

(2010) 07 BOM CK 0011

In the Bombay High Court

Case No : Arbitration Petition No. 24 of 2009

Discovery Properties and Hotels Pvt. Ltd.

APPELLANT

Vs

City and Industrial Development Corporation of Maharashtra
Ltd. (CIDCO)

RESPONDENT

Date of Decision : 16-07-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 7

Citation : (2011) 6 RCR(Civil) 2693

Hon'ble Judges : Chandrachud D.Y., J

Bench : Single Bench

Advocate : Hiroo Advani, Dinesh Pednekar, Vatsal Shah, instructed by Advani and Co, for the Appellant; A.A. Kumbhakoni and A.M. Kulkarni, for the Respondent

Final Decision : Dismissed

Judgement

Chandrachud D.Y., J.—The petition has been filed u/s 11(6) of the Arbitration and Conciliation Act, 1996, for the appointment of an arbitrator.

2. By a letter dated 10 December, 2007, the Respondent accepted the offer of the Petitioner for the allotment of a plot at Kharghar, Navi Mumbai, for the construction of a Five Star Hotel. The balance amount payable, apart from the earnest money of Rs. 2.5 crores, was Rs. 78.28 crores.

3. The Respondent by its letter dated 3 February, 2009 sought the payment of the balance lease premium failing which it was stated that the agreement would be liable to be terminated by forfeiting the earnest money deposit and twenty five percent of the agreed lease premium. The Petitioner by a letter dated 12 March, 2009 recorded that it had paid a sum of Rs. 39.14 crores towards the first installment of the bid consideration. However, according to the Petitioner, it had agreed to take up the project on a representation by the Respondent that certain "milestones" would be achieved by the Respondent including the construction of an International Airport at Navi Mumbai; a Fly Over adjacent to the plot; the

setting up of a Special Economic Zone at Navi Mumbai; the completion of certain road projects and the setting up of a Central Park and golf course. The Petitioner stated that it was ready and willing to make payment of the second installment amounting to Rs. 39.14 crores only if the Respondent completed some or all the milestones, referred to earlier and subject to the grant of additional F.S.I. The Petitioner also sought permission to carry out a mixed development project. In terms of Clause 44 of the Letter of Allotment, which according to the Petitioner, contemplates appointment of the Managing Director of the Respondent as arbitrator, the Petitioner nominated Mr. G.S. Gill, Managing Director of the Respondent as arbitrator. This was followed by a letter dated 12 March, 2009.

4. In the petition u/s 11(6) and in the affidavit in rejoinder, the Petitioner has relied upon Clause 44 of the Letter of Allotment and Clause 41 of the bid document as containing an agreement to refer disputes to arbitration. Clause 41 of the bid document provides as follows:

41. Interpretation of general terms & conditions for disposal of plots of land In case of dispute as regards interpretation of the General terms and conditions of disposal of plots of land and of the invitation of offer or any thing therefrom, the final decision rests with Managing Director of CIDCO and will be binding on all parties as the award of arbitrator.

Clause 44 of the Letter of Allotment is in the following terms:

44. Interpretation of general terms and conditions for disposal of plots of land In case of dispute as regards interpretation of the General terms and conditions of disposal of plots of land and of the invitation of offer or any thing therefrom, the final decision rests with Managing Director of CIDCO and will be binding on all parties as the award of arbitrator.

5. The case of the Petitioner is that an arbitration agreement can be spelt out from these two clauses. Reliance is sought to be placed on the judgment of a learned Single Judge of the Delhi High Court in Smt. Bhagwan Devi Vs. The Chairman, Delhi Agricultural Marketing Board, . On the other hand, it has been urged on behalf of the Respondent that in a judgment of a learned Single Judge of this Court dated 3 August, 2001 in Mrs. Mini Radhakrishnan v. CIDCO, Arbitration Application No. 1 of 2001 a similar clause was construed. It was urged that the learned Single Judge while relying upon the judgment of the Supreme Court in (Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd., Kanpur, held that such a clause would not constitute an agreement to refer disputes to arbitration.

