IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF MARCH 2022

BEFORE

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

CIVIL MISCELLANEOUS PETITION NO.129/2020

BETWEEN :

SOUTH INDIA BIBLICAL SEMINARY
NOW KNOWN AS SIBS MINISTRIES
A SOCIETY REGISTERED UNDER
KARNATAKA SOCIETIES ACT, 1960,
HAVING ITS REGISTERED OFFICE AT
'ANANDAGIRI' BANGARAPET - 563 114
REPRESENTED BY ITS TREASURER
AND AUTHORIZED REPRESENTATIVE
MR SAM RUFUS SELWINE.

... PETITIONER

(BY SRI. JOSHUA HUDSON SAMUEL, ADVOCATE)

AND:

1. INDRAPRASTHA SHELTERS PVT. LTD.,
A COMPANY INCORPORATED UNDER
THE COMPANIES ACT 1956
HAVING ITS REGISTERED OFFICE AT
4TH FLOOR, PRESTIGE CORNICHE 62/1
RICHMOND ROAD, BENGALURU - 560 025
REPRESENTED BY ITS MANAGING DIRECTOR
MR ANIRUDHA S KAMAT.

2. EVANGELICAL TRUST ASSOCIATON OF
SOUTH INDIA
A SECTION 25 COMPANY INCORPORATED
UNDER THE COMPANIES ACT 1956

HAVING ITS REGISTERED OFFICE
AT NO.54, KHB COLONY, KORAMANGALA
BENGALURU - 560 095.
AND ALSO AT NO.3, 1ST MAIN ROAD
LINGARAJAPURAM, ST. THOMAS TOWN POST
BENGALURU - 560 084
BY ITS SECRETARY AND AUTHORIZED
REPRESENTATIVE Dr. MICHEAL SRINIVASAN.

... RESPONDENTS

(BY SRI. NAVAKESH BATRA., ADVOCATE AND
SMT. B.R. DHANALAKSHMI., ADVOCATE FOR R1;
STI. V.B. SHIVAKUMAR., ADVOCATE FOR R2)

THIS PETITION IS FILED UNDER SECTION 11(4) & (6) OF THE ARBITRATION AND CONCILIATION ACT, 1996 (AS AMENDED BY ACT NO. 33 OF 2019) A) CONSTITUTE AN ARBITRAL TRIBUNAL CONSISTING OF MR. JUSTICE (RETD.) PATRI BASAVANA GOUD AS THE PETITIONER'S NOMINEE, AS CONTEMPLATED UNDER CLAUSE NO. 30.4 OF THE JOINT DEVELOPMENT AGREEMENT DATED 04/10/2010, TO ADJUDICATE UPON THE DISPUTE BETWEEN THE PARTIES UNDER THE SAID JOINT DEVELOPMENT AGREEMENT/SUPPLEMENTAL AGREEMENT DATED 04/10/2010 AND CONSEQUENTLY REFER THE DISPUTES TO ARBITRATION; B) ALTERNATIVELY, APPOINT A SOLE ARBITRATOR TO ADJUDICATE UPON THE DISPUTE BETWEEN THE PARTIES UNDER THE JOINT DEVELOPMENT AGREEMENT/SUPPLEMENTAL AGREEMENT DATED 04/10/2010 AND CONSEQUENTLY REFER THE DISPUTES TO ARBITRATION.

THIS PETITION HAVING BEEN HEARD AND COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THIS COURT MADE THE FOLLOWING:

O R D E R

The petitioner is a society registered under the Karnataka Societies Registration Act, 1960 [hereafter referred to as *'the Association'*]. The first respondent is a company registered under the Companies Act, 1956 and is engaged in the business of real estate development and construction of multi-storied apartments. The second respondent is a company registered under Section 25 of the Companies Act, 1956. The dispute is about the handing over vacant possession of certain apartments constructed in the property bearing No.3 (old 25, 25/2) situated at Norris Road, Municipal ward No. 76, Richmond Town, Bengaluru, admeasuring 18796 Sq. Ft [*the Subject Property*].

