lakhs, of which Rs.25 lakhs was paid on the date of agreement.

3. The first respondent had agreed to complete the project within a period of 24 months from the commencement of construction. On 31.09.2007, the petitioner along with owners of adjacent properties entered into a Supplemental Memorandum of Agreement to the two Joint Development Agreements entered into between the petitioner and the first respondent and another Joint Development Agreement with respondents 4 to 6. The total extent of property to be developed

by the first respondent was 5.02 acres, including the land owned by the petitioner.

4. The first respondent obtained the multi-storied building plans on 18.07.2008 and he gave assurance to the petitioner that the building would be handed over immediately after completion of the project. However, no progress was made by him. Meanwhile, Mr.R.Ravi, Director of the first respondent had negotiated with the petitioner that he promoted the 2nd and 3rd respondents and requested the petitioner and others to execute a sale deed in favour of the second and third respondents to enable them to raise loans to complete the construction. The petitioner and others executed sale deed Nos.896, 897 and 895 of 2009 dated 16.03.2009 in favour of Respondents 1 to 3 respectively. Thus, the second and third respondents controlled and managed by Mr.R.Ravi, Director of the first respondent had accepted the terms and conditions of the Joint Development Agreements and Supplemental Memorandum of Agreement and have categorically agreed to perform the obligations as contained in the Joint

Development Agreements as well as Supplemental Memorandum of Agreement. However, the respondents have failed to fulfill their obligations by constructing and handing over the property as agreed in the Joint Development Agreements.

5. It is the case of the petitioner that Respondents 2 and 3 are aware of the JDAs, and the specific recitals of the agreement would bind them. According to him, respondents Nos.2 and 3, being group companies, as successors-in-interest and nominees of Respondent No.1 under the agreement, are bound by it.

6. To support his contention, petitioner has placed reliance on the decision of the Hon'ble Supreme Court in ***Chloro Controls India Pvt., Ltd., vs. Severn Trent Water Purification Inc., and Others*** reported in ***(2013) 1 SCC 641).***

It is submitted that though in this decision, reference was under Section 45 of the Arbitration and Conciliation Act, by virtue of the Amendment Ordianance, 2015, Section 8 has been amended and hence, the 2nd and 3rd respondents are also bound by the arbitration

agreement.

7. The first respondent has filed counter affidavit wherein it is stated that the 2nd and 3rd respondents companies are part of a larger group of companies engaged in various kinds of infrastructural development business. The 1st respondent intended to build/develop an IT Park/SEZ, to an extent of more than approximately 11,00,000 sq.ft., of which the petitioner and her family members would retain 20% of land and they will be entitled to receive 20% of the total built up area as per the approved plans from the first respondent or its nominees. The petitioner and her family would earn rental income from this 20% of the building. At the time of entering into the Joint Development Agreements, the first respondent paid heavy advances to the petitioner and her family members, to be adjusted against the future rental income.

8. It is further stated that the project envisaged the grouping of lands owned by the petitioner and her family. Parts of these lands were owned by the petitioner's minor grandchildren. The JDAs in respect

of the lands owned by the said minors were executed by their mother. It was envisaged that court orders would be required to implement the project, particularly in respect of transfer of property to the 1st respondent. However, the petitioner and her family thereafter effected a re-union of the family on 05.06.2007, by a Memorandum of Confirmation of Re-Union dated 11.06.2007. Respondent No.5 herein is the petitioner's son. This re-union and reformation of the HUF was subsequently confirmed and declared binding by the High Court vide its order dated 13.12.2007 in O.S.No.2067 of 2007. The first respondent completed nearly 40% of the total project area, ie., about approximately 4,00,000 sq.ft., of buildings by December, 2008, which was certified by the local planning authority in their letter dated 05.08.2009. There is not even a single deviation or illegality in the constructed building. It is stated that Respondent No.1 had spent approximately Rs.30 Crores for the development of the project, including for construction and related costs.

9. It is further stated in the counter affidavit that respondents Nos.2

and 3 were brought in only after completion of the construction. Only after satisfying that the 20% building to be retained by the petitioner was ready, she executed the sale deeds dated 16.3.2009 transferring 37.78% to the 1st respondent, 37.22% to the 3rd respondent and 5% to the 2nd respondent. It is stated that from the documents submitted by the petitioner, it is clear that the building was ready and a tenant was identified for the petitioner's portion as early as 07.07.2011. The draft lease agreement was sent for the petitioner's approval, but there was no response after reminders on 18.08.2011 and 10.09.2011 for approval/comments on the draft lease agreement. The prospective tenants obviously were not willing to wait any longer due to the petitioner's fault. Petitioner also filed police complaints alleging land grabbing against respondents 1 to 3. The 1st respondent denied that the conditions for invoking Section 11 of the Arbitration and Conciliation Act, 1996 have been satisfied and prays for dismissal of the original petitions.

