

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF SEPTEMBER 2022

BEFORE

THE HON'BLE MR. JUSTICE B. M. SHYAM PRASAD

CMP No.449/2022

BETWEEN :

1. JAGANMAYI BUILDERS AND
DEVELOPERS PRIVATE LIMITED
A COMPANY INCORPORATED
UNDER THE PROVISION OF
COMPANIES ACT, 2013
HAVING ITS REGISTERED
OFFICE AT
SALARPURIA WINDSOR,
NO.3, 4TH FLOOR, ULSOOR ROAD,
BENGALURU 560 042.

REP BY ITS AUTHORIZED SIGNATORY
MR. ASHWIN SANCHETI.

2. NEELANCHAL HAPPY GRIHA LLP
A LIMITED LIABILITY PARTNERSHIP
REGISTERED UNDER THE
PROVISIONS
OF LIMITED LIABILITY
PARTNERSHIP ACT, 2008
HAVING ITS REGISTERED OFFICE AT
SALARPURIA WINDSOR, NO.3,
4TH FLOOR, ULSOOR ROAD,
BENGALURU - 560 042.

REP BY ITS AUTHORIZED SIGNATORY
MR. ASHWIN SANCHETI.

3. JAGANMAYI CONSTRUCTIONS
PRIVATE LIMITED
A COMPANY INCORPORATED
UNDER THE PROVISIONS OF
COMPANIES ACT 2013
HAVING ITS REGISTERED OFFICE AT
SALARPURIA WINDSOR,
NO.3, 4TH FLOOR,
ULSOOR ROAD,
BENGALURU 560 042.

REP BY ITS AUTHORIZED SIGNATORY
MR. ASHWIN SANCHETI.

... PETITIONERS

(BY SRI. G.L. VISHWANATH, SENIOR ADVOCATE
FOR SRI. ARUN PRADESH E, ADVOCATE)

AND:

1. MR SUMANTH REDDY
R/AT NO. S -001, LE PROMENADE
PROMENANDE APARTMENTS,
LE PROMENANDE ROAD, FRAZER TOWN
BENGALURU - 560 005.

AND AT NO. 537, AMARJYOTHI LAYOUT,
OPPOSITE TO DELL AND NEXT
TO SHELL PETROL BUNK
DOMLUR, BENGALURU 560 071.

AND AT 24/161,
SHANTI NAGAR
NEAR SINDURA NURSING HOME
DARGAMITTA, NELLORE
ANDHRA PRADESH - 524 003.

2. MR. SREENADHA REDDY
HAVING HIS OFFICE AT
KAY KAY TOWERS,

NO.18, 17th CROSS,
SECTOR 7, HSR LAYOUT,
BENGALURU 560 102.

110 TANJONG, RHU ROAD,
UNIT 10- 02, CAMELOT BY WATER
SINGAPORE 436 928.

3. RP PLATINA
HAVING ITS REGISTERED OFFICE AT
KAY KAY TOWERS
No.18, 17TH CROSS
SECTOR 7, HSR LAYOUT
BENGALURU - 560 102.

... RESPONDENTS

(BY SRI. S.K.V. CHALAPATHY, SENIOR ADVOCATE
FOR SRI. SIDDHARTHA H M &
MANJUNATH B, ADVOCATES)

THIS CMP IS FILED UNDER SECTION 11(6) OF THE
ARBITRATION & CONCILATION ACT, 1996 PRAYING TO
APPOINT A SOLE ARBITRATOR IN TERMS OF CLAUSE-18
R/W 19 OF THE MEMORANDUM OF UNDERSTANDING
DATED 06/10/2018 VIDE ANNEXURE-A AND
SUPPLEMENTAL AGREEMENT DATED 06/10/2018 VIDE
ANNEXURE-C TO ADJUDICATE THE DISPUTE IN
QUESTION BETWEEN THE PARTIES.

THIS PETITION COMING ON FOR PRONOUNCEMENT
OF ORDERS THIS DAY, THIS COURT MADE THE
FOLLOWING:

ORDER

The petitioners have filed this petition for appointment of a sole arbitrator relying upon the terms of Memorandum of Understanding dated 06.10.2018 [MOU] and the Supplemental Agreement dated 04.12.2018 [*Supplemental Agreement*]. The respondents, who are together parties to both the MOU and the Supplemental Agreement unlike the petitioners, resist the petition essentially contending that there is no subsisting agreement for arbitration. The MOU is only between the first petitioner and the respondents, but all the petitioners and respondents are parties to the *Supplemental Agreement*.