2. The residential apartment building comprising of these apartments is constructed by the first respondent in performance of the terms of the Joint

Development Agreement dated 04.10.2010 and the Supplemental Agreement of even date. These agreements are executed and registered amongst the petitioner and the respondents. The Joint Development Agreement dated 04.10.2010 [hereinafter referred to as, '*the J D Agreement']* is executed contemporaneously with a Power of Attorney. The J D Agreement provides for resolution of *disputes/ difference* amongst the parties thereto, and clause 30 thereof reads as extracted hereafter. It must be observed that a copy of the Supplemental Agreement dated 04.10.2010 is not produced by either of the parties.

> *30)* ***SPECIFIC PERFORMANCE AND DISPUTE RESOLUTION:***
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> *30.1) In the event of a breach by either party, the other party (the aggrieved party) shall be entitled to specific performance and also be entitled to recover all losses, expenses and damages incurred as a consequence of such breach from the party committing breach;*
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> *30.2) Irrespective of what is stated in this Agreement, any breach committed by a Party may be complained of by the Other Party in writing calling upon the Party in breach to remedy the breach. On the failure of such Party to remedy such breach within 15 days from the*

date of receipt of such notice to that effect, the non-defaulting Party shall take steps to resolve such compliance in terms stated below

30.3 In the event of any dispute of difference arising in relation to this agreement, its interpretation, performance or any other matter, the same shall be decided by mutual discussion between the parties. Either of the Party shall be entitled to raise such question in writing in a letter to the other Party and the Parties' representative shall meet and use good faith efforts to resolve such dispute or differences within a week of either of the Parties raising a dispute.

30.4 In the event of the Parties being unable to resolve their difference/dispute by conciliation as above or within such further time as the Parties may mutually agree, the dispute may be referred by either Party to the Arbitration by a panel of three [3] arbitrators (one to be appointed by the First Party and the other to be appointed by the Second Party and third by the two [2] arbitrators) in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any re-enactment or modification thereof and shall be decided by such Arbitral Tribunal;

i) The venue of the arbitration will be held in Bangalore City;

ii) The language of the Arbitration Proceedings will be in English.

The disputes shall be resolved of reference or within a reasonable period as may be agreed between the parties in writing. It is, however, clarified the work will not stop, pending the Arbitration process."

3. The undisputed facts are that the M/s.World Gospel Mission has purchased the subject property

under the sale deed dated 20.09.1961, and this Mission, a trust, has executed a *Deed of Trust from one Trustee to another* dated 29.12.1973 endowing all its immoveable properties, including the subject property. The second respondent is described as the *Transferee Trustee* and the petitioner is described as the *Administrative Trustee*. This Deed of Trust dated 29.12.1973, because of certain mistakes, is rectified by the next deed dated 26.04.1975.

4. It is seen from the terms of the J D Agreement that the second respondent is described as the *owner* of the subject property with the petitioner being described as the *Administrative Trustee* managing the affairs of the subject property, and that the revenue records for the subject property are made in the second respondent's name. The recital in this regard reads as under:

> *AND WHEREAS, though the Trustee Owner is the owner of the Schedule Property, the Beneficial Owner being an Administrative Trustee under the aforesaid Transfer Deed dated 23/12/1973, to manage not only the schedule property, but also be part of any transfer/alienation of the schedule Property and therefore, consequently the Beneficial Owner herein has been joined in the execution of this Joint Development Agreement.*

5. The petitioner and the second respondent, who are jointly referred to as *'the First Party'* in the J D Agreement, have agreed that they shall be entitled to 50% of the residential apartments proposed in the subject property by the first respondent [which is described as *the Owners' Constructed Area*] subject to working out the actual number of units in the manner agreed with the proportionate undivided share in the subject land and the amenities. The first respondent has completed the construction of the residential apartments in the subject property and has dealt with the apartments allotted to its share. The dispute *inter se*

the parties is as regards the apartments that have to be allotted as the *Owners' Constructed Area.*

6. ***The Petitioner's Case***: The first respondent had to complete the construction and handover the *Owners' Constructed Area*, even after factoring in the grace period, on or before September, 2013 with the necessary clearances and certificates from the competent authority. The first respondent has agreed to inform the petitioner in writing about the completion of the Residential Apartments and about handing the *Owners' Constructed Area*, but the first respondent, even as of the date of this petition, has not issued such communication. The petitioner in the months of July and August 2016 has communicated with the first respondent for copies of the Allocation Agreement, Occupancy Certificate and other documents to ascertain that the construction is complete. The petitioner's letters, including the letter by the

petitioner's advocate, are returned un-served and therefore, the petitioner has sent these letters by e-mail.

