
(2007) 07 BOM CK 0064

In the Bombay High Court

Case No : Arbitration Petition (Lodg.) No. 233 of 2007

Oberoï Constructions Pvt. Ltd.

APPELLANT

Vs

Worli Shivshahi Co-op. Housing

RESPONDENT

Date of Decision : 11-07-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 9

Citation : (2008) 1 ARBLR 106 : (2007) 5 BomCR 758

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : J.J. Bhatt, Biren Saraf and Amit Naik, instructed by Naik, Naik Iyer and Co, for the Appellant; Jai Chinai, Shailesh Shah and Prakash Gunwani, instructed by Shiralkar and Co., for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The petitioners have invoked the provision of Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "Arbitration Act") based on a initialled draft of Memorandum of Understanding (MOU).

2. The petitioners averred that on 1st March, 2004 MHADA gave an in-principle approval for handing over to the respondents approximately 11,827.74 (approximately) square meters of land as more particular described in the petition.

3. In April, 2004, the respondents had invited bids from various developers for redevelopment under Development Control Regulation No. 33(9) of the Development Control Regulations read with MHADA Act.

4. In April-May, 2004, the petitioners submitted their offer to acquire rights, title and interest in respect of the property of the respondents and deposited a sum of Rs. 2,00,00,000/-(Rupees Two crores only) with the respondent. Various other developers also submitted their offers. Meetings were held between the office bearers/representatives/members of the respondents and the representatives of

the petitioners. The respondents requested certain revisions in the offer submitted by the petitioners. The petitioners submitted various revised offers from time to time.

5. On 7th August, 2005, the petitioner's offer was accepted. The petitioners were then granted rights in terms of the petitioner's offer dated 30th June, read with their letters dated 22nd July, 2005, 23rd August, 2005, 19th September, 2005, 30th September, 2005 and 25th October, 2005.

6. On 6th December, 2005, the respondents by their another letter dated 6th December, 2005 informed the petitioner that they were in process of drafting terms and conditions to be incorporated in the MOU and requested the petitioner to send them the proposed lay out and floor plan. The petitioners by their letter dated 6th December, 2005, accepted the grant of rights by the respondents to the petitioners.

7. On 8th January, 2006, the respondents got prepared a MOU and by their letter dated 8th January, 2006 forwarded the same to the petitioners for their approval and requested for their comments.

8. On 22nd January, 2006 some of the respondents' members also visited the projects undertaken by the petitioners on 22nd January, 2006 and expressed satisfaction with the projects done or being done by the petitioners. Floor plans of the flats were also discussed with the members of the respondents. Thereafter various meetings were held and discussions took place between the representatives of the petitioners and the respondents for the purpose of crystallizing the detailed terms and conditions to be incorporated in the MOU.

9. In January-October, 2006, the petitioners appointed architect being Mr. Pravin Naik who had commenced liaisoning with MHADA, the Urban Development Department of the Government of Maharashtra and the Municipal Corporation. Architects from Singapore, viz. Subrana were appointed as design Architect for planning and designing the buildings. A meeting was held on 7th February, 2006 at the office of Architect Shahshi Prabhu where the typical floor plan was explained. In February, 2006, a detailed survey of the plot was done in order to undertake the process of architectural planning and designing. In or about March, 2006, drawing showing different stages of the development was prepared and explained. At the request of the respondents, Sterling Engineering and Consultancy Services Pvt. Ltd. studied the scheme and by their letter dated 16th March, 2006 issued their confirmation to work on their project. Larsen and Turbo Ltd. vide their letter dated 16th March, 2006 accorded their consent to the construction of the buildings. The Managing Committee members of the respondents visited the Head Office of the petitioners and had meeting with the representatives from the architect and the engineering department. On 15th April, 2006, various sketches and drawings were sent to the respondents. The drawings were also sent to Shashi Prabhu and Associates. On 22nd April, 2006 colour copies of the presentation booklet along with the documents were sent to

the society for its members. The details of the modular kitchen were also sent on 25th April, 2006. 3D views colour copies of the development were got prepared from Rendercard, who are specialist in making 3D perspective images and the same were sent to the respondents in October, 2006.