2. The first petitioner, M/s Jaganmayi Builders and Developers Private Limited, and the respondents have entered into MOU for the construction of a Commercial Office Complex under a joint venture arrangement in the land measuring 20 acres in the

different survey numbers of two villages viz., Kariyammana Agrahara and Devara Beesanahalli Villages of Varthur Hobli, Bangalore East Taluk [*the subject property*] in anticipation of the allotment of this land by M/s. Karnataka Industrial Areas Development Board [KIADB] in favour of the respondents. The first petitioner, in consideration of the assurance to grant development rights on terms as mentioned in the MOU, has agreed to pay security deposit of Rs.135,00,00,000/- [Rs. One Hundred and Thirty Five Crores Only]. The first petitioner, as acknowledged in the MOU, has paid Rs.25,00,00,000/- [Rs. Twenty Five Crores Only] agreeing to pay the balance amount of Rs.110,00,00,000/- [Rs. One Hundred and Ten Crores Only] on the execution and registration of joint development agreement and power of attorney for the proportionate share in the land.

3. The terms of the MOU, amongst others, include the conditions covenants contemplated as Conditions Precedent. The first petitioner and the respondents have also agreed on the mode for dispute resolution. They have agreed for resolution of disputes by a sole arbitration, and clause 18 of the MOU in this regard reads as under:

“18. Dispute Resolution:

In the event of there being any dispute pertaining to this binding MOU, or any of the clauses thereof, or interpretation of any of the terms, clause etc., the same shall be referred to arbitration of a sole arbitrator. The arbitration shall be in terms of the Arbitration and Conciliation Act, 1996 as amended up to date. The seat of arbitration shall be at Bangalore.”

4. The second and the third petitioners have joined the first petitioner and the respondents in the execution of the Supplemental Agreement in the month

of December 2018. The respondents' opposition to the appointment of a sole arbitrator as agreed in clause 18 of the MOU is based on the execution of this Supplemental Agreement. The petitioners and respondents, amongst others, have recited in the Supplemental Agreement that this agreement is entered into *in furtherance of the mutual discussion* and at the respondents' request the first petitioner has paid additional refundable security deposit amount¹. They have also recited in this Agreement² that after discussing the modalities of the development and in furtherance of the same, they have agreed to add the second and third petitioners as they are part of the group companies of Salarpuria-Sattva along with the first petitioner.

¹ *It is acknowledged in clause 8 of this Supplemental Agreement that the further sum of Rs.25,00,00,000/- [Rs. Twenty Five Crores Only] is paid by the petitioners [referred to as the second party] by the cheque dated 03.12.2018. The Petitioner has paid a total sum of Rs. 50,00,000/- (Rs. Fifty Crores Only)*

² *Clause 2 of the Supplemental Agreement*

5. The other salient features of this Supplemental Agreement, for the purposes of the present controversy, is that the respondents and the petitioners have agreed for development of the subject property in parcels stipulating that the respondents shall ensure that there is an allotment letter from M/s KIADB for an extent of 9 acres and 35 guntas in the subject property within 45 days from the date of the Supplemental Agreement with further agreement on the timelines within which the respondents will have to get appropriate letters of allotment and documents of transfer from M/s. KIADB for the remaining extent.

6. The petitioners and respondents, insofar as the first parcel of 9 acre 35 Guntas in the subject property, have agreed on reconstitution of the third respondent [a partnership firm] with the first and second joining the firm to hold a certain stake. The

agreement in this regard in the Supplemental Agreement is in Clause 6 which reads as under:

Clause 6.

It is agreed between the parties for the purposes of development of extent of 9 acres 25 – from out of the schedule property as per the terms of the MOU, the party No. 3 of the first party shall be reconstituted and the party No. 2 of the second party along with party No. 1 of the second party shall become one of the partner in the party No. 3 of the first party firm holding 54% in the party No. 3 of the first party firm. The first party undertakes to cause the reconstitution of the party No. 3 of the first party as one of the Condition Precedent by the first party. Terms and conditions of the reconstitution of the party No. 3 firm of the first party shall be mutually agreed between the parties for execution of mutually agreed definitive reconstitution partnership deed to be executed before allotment of the schedule

There is also certain agreement on the respondents holding equity in the third petitioner for the

development of the remaining extent of 10 acres 18 guntas in the subject property³.

