



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 216 OF 2022

M/s. Devike Constructions and Developers Pvt. Ltd.,

A Private Limited Company, Having its registered office at Shop No.11, Laxmi Tara Market, Tathwade Road, Theargaon, Pune 411 033.

Through its Chairman Shri. Dhanraj Kersrimal Sonigara, Age: 61, Occ.: Business

...Petitioner

Versus

Dilip Vengsarkar Foundation,

A Public Trust registered under the Provisions of the Bombay Public Trust Act, 1950 Through its President and Managing Trustee Shri. Dilip B. Vengsarkar Having Office at: Flat No.5A, Sports Filed, Worli Sea Face, Mumbai 400 030.

...Respondent

Mr. Tejas D. Deshmukh, with Mr. M H. D. Chavan and Ms. Sulagna Mohanty, i/b. Sagar Kursija, for the Petitioner.

Mr. S. M. Gorwadkar, Senior Advocate, i/b. Mr. Niranjana Mogre & Mr. Ritvik Joshi, for Respondent.

CORAM : DR. NEELA GOKHALE, J.

RESERVED ON : 9th January 2024.

PRONOUNCED ON : 12th January 2024.

JUDGMENT:

1. The petition seeks appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 to adjudicate disputes arising out of a Memorandum of Understanding (“MOU”) dated 16th June 2011.

2. The Petitioner is a company engaged in a business of construction and land development and the Respondent is a public trust registered under the provisions of the Bombay Public Trust Act, 1950. It is the case of the Petitioner that the Pimpri-Chinchwad Municipal Corporation (“**PCMC**”), by an agreement dated 2nd November 2007 vested certain rights in land bearing Survey No.09(Part) admeasuring approximately 2.56 Hectares at village Theargaon, Pune for a period of 30 years in the Trust. The Trust was permitted to construct a playground and run a Cricket Academy/Gymkhana providing International Standard Training and Coaching facilities to young cricket aspirants from Pimpri-Chinchwad and other adjoining areas free of cost.

3. A MOU dated 16th June 2011 was executed by and between the Respondent Trust and one Shri. Dhanraj Keshrimal Sonigara referred to as ‘Promoter’ in the MOU. In terms of MoU a special purpose entity namely ‘DV Gymkhana and Clubhouse’ (“**DVGC**”) was to be incorporated to undertake the responsibility of development of the playground and the Cricket Academy. It was agreed that the DVGC shall engage the promoter or his agent/assignee for undertaking the activities on terms and conditions mutually agreed upon by the parties.

4. The relevant clauses of the MOU read as thus:

“1. **Appointment of Promoter:** (DVF) is responsible for development of said property in terms of NOV 07 agreement and wishes to undertake the said activities by forming of special purpose entity. The said special purpose entity i.e. DVGC shall undertake the work of constructing and developing Cricket ground and Cricket Academy/ Gymkhana and shall also be responsible for development of Club and facilities therein which would be essential for financing the running, maintenance and future development of Cricket Academy/ Gymkhana. The DVGC shall engage the Promoter or his agents/ assigns for undertaking the said activities for such concessions and terms and conditions as mutually agreed between the parties.

2. **Agreement between DVF & DVGC:** DVF shall therefore enter into an agreement with DVGC for carrying out the development activities on the said property in the light of responsibilities cast on it by the NOV'07 Agreement for such consideration and on such terms and conditions which are briefly set out in Appendix 1 to this MOU.

3. **Agreement(s) with the Promoter:** The said DVGC, not having direct experience or exposure in matters related construction and development; running and managing a Club with all its amenities and services or in regard to raising finance for such ventures shall enter into contract/s with the Promoter who shall act as project consultants and advisers on a turnkey basis. The said promoter has also expressed willingness to undertake some or all of the assigned tasks either directly or through entities or agents designated / authorized by them for the purposes of achieving the agreed objectives. It is understood by the parties hereto that the detailed terms shall be agreed upon taking into consideration comparable prices and offers made by other entities. However, other things being equal, the entities suggested by the promoter would be preferred by DVF /DVGC in light of the

