

SPCS/59/2019**Order below Exhibit – 11**

1. By this order, I shall decide this application under Section 8 of the Arbitration and Conciliation Act, 1996 (in short, "**the Arbitration Act**").

2. The present application is submitted by the defendant to refer the matter to the arbitrator as there is a clause of arbitration in the agreement. The application is accompanied by the photo copy of the agreement.

3. Heard learned Advocate Mr Jaydeep Verma for the defendant. Heard learned Advocate Mr D B Bhatt for the plaintiff.

4. Learned Advocate for the defendant has submitted that the plaintiff himself is relying on the agreement and, therefore, it is an undisputed document. It

is submitted that the document has a clause of arbitration, and, therefore, the matter is required to be referred to the arbitrator. He has, also, argued that this application is submitted before filing written statement and, therefore, the provisions of the Arbitration Act is complied with.

5. *Per contra*, the learned Advocate for the plaintiff has argued that the dispute is pertaining to the cancellation of sale-deed / allotment letter as it is a contract without consideration. It is also submitted that the cancellation of sale-deed cannot be the subject-matter of arbitration as the arbitrator does not have jurisdiction to decide this issue. Moreover, the plaintiff is not seeking any relief pertaining to allotment-letter and, therefore, this matter cannot be referred to the arbitrator.

6. Learned Advocate for the defendant has also submitted that the provisions of Section 8 (1) of the Act is mandatory, and when there is a valid agreement i.e

allotment letter and the agreement is not disputed, rather the plaintiff himself is relying on the allotment letter to bring this suit for its specific performance, the clause in the allotment letter is binding to the plaintiff and, therefore, the matter be referred to the arbitrator. Moreover, as the allotment letter - document is not under challenge, it cannot be said that the provisions of sub-section (2) of Section 8 are not fulfilled.

7. Read the application and gone through the record.

8. So far as the compliance or non-compliance of the provisions of Section 8(2) of the Act is concerned, the learned Advocate for the defendant has relied upon the decision in the case of ***Rupal Textile and Partners of Partnership Firm Madhubhai G. & Anr. Vs. Partners of Partnership Firm M/s Rupal Textile Mahendra H. & Anr., Special Civil Application No. 11605/2004***, wherein our

Hon'ble High Court has held in para 15 as under:

“15. In the instant case as has been correctly pointed out from the beginning original plaintiffs (respondents herein) had produced the copy of partnership deed which contained arbitration clause for appointing the Arbitrators by the partners of the firm. And thus, the copy of such deed continued to be the part of the record for having been initially produced with the plaint and both the parties had relied upon such partnership agreement for their rival claims which was already on record. Thus, the original plaintiff (present respondent) has filed the suit based on such partnership agreement which has not been challenged by the either side and on the basis thereof, when respondent had made an application below exh.-15 in such premise, if such a partnership deed or certified copy thereof had not accompanied the application, it would be too technical an approach on the part of the Court to hold it against the petitioners herein and that would mar the very object and spirit of such provision and the Act.”

9. Considering the aforesaid decision, the submission of the learned Advocate for the defendant is tenable with regard to sub - section (2) of Section 8 of the Act.

10. Now, so far as reference to the arbitration is concerned, it is pertinent to note that in considering an application under Section 8 of the Arbitration Act, the judicial authority is required to satisfy itself that the action brought before it constitutes the matters which are the subject of an arbitration agreement.

11. I rely on a decision of **Booz Allen And Hamilton Inc. vs. SBI Home Finance Limited and Others, (2011) 5 SCC 532**, the Hon'ble Supreme Court, in paragraph 19 of the judgment has stated as under:

"19. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:

- (i) whether there is an arbitration agreement among the parties;
- (ii) whether all the parties to the suit are parties to the arbitration agreement;

- (iii) whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;
- (iv) whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and
- (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration."