7. Significantly, the respondents and petitioners have recorded that the terms of the Supplemental Agreement are in addition to the terms and conditions of the MOU and except the terms agreed under the Supplemental Agreement there will be no changes in the MOU. The Clause-13 in this regard reads as under:

13. The above terms are in addition to the terms and conditions of the MOU dated 06/10/2018 and except the above, there are no other changes in the MOU.

8. The learned Senior Counsels, Sri. G.L. Vishwanath and Sri. S.K.V. Chalapathy are heard on behalf of the petitioners and the respondents respectively. Though initially both elaborated on this Court's jurisdiction under Section 11 of the Arbitration

³ *The agreement in this regard is in Clause 7.*

and Conciliation Act, 1996 [for short, '*the Arbitration Act*'] relying upon the decisions of the Hon'ble Supreme Court in *SBP & Co., v. Patel Engineering Limited and Another*⁴ and *Vidya Drolia and Others v. Durga Trading Corporation*⁵, they ultimately submitted in unison that this Court will have to decide on whether the agreement for arbitration in the MOU subsists after the execution of the Supplemental Agreement in the light of the Supreme Court's decision in *Vidya Drolia [supra]*. The learned Counsels are also categorical that the dispute between the petitioners and the respondents pertains to the petitioners' claim to recovery of the amounts paid to the respondents as acknowledged under the MOU and the Supplemental Agreement.

9. Sri. S.K.V. Chalapathy submits that the respondents' opposition to the appointment of a sole arbitrator as requested by the petitioners is twofold: the

⁴ [2005] 8 SCC 618

⁵ [2021] 2 SCC 1

MOU is novated with the execution of the Supplemental Agreement and as such, the arbitration clause in the MOU would not survive; the Supplemental Agreement does not contain any agreement for arbitration and though there is a general reference to the MOU terms, insofar as the agreement for arbitration, a general reference will not suffice. If the agreement for arbitration in the MOU is to be read into the Supplemental Agreement, there must be a specific reference to the agreement for arbitration as against a general reference to the terms of the MOU.

10. Sri. S.K.V. Chalapathy, on the ground of novation of the MOU, submits that even a bare reading of the terms of the MOU would indicate that the agreement for development of the 20 acres of land [*the subject property*] was only between the first petitioner and the respondents with the onus of securing the allotment of the land on the respondents and the

development of the commercial complex on the first respondent. However, with the execution of the Supplemental Agreement, and with the addition of the second and the third petitioners, the entire onus of developing the commercial complex is taken over by the second and third petitioners. With this substitution, the second and third petitioners have stepped into the first petitioner's shoes and it has effectively transferred the onus of development to the first and the second respondents resulting in novation of the MOU. Sri. S.K.V. Chalapathy relies upon Clause-11 of the MOU which reads as under, to buttress his submissions in this regard.

"11. The party No.1 of the Second Party has informed the First Party that the Party No.2 the Second Party will be one of the shareholders in the PartyNo.3 of the Second Party company. Hence, all responsibility towards the construction of the project on the Schedule Property allocated to the Party No.3 of the Second

Party in terms of the clause 7 shall be the responsibility of the Party No.2 of the Second Party."

11. Sri. S.K.V. Chalapathy next submits that the second and the third petitioners have taken over the responsibility of the development of the subject land on terms as are contained in the MOU and as such, there is a general reference to the terms of the MOU in Clause-13 of the Supplemental Agreement with a stipulation that the terms of the Supplemental Agreement are in addition to the terms of the MOU and there would not be any change in the terms of the MOU except as are mentioned in the Supplemental Agreement. This general reference to the MOU cannot be construed as incorporation of the agreement for arbitration into the Supplemental Agreement as required under the provisions of Section 7[5] of the Arbitration Act.

12. Sri. S.K.V. Chalapathy, relying upon the decision of the Hon'ble Supreme Court in *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*⁶, and the reiteration of the law laid down in such decision in *Duro Felguera S.A. v. Gangavaram Port Limited*⁷, submits that the settled proposition is that a general reference to another contract would not have the effect of incorporating the agreement for arbitration unless the necessary conditions are satisfied. The petitioners, who rely upon a general reference, cannot contend that those conditions are established in the present case. He relies on the reiteration of the following paragraph in *M.R. Engineers and Contractors Private Limited [supra]*.