assistance and advice rendered by the promoter in formulating this venture. Accordingly, as per the advice given by the promoter in regard to the overall scheme of the project, the following three broad areas for which contracts would be entered into are mentioned hereunder:

i. Construction of Cricket Gymkhana appurtenant to the cricket ground which is already in the charge and possession of DVE, Pavilion and incidental infrastructure and cricket facilities which would be used as Cricket Academy, and further the construction of Club House and sports and recreational facilities which would enable the operation of a full fledged Club as required in terms of Nov07 agreement; the broad details of the understanding thereto being given in Annexure 2A annexed hereunder

ii. Assisting the DVGC in mobilizing and raising funds for the purpose of financing the construction of the said Cricket Gymkhana and Club House and for the maintenance and future development of thereof; and for this purpose promoting and marketing the membership of the DVGC; the broad details of the understanding thereto being given in Annexure 2B annexed hereunder and

iii. Granting of the concession to the Promoter, by permitting him to run and operate the Club House and facilities therein

(broad terms of the contract/s are set out in Appendix 2 – Agreements 2A, 2B & 2C respectively).

5. The Club House and facilities therein will be operated and maintained by the Promoter in terms of concession granted to them, under the supervision and administration of the Board formed by DVGC (hereinafter referred to as "Club House Managing Committee) headed by Shri Dilip B. Vengsarkar as Chairman and comprising of 6 other members. Out of the said board members, the Promoter shall be entitled to nominate 4 Directors on the Club House Managing Committee, in a manner as to participate in the running

/management of the Club. The remaining 2 Directors shall be nominated by Shri Dilip Vengsarkar. The existing strength of the Club House Managing Committee may be increased, if felt necessary, in accordance with rules framed in this regard. The persons so nominated shall play an active role in the day-to-day management of the activities of the Club and accordingly the persons so nominated shall assist in managing and administering the day to day affairs of the Club House for the tenure of the concession.

10. **Execution of other documents:** The DVF/DVGC shall undertake to sign, make and execute all applications, papers, writings, deeds, further acts, matters and documents at the request and cost of the Promoter as may be deemed necessary and / or expedient for the purpose of implementing and executing the terms and conditions of these presents

12. **Restriction on Assignments:** The Promoter shall not be entitled to assign his rights under the said agreement to third parties at any point in time during the tenure of the said agreement except with the specific written consent of DVF.

13. **General:** This MOU is entered only with the intent of recording the broad understanding of the parties as regards the development of the said property/assets and activities contemplated herein, without having gone into the niceties of drafting. Hence this MOU shall remain in force until the documents setting out the detailed scope and terms governing the manner of execution of such activities, the consideration payable and roles and obligations of the parties to this MOU are executed. For the purpose of clarity, this period shall be a period of six months which may by mutual consent be extended by a further period of six months. Such period should be referred to as the AGREED DOCUMENTATION PERIOD. If the event of necessary agreements in terms of the financial and other responsibilities involved and /or the other documentation not being completed within the said AGREED DOCUMENTATION PERIOD, this memorandum of

understanding shall cease to have effect in accordance with the terms agreed as per the undernoted Termination Clause.

15. **Arbitration:** In the event of any dispute, controversy or claims arising out of or relating to this Agreement or the breach, termination or invalidity thereof, the same shall be settled by arbitration in accordance with the provisions of the Indian Arbitration and Conciliation Act. The dispute shall be referred to a sole arbitrator to be mutually appointed by the parties hereto. The award of the arbitrator shall be final and conclusive and binding upon the Parties.

16. **Termination:** If for any reason whatsoever, the parties hereto are unable to reach agreement on necessary terms forming part of broader understanding reached and documented herein, OR the legal documentation considered necessary to be entered into to give full and complete effect to the clauses agreed upon by this Memorandum of Understanding OR the Memorandum of Understanding and /or some or all of the agreements entered into become unworkable by reason of supervening impossibility or for any other reason their arise problems in implementation of the terms presently agreed upon; the parties hereto agree that they shall serve to the other a notice in writing calling for a meeting where in an attempt shall be made to resolve the issues within a period not exceeding six months, failing resolution of the matter by this method, and if the agreed documentation period has elapsed and is not mutually agreed to be extended; this MOU shall automatically terminate. In such event, the amount expended by each of the parties hereto shall be quantified (considering only the actual costs and excluding all implicit and opportunity costs and any actual or notional remuneration paid /payable to the parties hereto or to their related parties), and such balance shall be agreed to be mutually settled within a period not exceeding 36 months.