7. The first respondent, without complying with the petitioner's request for copies, has responded by its reply dated 30.09.2016 informing the petitioner that its Chartered Accountant could inspect the documents. The petitioner is entitled for the *Owner's Constructed Area* being the beneficial owner of the subject property and the petitioner is put to difficulties because the first respondent, despite having sold its share of apartments for valuable consideration of over Rs.3.1 crores per apartment, has not handed over possession of its share in the residential apartments. As such, there is a dispute that will have to be decided by a tribunal of three arbitrators.

8. The petitioner has caused legal notice dated 21.09.2019 nominating Justice Patri Basavana Goud as its nominee arbitrator calling upon the first respondent

to nominate its nominee arbitrator. The first respondent, who is served with the legal notice dated 21.09.2019, has failed to respond and therefore, the petitioner has caused a rejoinder dated 21.11.2019. The first respondent, responding to this rejoinder dated 21.11.2019, has asserted that the notice is premature and unacceptable. Therefore, the petitioner has sought for constitution of an arbitral tribunal comprising of Justice Patri Basavana Goud to decide on the controversy, and in the alternative, to appoint a sole arbitrator.

9. ***The first respondent's case***: The first respondent asserts that the petitioner's claim is non-arbitrable. The dispute is with respect to 3 residential apartments bearing numbers 002, 202 and 203, which corresponds to the *Owner's Constructed Area*. The petitioner and the second respondent have assigned all their rights under the J D Agreement in these three

apartments in favour of Smt. Kaveri Bai and Sri. Sudhir Jaganathan Kamath for valuable consideration of Rs. 8.15 crores. The aforesaid Smt. Kaveri Bai and Sri. Sudhir Jaganathan Kamath have stepped into the shoes of both the petitioner and the second respondent. The disputes between the petitioner and the second respondent, and as also amongst the office bearers of the second respondent, have resulted in several litigations, including initiation of criminal proceedings. They have alleged fraud against each other even in the conclusion of MOUs with the aforesaid Smt Kaveri Bai and Sri Sudhir Jaganathan Kamath.

10. The petitioner has alleged cause of action in the month of September 2013 [the date before which the first respondent had to deliver possession of the *Owners Constructed Area*] and an application under section 9 of the Arbitration and Conciliation Act, 1996 [for short, '*the Arbitration Act*'] is filed on 21.09.2019, but the

present application is filed in the month of January 2000. Therefore, the petitioner's claim is not only belated but also time barred.

11. ***The second respondent's case***: The second respondent was the absolute owner of the subject property and therefore, the katha for this property was mutated with the Bruhath Bangalore Mahanagara Phalike [BBMP] in its favour. The terms of the J D Agreement would establish that the second respondent alone is entitled for *the Owners' Constructed Area.* The dispute will have to be resolved only between the respondents, and the petitioner cannot invoke Clause 30.4 of the J D Agreement. Even otherwise, unless there is a conciliation process as contemplated under clauses 30.2 and 30.3 thereof, an arbitral tribunal cannot be constituted.

12. There are serious disputes between the first respondent and the second respondent. The second

respondent has alleged fraud by the first respondent in collusion with its erstwhile authorized signatories in bringing about third party rights in the Owner's constructed Area. The first respondent, despite being informed about the change in the person who could represent the second respondent, has caused certain deeds/agreements purportedly executed by its erstwhile employers/office bearers. Thus, there are serious allegations of fraud and when there are serious allegations of fraud, there cannot be arbitration.

13. ***The details of the litigations and transactions highlighted by the respondents***:

Original Suit in OS No.26465/2013: This suit is commenced by the second respondent against some of its office bearers for declaration that the persons arrayed as defendants are not members of the Managing Committee or the primary members of the

company (the second respondent], and that Sri Michael Sreenivasan (the first defendant therein) had no authority to issue notice dated 28.0.2013 to convene the meeting and for other consequential relief/s. This suit is pending consideration. Neither the petitioner nor the first respondent is a party to these proceedings.