10. On 9th October, 2006, ultimately, at a meeting held in the office of the Advocates of the respondent on 7th October, 2006, the terms of the MOU were mutually agreed upon by the parties. Accordingly, by a letter dated 9th October, 2006, the petitioners forwarded to the respondents the agreed MOU initiated by Mr.Vikas Oberoi, Director of the petitioners.

11. In a special General Meeting of the respondents held on 22nd October, 2006, all the terms and conditions (save and except some minor changes) to be incorporated in the MOU, were approved by the respondents' members. The Managing Committee was authorized to sign and execute the MOU.

12. The respondents by their letter dated 25th October, 2006 forwarded the final MOU to the petitioners and requested the petitioners to send the same back to the respondents after initialling the same.

13. On 1st November, 2006 the petitioner accepted the said minor changes suggested by the respondents, initialled two copies of the MOU, and by their letter dated 1st November, 2006 forwarded the same to the respondents.

14. The respondents by their letter dated 3rd November, 2006 responded to the petitioner's letter dated 2nd November, 2006, but did not raise any objection of any kind.

15. The petitioners by their letter dated 2nd December, 2006 recorded some of the aforesaid facts and requested the respondents to do the needful.

16. In or about 1st week of January, 2007, one Sunil Purohit of the respondents contacted Vikas Oberoi of the petitioners and sought to negotiate the terms and conditions of agreement already arrived at between the petitioners and the respondents.

17. The respondents addressed letter dated 5.1.2007 stating that the MOU initialled and forwarded by the petitioners was an offer which was being considered by the respondents. It was incorrectly alleged that the amount of Rs. 2 crores paid by the petitioners was not any advance but only earnest money deposit as an expression of bonafides so that negotiations can be proceeded with for finalizing the MOU.

18. By a letter dated 9th January, 2007, the petitioners recorded the facts and pointed out that there were no outstanding issues and that the MOU had been finalized. The petitioner also expressed their willingness to meet the respondents.

19. The respondents by a response letter dated 10th January 2007 merely denied the petitioners' contentions and suggested a meeting on 15th January 2007. The said meeting was re-scheduled on 19th January 2007 and finally re-

scheduled to 25th January, 2007.

20. The petitioners received letter dated 25th January, 2007 from the respondents wherein the respondents falsely alleged that MOU was not finalized.

21. In response to the respondents' letter dated 25th January, 2007, the petitioners by their letter dated 1st February, 2007 inter alia denied that the MOU was not finalized and once again expressed their readiness and willingness to go ahead with the transaction and perform their part of the contract.

22. By a letter dated 20th February, 2007, the petitioners suggested that a joint meeting be held with the solicitors of both the sides. Various letters were exchanged between the petitioners and respondent between 20th February, 2007 to 13th April, 2007.

23. On 14th April, 2007, a meeting was held between Mr. Sunil Purohit and seven others of the respondent and Mr. Vikas Oberoi, Mr. Saumil Daru, Mr. Rajendra Chandukar and Miss. Bhagwati Raghani, of the petitioners wherein the said Mr. Purohit once again sought to re-negotiate the terms, and threatened that if their demands are not met, the respondents would wriggle out the valid, binding, subsisting and concluded agreement and hence this petition.

24. Simultaneously upon this petition, by a letter dated 23rd April, 2007 the petitioners invoked the arbitration agreement and referred the disputes between the parties to arbitration. The petitioners appointed an arbitrator and called upon the respondents to appoint an arbitrator.

25. The respondents have denied and resisted even the existence of any binding contract based on the MOU and the above correspondences.

26. Admittedly, there is no signed MOU executed between the petitioners and the respondents. By letter dated 25.10.2006 the respondents-society has forwarded the draft MOU to be initialled by the petitioners, subject to suggested minor changes. In the special general meeting of the society on 22.10.2006 it was decided to go ahead with the NOC and signing of MOU based on the points suggested in the special general meeting held on 22.10.2006. There was alteration and modification going on even in the draft MOU from time to time, since June, 2005. In the letter dated 8.1.2006 issued by the society-respondent No. 1, it was informed to the petitioners specifically that the draft MOU would be circulated to all members and the Architect for their inputs and final approvals. Therefore though two copies of the MOU initialled by the petitioners forwarded by covering letter dated 1.11.2006 to respondent No. 1 even then it is difficult to accept the contention as raised by the learned senior counsel Mr. J.J. Bhatt for the petitioners that there exists a valid contract between the parties as the petitioner's Director has initialled two copies of the MOU. What is required and even agreed by the parties as reflected in the letter dated 25.10.2006 itself that the said initialled MOU would be signed later on, but firstly it would be circulated amongst the members. The initialled draft MOU therefore was subject to the

signature of the parties for proceeding with the development/transaction.

