

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Arbitration Application No. 146/2023

M/s R.K. Constructions, having its registered Office At 143-144,
Guru Jambeshwar Nagar-A, Vaishali Nagar, Jaipur through Its
Partner Raj Kumar Agarwal

-----Petitioner

Versus

Ganesh Narayan Jaiswal S/o Shri Antilal Jaiswal, R/o Plot No.
319, Shiv Mandir Lane, Devi Nagar, New Sanganer Road, Jaipur,
Rajasthan, Presently Residing At Plot No. 98, Rail Nagar, Kings
Road, Ajmer Road, Jaipur, Rajasthan Through Legal
Representative Mr. Jagdish Jaiswal, Son Of Shri Antilal Jaiswal,
Aged 52 Years, Resident Of Plot No. 98, Rail Nagar, Kings Road,
Ajmer Road, Jaipur, Rajasthan

--Non-Applicant/Respondent

Connected With

S.B. Arbitration Application No. 4/2024

M/s R.K. Constructions, having Its Registered Office At 143-144,
Guru Jambeshwar Nagar-A, Vaishali Nagar, Jaipur through Its
Partner Raj Kumar Agarwal.

-----Petitioner

Versus

Jagdish Jaiswal S/o Shri Antilal Jaiswal, R/o Plot No. 319, Shiv
Mandir Lane, Devi Nagar, New Sanganer Road, Jaipur, Rajasthan,
Presently Residing At Plot No. 97, Rail Nagar, Kings Road, Ajmer
Road, Jaipur, Rajasthan.

--Non-Applicant/Respondent

For Petitioner(s)	:	Mr. Gunjan Pathak Ms. Ishita Rawat
For Respondent(s)	:	Mr. Harshit Mittal

HON'BLE MR. JUSTICE SUDESH BANSAL
Order

29/11/2024

1. Both the arbitration applications have separately been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "A&C Act, 1996"), for appointment of an arbitrator to resolve/ settle the disputes/ differences arisen between the parties out of agreements dated 10.08.2021.

2. In arbitration application No.146/2023, applicant alleges to have an agreement of collaboration dated 10.08.2021 (Ann.4) with respondent-Ganesh Narayan Jaiswal in respect of plot No.98 measuring 249.16 Sq.Yrds situated at Rail Nagar Scheme, Kings Road, Ajmer Road, Jaipur to develop two residential duplex Villas. After filing of this arbitration application, sole respondent-Ganesh Narayan Jaiswal passed away and on the basis of his 'Will' dated 23.07.2024 executed in favour of his younger brother, Mr. Jagdish Jaiswal has been substituted as party respondent in place of deceased respondent.

3. In arbitration application No.4/2024, applicant has relied upon the agreement of collaboration dated 10.08.2021 executed between the applicant firm and respondent-Jagdish Jaiswal in respect of Plot No.97 measuring 314 Sq.Yrds situated at situated at Rail Nagar Scheme, Kings Road, Ajmer Road, Jaipur to develop two residential duplex Villas thereupon.

4. In both arbitration applications, applicants and respondents are common parties as also the issue involved is identical in nature, hence with consent of learned counsel for both parties, both arbitration applications have been heard together and are being decided by this common order.

5. Applicant, in both arbitration applications, has come up with a case that applicant is a registered partnership firm, indulged in Real Estate business as also in activities of construction of buildings, development of lands etc. and respondents were willing to get construction of two residential Villas on their respective plots through the applicant firm and in that connection, deal was entered into between the parties. Initially, two hand written

documents dated 30.07.2021 were executed and signed by the parties and later on, two separate agreements of collaboration dated 10.08.2021 were executed. The photostat copies of the documents dated 30.07.2021 and 10.08.2021 have been placed on record.