5. Pursuant to Clause (3) of the agreement, the broad terms of the contract between the Trust and the promoter were also contained

in Appendix-2 to the agreement. The relevant clause of the Appendix reads as thus:

“1. No transfer of any interest in the site: The Parties agree and undertake that DVF/DVGC shall not during the AGREED DOCUMENTATION PERIOD sell, assign, underlet or sublet or part with possession of any part of the said property or any interest therein except as otherwise mutually agreed in writing. The possession and all leasehold rights in the said property shall remain with the DVF and the Promoter shall only be a licensee appointed by DVGC and shall not have any other interest in the said property.

4. Detailed Agreements with the Promoter: The DVF shall endeavor to form the said special purpose entity within 90 days from execution of this MOU. On incorporation of the said Special Purpose Entity, the detailed and comprehensive agreements in terms of Clause 13 of the MOU shall be executed between the parties within 90 days from the date of formation of such entity.

7. Interim Period Obligation: Till the date of execution of the agreement/s as mentioned in Clause 13 of this MOU, the Promoter shall comply with and perform the following obligations at its sole cost and expense:

- a) Comply with the broad terms set out in this MOU.
- b) Settle forthwith upon execution of this MOU certain sums that are payable to contractors /vendors in regard to work already undertaken for site preparation and basic construction done till date and which for the sake of clarity is recorded herein as an -estimated sum of Rs. 105 Lakhs (comprising of Rs.55 Lakhs towards construction cost incurred by earlier contractor viz. Chq. No- 775 417, 775418 and Rs.50 lakhs paid by the said contractor to DVF towards refundable deposits. On such payment, all liabilities of DVF towards the said contractor would end, and sum of Rs.50 Lakhs shall

continued to be held by DVF, as if it is a refundable deposit paid by the Promoter to DVF, at the instance of DVGC. The said amount shall be paid by the promoter to the said contractor directly on behalf of DVF and at the instance of DVGC. and thereafter commence necessary site investigation, survey, design and planning followed by commencement of actual execution of the construction.

c) Commence procedures for obtaining the basic clearances with relevant authorities.”

6. Thus, the salient features of the MOU were as follows:

(a) The promoter was to refund Rs.55 Lakhs to the erstwhile contractor who had abandoned the project but had claimed refund of the said amount from the Respondent Trust. This amount was to be paid by the promoter to the Trust which in turn would refund the same to the erstwhile contractor.

(b) The promoter would also refund an amount of Rs.50 Lakhs to the Trust to be repaid to the erstwhile contractor. This amount was a security deposit accepted by the Trust from the erstwhile contractor.

(c) The promoter was to make a refundable deposit with the Trust. The MOU was to remain in force until the document setting out the detailed scope and terms, consideration payable and role and obligation of parties to the MOU was executed.

(d) If for any reason the parties are unable to reach an agreement to execute a further agreement, a notice shall be served by any party to resolve the issues within a period not exceeding six months. Failing a resolution of the matter and if the agreed documentation period of one year had elapsed and not mutually extended, the MOU shall automatically terminate.

7. Accordingly, the promoter paid Rs.50 Lakhs and another Rs.55 Lakhs to the Trust to be repaid to the erstwhile contractor towards his claim and refund of security deposit respectively. The Trust paid this amount to the erstwhile contractor as agreed. The promoter also made his own security deposit with the Respondent Trust. Thereafter, certain disputes arose from the terms of the said MOU and a letter dated 27th August 2014 was issued by the promoter to Shri. Dilip Vengsarkar, the President and Managing Trustee of the Respondent Trust requesting a meeting to discuss some issues pertaining to continuance of work on site.