Criminal proceedings in CC No.27929/2014:

One of the office bearers of the second respondent, Sri Aruldas Gnanamuthu, has lodged information with the jurisdictional police against the aforesaid Sri Michael Sreenivasan about commission of offences punishable under section 419 of IPC. The jurisdictional police has filed charge sheet after investigation, but in the petition filed by

him under section 482 of the Code of Criminal Procedure in Criminal Petition No. 6520/2015, this Court has quashed the proceedings primarily for the reason that the dispute between the second respondent/its office bearers and Sri Michael Sreenivasan is civil in nature.

CP No. 28 of 2019 before the National Company Law Tribunal, Bengaluru Bench [NCLT]:

A set of certain persons have filed this petition against the second respondent and its board of members alleging oppression and mismanagement. These persons have prayed for a direction to restore the status of the management committee as it stood on 27.09.2012 and for certain other relief/s. The NCLT has rejected this petition by its

order dated 04.09.2019 primarily on the ground that these persons are not members of the company and the petitioners did not have the locus to maintain the petition.

Comm. A.A. in No. 111/2019 under section 9 of the Arbitration Act[1]:

This application is filed by the petitioner before the jurisdictional Commercial Court for interim custody of the Owners' constructed area *viz.,* apartments bearing No. 002, 202 and 203 [hereafter referred to as '*the subject Apartment*s'] for securing the petitioner's claim for a sum of Rs.18 crores as damages. The pleadings in this petition are relied upon to emphasize that third party transactions have been entered into even according to the petitioner, and therefore, the arbitration only

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[1] *This application is pending consideration*

inter se parties to the present proceedings would be impermissible.

In this regard, the attention of this Court is drawn to the assertion in paragraph 15 of the petition. In this paragraph, the petitioner has asserted that the family members of the first respondent were introduced to the petitioner as prospective purchasers. The petitioner, believing the representations of the said persons and the assurances by the first respondent that it would guarantee payment of consideration in respect of the subject apartments, and that it would stand guarantee for the payment of the consideration by the said persons, has entered into certain M.O.U with the prospective purchasers agreeing to receive a

sum of Rs.8.10 crores along with the second respondent, which had new office bearers.

The petitioner has also asserted that certain instruments handed over are not encashed[2].

14. ***The details of the sale deeds executed by the parties***:

The first of the three sale deeds is executed on 29.06.2017 and the next two sale deeds are executed on 0 5.09.2017. The sale deeds are for the apartments identified as developers constructed area, and the present dispute is not about the apartments transferred under the sale deeds. But, the fact that the first respondent has executed

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[2] *However, the first respondent has furnished Letter dated 10.02.2020 issued by M/s Corporation Bank [which is addressed to Smt. Kaveri Bai] affirming that 3 cheques dated 03.05.2013, 03.05.2013 and 19.06.2013 respectively for Rs.3,00,00,000/- Rs. 2,85,00,000/- and Rs. 2,15,00,000/- are credited to the second respondent's account with Canara bank, Hunsenahalli*

the sale deeds not only on its own behalf but also on behalf of the petitioner and the second respondent as their power-of-attorney must be recorded.

15. Sri J Hudson Samuel, while reiterating the circumstances relied upon by the petitioner, submits that it would be undeniable that parties have agreed to submit their disputes to arbitration. Though in clause 30.4 of the J D Agreement the parties have used the expression '*may'*, this expression must be construed as '*shall'* in view of the other clauses of the J D Agreement. The circumstances of the case demonstrate a dispute not *inter se* the petitioner and the first respondent, which are admittedly trusts, but a dispute that relates to the performance assured under the J D Agreement *viz.*, the assurance to deliver possession of three completed apartments. The first respondent, to its benefit, cannot take advantage of differences as regards

the second respondent's management issues. The first respondent is trying to create an *impasse* and has withheld delivery of possession of the subject apartments that together value more than Rs. 31 crores.

16. Sri J Hudson Samuel emphasizes that petitioner has established the existence of disputes *inter se* the parties, and an undeniable mandatory agreement amongst the parties to refer such disputes to arbitration. The petitioner has issued notice for constitution of arbitral tribunal as agreed, but the same is refused on the ground that it is premature. Thus, the petitioner has made out a case for appointment of an arbitrator.