27. The petitioners themselves by letter dated 2.12.2006 communicated to the respondents-society to approve the said MOU initialled by them from the General Body. It was also communicated that they are awaiting the NOC of the members of the society as required by the MOU to proceed with the work of development. The respondents-society also by various communication even after the receipt of the draft of the MOU, has communicated to the petitioner that the offer made by the petitioners and the draft MOU for the proposed development of society could be proceeded further only if the draft MOU approved by the members of the society. It was also informed that various members have raised number of substantive issues in regard to the MOU which required detailed consideration. The petitioners also requested respondent No. 1 to fix the meeting so that any outstanding issues regarding finalisation of the MOU could be clarified. The respondent=society again by letter dated 25.1.2007 re-iterated that the MOU is not yet finalised. Therefore, in the facts and circumstances of the case, at this stage, it is difficult to accept the contention as raised by the learned Counsel for the petitioners that there was a contract executed by this initialled MOU vide *Dresser Rand S.A. Vs. BINDAL Agro Chem Ltd. and K.G. Khosla Compressors Ltd., and United Bank of India Vs. Ramdas Mahadeo Prashad and Others, .*

28. Admittedly, this MOU is not only agreement between the society-respondent No. 1 and the petitioners. The requirement of NOC from the members and the clauses of MOU further shows that all concerned society members would be bound by this MOU and its terms and conditions. Therefore, such MOU cannot be said to be a final agreement or any agreement of contract of development as contended to claim any right or specific performance against respondents or its members.

29. Admittedly, in all the correspondences as referred in the petition and reply or rejoinder except the draft MOU in question there is no agreement for arbitration to refer such dispute. In the absence of any agreement in those correspondences, at this stage, it is difficult to accept the case of the petitioners and that they are entitled to invoke Section 9 of the Arbitration Act. The reliance on *Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.,* is of no assistance to the petitioners. The facts are distinct and distinguishable. There was signed partnership agreement in that case. In the present case, there is no concluded contract as observed above, either based upon correspondence or MOU in question vide *Smt. Gitarani Paul Vs. Dibyendra Kundu alias Dibyendra Kumar Kundu, .*

30. The petitioners have already filed an application u/s 11 of Arbitration Act for appointment of an Arbitrator based on the arbitration clause of MOU. At this stage of the proceeding, I am not expressing on the merits of the said agreement or arbitration clause. The parties are at liberty to submit their case u/s 11 of Arbitration Act by putting more material or documents for appointment of Arbitrator to resolve the dispute based on the MOU. At this stage, in view of the

above facts and circumstances, I am of the view that there is no binding contract executed between the parties and, therefore, there is no arbitration clause even to invoke Section 9 of the Arbitration Act vide *Nasir Husain Films Pvt. Ltd. v. Saregama India Pvt. Ltd.* in Arbitration Petition No. 81/2007 dated 4th May 2007. The submission of the learned senior counsel Mr. Jai Chinai is acceptable.

31. Admittedly, the petitioners have deposited with the respondents-society about Rs. 2 crores. The respondents contended and even reflected from the documents that the said amount was deposited towards the earnest money and security. Merely because the said amount was deposited in the account of respondent No. 1 that itself cannot be the reason to accept the case of the petitioners that there was consideration paid, based on the said MOU. Pending the present petition, the respondents-society has refunded the said amount as the draft MOU could not be settled and/or approved by respondent No. 1 and its members. It was specifically agreed even in the draft MOU that the amount would be adjusted and/or refunded in case the parties unable to proceed with the agreement.

32. In view of this, at this there is no binding agreement. However, liberty is granted to their case in detail in Section 11 Arbitration petition. stage, I am between the petitioners convinced the to that parties. submit

33. In view of this, the present petition is dismissed. Interim orders stand vacated. No order as to costs.