

(2012) 11 BOM CK 0099

In the Bombay High Court

Case No : Arbitration Application No. 248 of 2012

G.A. Builders Private Limited

APPELLANT

Vs

Chembur Nishant Co-Operative Housing Society Limited

RESPONDENT

Date of Decision : 27-11-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2012) 11 BOM CK 0099

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Pratik Sakseria, with Ms. Nidhi Singh instructed by M/s Vidhi Partners, for the Appellant; Niranjana Shimpi instructed by and Kishore G. Nagavekar, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka J.

1. By this application filed u/s 11 of the Arbitration and Conciliation Act 1996, applicant seeks appointment of Arbitrator relying upon Clause-47 of the alleged agreement dated 27 February 2010. Respondent Society is owner of a plot of land adm. 896.98 sq. metres along with building thereon being building no. 32, known as "Chembur Nishant Co. Op. Housing Society Ltd", bearing Survey No. 67 to 71, C.T.S. No. 826 situate at Subhash Nagar, Chembur. The building was in need of urgent repairs. It is the case of the applicant that the Society had proposed to redevelop the property. By letter dated 23 January 2009, applicant gave terms of the development to the respondent Society. On 1 February 2009, Special General Meeting of the respondent Society came to be held in which, members unanimously gave their consent and approval to the development proposal to be furnished by the applicant. It is the case of the applicant that on 27 February 2010, applicant and respondent Society entered into development agreement, whereby respondent Society agreed to grant development rights in respect of the property to the applicant.

2. It is the case of the applicant that the applicant paid a sum of Rs. 1,54,82,752/- to Maharashtra Housing & Area Development Authority (MHADA) for seeking necessary application/permission for allotment of additional buildable area. It is not in dispute that applicant submitted Confirmation Deed dated 17 June 2011 and got the said alleged agreement registered unilaterally.

3. The applicant, thereafter by letter dated 30 September 2011 called upon the Society to execute irrevocable Power of Attorney in its favour in accordance with the said alleged agreement dated 27 February 2010. It is the case of the Society that Society has not received any such alleged letter dated 30 September 2011.

4. The applicant thereafter issued notice invoking alleged arbitration clause and filed this application for appointment of Arbitrator.

5. The respondent Society has filed detailed affidavit-in-reply. It is the case of the Society that a draft of the proposed agreement to be finalized was furnished by the applicant to the Society which was undated consisting many blanks. It is submitted that the applicant had obtained signature of the members of the Society on the said draft copy of the proposed agreement to be finalized, by misrepresenting them that a member would get partial amount from the developer at the time of execution. However, none of the members received any amount from the applicant. It is averred in the affidavit that the applicant obtained consent of the members by playing fraud upon them. It is averred that the agreement being relied upon by the applicant is unilaterally registered with Deed of Confirmation, which is a manipulated document and is different than the copy of the agreement which was furnished to the respondent Society. It is averred that petitioner is relying upon a fabricated document and is thus unenforceable as against the respondent Society which the Society and/or its members have not executed at any point of time.

6. The learned counsel appearing for the applicant submits that it is not in dispute that Society passed a resolution to enter into development agreement with the applicant. It is submitted that there is no dispute that copy of agreement being relied upon by the Society consists seal of the Society and also signature of office bearers. It is submitted that initial consideration agreed to be paid by the applicant to the members was though tendered by the applicant to the members, the same was not accepted. It is submitted that pursuant to the agreement, the applicant has taken steps and has paid a substantial amount to MHADA. It is submitted that since the respondent Society has refused to comply with their part of obligation, dispute has arisen and thus, matter is required to be referred to arbitration under Clause-47 of the agreement.

7. The learned counsel appearing on behalf of the respondent Society on the other hand, submits that applicant has manipulated and fabricated the material clause of the agreement as well as has played fraud in execution of the agreement. It is submitted that only a draft agreement was furnished to the respondent Society. Applicant never paid any consideration amount. The final

terms and conditions of the agreement were never agreed. According to respondent Society, the terms and conditions of the final Deed of Development Agreement were not concluded and thus, no agreement has been arrived at. The learned counsel for the respondent Society invited my attention to Clause-21 of the draft agreement, which was furnished to the Society, which has been scored off by the applicant in the agreement dated 27 February 2010 relied upon by the applicant. The learned counsel invited my attention to various recitals and other clauses of the alleged agreement to demonstrate that various blanks which were found in the draft development agreement furnished to the respondent Society had been subsequently filled up. It is submitted that after furnishing the draft of the agreement proposed to be entered into, the applicant never furnished any document nor any terms were finalized. It is submitted that thus, when there are serious allegations of forgery, manipulation and fabrication in the material terms of the agreement and the agreement not having been concluded, dispute cannot be referred to the Arbitrator and such dispute can only be decided by the Civil Court.

8. On my query raised to the learned counsel appearing for the applicant, the learned counsel fairly admitted, on taking instructions, that copy of the agreement dated 27 February 2010 relied upon by the applicant, was never furnished to the respondent Society. It is admitted position that at no point of time further consideration was offered to the Society. It is also admitted position that before signing the Deed of Confirmation and getting the document registered, Society was never informed. It is also admitted position that before making payment to MHADA, applicant never obtained consent from the respondent Society.

9. The record produced by both the parties indicates that there is serious dispute about existence of arbitration Agreement. It is admitted position that there is difference in the copy of the agreement relied upon by the applicant and the copy furnished to the respondent Society. The copy, admittedly furnished to respondent Society, does not bear signature of the applicant whereas copy relied upon by the applicant bears signature of the applicants.

10. In view of these serious allegations of forgery, fabrication and manipulation and in the circumstances aforesaid, I am of the view that such dispute cannot be referred to arbitration and can be tried only by Civil Court. Application is therefore rejected. There shall be no order as to costs.