

# Chandna Developers Pvt. Ltd & Anr vs Army Welfare Housing Organisation & Anr on 30 April, 2024

**Author: Dinesh Kumar Sharma**

**Bench: Dinesh Kumar Sharma**

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IN THE HIGH COURT OF DELHI AT NEW DELHI  
CS(COMM) 434/2021, I.A. 11752/2021, I.A.

CHANDNA DEVELOPERS PVT. LTD & ANR.

ARMY WELFARE HOUSING ORGANISATION & ANR.

Through: Mr. A. K. Tewari,  
Adv. for D-I  
Mr. Naman Maheshw  
Kapoor, Ms.Sneha  
for D-2

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA  
ORDER

% 30.04.2024 CS(COMM) 434/2021, I.A. 9531/2022, I.A. 10098/2022

1. The present applications have been filed by defendant No.1 and defendant No.2 under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the matter to the arbitration in view of clause -17 of the MoU dated 29.12.2011.

2. In brief, the argument advanced by Mr. A. K. Tewari, learned counsel for the defendant No.1 and Ms. Akanksha Kapoor, learned counsel for the defendant No.2 is that an agreement/MoU dated 29.12.2011 was executed between the defendant No.2 as first party and defendant No.1 as the second party. The agreement provided that the defendant No.2 had identified approximately 17.43 acres of residential plot in Kolkata and offered the same to the defendant No.1 at the price of Rs.4,85,00,000/-

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 10/05/2024 at 21:37:48 per acre. The defendant No.1 accepted the offer and issued a letter of intent 26.11.2011. The defendant No.2 duly accepted the letter of intent vide communication dated 27.11.2011. Clause- 4 of

the said agreement provided that the defendant No.2 had informed the defendant No.1 and further that defendant No.1 duly acknowledged that the total consideration for the said land would be Rs.84,53,55,000/-. Clause-5 provided that the defendant No.1 informed the defendant No.2 who acknowledged that the said total consideration will be divided in the following manner:

3. The relevant point is that out of this amount, a sum of Rs.11,67,81,000/-

was to go to the plaintiff. Both the learned counsel invited the attention of this Court to the clause-17 of the agreement /MoU which provides as under:

"17. Any dispute arising out of this MOU will be amicably settled between the First and Second Parties. In case no agreement can be reached through mutual discussions, the matter will be left to the arbitrator to be appointed by the Chairman of the Army Welfare Housing Organisation. The Venue of Arbitration shall be in New Delhi and the proceedings of the same shall be in English. The finding of the arbitrator shall be final and binding on both parties."

4. Learned counsel for the defendants further invited the attention to the conveyance deeds executed by the defendant No.1 as first party and defendant No.2 as second party and defendant No.3 as first confirming party.

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5. M/s Mirage Land Developers i.e. plaintiff No.2, has also been referred to as the second confirming party in the present case in all three executed conveyance deeds. However, subsequently, the Army Welfare Housing Organisation (AWHO) could not bear the fruits of the land despite making the payments as it was found that the land was under

unauthorized occupation and was not available for the development. Before proceeding further, it is pertinent to mention the roles played by each party; the role of the defendant No.2 was to acquire the lands and aggregate the role of the plaintiffs were being the developers and that of the defendant No.1 was that of the utilizer and ultimately beneficiary of entire transactions. The residential housing complexes were to be constructed by defendant No.1.

6. Both the learned counsels for the defendants have submitted that since the land was under unauthorized occupation, the matter could not proceed further and the demand was raised to the plaintiffs for the refund of the money. Plaintiffs admitted their liability. Learned counsel for the defendant No.1 has specifically invited the attention of this Court to the communication dated 15.06.2021 from plaintiff No.1 to the defendant No.1 wherein not only the liability was admitted, but the plaintiff also stated, "we are working out all the possible modalities including clause number 17

of MOU dated 29.12.2011 to settle the interest part as demanded by AWHO."

7. Learned counsel for defendant No.1 states that in view of this unequivocal assertion made by the plaintiff No.1, the MOU dated 29.12.2011 in fact automatically stands novated and the plaintiff accepts the binding terms of the MOU dated 29.12.2011. Learned counsel for defendant No.1 has also invited the attention of the court to the other This is a digitally signed order.

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8. Learned counsel for the defendant No.2 has argued vehemently and emphatically that the present matter is required to be referred to the arbitration. Learned counsel submits that the conveyance deeds which were executed pursuant to the MOU dated 29.12.2011 clearly reveals that the transactions which were carried out in pursuance to the MOU binds the plaintiffs. The learned counsel has asserted that in all three conveyance deeds, the plaintiffs are the confirming party. Learned counsel has invited the attention of the Court to the pleadings in the suit filed by the plaintiff wherein the plaintiffs have admitted the execution of the MOU. Learned counsel submits that it is the plaintiff who himself has filed this MOU therefore, now the plaintiffs, in order to avoid the resolution of disputes through arbitration, cannot wriggle out of it.

