IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.72 OF 2024
WITH
INTERIM APPLICATION NO.9968 OF 2024
IN
ARBITRATION APPEAL NO.72 OF 2024

VINA ARVIND KHADPE
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1. Bks Galaxy Realtors LLP
(previouslyknown BKS Galaxy Realtors Pvt. Ltd.),
having its registered office at, 1301/02, Bhumiraj Costarica, Sector-18, Sanpada, Navi Mumbai – 400 705 .. Appellants / Applicants/ Orig. Plaintiffs
2 Proviso Builders and Developers
having office at
1201/02, Bhumiraj Costarica,
Sector-18, Sanpada,
Navi Mumbai – 400 705.
3 Brijmohan Gupta
4 Kashish Gupta
5 Sanjay Gawande
6 Siddhant Gawant
(Appellant Nos.3 to 6
being the Designated partner of BKS Galaxy Realtors LLP and partner of Proviso Builders and Developers all having address at
1201/02, Bhumiraj Costarica,
Sector-18, Sanpada,
Navi Mumbai-400705

Versus

1 Sharp Properties
having its registered office at,
328, Pragati Industries Estate316,
N. M. Joshi Marg, Delisle Road,
Lower Parel, (East),
Mumbai 400011
2 Ramnik Gala
being the Partner of Sharp Properties
having address at
A-11, Ajinkya Apartments,
80, Tagore Road,
Santacruz (W),
Mumbai 400 054

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3 Hasmukh Gala
being the partner of Sharp Properties
having address at
901, Joy While House,
Tagore Road,
Santacruz (w),
Mumbai - 400054

4 Sacchanand Lalwani
Being the partner of Sharp Properties
residing at
1102, Garden Court,
MMGS Road,
Opp. Sunshine Plaza,
Dadar (E),
Mumbai-400014

5 Mukesh Rekhani
Being the partner of
Sharp Properties
having address at
22nd Floor, Ambience Court,
Sector 19, Vashi,
Navi Mumbai - 400703

6 Lakhani Industries Limited
C2, Cuffee Castle
GD Somani Road,
Ganesh Murti Nagar,
Cuffe Parade,
Mumbai – 400 005

7 Eurrestra Industries Limited
Eurrestra Compound, NR Royal Park,
Ramnagar, Navi Mumbai,
Thane – 400 078

8 Kulbir Rekhi
Being the designated Parner
of BKS Galaxy Realtors LLP
having address at,
1201/02, Bhumiraj Costarica,
Sector 18, Sampada,
Navi Mumbai – 400705.

Respondents/
.. orig. Defendants

.....

- Mr. Pravin Samdhani, Senior Advocate a/w Mr. Mayur Khandeparker, Ms. Aneesha Cheema, Ms. Darshia Parekh, Mr. Parth Jasani and Ms. Sneha Golecha i/b M/s. Purnanand & Co. for the Appellants.

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- Dr. Virendra Tulzapurkar, Senior Advocate a/w Mr. Siddhesh Bhole i/b. SSB Legal and Advisory for Respondent No.1.

- Mr. Nikhil Sakhardande, Senior Advocate a/w Mr. Siddhesh Bhole, Ms. Shubhra Swami i/b. SSB Legal and Advisory for Respondent No.2.

- Mr. Siddhesh Bhole a/w Mr. Apoorva Kulkarni i/b. SSB Legal and Advisory for Respondent Nos.3 to 5.

- Ms. Vinodini Srinivasan (through V.C.) Mr. Dharmesh Jain, Ms. Roshni Naik i/b. Mr. Anil Agarwal for Respondent Nos.6 & 7.

.....

CORAM : R. I. CHAGLA J.

JUDGMENT RESERVED : OCTOBER 07, 2024
JUDGMENT PRONOUNCED NOVEMBER 11, 2024

JUDGMENT:

1. By this Arbitration Appeal, the Appellants are seeking to set aside the impugned order dated 2nd May, 2024 passed by the Civil Judge, S.D. Belapur, in below exhibit 14 in Special Civil Suit No.87 of 2024. The impugned order was passed rejecting the Application filed by the Appellants under Section 8 of the Arbitration and Conciliation Act, 1996 (for short, "Arbitration Act") for referring the aforementioned Suit for Arbitration. The present Arbitration Appeal has been filed by the Appellants under Section 37 of the Arbitration Act.