17. Sri. Navkesh Batra, the learned counsel for the first respondent, argues for dismissal of the petition on multiple counts, and in support of each of the counts, he has relied upon certain decisions. Sri. Navkesh Batra's contentions are: ***[a]*** that the

dispute is *ex-facie* a dispute between trustees over a trust property and therefore, there can't be arbitration[3], ***[b]*** the petitioner and the second respondent have assigned their rights in the subject apartments for valuable consideration in favour of third parties and such third parties have stepped into the shoes of the petitioner/the second respondent and as such, there is no cause for the petitioner or the second respondent[4], ***[c]*** the petitioner's claim in any event is time barred[5], and ***[d]*** the arbitration clause [clause 30] does not mandatorily contemplate arbitration and it is only optional and even otherwise, the arbitration clause does not provide for resolution of a dispute *inter se* the

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3 *The decision of the Hon'ble Supreme Court in* ***Vidya Drolia v. Durga Trading Corporation*** *and other matters reported in (2021) 2 SCC 1 - paragraphs 28-31*

4 *The decision of the Hon'ble Supreme Court in* ***WAPCOS Limited v. Salma Dam Joint Venture and another*** *reported in (2020) 3 Supreme Court cases 169.*

5 *The decision of the Honourable Supreme Court in* ***BSNL and another v. M/s Nortel Networks*** *reported in (2021) SCC online 207*

petitioner and the second respondent[6]. Sri. Navkesh Batra, relying upon these circumstances, contends that the petitioner's claim for appointment of a sole arbitrator is manifestly deadwood and hence, the petition must be rejected.

18. Sri. V B Shiva Kumar, the learned counsel for the second respondent, relying upon clause 30 of the J D Agreement argues that the petitioner, even if it could invoke the arbitration clause, should have first initiated proceedings for mutual discussion to remedy the dispute, and if those discussions failed, the petitioner should have initiated conciliation proceedings with the representative's meeting to reconcile the differences good faith. Admittedly, the petitioner has not initiated any such measure and therefore, this Court must reject the petition.

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[6] *The decision of this Court in* ***Nitesh Urban Development Pvt. Ltd., v. Brigadier Peter Anthony Lopes and others*** *reported in (2019) Kar.L.J 574 and other decisions as well.*

19. Sri. V B Shiva Kumar also submits that fraud by the first respondent in collusion with Sri Michael Sreenivasan, an erstwhile representative of the second respondent, is an inextricable part of the dispute and therefore, the dispute cannot be arbitrated. He emphasizes that Sri Michael Sreenivasan was only authorised to execute the J D Agreement but he has joined hands with the first respondent in bringing about the sale deeds for the 3 [three] apartments that falls to the first respondent's share. The petitioner is acting at the behest of Sri Michael Sreenivasan.

20. At the outset this Court must record the conclusions of the Hon'ble Supreme Court in ***Vidya Drolia v. Durga Trading Corporation,*** reported in (2021) 2 SCC 1. The conclusions are:

> *a] Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*
>
> *b] Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.*

c] The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of nonexistence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

d] The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.

e] The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:

i. Whether the arbitration agreement was in writing? or

ii. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?

iii. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

iv. On rare occasions, whether the subject matter of dispute is arbitrable'

These conclusions are in the light of the following expositions:

Rarely as a demurrer the court may interfere at the 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.*

21. The respondents' objections to the reference of the dispute to arbitration is on multiple grounds such as that the dispute is essentially between two trusts [petitioner and the second respondent], the dispute is because of the *fraud* that is played by the first respondent in tandem with Sri Michael Sreenivasan

[who formerly, according to the second respondent, represented it], the dispute is time barred, the parties have not agreed upon mandatory arbitration, and the dispute cannot be just amongst the parties to the present petition. In fact, the first respondent contends that certain third parties have entered into the shoes of the petitioner/ second respondent with assignment of their respective rights in the subject apartments in favour of such third parties and therefore, the claim is not-arbitrable *inter se* the parties to the present petition. These grounds must necessarily be tested against the law declared by the Hon'ble Supreme Court as referred to above.

22. The Courts, as observed by the Hon'ble Supreme Court, by default would refer a *claim* when contentions relating to its non-arbitrability are '*plainly arguable*' and when consideration, in summary proceedings, would be insufficient and inconclusive.

The proceeding under section 11 of the Arbitration Act is not a stage for the Courts to enter into mini trial. The circumstances of the present case are tested in the background of this exposition on caution, and the commitment to the efficacy of the arbitral proceedings as an alternate of dispute resolution mechanism.