9. Learned counsel for the defendant No.2 has further relied upon the judgment of this Court in Gaurav Dhanuka and Anr. v. Surya Maintenance Agency Pvt Ltd and Ors.1 and connected matters in ARB.P.1296/2022, 1297/2022 and 1324/2022. Learned counsel submits that in this case, there was an agreement between the flat owner and the maintenance agency. Learned counsel submits that the developer took an objection that since he is not the party to the agreement, therefore he cannot be referred to the arbitration. Learned counsel has specifically relied on para -22 of the judgment which reads as under;

"22. Given the framework of the aforesaid agreement, it is completely untenable for the respondent no.3 (developer) to disassociate itself from the maintenance activities being carried out by the maintenance agency. It is also evident that the aforesaid 2023 SCC OnLine Del 2178 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 10/05/2024 at 21:37:49 agreement dated 30.06.2008 between the respondent no.3 (developer) and the maintenance agency is inextricably connected with the maintenance agreements between the maintenance agency and the petitioner no.1. In fact, the maintenance agreements between the petitioner no.1 and the maintenance agency (the arbitration clause of which has been invoked by the petitioners), expressly records as under:

"AND WHEREAS the Company was engaged by M/s V3S Infratech Ltd. (herein after referred to as the Promoter or Developer) to provide maintenance and security related services by itself or through some other maintenance agency in the said Building located at the said plot either through itself or by engaging some reputed agency."

10. Learned counsel has submitted that the concept which was propounded is "commonality of agreement". Learned counsel submits that in the present case, there is commonality of agreement and on the same concept, the application under Section 8 to be allowed and the matter is required to be referred to the arbitration.

11. Learned counsel for the plaintiff has submitted that the plaintiff is neither a party nor a signatory except being a witness to the MOU dated 29.12.2011. Learned counsel submits that in the earlier MOU between the defendant No.1 and defendant No.2 dated 08.05.2007, the plaintiff No.1 was a duly confirming party. Learned counsel submits that in absence of any agreement between the plaintiffs and the defendants for resolution of disputes through arbitration, the plaintiffs cannot be pushed to arbitration.

12. Learned counsel for the defendant No.1 has relied upon Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors.2 in Civil Appeal Nos. 6202-6205 of 2019 decided on 08.08.2019 wherein it was inter alia held This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 10/05/2024 at 21:37:49 that given the tripartite nature of transactions, there can be final resolution of the dispute only if all three parties join in the arbitration proceedings to finally resolve the disputes which have been pending over for 36 years. Learned counsel has further invited the attention of this Court to point 10.9 of this judgment which inter alia says that it will be a futile effort to decide the disputes only between MTNL and Canara Bank, in the absence of CANFINA, since undisputedly, the original transaction emanated from a transaction between MTNL and CANFINA - the original purchaser of the Bonds. It is pertinent to mention here that in this case, the actual disputes between the parties emanated out of the transactions dated 10.02.1992 whereby, CANFINA has subscribed to the bonds floated by MTNL. Can Bank Financial Services Ltd (CANFINA) transferred the Bonds to its holding company - Canara Bank.

13. Learned counsel for the plaintiff has relied upon S.N. Prasad Hitek Industries (Bihar) v. Monnet Finance Ltd. & Ors.3 to emphasize that reference to arbitration can only be made if there is an arbitration agreement between the parties. Learned counsel further submits that in this case it was inter alia held that an arbitrator can be appointed under the act at the instance of the party to an arbitration agreement only in respect of disputes with another party through arbitration agreement. Learned counsel further submits that it was also further inter alia held that if there is a dispute between a party to arbitration agreement with another party to the agreement and also with a party that is not a signee to the arbitration agreement, reference to arbitration or appointment of (2020) 12 SCC 767 2011 1 SCC 320 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 10/05/2024 at 21:37:50 arbitrator can be only with respect to the parties to the arbitration agreement and not with any other parties.

14. Learned counsel for the plaintiff has relied upon Yogi Agarwal v.

Inspiration Clothes & U and Others<sup>4</sup> in which it was inter alia held that when a defendant invokes section 8 of the Act by alleging existence of an arbitration agreement, he should establish that such arbitration agreement related to, or is applicable to the suit transaction/contract. It was further inter alia held that the parties may enter into different contracts at different points of time or may enter into a series of unrelated transactions. It was further inter alia held that it is possible that in regard to some transactions, the agreement may provide for arbitration and in regard to others, it may not provide for arbitration. Learned counsel submits that the existence of an arbitration agreement with reference to some other transaction/contract to which plaintiff was or is a party, unconnected with the transactions or contracts to which a suit relates, cannot be considered as existence of an 'arbitration agreement' in regard to the suit transactions/contracts.