8. On 5th January 2019, the Petitioner company issued a letter to Dilip Vengsarkar Cricket Academy Ground, an entity of the Respondent Trust conveying details of payments made by the promoter. By letter dated 21st January 2019, the Petitioner company conveyed to the Commissioner of the PCMC the history of the

transaction between the promoter and the Trust including the payments made by the promoter to the Trust. A copy of this letter was marked to the Trust. A reply dated 22nd March 2019 was issued by the Respondent Trust to the Petitioner and the Commissioner, PCMC conveying the entire transaction between the promoter and the Trust. The Respondent Trust specifically called upon the Petitioner to desist from issuing any letter against it to any Authority. Finally, by notice dated 31st March 2021, the Petitioner relying upon the Arbitration Clause (15) in the MOU conveyed to the Respondent Trust that it has appointed one Shri. Shirang Appa Saheb Barne as a sole arbitrator to decide the controversy between the parties. There was no reply to the said notice. Hence, the Petitioner had filed the present petition seeking appointment of an arbitrator to adjudicate disputes arising out of the MOU.

9. An important question that arises for consideration in the present petition is regarding the maintainability of the petition on account of the petitioner company not being signatory to the MOU containing the arbitration clause.

10. Mr. Deshmukh, learned counsel appearing for the Petitioner has narrated the entire chain of events as pleaded in the petition. He says that the promoter is the Chairman of the Petitioner company and

hence, it is the Petitioner company which has claims through the promoter. To buttress his contentions, he has relied upon the eighth recital of the MOU which reads as thus:

“And Whereas the Promoter and his associates are persons of considerable commercial experience who are capable of executing in a professional manner the entire project referred above, were desirous of undertaking such activity in the Pimpri Chinchwad area and have therefore agreed to undertake such responsibility of constructing the Cricket Gymkhana and Club House building including sports and recreational facilities therein, marketing memberships of the Club House and running and managing the affairs of such Club House with a view to assisting DVGC in fulfilling their objects in public interest of the residents of the area.”

11. He has stressed on the words ‘and his associates’ to canvass that the Petitioner company being an associate of the promoter also has a privity of contract in the MOU. He further refers to the last recital, the relevant part of which reads as under:

“(which would include not only the individuals who are parties to this agreement but also companies, firms, trust or other entities referred to in whether in existence as a date or to be formed / constituted hereafter) and accordingly the parties hereto have mutually set out in writing the understanding reached by them as under:”

12. According to Mr. Deshmukh, on the basis of the portion extracted above of the MOU, the Arbitration Clause extends to the Petitioner company as claiming through the promoter, a signatory to

the MOU. He also relies upon the reply dated 22nd March 2019, of the Respondent Trust to the Petitioner's notice to the Commissioner, PCMC to say that the Respondent Trust has not denied the connection of the Petitioner company with the promoter and in the absence of any such specific denial, the arbitration clause must be interpreted as to include the Petitioner company.

13. Mr. Gorwadkar, learned Senior Advocate represents the Respondent Trust. He denies the averments and contests the maintainability of the petition on the ground that *firstly*, the Petitioner has no *locus standi* in the MOU between the Trust and the promoter and thus cannot enforce the arbitration clause; *secondly*, the MOU is not a valid document under the Indian Contract Act, 1872, being unregistered and unstamped and *thirdly* the petition is time barred.

14. In support of his argument regarding *locus standi*, Mr. Gorwadkar states that all the cheques of the amounts to be refunded to the erstwhile contractor were signed by the promoter in his individual capacity. Even the security deposit has been paid to the Trust by the promoter again in his individual capacity. He further states that the promoter had never started any construction activity and in these circumstances the further agreement could not be

entered into on account of the breach of the terms of the MOU. In fact, the Trust has even returned the security deposit to the promoter. In the absence of any arbitration agreement between the Petitioner company and the Trust, Mr. Gorwadkar, urges the Court to dismiss the petition as not maintainable.

15. Heard the learned counsel for the parties. I have perused all the documents on record with the assistance of the counsel.

16. Arbitration agreement has been defined in Section 7 of the Act to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen in respect of a defined legal relationship, whether contractual or not. The Act contemplates an arbitration agreement to be either an independent agreement or in the form of a clause in the contract. The agreement may be express or implied, however, the Act contemplates the agreement to be in writing. The principle of party autonomy underpins the arbitration process as it allows the party to dispense with technical formalities and agree upon substantive and procedural rules applicable to the arbitration.