12. Even in the judgment of ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya And Another, 2003 (5) SCC 531***, the Hon'ble Supreme Court has held that when the Court finds that the matter brought before the Court is not subject of an arbitration agreement, the question to refer the non-parties to the agreement to arbitration does not arise. Paragraphs no. 26 and 27 of the judgement read as under:

"26. As stated above, respondent no.1 plaintiff has not simply asked for specific performance of development agreement between him and

the petitioners but has also prayed for passing of decree against the defendants for execution of sale deed in its favour. Under the development agreement, the respondent No.1 had got rights to develop the suit property subject to the other terms and conditions of the said development agreement. But before the said development agreement could be acted upon, petitioner no.2-defendant no.2 could get the sale deed executed in his favour based on the agreement to sell and consent decree alleged to have been passed between him and other societies. Respondent No.1 has made averments in respect of such agreement to sell and execution of the sale deed in favour of petitioner no.2 and has made prayer for passing of decree of execution of sale deed in its favour by petitioners and other societies. Therefore, such prayer could not be said to be connected in any manner with the development agreement i.e. subject matter of arbitration agreement. The respondent no.1 has also made one more prayer in the suit for cancellation of the sale deed executed in favour of petitioner no.2-defendant no.2. Such execution of sale deed in favour of petitioner no.2 defendant no.2 was also not in connection with the development agreement or any other agreement between respondent no.1 and other parties. Therefore, such sale deed executed in favour of petitioner no.2 could not be said to be in any way the subject matter of development agreement. Therefore, it would be beyond the purview of the arbitration to adjudicate upon the disputes concerning the above other matters involved in the suit.”

13. In this context, it is apposite to refer to the decision of the Hon'ble Supreme Court in Chloro Controls India (P) Ltd. Vs. Severn Trent Water Purification Inc. reported in (2013) 1 SCC 641, wherein it is held that:

“83. Where the Court which, on its judicial side, is seized of an action in a matter in respect of which the parties have made an arbitration agreement, once the required ingredients are satisfied, it would refer the parties to arbitration but **for the situation where it comes to the conclusion that the agreement is null and void, inoperative or incapable of being performed.** These expressions have to be construed somewhat strictly so as to ensure that the Court returns a finding with certainty and on the correct premise of law and fact as it has the effect of depriving the party of its right of reference to arbitration. But once the Court finds that the agreement is valid then it must make the reference, without any further exercise of discretion {refer General Electric Co. v. Renusagar Power Co. [(1987) 4 SCC 137]}. These are the issues which go to the root of the matter and their determination at the threshold would prevent multiplicity of litigation and would even prevent futile exercise of proceedings before the arbitral tribunal.” (Emphasis supplied)

14. In the instant case, there is no dispute with regard to the existence of an arbitration agreement in the letter of allotment. But, in the instant case, the subject-matter pleaded in the plaint cannot be said to be the same which is the subject matter of the letter of allotment. In the present case, the plaintiff has averred that though the sale-deed appears to have come into existence, it is executed without receipt of any consideration. He, therefore, seeks the cancellation of the sale-deed. It is further also averred that the defendant has not allotted any units as required by the letter of allotment. It may be noted that the letter of allotment has arisen out of the sale-deed in question. Thus, the principal agreement is the sale-deed in question. In the present case, when the sale-deed itself is challenged on the ground that no consideration had ever passed, the validity of the allotment letter also becomes doubtful. Under these circumstances, it is not just and proper to refer the dispute to arbitration. It may also be noted that it is not the case

that there is an arbitration clause in the sale-deed itself.

15. For the foregoing reasons, the present dispute cannot be referred to arbitration. Therefore, this application is liable to be rejected. As a result, it is rejected.

Date : 12-02-2020

(PRIYADARSHINI PINAKIN MOKASHI)

Place : Kheda

Principal Senior Civil Judge And
Additional Chief Judicial Magistrate.

Code: 00654

PRINCIPAL SENIOR
CIVIL COURT
TALUKA- KHEDA