15. Learned counsel has also relied upon paras -10 and 12 of Yogi Agarwal (supra) whereby held as under;

"10. When sections 7 and 8 of the Act refer to the existence of an arbitration agreement between the parties, they necessarily refer to an arbitration agreement in regard to the current dispute between the parties or the subject matter of the suit. It is fundamental that a provision for arbitration, to constitute an arbitration agreement for the purposes of sections 7 and 8 of the Act, should satisfy two conditions. Firstly, it should be between the parties to the dispute. Secondly, it should relate to or applicable to the dispute. XXX

12. It is significant that, in their application under section 8 of the 2009 1 SCC 372 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 10/05/2024 at 21:37:50 Act, the defendants did not even allege that there was an arbitration agreement in regard to the subject matter of the suit. What they alleged was that 'subject matter of the suit' was similar to or identical with the 'subject matter of the arbitration agreement'. That does not entitle them to seek relief under section 8 of the Act. As there was no 'arbitration agreement', the requirements of section 7 were not met."

16. Section 8 of the Arbitration and Conciliation Act, 1996 provides as under;

"8. Power to refer parties to arbitration where there is an arbitration agreement:

--1[(1)A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.] (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

2[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.] (3) Notwithstanding that an application has been made under sub-

section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

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17. The jurisdiction of Section 8 and 11 (A) of the Act to came up for consideration before the Division Bench of this Court in FAO (COMM) 69/2023 titled Unique Décor (India) Pvt. Ltd. V. Synchronized Supply Systems Ltd. whereby vide order dated 30.05.2023, the Division Bench of this Court has inter alia held as under:

"21. The Supreme Court in National Insurance Company Limited v. Boghara Polyfab Private Limited.: (2009) 1 SCC 267 had classified the issues that could be considered by a Court in an application filed under Section 11(6) of the A&C Act into three categories, namely: (i) issues that are required to be decided by the Chief Justice or his designate; (ii) issues that may be decided by the Chief Justice or his designate or may be left to the arbitral tribunal to decide; and, (iii) issues that are required to be left to the arbitral tribunal to decide. The relevant extract of the judgment which sets out the different issues that can be classified under the three categories is set out below:

"22.1 The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied Under Section 11 of the Act, is a party to such an agreement 22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

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(i) Whether a claim made falls within the arbitration Clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

18. In the context of arbitrability of disputes, the Apex Court in Vidya Drolia & Ors. V. Durga Trading Corporation<sup>5</sup>, discussed the scope of 8 of the Arbitration and Conciliation Act, 1993 and inter alia held as under, "154. Discussion under the heading "Who Decides Arbitrability?"

can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8- 2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at 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 (2021) 2 SCC 1 This is a digitally signed order.

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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.

XXXX XXXX XXXX

238. At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not (sic) be referred to an arbitration by a court of law unless it finds that prima facie there is no valid arbitration agreement. The negative language used in the section is required to be taken into consideration, while analysing the section. 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. Therefore, the rule for the court is "when in doubt, do refer".

XXXX XXXX XXXX

244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.



244.3. 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 non-

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244.4. 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".

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or 244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

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

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?"

19. It is no more/longer res integra that the considerations that are relevant for an application under Section 11 of the Act are equally important under Section 8 of the Act. It is pertinent to mention herein that in Vidya Drolia (supra) it has inter alia held that "when in doubt, do refer". The law regarding arbitration has undergone tremendous changes and it is still in the process of being developed. The judiciary, through their regular pronouncements, aims at encouraging the parties for resolution of disputes through ADR. In such circumstances, if there is a possibility of settlement through arbitration, it is always the preferred method. However, no doubt if a particular party is not ad idem, such party cannot be pushed to the arbitration. However, in this case, the concept like commonality of agreement and composite transactions are very relevant. If there is transaction which is so interlinked in nature or where the performance of the agreement may not be possible without the aid, This is a digitally signed order.

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20. I consider that in the present case that the transactions between the parties are so interlinked and interconnected that if only defendant No.1 and defendant No.2 goes to the arbitration, the matter cannot be adjudicated with finality. The defendant No.1 is the final beneficiary/utilizer. The defendant No.2 is aggregator of the land and defendant No.3 is the developer. If the developer is taken out that there would be no purpose of any adjudication between defendant No.1 and defendant No.2. The plaintiff has raised the allegations of collusion between the parties. However, this Court will make no comment in regard to the same and towards the merits of the case. The Court is of considered view that in such a case, it is to follow the guiding principle that in case where there is a doubt, refer the matter to the arbitration.

21. It is informed that in a similar matter bearing ARB.P.1234/2022, Justice Madan B. Lokur, Former Judge, Supreme Court of India has been appointed as Sole Arbitrator in respect to the Jaipur Project between the same parties.

22. Learned counsel for the defendants submits that Justice Madan B.Lokur, Former Judge, Supreme Court of India may be appointed as arbitrator.

23. In the present circumstances, the present matter is referred to the arbitration with following directions;

i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.

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ii) Mr. Justice Madan B. Lokur, Former Judge, Supreme Court of India is appointed as an Arbitrator to adjudicate the disputes between the parties.

iii) The remuneration of the learned Arbitrator shall be in terms of Schedule IV of the A&C Act or as the parties may agree.

iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned arbitrator within two weeks from today.

24. In view of the above, the present suit along with both the applications stand disposed of.

DINESH KUMAR SHARMA, J APRIL 30, 2024/Pallavi This is a digitally signed order.

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