17. Consent is a *sine qua non* of arbitration. The agreement records the consent of the parties to submit their disputes to the

arbitration. The arbitration agreement must satisfy the principles of contract law under the Contract Act in addition to the requirements of Section 7 of the Act to qualify as a valid agreement. One of the major ingredients of a valid contract is *consensus ad idem* between the parties. The principles of Contract Act also envisage the doctrine of privity which means that a contract cannot confer rights or impose liabilities on any person except the parties to the contract. Thus, a third party cannot acquire rights and entitlements under a contract to which he is not a party.

18. The arbitration clause is contained in the MOU in the present case. The MOU is admittedly between an individual namely Shri. Dhanraj Keshrimal Sonigara, a promoter and the Respondent Trust. Admittedly, the Petitioner company is not a party to the MOU. None of the clauses of the MOU even remotely or impliedly refer to Shri. Dhanraj as acting on behalf of the Petitioner company. Mr. Deshmukh, fairly concedes that the cheques of the amounts paid to the Trust are signed by Shri. Dhanraj in his individual capacity. The clauses of the MOU relied upon by Mr. Deshmukh do not remotely suggest involvement of the Petitioner company. A bare reading of the MOU clearly indicates that the intent was only to record a broad understanding between the parties to MOU as regards development of the property and it was agreed that once the terms of the MOU

were complied, appropriate legal documentation would ensue. Mr. Gorwadkar contended that since Shri. Dhanraj committed breach of the terms of the MOU itself, the Trust refunded the amount of security deposit to Shri. Dhanraj by a cheque issued in his name which was even encashed by Shri. Dhanraj.

19. The contention of the Petitioner that there is no denial by the Trust of Shri. Dhanraj, promoter acting on behalf of Petitioner company in its reply dated 22nd March 2019, is considered only to be rejected. The reply simply conveys the transaction of the Trust with the promoter to the Commissioner, PCMC. The reply, though addressed to the Petitioner company, emphasizes the role of Shri. Dhanraj in his individual capacity as promoter and not acting for or on behalf of the Petitioner company. Thus, there is no privity of contract between the Petitioner and the Respondent Trust relating to the MOU. The Petitioner company which is a third party and not a party to the contract cannot enforce the terms of either the MOU or the arbitration clause contained in the MOU.

20. Paragraph 164 of the decision of the Constitution Bench of the Supreme Court of India in the reference answered in the matter of *Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr.*,¹ reads as under:

¹ 2023 SCC OnLine SC 1634.
Gaikwad RD

“164. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge: first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement.”

21. The Supreme Court of India in *Cox and Kings (supra)*, has held the conduct of the non-signatory party to be an indicator of their consent to be bound by the arbitration agreement and the concept of a ‘party’ to be distinct and different from the concept of ‘persons claiming through or under’ a party to the arbitration agreement. The Court has further held that the underlying basis for the application of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement. To apply the group of companies doctrine, the Courts or Tribunals have to have consider all the cumulative factors laid down in the *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd.*² Resultantly, the principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine.

² (2022) 8 SCC 42.
Gaikwad RD

22. Justice P. S. Narasimha, concurring with the majority judgment in *Cox and Kings (supra)* held that whether a non-signatory is a party to an arbitration agreement will be determined by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance and discharge of the contract.

23. The intention of the parties in the present case is clearly discerned from the MOU, the conduct of Shri. Dhanraj in issuing cheques in his own name, etc. The conduct of the parties does not remotely suggest any direct relationship of the Petitioner company with the signatory parties, commonality of subject matter and performance of the contract. Thus, I have no hesitation in holding that there is no privity of contract between the Petitioner company and the Respondent Trust arising out of the subject MOU. Since the Petition itself is not maintainable, it is not required to deal with the other objection of the Respondent that the claim is time barred.

24. The Petition is, thus, dismissed as not maintainable. No order as to costs.

(DR. NEELA GOKHALE, J.)