"24. *The scope and intent of Section 7(5) of the Act may therefore be summarised thus:*

(i) *An arbitration clause in another document, would get incorporated into a contract by*

⁶ [2009] 7 SCC 696

⁷ [2017] 9 SCC 729

reference, if the following conditions are fulfilled:

- (1) the contract should contain a clear reference to the documents containing arbitration clause,*
 - (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,*
 - (3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.*
- (ii) 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. 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.*
- (iii) 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.

- (iv) *Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) 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. 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."*

13. Sri. G.L. Vishwanath does not contest the aforesaid proposition, but he argues that if the circumstances of the present case are tested as against the requirements enunciated in *M.R. Engineers and Contractors Private Limited [supra]*, the respondents cannot gainsay that the reference in Clause-13 of the Supplemental Agreement would also be a specific reference to the agreement for arbitration in the MOU. He submits that the MOU was for development of total

extent of 20 acres - the subject property, however because of circumstances, the development of this property is divided into two parts with the development of 9 acres and 35 guntas being the first phase and the development in the remaining extent being in the next phase with the specific understanding as to the corresponding rights in the development with the reconstitution of the third respondent with certain equity to the first petitioner and the shareholder rights for some of the respondents in the third petitioner. The Supplemental Agreement is executed in continuation of the MOU because of these terms and payment of further amounts.

14. Sri. G.L. Vishwanath emphasizes that apart from the above, the respondents acknowledge that the petitioners are part of Salarpuria-Sattva group of companies and the development rights are modulated *inter se* the petitioners and the respondents in the

background of this undeniable fact for commercial reasons. The argument that the second and third petitioners have taken over the onus of developing the subject property independent of the first petitioner is specious. The terms for the development of the subject property, including the terms as regards the conditions precedent, subject to the changes are continued in the Supplemental Agreement. The MOU and the Supplemental Agreement are not separate agreement between the petitioners and the respondents and both constitute one agreement. Therefore, the agreement for arbitration subsists.

15. Sri. G.L. Vishwanath further submits that the question whether the Supplemental Agreement novates the MOU, and even the question whether the underlying agreement for arbitration in the MOU is continued by reference in the Supplemental Agreement, could be considered by the sole Arbitrator as these

questions would require a detailed enquiry with opportunity to both the petitioners and the respondents to substantiate their respective stands. This Court, given the settled law that the arbitral tribunal must be the *preferred first authority* to determine and decide all questions of non-arbitrability, must therefore appoint a sole Arbitrator. He emphasizes that this Court must also bear in mind that it is now settled that the jurisdiction under Section 11 of the Arbitration Act is limited to a *primary first review* to weed out manifestly and *ex facie* non-existent and invalid arbitration agreements and non-arbitral disputes without getting lost in the thicket of facts.

16. In the facts and circumstances of the case and the rival submissions in the background of admitted settled legal positions, the question for consideration is:

Whether this Court, at this pre-arbitral stage, can conclusively opine that the MOU is novated with the execution of the Supplemental Agreement or that the reference to the terms of the MOU in this Supplemental Agreement cannot be construed as a reference to the agreement for arbitration in the MOU.

17. At the outset, this Court must record its considered view that the Hon'ble Supreme Court in *Vidya Drolia [supra]* has reiterated the exposition in *Shin-etsu Chemical Company Limited v. Aksh Optifibre Ltd.*⁸ that the correct approach at the reference stage would be to restrict the review of the circumstances of a given case to a *prima facie* finding that an agreement for arbitration exists and is not inoperative. The approach to be adopted at the reference stage is to ascertain whether it can be *plainly argued* that the arbitration agreement is in existence, and because this approach

⁸ [2005] 7 SCC 234

must be the guiding factor, it is declared thus in *Vidya Drolia [supra]*.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to

affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

The Hon'ble Supreme Court in *Sanjiv Prakash v. Seema Kukreja and Others*⁹, in the context where the defence was based on novation of the relevant contract, has once again reiterated that it would be unsafe to conclude one way or the other about the existence of an agreement for arbitration on a *prima facie* review of facts and that a deeper consideration must be left to the arbitral tribunal which has to examine the documentary and oral evidence and then arrive at a conclusion.