6. It is further case of applicant that at the time of execution of agreements of collaboration dated 10.08.2021, the vacant possession of plots was handed over by the respondents to the applicant firm and applicant firm started the process of development on aforesaid plots, did *Bhumi Pujan*, got prepared site plans and invested huge amount towards the process of development. It has been pleaded that applicant had paid Rs.1,00,000/- to each respondent through cheque at the time of execution of hand written document dated 30.07.2021 and later on, paid Rs.16,50,000/- thus, total Rs.17,50,000/- as security to each of the respondent but respondents did not cooperate with the applicant firm and did not sign the requisite papers due to which the delay occurred in progress of development, which is attributable to the respondents. As per the terms and conditions of the agreement, after construction of Villas, sale proceeds was to be divided in ratio of 53:47 between the respondents and applicant firm respectively and the construction work was agreed to be made between the period of 13 to 15 months, however such period was extendable with the consent of parties.

7. It has been pointed out that there was no clause in the agreement for termination of the agreement of collaboration by either of the parties. The applicant was ready and willing to proceed with the development in accordance with the agreed

terms and conditions and had paid the security amount of Rs.17,50,000/- to each of the respondent but thereafter, malice intention crept into the mind of respondents and they did not cooperate with the applicant firm. When the applicant visited the site, he came to know that the construction work was being carried out by a third party on the instructions of the respondents, which was clear violation of the terms and conditions of collaboration agreements dated 10.08.2021, hence applicant firm published a public notice in the local newspaper on 10.07.2023 in respect of having a collaboration agreement for both the plots to develop Villas thereupon.

8. It is further case of applicant firm that thereafter, legal notice and replies etc. were exchanged between the parties. The respondents refunded the security amount to the applicant firm and took a stand of cancelling the collaboration agreements unilaterally by serving a legal notice dated 08.08.2023. The applicant was/ is willing to perform the collaboration agreements, hence, sent reply notice dated 09.09.2023 and stated that the applicant firm has already invested huge amount towards development and the unilateral cancellation of collaboration agreement is an arbitrary and illegal act of respondents just to bulldoze the applicant for drawing own benefits. Finally, in order to resolve/ settle such disputes, applicant invoked the arbitration clause contained in clause No.20 of the collaboration agreement dated 10.08.2021. A legal notice dated 20.10.2023 (Ann.10) was served upon the respondents, seeking to refer the disputes/ differences arose between the parties to the Arbitrator for resolution and the name of Arbitrator was also proposed. For

ready reference, Clause 20 which is identical in nature in both the agreements dated 10.08.2021, is being extracted hereunder:-

"20. यह कि इस सह निर्माण इकरारनामा के तहत प्रथम पक्ष व द्वितीय पक्ष के मध्य निर्माण के दौरान अथवा निर्माण की समाप्ति पर हर प्रकार के वाद-विवाद पंचगण की मौजूदगी में किया जावेगा, पंचगण की नियुक्ति दोनों पक्ष आपसी सहमति से करेंगे व बहुमत का निर्णय दोनों पक्ष पर बाध्य होगा, यदि फिर भी पंचगण का निर्णय किसी भी पक्ष को मान्य न होने न्याय क्षेत्र जयपुर, राजस्थान ही रहेगा।"

9. It has been contended by learned counsel for applicant that the Arbitrator could not be appointed by mutual consent of both parties, hence the applicant filed present arbitration applications on 24.11.2023.

10. It has also been pointed out that the applicant firm also filed an application under Section 9 of the A&C Act, 1996 before the Commercial Court, seeking interim relief which is pending under consideration.

11. The prayer of counsel for the applicant is that since the disputes/ differences have arisen between the parties, due to non-compliance of the collaboration agreement, which are arbitral in nature and an arbitration agreement incorporated in Clause 20 of the collaboration agreement, was also entered into between the parties to resolve/ settle such disputes through arbitration. No Arbitrator with the mutual consent of both parties could be appointed, therefore, an independent, impartial and neutral Arbitrator be appointed to resolve/ settle such disputes between the parties.