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2. Brief background of the facts is necessary to be stated as under:-

(a) The Respondent No.6 was erstwhile owner of the land being Gat Nos.51(2), 56 and 57(2) admeasuring 5 acres or thereabouts situated at Thane Belapur Road, Village Dighe, Kalwa, District Thane, (for short, "subject property").

(b) The Respondent No.7 had owned and was seized of a factory structure situated on the subject property.

(c) An unregistered Memorandum of Understanding ((MoU 2015) dated 8th September, 2014 was executed by Respondent No.6 in favour of Respondent No.1 for transfer of the subject property on the terms and conditions recorded therein and for a total sale consideration of Rs.58,50,00,000/- (plus capital gains tax).

(d) The Respondent no.1 as owner executed an unregistered Joint Development Agreement dated 7th October, 2014 in favour of Appellant Nos.1 and 2 (as Developers) for joint development of the subject property.

(e) The terms of the Joint Development Agreement were subsequently amended under Addendum dated 26th November 2014.

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(f) The Respondent No.1 had failed to comply with their obligations under the Joint Development Agreement. The dispute ensued between Respondent No.6 and 1 and it was agreed between them that Respondent No.6 would transfer the undivided share i.e. 75:25 in favour of Appellant Nos.1 and 2 respectively. This was in the year 2014 and 2015.

(g) A registered Agreement for Sale ("the said Agreement") was executed on 5th November, 2015 in respect of the subject property between Respondent No.6 (as the owner); Appellant Nos.1 and 2 (as purchasers); Respondent No.7 (as the first confirming party); and Respondent 1 (as the second confirming party). By the said Agreement, Respondent No.6 had agreed to sell the subject property in favour of Appellant Nos.1 and 2. It is necessary to note that in Clause 16 of the said Agreement it is provided that Appellant No.1 and 2 with Respondent No.1 will execute a separate Agreement in writing identifying all the obligations of the Second confirming party as provided in the said Agreement. Clause 35 provides for Arbitration Clause.

(h) On 5th November, 2015, in pursuance to Clause 16 of the said Agreement, an unregistered Memorandum of Understanding ("MoU 2015") was executed between the

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Appellant Nos. 1 and 2 with Respondent No.1 on the stamp paper of Rs.100/- detailing the obligations of Respondent No.1 to be complied with under the said Agreement and specifying the consideration payable to Respondent No.1 on successful compliance of the obligations. In the operative portion of the MoU 2015, it is provided that Respondent No.1 would be entitled to a monetary consideration of Rs.3500/- per square feet of the saleable area. Further Respondent No.1 shall comply with all obligations / responsibilities / duties in the said Agreement / MoU 2015 on or before 31st December, 2015 subject to which balance payment shall be payable to Respondent No.1. Further, in the operative portion, it is provided that the responsibilities, duties and entitlements of the said Agreement and MoU 2015 shall be read jointly and not separately.

(i) As a security for the monetary consideration payable to Respondent No.1 for compliance of obligations of the said Agreement which are detailed in MoU 2015, Appellant No.1 and 2 had issued an Allotment Letter dated 5th November 2015 in favour of Respondent No.1

(j) Respondent No.6 and 7 executed a registered Conveyance Deed dated 2nd March, 2022 in favour of Appellant No.1 and

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2 in the ratio of 75:25 as the undivided share in the subject property. It is pertinent to note that Appellant No.2 had thereafter transferred 25% undivided share in the subject property in favour of Appellant No.1.