10. In support of his stand, learned counsel for the first respondent

relied on the following decisions:

a) *Wellington Associates Ltd., vs. Kirit Mehta (AIR 2000 SC 1379)*

b) *Sankar Sealing Systems vs.Jain Motor Trading Co., (AIR 2004 Mad 127)*

c) *Castrol India Ltd., vs. Apex Tooling Solutions, (unreported Judgment dated 03.01.2014 in A.No.5597 of 2013 in CS.No.162 of 2012).*

d) *Avant Garde vs. Ind Swift Ltd., (2014) 210 DLT 714)*

e) *Payal Chawla vs. Coca Cola Co., (2015) SCC Online SC 327*

f) *Corrosion Controls Pvt., Ltd., vs. Sarku Engg. Services, (2009) 1 SCC 303.*

g) *MR Engineers & Contractors v. Som Datt Builders (2009) 7 SCC 696)*

11. Heard the learned counsel appearing for the parties and perused the materials available on record.

12. The petitioner claims that the Joint Development Agreements provide for a mechanism of settlement of disputes through Arbitration, being Clause-17, which reads as under:

> "17. In the event of any disputes or difference arising between the parties in regard to this agreement or the development of the schedule property they shall endeavour to settle the same by mutual negotiation/discussion. In the event of being unable to arrive at a mutual agreeable solution, they shall refer such dispute/difference to arbitration. Such reference shall be to an arbitrator to be appointed by the parties. The decision of the arbitrator shall be final and binding on both the parties. The Venue of arbitration shall be Coimbatore. It is further agreed with between the parties that in case of dispute, the Owner and the Developers shall be entitled to seek such reference of the dispute only jointly and not individually."

13. On analysis of the submissions of the learned counsel appearing for the parties, it is quite obvious that some areas of submissions which deal with the merits of the controversy really are not required to be gone into by this Court. The reason is simple i.e., in the present proceedings, the only aspect to be considered is whether the disputes have to be resolved through arbitration. Thus, whether the respondents have performed their obligations or not would have to be determined by the appropriate forum.

14. What appears to be troubling the first respondent is that a minor grand-daughter of the petitioner, on attaining majority, has

sought to assail the document executed and this is stated to be in collusion with the petitioner to put pressure on first and other respondents. As to what is the merit of such a contention, in my view, would have to be examined in those proceedings, and thus could not be germane to the present proceedings.

15. Now coming to the plea arising from the arbitration clause, what is sought to be contended is, it could hardly be pleaded by the respondents that the first part of Clause-17 has not been complied with, as no mutual negotiation and discussion took place. In fact, the records show that the dispute *inter se* the parties even escalated to filing of police complaints.

16. The last and the crucial aspect of the arbitration clause is that it provides for reference of disputes "only jointly and not individually". This clause is sought to be construed by the learned counsel for the respondents as implying that unless both the parties are willing to go to arbitration, no arbitration can take place. It is pleaded that if the respondents are not willing for arbitration, the petitioner cannot compel them to arbitration. In such a situation, the

other party would have to file a civil suit.

17. Learned counsel for the respondents referred to the judicial pronouncements, enumerated aforesaid, for the purposes of construction of the arbitration clause.

18. In *Wellington Associates Limited vs. Kirit Mehta (supra)* it was held that the jurisdiction of the Chief Justice under Section 11 of the said Act does not prohibit the decision or question as to the existence of the arbitration clause. The use of the word "*may*" in Section 16 of the said Act was held to indicate that the arbitral tribunal cannot be the only forum to decide about the existence of the arbitration clause. Thus, where it is objected that there is no arbitration clause at all between the parties, such a question can be decided by the Court.

19. I do not see how this can come to the aid of the respondents, as the existence of the arbitration clause is not in question, but the only aspect is the construction of the same. Similarly, the issue that the agreement provided that the parties may go to suit or may also go to arbitration does not amount to an arbitration agreement, does not

once again advance the case of the respondents.

20. In *Sankar Sealing Systems P. Ltd. Vs. Jain Motor Trading Co. (supra),* the issue was with regard to plea of vagueness in Clause-23A of the arbitration agreement, while dealing with the expression "neutral person agreed to by both". It was held that as it does not indicate how it could be determined as to who would be the neutral person as also to arrive at a consensus on the issue, the said Clause cannot be given effect to.

21. In *Castrol India Limited case (supra),* again the learned single Judge of this Court was concerned with the clause which gave the option to only one party to either approach the Civil Court of competent jurisdiction where the agreement is entered or to refer the disputes to arbitration i.e., the Managing Director of that Company.

22. In *Avant Garde case (supra),* while using the word "arbitration" in Clause-11, the main body provided for the disputes to be subject to the exclusive jurisdiction of the Court in the city of Delhi without the use of the word arbitration in the main body. Similar was the situation in *Payal Chawla Singh case (supra) and*

Standard Corrosion Controls Private Limited case (supra) (referring only to the contract to be governed by the laws of India).