18. As regard the present case, the first agreement in the MOU is for development of commercial complex in the entire subject property. This development is subsequently split into two parts with specific agreement on reconstitution of the third

⁹ [2021] 9 SCC 732, an authority relied upon by Sri G L Viswanath

respondent to assure a certain stake in it for the first petitioner and shareholder rights for the respondents in the third petitioner. The terms in this regard are part of the Supplemental Agreement. The reconstitution of the firm, with stakes to the first petitioner, is insofar as the development of the first parcel of land measuring 9 acres 35 guntas and the agreement on equity shareholding is insofar as the remaining extent of land.

19. The covenant that the responsibility of the construction of the commercial complex is allocated to the third petitioner to the complete exclusion of the first or second petitioner will have to be examined in the background of the aforesaid agreement and the other terms of the MOU which are reiterated with the execution of the Supplemental Agreements. Without examination of these circumstances, and other circumstances, after a detailed enquiry and with due opportunity to the parties to adduce evidence, there

cannot be any conclusive opinion on either novation or the inter play between the MOU and the Supplemental Agreement. As such, in the facts and circumstances of the case, this Court, on a *prima facie* review, must opine that the petitioners can plainly argue that the agreement for arbitration subsists.

20. In the aforesaid circumstances, this Court must answer the question framed in the negative and opine that all questions relating to novation of the MOU with the execution of the Supplemental Agreement and the significance of reference to the terms of the MOU in Clause-13 of the Supplemental Agreement, which touch upon the jurisdiction of the sole Arbitrator to enter reference of the dispute, must be decided by the sole Arbitrator as required under Section 16 of the Arbitration Act. Therefore, this Court is of the considered view that the petition must be allowed appointing a sole Arbitrator to enter reference of the

dispute between the petitioners and the respondents leaving all questions open to be decided in such proceedings. Further, this Court is of the considered view that Hon'ble Sri. Justice P. Krishna Bhat, a former Judge of this Court must be appointed as the sole Arbitrator.

Therefore, the following:

ORDER

- [a] The petition is allowed;
- [b] Hon'ble Sri Justice P. Krishna Bhat, a Former Judge of this Court, Address: No.234, 4th Cross, 4th Main, I Block, Koramangala, Bengaluru - 560 034, is appointed as the sole Arbitrator to enter reference of the dispute between the petitioner and the respondents.
- [c] The Registry is directed to communicate this order to the Arbitration

and Conciliation Centre (Domestic and International), Bengaluru, and Hon'ble Sri Justice P. Krishna Bhat, a Former Judge of this Court, Address: No.234, 4th Cross, 4th Main, I Block, Koramangala, Bengaluru - 560 034.

**SD/-
JUDGE**

AN/-

CMP NO. 449/2022

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

[JAGANMAYI BUILDERS AND DEVELOPERS PRIVATE LIMITED
AND OTHERS VS. MR SUMANTH REDDY AND OTHERS]

BMSPJ

09.09.2022

(VIDEO CONFERENCING / PHYSICAL HEARING)

ORDER

After pronouncement of the orders in this petition today, Sri. G.L. Vishwanath, the learned Senior Counsel who appears for the petitioners, submits that the petitioners will request for private arbitration with liberty to the petitioners to request the sole Arbitrator, Hon'ble Sri. Justice P. Krishna Bhat, to decide on the venue and the procedure to be followed in such private arbitration.

Sri. Siddhartha H M, the learned counsel who appears for the respondents, is heard on this request, and he submits that there could be private arbitration by Hon'ble Sri. Justice P. Krishna Bhat and the parties could be granted liberty to request for decision on the venue and the procedure but insofar as the fee payable to the learned Arbitrator, this Court may observe that the parties shall pay

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the learned sole Arbitrator's fee as per the Fee Schedule in the Rules governing the arbitration at the Arbitration and Conciliation Centre [Domestic and International], Bengaluru.

In view of this submission, Hon'ble Sri. Justice P. Krishna Bhat, is requested to enter reference of the dispute for private arbitration and decide on the venue and the procedure for such arbitration. The parties are directed to pay equally, apart from the venue charges and secretarial assistance, the fee for arbitration in terms of the Fee Schedule in the Rules governing the arbitration at the Arbitration and Conciliation Centre [Domestic and International], Bengaluru and subject to these Rules.

**SD/-
JUDGE**

AN/-

List No.: 1 Sl No.: 50