(k) Respondent No.1 to 5 filed Special Civil Suit No.87 of 2024 ("Suit") before the Civil Judge, Senior Division, Belapur, C.B.D. Belapur, Navi Mumbai for the following prayers:-

> *(a) That this Hon'ble Court be pleased to declare that the said MoU and said Allotment Letter dated 05 November 2015 is subsisting, valid and binding on the Defendants 1 to 9.*
>
> *(b) That this Hon'ble Court be pleased to declare that the Plaintiff No.1, has 50% rights in the total constructed area in the construction undertaken or to be undertaken by the Defendant No.1 and 2 on the said Property and entitlement of 50% rights in total area of the said Property.*
>
> *(c) That this Hon'ble Court be pleased to direct the Defendants No.1 to 7 to allot and or enter into Agreement for sale of 50% of the total flats and shops in the buildings being constructed on the suit lands, in the name of the Plaintiff No.1 before entering into any further Allotment / Agreement Sale / Sale Deed with any 3rd party in respect to and shop / flat in the buildings/s being constructed on the suit lands.*

(l) In an Application taken out by Respondent No.1 to 5 for *ex-parte* temporary injunction (Exh.5), the Trial Court granted the *ex-parte* injunction vide order 6th April, 2024 in favour of Respondent No.1 restraining Appellant No.1 and 2

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from creating third party rights in the subject property over constructed area to the extent of 50% out of commencement certificate dated 12th April, 2023 till further orders.

(m) The Appellants filed an Application under Section 8 of the Arbitration Act on 16th April, 2024 *inter alia* on the grounds that (i) the Agreement for sale dated 5th November, 2015 contained an Arbitration Clause (Clause No.35); (ii) the MoU and the Allotment Letter were documents executed in furtherance of the said Agreement; (iii) the performance of the MoU / the Allotment Letter was dependent on the said Agreement; and (iv) the said documents were interlinked, had to be jointly considered and were not separate and distinct from each other.

(n) By the impugned Order dated 2nd May, 2024, the Application filed by the Appellants under Section 8 of the Arbitration Act was rejected.

(o) Being aggrieved by the impugned order, the present Arbitration Appeal under Section 37 of the Arbitration Act has been filed.

3. Mr. Samdhani, learned Senior Counsel appearing for the Appellants has submitted that the Agreement for Sale dated 5th

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November, 2015 (referred to as "the said Agreement") is the main / principal document and all other documents therein are intertwined and integrally connected. He has submitted that the said Agreement, the MoU and the Allotment Letter are all executed on the same day and simultaneously. He has in support of these submissions referred to the averments made in the plaint and more particularly the paragraphs of the Plaint and corresponding page numbers in the Arbitration Appeal Paper Book wherein the said Agreement, the Mou and the Allotment Letter have been expressly referred to: (para "H" at page 152, para 56 at 153, para 57(d) at page 155, para 57(e) at page 157, para 57(f) at page 158, para 57(h) at page 159, para 58 at page 159, paras (ii) and (iii) at page 160, para 58 (iv) at page 161, para (vi) at page 162 and para 59(a) at page 163). Mr. Samdhani has submitted that the said Agreement, MoU and Allotment letter are part of one transaction. In law, they constitute an integral part of one transaction. This factual position has been admitted in the plaint.

4. Mr. Samdhani has submitted that the said Agreement is the principal document. The Arbitration Clause contained therein also applies to all subsidiary and integral connected documents in respect of a single transaction. In support of his submission, he has placed reliance upon the decisions of the Supreme Court as under :-

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	Decisions	Referred paragraphs
1	*Ameet Lalachand Shah and ors. Vs. Rishabh Enterprises and anr.*[1]	- 24-26, 28, 30
2	*Sushma Shivkumar Daga and anr. Vs. Madhukumar Ramkrishnaji Bajajand ors.* [2]	- 21, 24 to 26, 34, 35
3	*Sushma Shivkumar Daga and anr. Vs. Madhukumar Ramkrishnaji Bajajand ors.* [3]	- *8, 13 to 15, 24, 25*
4	*Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. And Ors.* [4]	- 11, 151-158

5. Mr. Samdharni has submitted that absence of Arbitration Clause in the subsidiary documents is immaterial. The learned Trial Court erred in holding that the MoU does not have an Arbitration Clause thereby treating the MoU as a stand-alone document overlooking that the MoU was one of the subsidiary documents to the principal document i.e. the said Agreement.