23. It emerges from the undisputed submissions and the records by the parties that the dispute/ difference *inter se* is about the delivery of 3 [three] apartments [*the subject apartments*]. The petitioner and the respondents have entered into MOUs with third persons agreeing to assign their rights in these apartments in favour of Smt. Kaveri Bai and Sri. Sudhir Jaganathan Kamath, who are not parties to the present petition. The petitioner is categorical in his pleadings in the application under section 9 of the Arbitration Act that such MOUs have been executed in favour of the

aforesaid. The petitioner's assertions in this regard in its application under section 9 reads as under:

> *"15. It is submitted that, when things stood thus, certain persons who the Petitioner now understands are the family members of the Managing Director of the Respondent No.1, were introduced by the Respondent No.1 as prospective purchasers in respect of the Flats which had fallen to the share of the Petitioner (Owners Constructed Area); Believing the representations of the said persons and the assurances of the Respondent No.1 that they would guarantee payment of the consideration in respect of the Three (3) Flats which had fallen to the share of the Petitioner i.e., Flat Nos.002, 202 and 203 in the apartment building now known and called as "Indraprastha Schon" constructed on the property bearing New Municipal No.3 (Old No. 25 and 25/1) and even earlier No.3,3/1, 3/2 and 4, situated at Norris Road, Municipal Ward No.76, Richmond Town, Bangalore totally admeasuring 18796 Sq. Ft. the said Flats are morefully described in the Schedule 'B' appearing hereunder and hereinafter referred to as the Schedule 'B' Property/ " Owners Constructed Area" and the*

further representation of Respondent No.1 that they would stand guarantee for the payment of the consideration by the said persons, the Petitioner along with the Respondent No.2 which had new office bearers had entered into certain MOU's with the prospective purchasers in respect of the Schedule 'B' Property and a sum of Rs.8.10 Crores was received as advance towards the said Three (3) Flats by the Respondent No.2 as the Trustee Owner. However, despite the assurance of Respondent No.1 that they would guarantee the payment of the balance consideration in respect of the Owners Constructed Area by lodging Three (3) Post dated cheques in respect of each of the Flats proposed to be purchased by the persons identified by them, the Petitioner is given to understand that the said post dated cheques were never lodged by the Respondent No.1 and therefore the guarantee held out by the Respondent No.1 was never acted upon by Respondent No.1. In any event, the proposed sale by the Petitioner and the Respondent No.2 in respect of the Schedule 'B' Property is not in any manner connected with the performance of the terms and conditions of the JDA and the obligations of the Respondent No.1 to be fulfilled

under the terms of the JDA, which is independent."

24. The petitioner, while thus admitting creation of third party rights, proposes adjudication of its right to recover possession of the subject apartments in the absence of these third parties. No doubt, the petitioner contends that these third persons, notwithstanding the terms of the respective MOUs have not paid the agreed amount and the first respondent, on whose guarantee the MOUs were executed, has also failed to pay the agreed amount. However, the first respondent submits that the agreed amount is paid to the second respondent by an undeniable mode and such payment would satisfy even the petitioner's rights in the subject apartments because of the terms of the MOU; as such, the performance under the J D Agreement is completed.

25. The dispute over the subject apartments, in this Court's considered view, encompasses those

questions of facts which will have to be necessarily decided with due opportunity to the third parties who will not be parties to the arbitration proceedings. These questions of facts arise because of the admitted transactions involving third parties after the J D Agreement. The petitioner does not even assert that the third parties would be bound by the arbitration clause as contained in the J D Agreement. It is obvious that larger questions of facts involving third party rights are to be decided and such third parties will not even be parties to the arbitration proceedings. There cannot be complete adjudication of the petitioner's rights in the subject apartments unless the aforesaid third parties are also heard. This will lead to splitting up of cause of action, a determination on matters which are not contemplated for arbitration and to multiplicity of proceedings. With these circumstances, it can be conclusively opined that the respondents must be

protected from being forced to arbitrate when the matter is demonstrably non-arbitrable.

26. The circumstances of the case and the reasons discussed present those rare exceptional circumstances in which it can only be reasonably opined that the dispute is non-arbitrable and the parties must necessarily work out the remedies in a properly instituted proceedings with these third parties also being given an opportunity to contest the claim. For the foregoing, the petition is rejected.

SD/-
JUDGE

SA*
Ct:sr