12. On behalf of respondents, separate replies to both arbitration applications have been filed, though the plea of both the respondents is common. The respondents have not disputed the

execution of agreements dated 30.07.2021 and 10.08.2021 with the applicant firm nor has denied receiving of advance payment of Rs.1,00,000/- through cheque at the time of execution of agreement dated 30.07.2021. Respondents has disputed the payment of advance amount of Rs.16,50,000/- at the time of execution of collaboration agreement dated 10.08.2021, rather has contended that such amount was delivered by the applicant firm, when the respondents had cancelled the collaboration agreement vide notice dated 08.08.2023. The fundamental plea of respondents is that from 10.08.2021, it means the date of execution of collaboration agreement, till 08.08.2023 when the respondents cancelled the collaboration agreement by serving a legal notice, no construction work was initiated by the applicant on the plots in question, which is explicit breach of the terms and conditions of the collaboration agreement by the applicant firm because the construction was to be completed within a period of 13 to 15 months from the date of collaboration agreement i.e. 10.08.2021. It has been submitted by the respondents that the security amount paid by the applicant firm, has been returned to the applicant viz. Rs.1,00,000/- on 05.09.2023 and Rs.16,50,000/- was returned on 13.09.2023. Thus, as per the respondents, no dispute between the parties in respect of collaboration agreement survives, hence, the question to refer the disputes for arbitration, does not arise and the arbitration applications are liable to be dismissed.

13. That apart, learned counsel for the respondents has raised a peculiar objection that arbitration agreement as contained in Clause 20 of the collaboration agreements dated 10.08.2021, is

confined to the disputes between the parties either during the course of construction or post construction on the plots in question. His submission is that since the applicant firm did not start any construction on the plots in question, the arbitration clause in-fact does not come in play and the dispute sought to be raised by the applicant firm in respect of non-compliance of the terms and conditions of the collaboration agreement, does not fall within the scope of Arbitration Agreement.

In addition, learned counsel for the respondents has also raised a plea that another partner of the applicant firm namely, Radha Kishan Chandweani, who was one of the signatory of the collaboration agreements dated 10.08.2021, has not been made party to these arbitration applications, hence, on such grounds as well, the arbitration applications deserve to be dismissed.

14. Heard. Considered.

15. At the outset, it is clear from the respective case of both parties and as per the documents available on record that two separate agreements of collaboration dated 10.08.2021 in furtherance to the previous hand written agreements dated 30.07.2021, were executed by the respondents in favour of the applicant, which is a registered partnership firm, in order to develop their respective plots No.97 and 98 situated at Rail Nagar Scheme, Kings Road, Ajmer Road, Jaipur and to construct two residential duplex Villas on each plot.

16. It is further undisputed that at the time of execution of hand written agreements dated 30.07.2021, an amount of Rs.1,00,000/- as security was received by the respondents through cheques and at the time of execution of agreements for

collaboration on 10.08.2021, the vacant possession of respective plots was handed over to the applicant firm.

17. There appears some disputes between the parties in respect of making payment of the security amount of Rs.16,50,000/- as according to applicant firm, cheque of this amount was paid to the respondents on 10.08.2021 itself which was not encashed and later on, this amount was tendered through demand draft, whereas the respondents have controverted this fact and states that this amount was tendered by the applicant through demand draft only after cancellation of the agreements of collaboration by the respondents.

Be that as it may, the plea of respondents is that the entire security amount of Rs.17,50,000/-(1,00,000+16,50,000) has been refunded by them to the applicant firm and collaboration agreement has been cancelled.