6. Mr. Samdhani has submitted that at the stage of Application under Section 8 of the Arbitration Act, only a *prima facie* enquiry is required and not a mini trial. In support of his submission, he has placed reliance on the following judgments:-

- ***Ameet Lalchand Shah and Ors.*** (supra) (paragraph 28);
- ***Sushma Shivkumar Daga*** (supra) (paragraphs 25 and 35);

1 (2018) 15 SCC 678
2 2021 SCC OnLine SC 1683
3 2023 SCC OnLine SC 1683
4 (2013) 2 Supreme Court Cases 641

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- ***Sanjiv Prakash Vs. Seema Kukreja and Ors.***[5] (paragraphs 21 to 23);
- ***SBI General Insurance Co. Ltd Vs. Krish Spinning*** [6] (paragraphs 94, 102);
- ***Ajay Madhusudan Patel and Ors. Vs. Jyotrindra S. Patel and Ors.*** [7] (paragraphs 59, 63, 65,68, 79)
- ***DLF Limited Vs. PNB Housing Finance Ltd. And Ors.***[8] (paragraphs 32-37);

7. Mr. Samdhani has submitted that in the present case, the learned Trial Court conducted a mini trial and rendered a finding contrary to the admitted position in the plaint. The Legislative intent is to lean in favour of relegating parties to an arbitration for a speedy trial and to bring the matter to a logical end. In support of his submission, he has relied upon ***Govind Rubber Limited Vs. Louis Dreyfus Commodities Asia Private Limited***[9] at paragraph 17 and ***Ameet Lalchand Shah and Ors.*** (supra) at paragraph 30.

8. Mr. Samdhani has submitted that the Arbitration Clause is very wide in its language and a similar Arbitration Clause was also considered by the Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co.***[10] (paragraph 25). He has submitted that the

5 (2021) 9 Supreme Court Cases 732
6 2024 SCC OnLine SC 1754
7 2024 SCC OnLine SC 2597
8 2024 SCC Onlline Del 2165
9 (2015) 13 SCC 477
10 (1984) 4 SCC 679

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subject matter of the Suit and reliefs sought therein are squarely covered under the Arbitration Clause under the said Agreement.

9. Mr. Samdhani has submitted that the reliance placed by the learned Trial Court and Respondent Nos.1 to 5, on the Judgment of the Supreme Court in ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** [11] more particularly paragraphs 6, 11, 14, 22, 23, 26 and 28 is erroneous for the following reasons :-

a. The argument before the Supreme Court was that the Arbitration Clause contained in the tender document is incorporated by reference in the Letter of Intent. The argument was not that the Letter of Intent was a subsidiary document to the tender document (main document). The said Agreement, in the present case, itself contemplates the subsidiary documents (MoU and Allotment Letter). The present case is one of single contract in respect of one transaction, the terms of which are contained in three documents, as admitted in the Plaint.

b. In the case of ***NBCC (India)*** (supra), the Letter of Intent provided that all the conditions of Tender were applicable, unless modified by the Letter of Intent. The dispute redressal mechanism provided under the letter of intent clearly modified and intentionally departed from the dispute redressal mechanism under the Tender, by use of expression “alone” and “only”, thus expressly excluding the Arbitration Agreement contained in the Tender.

11 (2024) 7SCC 174

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c. In the instant case, the clauses and the language of the said Agreement and the averments in the body of the plaint, leave no manner of doubt that the MoU and the Allotment Letter are intertwined and integrally connected to the said Agreement and the same form part thereof.

10. Mr. Samdhani has submitted that the argument of Respondent No.1 to 5 that there has been (i)accord and satisfaction; and (ii) novation is based on the plea that the Sale Deed being executed which does not contain an Arbitration Clause, is an argument which finds no place in the plaint and infact the case in the plaint is to the contrary.

11. Mr. Samdhani has submitted that the plea of accord and satisfaction and novation cannot be adjudicated in the scope of enquiry under Section 8 read with Section 16(1)(b) of the Arbitration Act. He has in support of his submission, placed reliance upon the various decisions of the Supreme Court as under :-

- ***Sanjiv Prakash Vs. Seema Kukreja and Ors*** (supra) at paragraphs 21 and 23;
- ***SBI General Insurance Co. Ltd Vs. Krish Spinning (supra) at*** paragraphs 45, 48 to 51, 53, 54, 92, 93, 96, 101;
- ***Ajay Madhusudan Patel and Ors. Vs. Jyotrindra S. Patel and Ors.*** (supra) at paragraphs 59, 63, 65, 66, 68, 79.