23. In *M.R.Engineers and Contractors Private Limited case (supra),* the conditions precedent for incorporation of arbitration clause from another document into the contract/sub-contract were laid down and one such condition was the existence of a special reference indicating the mutual intention for the parties. Thus, a mere reference to another document was found to be not sufficient.

24. The reason why the aforesaid judgments would in no manner come to the aid of the respondents is that there is a valid subsisting agreement *inter se* the parties as per Clause-17. It is the construction of the terminology which entitles seeking of such reference of the disputes only "jointly and not individually". This only shows that one party by itself cannot commence the arbitration proceedings. This is in conformity with what is stated in the previous portion of Clause-17 requiring the arbitrator to be appointed by the parties i.e., that the parties must jointly agree upon the arbitrator. This does not imply that one of the parties may refuse to appoint the arbitrator at all and

thus, defeat the arbitration clause. It would only imply that if there is no joint agreement on a particular arbitrator, then the provisions of Section 11 of the said Act would have to be resorted to seeking appointment of such arbitrator by the Court. I am, thus, of the view that the invocation of jurisdiction of this Court by the petitioner is valid and proper.

25. It can hardly be seriously contended on behalf of the respondents that the documents executed were not in the nature of a composite document. The principles laid down in *Chloro Controls India Private Limited (supra)* would squarely apply in the facts of the present case, and thus the arbitration proceedings would require all the respondents to be joined from one side.

26. It would be useful to extract some part of the discussion in the aforesaid case. (see SCC pages 693-695, paras 100-107)

> "100. We have already referred to the judgments of various courts, that state that arbitration could be possible between a signatory to an agreement and a third party. Of course, heavy onus lies on that party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated

under Section 45 of the 1996 Act.

101. Michael J. Mustill and Stewart C. Boyd in The Law and Practice of Commercial Arbitration in England have observed that the applicant must show that the person whose claim he seeks to stay is either a party to the arbitration agreement or a person claiming through or under such a party. It is further noticed that it occasionally happens that the plaintiff is not himself a party to the arbitration agreement on which the application is founded. This may arise in the following situations :

i) The plaintiff has acquired the rights, which the action is brought to enforce, from someone who is a party to an arbitration agreement with the defendant;

ii) The plaintiff is bringing the action on behalf of someone else, who is a party to an arbitration agreement with the defendant.

iii) When the expression used in the provision, the words 'claiming under plaintiff' relate to substantive right which is being asserted.

The requirements can scarcely be interpreted in their literal sense, this would mean that a person could claim a stay even though not a party to the arbitration agreement. However, the applicant must be party to the agreement against whom legal proceedings have been initiated rather than a party as intervenor.

102. Joinder of non signatory parties to arbitration is

not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal basis may be applied to bind a non-signatory to an arbitration agreement.

103.1 The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2 The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

104. We may also notice the Canadian case of The City of Prince George v. A.L. Sims & Sons Ltd. [YCA XXIII (1998), 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor

incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

105. We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

106. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

> 107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

27. In *Purple Medical Solutions Pvt. Ltd. Vs. MIV Therapeutics Inc. (2015 SCC Online SC 984),* the principle of lifting of corporate veil was applied to include the third party on the basis of the facts and circumstances of the case.

28. There is presence of the arbitration clause in both the joint development agreements between the petitioner and the respondents

and it is not disputed that respondents 1 to 3 are group companies having the same Directors and Shareholders. In fact, the second and third are either the nominees or successors in interest of the first respondent, and the expression “developer” is required to mean successors in interest, legal representatives, administrators and assignees, as defined in the agreement. If I may say so, these second and third respondents are in a sense the *alter ego* of the first respondent, and thus, the sale deed executed can be construed as an agreement under Section 7(5) of the said Act. The amendment to Section 8 in fact obliterates any other thought process, and thus, respondents 1 to 3 are liable to be arrayed in the proceedings for arbitration.

29. I am, thus, of the view that the petitions filed by the petitioner are liable to succeed, and an Arbitrator is liable to be appointed to enter upon reference and adjudicate the dispute inter se the parties. The place of Arbitration, as per Clause-17, shall be at Coimbatore.

30. I hereby appoint Mr.V.Sivasubramanian, a retired District

Judge, residing at D.No.124/84A, 3rd Cross road, West Bharathi Colony, Avinashi, Coimbatore – 641004 (Mobile-9443015316), as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties, and the arbitration proceedings will be conducted under the aegis of the Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

31. The petitions are allowed, leaving the parties to bear their own costs.

(S.K.K., CJ.)

19.02.2016

Index: Yes/No
Internet:Yes/No
Ksr/pv

The Hon'ble The Chief Justice

Ksr/pv

Pre-delivery Order
in
O.P. Nos.808 and 824 of 2012

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