18. It appears that the parties are also at dispute in respect of commencement of the terms and conditions of the agreements of collaboration as according to applicant firm, huge amount in doing *Bhoomi Phujan*, preparing the site maps and in progress of the development work has been invested, but the delay in performing the agreements occurred on account of non-cooperation and not signing the requisite papers by the respondents, whereas the plea of respondents is that no construction work at site was started by the applicant firm from 10.08.2021 until cancellation of agreements by respondents on 08.08.2023. Various legal notices & replies thereto exchanged between the parties, are available on record. This Court finds that such disputes touch to the merits of subject matter of disputes and this Court being a referral Court,

needs not to enter into such area of disputes. It is suffice to hold and observe that *prima facie*, disputes/ differences between the parties in respect of compliance/ non-compliance of the agreements of collaboration executed between the parties, have arisen and such disputes need to be resolved/ settled.

19. It is noteworthy that Clause 20 incorporated in the agreements of collaboration dated 10.08.2021, extracted hereinabove, is an undisputed agreement between the parties, but the counsel for the respondents has made an attempt to confine this arbitration agreement only to that nature of disputes, which arise between the parties during the course of construction or post construction over the plots in question and no other disputes came within compass of this arbitration agreement. Per contra, counsel for the respondents submits that all kinds of disputes between the parties, in respect of collaboration agreements, are covered in this arbitration clause.

20. Having considered the arbitration clause and the other terms & conditions of collaboration agreements holistically, in the opinion of this Court, *prima facie*, the arbitration clause may not be read within such narrow spectrum as contended by counsel for respondents. This arbitration clause was entered into between the parties while entering into the agreements of collaboration to construct and develop two duplex residential Villas on their respective plots and in the collaboration agreements, in order to proceed with such construction and development of Villas and to complete the same, several terms and conditions were entered into between the parties required to be performed reciprocally. Since the arbitration clause to settle the disputes/ differences

between the parties through arbitration was also entered into as one of the terms and conditions of the agreements and words every kind of disputes/ differences is referred therein, same may not be allowed to be construed in such a narrow sense to construe the arbitration agreement, confines it to the dispute of construction work only. If such a narrow sense is given to the arbitration agreement, same would also not be in consonance with the aim and object of the Arbitration Act. Further the intention of parties, *prima facie* reflects that the parties were agreeable to refer all kinds of disputes/ differences arisen out of the agreements of collaboration, to the Arbitrators to be appointed by mutual consent of both parties and the majority decision of the Arbitrators shall be binding on both parties.

21. Further, this Court finds that the existence of an arbitration agreement between the parties is not in dispute but the dispute appears to be that what nature of dispute would be covered within such arbitration agreement. This Court on *prima facie* observations, as noted hereinabove, finds that all kinds of disputes arisen between the parties in respect of collaboration agreements fall within ambit & scope of arbitration agreements. Nevertheless, it may also be observed that indeed there is no dispute between parties about existence and validity of the arbitration agreement, therefore, following the provision of Section 11(6A) of the A&C Act, 1996, the disputes and differences deserve to be referred to the arbitration and arbitration tribunal is required to be constituted and since as per Section 16 of the A&C Act, 1996, the Arbitral Tribunal is competent to rule on its own jurisdiction, therefore, it shall be open for the respondents to raise such plea before the

Arbitration Tribunal and if any such plea is raised, same can obviously be considered by the Arbitral Tribunal in accordance with law independently & without being influenced by *prima facie* observation of this Court.

22. The view expressed by this Court finds support from the recent judgment of the Hon'ble Supreme Court in case of **SBI General Insurance Co.Ltd. Vs.Krish Spinning: [Civil Appeal No.7821/2024 arising out of SLP (C) No.3792/2024]** delivered on 18th July, 2024. The relevant paras of the judgment are being reproduced hereunder:-

"110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16 implies that the scope of enquiry under section 11(6-A) is limited to a *prima facie* scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to 'rule' under Section 16. The *prima facie* view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

112. The aforesaid approach serves a two-fold purpose - firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in **In Re:**

Interplay (*supra*) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a *prima facie* arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

"209. The above extract indicates that **the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a *prima facie* arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings.** Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators.[...]"