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12. Mr. Samdhani has submitted that the argument of Respondent Nos.1 to 5 is on the basis of Arbitration Act, 1940 for which they have relied upon the decision of the Supreme Court in ***Union of India Vs. Kishorilal Gupta & Bros.***[12] , which is incompatible with Arbitration Act, 1996, more particularly Section 16(1)(b) thereof. Mr. Samdhani has submitted that the decision of the Supreme Court in ***Union of India Vs. Kishorilal Gupta & Bros***. (supra) is completely redundant, as held by the Supreme Court in ***Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and stamp Act, 1899*** [13] , more particularly at paragraph 116 and in ***Sanjiv Prakash Vs. Seema Kukreja and Ors*** (supra) at paragraph 23.

13. Mr. Samdhani has submitted that the argument of Respondent Nos.1 to 5 that this is not a case of single transaction and / or the said Agreement is separate and district from the MoU is contrary to the admitted position in the plaint read with the said Agreement and the MoU. In the plaint, Respondent No.1 to 5 have stated that the MoU and the Allotment Letter are a part of the said Agreement. Further, the argument that in the said Agreement the transaction was only for sale of land is factually incorrect in as much as the owner and the 2nd confirming party i.e. Respondent No.6 and 1 respectively, were

12 AIR 1959 SC 1362

13 (2024) 6 SCC 1

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under obligation to obtain various permissions for development of the said property, including obtaining full Commencement Certificate, and change of user from industrial to residential. He has submitted that the Plaintiffs' contention in the Suit is that they are entitled to the benefit under the MoU on the basis that their obligations under the said Agreement being discharged, whilst avoiding the Arbitration Agreement contained therein to ascertain performance thereof.

14. Mr. Samdhani has submitted that there is clear distinction between the principles of incorporation by reference and documents being part of one transaction contained in the said Documents wherein the main / mother agreement contains an Arbitration Clause. He has submitted on facts, it is an admitted position in the plaint that there is only one transaction. In the circumstances, the judgment of the Supreme Court in ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** (supra) is inapplicable to the case in hand. He has accordingly submitted that the impugned order be set aside and the subject matter of the Suit be referred to Arbitration under Arbitration Clause in the Agreement.

15. Dr. Tulzapurkar, the learned Senior Counsel appearing for Respondent Nos.1 to 5 has submitted that the impugned order is a well reasoned order and there is no error committed by the learned trial

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Judge in rejecting the Application of the Appellants who are original Defendant Nos.1 and 2 in the Suit on the ground that no case is made out under Section 8 of the Arbitration Act.

16. Dr. Tulzapurkar has submitted that the claims in the Suit do not arise out of a single transaction. The transaction mentioned in the said Agreement is different from the transaction in the MoU and the Allotment Letter. The object of the said Agreement was getting the properties which are subject matter of Agreement for Sale transferred from the owners i.e. Defendant Nos 8 and 9 who are Respondent Nos.6 and 7 to the Arbitration Appeal. The MoU pertains to the allotment and transfer of certain units to the Plaintiffs by Defendant nos.1 and 2 on the terms and conditions mentioned therein. The rights and obligations arising under the MoU and the Allotment Letter are distinct and separate from those mentioned in the said Agreement. In fact, on a proper reading of the MoU and the Allotment Letter, the Plaintiffs became entitled to claim rights after the culmination of the said Agreement in a Conveyance and they become enforceable only after Conveyance is executed in pursuance of the said Agreement.

17. Dr. Tulzapurkar has submitted that once a Conveyance is executed the object, purpose and effectiveness or validity of the said

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Agreement comes to an end. The rights if any in respect of the Suit property are enforceable under the Conveyance. He has submitted that in the instant case, there is a Conveyance executed by the owners i.e. Defendant Nos. 8 and 9 (Respondent Nos. 6 and 7 herein) in favour of the Appellants. Thus, efficacy of the said Agreement is over and alongwith that the Arbitration Clause also comes to an end. The said Agreement stands discharged and does not continue to have any legal effect.

