

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF AUGUST 2020

BEFORE

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

CIVIL MISCELLANEOUS PETITION NO.12 OF 2019

BETWEEN

MOHAMMED GAFOORUR RAHMAN
SON OF LATE MR.ABDUS SUBHAN,
AGED ABOUT 78 YEARS
R/AT NO.93, ITI LAYOUT, 6TH MAIN,
BANGALORE 560 046.

...PETITIONER

(BY SRI: S.R. KAMALACHARAN, ADVOCATE)

AND:

M/S. J M ASSOCIATES
A PARTNERSHIP FIRM
HAVING ITS OFFICE AT NO.10,
GROUND FLOOR, PRESTIGE TOWERS,
RESIDENCY ROAD,
BANGALORE 560 025.
REPRESENTED HEREIN BY ITS MANAGING PARTNER
MR. MOHAMMED MERAJ.

...RESPONDENT

(VIDE ORDER DATED 17.07.2020 SERVICE
OF NOTICE TO RESPONDENT IS HELD SUFFICIENT)

THIS CIVIL MISCELLANEOUS PETITION IS FILED UNDER SECTION 11(6) OF THE ARBITRATION AND CONCILIATION ACT, 1996 PRAYING TO

(i) APPOINT A SOLE ARBITRATOR OR IN THE ALTERNATIVE APPOINT THE SECOND AND ALSO THE PRESIDING ARBITRATOR, SO THAT THE ARBITRAL TRIBUNAL THUS APPOINTED MAY ENTER UPON REFERENCE AND ADJUDICATE THE DISPUTES BETWEEN THE PARTIES AS PER THE ARBITRATION CLAUSE MENTIONED AT PARA 22.3 OF THE JOINT DEVELOPMENT AGREEMENT DATED: 10.01.2014 REGISTERED ON 25.03.2014 (ANNEXURE-A) IN OFFICE OF THE SUB-REGISTRAR, GANDHINAGAR.

(ii) GRANT COSTS OF THESE PROCEEDINGS; AND

(iii) PASS SUCH FURTHER ORDERS AND/OR GIVE SUCH DIRECTION/S THAT THIS HON'BLE COURT MAY DEEM FIT ON THE FACTS AND IN THE CIRCUMSTANCES OF THIS CASE, IN THE INTERESTS OF JUSTICE AND EQUITY.

THIS CIVIL MISCELLANEOUS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 03.08.2020 AND COMING ON FOR PRONOUNCEMENT OF ORDER, THROUGH VIDEO CONFERENCE, THIS DAY, **JOHN MICHAEL CUNHA. J**, MADE THE FOLLOWING:-

ORDER

Petitioner is a party to the Joint Development Agreement dated 10.01.2014. Clause No.22.3 of the said agreement provides for arbitration in case of any dispute or difference arising between the parties, in its interpretation, performance or any other matter covered under the said agreement. The said clause reads as under:-

"22.3) In the event the parties being unable to resolve the disputes, the same may be referred by either party to arbitration by a panel of three arbitrators (one to be appointed by First Party, the other by Second Party and third by the two arbitrators) in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and shall be decided by such Arbitral Tribunal. The award shall be final and binding on the parties."

Petitioner has invoked section 11(6) of the Arbitration and Conciliation Act, 1996 and has sought for appointment of a Sole Arbitrator to enter upon reference and adjudicate difference between him and the respondent in terms of the above arbitration clause No.22.3 of the Joint Development Agreement dated 10.01.2014.

2. It is the case of the petitioner that respondent / second party failed to complete construction work within the stipulated time. The construction was not completed even after more than four years from the date of sanction of the plan. As the development was left to go waste and the respondent had not fulfilled the terms and conditions relating to the specifications for the development as per the Joint Development Agreement and Supplemental Agreement, petitioner issued a legal notice to the respondent on 03.04.2017 demanding the respondent to fulfill his obligations. In spite of receipt of said notice, respondent failed to fulfill his obligations and hence, having no other choice, petitioner addressed two emails dated 23.04.2017 and 24.04.2017 to the respondent stating that since the petitioner and his wife's health condition was deteriorating, petitioner's family wanted to proceed with the construction work by themselves. Subsequently, a meeting was held on 09.05.2017 between the petitioner, respondent and other concerned persons to discuss modalities. Accordingly, petitioner proceeded with the construction on the schedule properties as

per sanction plan and completed the same during September 2017.

3. According to the petitioner, towards expenses incurred by the petitioner and the payments made to different vendors for the purpose of completion of construction, the respondent was liable to refund a sum of Rs.29,51,202/-. Since the respondent failed to pay the above amount due to the petitioner as per the agreement, the petitioner issued a legal notice dated 26.03.2018 calling upon the respondent to refund the said amount with interest at the rate of 18% p.a. On receipt of said notice, respondent continued to make false promise of settlement and adjusted a sum of Rs.4,90,000/- that was due to the petitioner on behalf of the respondent towards other dues. However, entire payment having not been paid, the petitioner got issued an arbitration notice on 01.08.2018 informing the respondent that the petitioner intends to appoint Sri.S.Vivekananda, Advocate as the Sole Arbitrator to enter upon reference to adjudicate all the disputes that had arisen between the parties. Respondent did not respond to the said legal notice.

Hence, the petitioner has presented the petition seeking appointment of Sole Arbitrator in terms of clause No.22.3 of the Joint Development Agreement.

4. Process issued to the petitioner having not been served on the respondent, substituted notice was taken by publication in "The Hindu" and "Kannada Prabha". In spite of the said notice, respondent having failed to enter appearance, I have heard learned counsel for petitioner and have perused the Joint Development Agreement relied upon by the petitioner which contains an arbitration clause as per Clause No.22.3 thereof.

5. Exchange of notices between the parties, as evidenced in annexures 'C', 'N' and 'P', indicate that a dispute has arisen between the parties in relation to the performance of the terms and conditions of the aforesaid agreement. As a result, petitioner has made out a case for appointment of the panel of arbitrators as provided under clause No.22.3 of Joint Development Agreement.

6. Learned counsel for petitioner has sought for appointment of the Sole Arbitrator on the ground that the respondent having not responded to the legal notice and having not evinced any interest to appoint Arbitrator of his choice, directing the respondent to appoint an Arbitrator of his choice would delay the resolution of the dispute and in all likelihood, respondent would defeat the said clause by not appointing any person of his choice as one of the panel Advocates.

7. Having considered the above submission and on going through the material produced by the petitioner, I find that eventhough the above referred clause provides for appointment of a panel of three Arbitrators, yet in view of the conduct of the respondent in failing to exercise the option provided therein, it has to be held that the respondent has waived and given up his right for appointment of an independent Arbitrator of his choice and has impliedly consented to the appointment of the Sole Arbitrator named by the petitioner in the notice dated 01.08.2018. In view of the failure of the respondent to reply to the said notice which he was under obligation to reply, he is

deemed to have concurred with the course of action suggested by the petitioner. Under the said circumstances, it would not be expedient to adhere to the arrangement proposed in clause No.22.3 of the Joint Development Agreement.

Accordingly, Sri.S.Vivekananda, Advocate is appointed as Sole Arbitrator to resolve the disputes between the parties. Learned Arbitrator shall enter upon reference, settle terms of arbitration and proceed with the matter in accordance with law. The parties shall file their respective pleadings and documents before learned Arbitrator.

Petition stands **disposed of** in terms of the above order.

**Sd/-
JUDGE**

Bss.