(Emphasis supplied)

114. In view of the observations made by this Court in **In Re: Interplay** (*supra*), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of *prima facie* existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in **Vidya Drolia** (*supra*) and adopted in **NTPC v. SPML** (*supra*) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out *ex-facie* non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in **In Re: Interplay** (*supra*)."

23. The judgment relied upon by learned counsel for respondents delivered by the Constitutional Bench of Hon'ble Supreme Court **In Re: Interplay Between Arbitration**

Agreements Under The Arbitration and Conciliation Act 1996 And the Indian Stamp Act, 1989 [AIR 2024 SC 1], do not propose any contrary principle of law on this point but point also judgment suggest to rely on the proposition of Section 11 (6A) of the A&C Act,1996 while dealing with the arbitration application since such provision has been observed to be alive. For ready reference Section 11 (6A) of the A&C Act,1996 reads as under:-

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

Accordingly, the plea raised by counsel for the respondents is hereby decided in the aforesaid terms.

24. The arbitration applications have been filed by the registered partnership firm through its one of partner and same is permissible in law as per Order XXX, (2) of CPC. The objection of respondents for not joining the another partner of firm in these arbitration applications does not lead to any conclusion nor the arbitration applications can be dismissed on this ground. More so, when the applicant has pleaded that another partner of firm has been replaced.

25. *Prima facie*, this Court is of considered opinion that the disputes and differences, which have arisen between the parties are arbitral in nature and a valid arbitration agreement is in existence between the parties and indisputably, no Arbitrator

between the parties has been appointed by mutual consent, therefore, as per Sections 10 (2) of A&C Act, 1996, an independent and impartial and neutral Arbitration Tribunal of sole Arbitrator is required to be appointed by this Court to resolve the present disputes between parties, hence, the present arbitration application deserves to be allowed.

26. As a final result, both arbitration applications are allowed and this Court appoints Hon'ble Mr. Justice Narendra Kumar Jain (Former Chief Justice), *Mob. No.9829061053 E-mail:- justicenarendrakumarjain@gmail.com; Address:- 368, Mahaveer Nagar, Tonk Road, Durgapura, Jaipur* as a sole Arbitrator in both the arbitration applications to adjudicate the dispute between parties in accordance with provisions of the Arbitration and Conciliation Act, 1996.

27. The appointment of the Sole Arbitrator is subject to the declarations being made under Section 12 of the Arbitration & Conciliation Act, 1996 with respect to independence and impartiality, and the ability to devote sufficient time to complete the arbitration within the prescribed period.

28. The arbitration fee of the Sole Arbitrator shall be payable in accordance with the provisions contained in the Manual of Procedure for Alternative Dispute Resolution, 2009 as amended by the Manual of Procedure for Alternative Dispute Resolution (Amendment), 2017 vide notification dated 23.03.2017 read with 4th Schedule appended to the Act of 1996 or as determined by the Arbitrator with consensus of parties.

29. The Registry is directed to intimate Arbitrator Hon'ble Mr. Justice Narendra Kumar Jain (Former Chief Justice), for his approval and consent to act as Arbitrator.

30. All other issues may be raised by the parties before the Arbitrator, which shall be considered in accordance with law.

31. Since as per Section 29A of the Arbitration and Conciliation Act, 1996, the arbitration proceedings are required to be concluded within scheduled time as stipulated therein, it is expected from the parties to appear before the Arbitrator on 20.12.2024 or any other date as informed by the Arbitrator to parties or agreed between parties with the consent of Arbitrator, and further parties shall provide their respective E-mail/ Contact Number/ Mobile Number as also of their authorized representatives/lawyers, appearing on their behalf before the Arbitration Tribunal, in order to facilitate the Arbitrator to send information to the parties, whenever required. The information send by the Arbitrator, on such address/ E-mail/ cellphone of the parties/ their authorized representatives/lawyers, shall be treated as sufficient unless same is not changed.

32. Both the Arbitration Applications stand disposed of accordingly.

(SUDESH BANSAL),J