18. Dr.Tulzapurkar has in support of this contention placed reliance on the decision of the Supreme Court in ***Union of India Vs. Kishorilal Gupta & Bros*** (supra), paragraphs 8, 9 and 10 as well as the decision of the Karanataka High Court in ***Smt. Nagamma & Ors. Vs. Rudrayya & ors***. [14] at paragraph 6, 7 and 8.

19. Dr.Tulzapurkar has submitted that the observations of the Supreme Court in ***Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and stamp Act, 1899*** (supra) relied upon by the Appellants to contend that the Arbitration Act, 1996 renders the Judgment in ***Union of India Vs. Kishorilal Gupta & Bros*** (supra) redundant, are not applicable to the facts of the present case

14 WP NO.105278 of 2018 (GM-CPC) dated 25 July, 2024

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as Respondent No.1 and 2 have not contended that the said Agreement is null & void, or frustrated or breached. The decision in the case of ***Union of India Vs. Kishorilal Gupta & Bros*** (supra) states that once the Agreement ceases to exist, the Arbitration Clause contained in it also perishes. In the case in hand, by virtue of the execution of the Conveyance (Sale Deed), the said Agreement comes to an end and thus, the Arbitration Clause perishes.

20. Dr.Tulzapurkar has submitted that the entitlement of the Plaintiffs to receive the portion of the property / value thereof arises only after a Conveyance is executed subject to the terms and conditions or on the terms mentioned in the MoU and the Allotment Letter and not on the terms and conditions or subject to terms and conditions mentioned in the said Agreement. He has submitted that the transaction covered by the MoU and the Allotment Letter are quite distinct and different from the said Agreement and which are to be enforced only in terms of the MoU and the Allotment Letter, without any reference to the said Agreement. He has submitted that the rights which are sought to be enforced by the said Suit arise only under the MoU and the Allotment Letter to which two documents the owners i.e. Defendant Nos.8 and 9 are not parties at all. He has submitted that accordingly the contention of the Appellants that there is one transaction is untenable.

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21. Dr.Tulzapurkar has submitted that the entitlement of Respondent Nos.1 to 5 will be triggered as soon as the Conveyance is executed as recorded in Clause 10 read with Clauses 15(j) and 15(l) of the said Agreement. He has also referred to Clause 19 of the said Agreement which categorically records the understanding between the parties viz. "*inter alia* agreed between the parties that following steps shall be taken by the owners for giving effect to the transaction of sale and upon the completion of the following, the owners shall execute Deed of Conveyance in favour of the Purchasers…". He has further referred to the understanding recorded in the MoU at page 105 to the Arbitration Appeal which reads as under :-

> *"Sharp Properties have agreed to sell their 50% entitlement in the proposed residential / commercial project on Plot bearing Gut No.51(2), 56 and 57(2) at Dighe (Airavali), Navi Mumbai to M/s. BKS Galaxy Realtors Pvt. Ltd. and proviso Builders & Developers at the rate Rs.3500/- (Rupees Three Thousand Five Hundred Only) per sq. ft of the salable area to be calculated as defined below, on the payment terms as mentioned below and subject to documentation regarding Final Conveyance Deed between Purchasers and Owners..."*

22. Dr.Tulzapurkar has submitted that similar understanding is also recorded in the letter of allotment at page 112 of the Arbitration Appeal.

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23. Dr.Tulzapurkar has submitted that though there is reference in the Plaint to the said Agreement, it is only a historical reference and not because the said Agreement is the subject matter of the Suit. The nature of the Suit described in the Plaint after the title shows that the Suit is for declaration, injunction, recovery and specific performance in respect of the MoU and the Allotment letter. He has also referred to the prayers in the Suit which refers to the MoU and the Allotment Letter and by which the specific performance has been sought by entering into the Agreement for sale of 50% of the total flats and shops in the building to be constructed in the name of Plaintiff No.1 before entering into any further Allotment Agreement or Sale Deed with any third party. Thus, there is no right claimed by the Plaintiffs under the said Agreement and the Suit itself is not covered by the said Agreement containing the Arbitration Clause.