6. Clause 44 of the Letter of Allotment provides that disputes as regards the interpretation of the general terms and conditions of the disposal of plots and of the invitation of offer or anything therefrom, shall rest with the final decision of the Managing Director of CIDCO and will be binding on all parties "as the award of arbitrator". The clause does not, it must be noted, postulate an intention on the part of the parties to the agreement to refer their disputes to a private

Tribunal for arbitration, nor does the clause provide that the arbitral Tribunal has been empowered to adjudicate upon the disputes between the parties. The words, "as the award of arbitrator" do not specify that the Managing Director of the Respondent shall stand appointed as an arbitrator, that there would be a reference of disputes to the Managing Director or that the Managing Director was authorised to adjudicate upon disputes in an impartial manner. Merely equating the decision of the Managing Director with the award of an arbitrator does not constitute either an agreement to refer disputes to arbitration or indicate an intention of the parties that the Managing Director was to act as a private Tribunal in adjudicating upon their disputes. In fact, though it is not necessary to refer to the heading of the clause, it may also be noted that Clause 44 is entitled "Interpretation of general terms and conditions for disposal of plots of land".

7. u/s 7 of the Arbitration and Conciliation Act, 1996, an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement has to be in writing. The law, however, does not prescribe any particular form of an arbitration agreement and such an agreement can be contained in a document, in an exchange of communication or in an exchange of statements of claim and defence in which the existence of such an agreement is alleged by one party and not denied by the other. In (Jagdish Chander Vs. Ramesh Chander and Others, the Supreme Court emphasized that the terms of the agreement must indicate an intention on the part of the parties to the agreement to refer disputes to a private Tribunal for adjudication and a willingness to be bound by the decision of the Tribunal. The language used by the parties should disclose a determination and obligation to go to arbitration. The Supreme Court held as follows:

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private Tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private Tribunal. (c) The private Tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private Tribunal in respect of the disputes will be binding on them.

The Supreme Court held that the mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement. In the present case, a reading of both Clause 44 of the Letter of Allotment and Clause 41 of the bid document shows that parties merely contemplate that the final decision in the event of a dispute as regards the interpretation of the terms and conditions

for the disposal of the plot and of the invitation of offer or anything therefrom, would rest with the Managing Director of the Respondent. This decision was to be binding on the parties "as the award of the arbitrator". Merely stating that the decision of the Managing Director would be binding on the parties "as the award of arbitrator" does not constitute an agreement between the parties either to refer their disputes to arbitration nor does it reflect an intention on their part that the Managing Director was to adjudicate upon their disputes as a private Tribunal. In these circumstances, in view of the law laid down by the Supreme Court, it is not possible to accede to the contention of the Petitioner.

8. A learned Single Judge in a decision dated 3 August, 2001 in the case of Mini Radhakrishnan (supra) had occasion to consider the following clause:

19. In case of disputes as regards interpretation of the terms of this scheme (of) anything therefrom, the final decision will rest with the Managing Director, CIDCO and will be binding on all parties as the award of the arbitrators.

The learned Single Judge relied upon the judgment of the Supreme Court in Bharat Bhushan (supra) and came to the conclusion that it did not constitute an arbitration clause.

9. Counsel appearing on behalf of the Petitioner sought to place reliance on a judgment of a learned Single Judge of the Delhi High Court in Bhagwan Devi (supra). In that case, it was provided that if any dispute touching the effect and meaning of the agreement arose between the parties, it shall be referred to the Chairman of the Delhi Agricultural Marketing Board whose decision was to be final and binding upon the parties. The Delhi High Court noted that from the judgment of the Supreme Court in (Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., the essential elements of an agreement were as follows:

- (i) There must be a present or a future difference in connection with some contemplated affair;
- (ii) There must be the intention of the parties to settle such difference by a private Tribunal;
- (iii) The parties must agree in writing to be bound by the decision of such Tribunal; and
- (iv) The parties must be ad idem.

The learned Single Judge of the Delhi High Court held that in that case, parties had resolved their disputes in terms of an agreement and there was a "contemplation of possibility of some disputes arising in respect of implementation of the agreement", and that it was to take care of such a situation that the clause noted earlier was included in the agreement. In view of the decision of the Supreme Court in Jagdish Chander (supra), to which a reference has been made in an earlier part of the present judgment, it is clear

that the language used by the parties should disclose a determination and obligation to go to arbitration and not merely a contemplation or possibility of doing so in future. Having regard to the law laid down by the Supreme Court, it would not be possible to accept the submission on facts. For the aforesaid reasons, it cannot be held that there was an arbitration agreement between the parties to refer their disputes to arbitration. The arbitration petition shall accordingly stand dismissed. There shall be no order as to costs.