24. Dr.Tulzapurkar has submitted that where there is no specific reference to the Arbitration Clause in the said Agreement, the Arbitration Clause does not get incorporated or becomes applicable or governs the rights under the MoU and the Allotment letter. He has submitted that it is a settled position in law that unless there is a specific reference to the Arbitration Clause in a subsequent Agreement and which Clause is part of the earlier Agreement, the said Clause is

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not applicable for enforcement of the subsequent Agreement. He has placed reliance upon the decision of the Supreme Court in ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** (supra) at paragraph 17.

25. Dr.Tulzapurkar has submitted that the attempt of the Appellants to distinguish the said case viz. ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** (supra) on the ground that there were two contracts therein, is also not tenable as the present case is also a case of two contracts, one governed by the said Agreement and the other governed by the MoU and the Allotment letter. In fact, there is general statement of law in paragraph 30 of ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** (supra) that a general reference would not have the effect of incorporating the Arbitration Clause.

26. Dr.Tulzapurkar has referred to paragraph 24 of the decision of the Supreme Court in the case of ***MR. Engineers and Contractors Pvt Ltd. Vs. Som Datt Builders Ltd***.[15] wherein the Supreme Court has held that the Arbitration Clause from another contract can be incorporated into the contract where such reference is made only by a specific reference to Arbitration Clause.

15 (2009) 7 SCC 695 para 24).

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27. Dr.Tulzapurkar has submitted that the obligations of the Plaintiffs mentioned in the said Agreement were to become part of the subsequent independent Agreement in terms of Clause 16 of the said Agreement. Thus, the parties intended that there was a need to execute a separate writing categorically identifying all the obligations of the first party and also for consideration and terms and conditions to be mentioned therein. He has submitted that a separate writing on the parties own showing is an independent and separate writing without containing any Arbitration Clause. This shows that the parties never intended to agree to go for arbitration in respect of the disputes under such independent agreement.

28. Dr.Tulzapurkar has submitted that the contention of the Appellants that the Arbitration Clause in the said Agreement is applicable to MoU and the Allotment letter is not sustainable at all. Arbitration Appeal is therefore liable to be dismissed with costs.

29. Ms. Srinivasan, learned counsel appears through V.C. on behalf of Respondent Nos. 6 and 7. Respondent Nos. 6 and 7 have supported the submissions advanced by Respondent Nos. 1 to 5. Further, they have raised the submission that Respondent No.6 and 7 not being parties to the MoU cannot be referred to Arbitration. Respondent Nos. 6 and 7 have also contended that they were only

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concerned with the Sale of the said land and were not made aware of the existence or contents of the MoU . Respondent Nos. 6 and 7 have also contended that they are not connected to the dispute in the Suit and have been made formal parties therein.

30. I have heard the rival submissions. In my view, the Agreement for sale (referred to herein as "the said Agreement") has come to an end by the execution of the Deed of Conveyance / Sale Deed. It is well settled that once a Conveyance is executed, the object, purpose, effectiveness and validity of the Agreement for sale comes to an end. In the present case, the Conveyance Deed has been executed by the owners i.e. Defendant Nos. 8 and 9 (Respondent Nos.6 and 7 herein) in favour of the Appellants. Thus, the Arbitration Clause in the said Agreement comes to an end as the said Agreement stands fully discharged and does not have any legal effect upon the execution of the Conveyance.

31. An attempt was made on behalf of the Appellants to contend that the decision in ***Union of India Vs. Kishorilal Gupta & Bros***. (supra) is rendered redundant in view of the subsequent decision of the Supreme Court in the case of ***Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and stamp***

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Act, 1899 (supra). However, this contention on behalf of the Appellants is not acceptable in view of there being no contention on behalf of Respondent Nos.1 to 5 that the Agreement for Sale is null & void, or frustrated or breached.

32. In ***Union of India Vs. Kishorilal Gupta & Bros***. (supra), the Supreme Court has held that if parties to an earlier contract substitute it with another contract, the Arbitration Clause in the original contract also perishes with it. This has been observed in paragraph 115 of ***Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and stamp Act, 1899*** (Supra). Although in paragraph 116 of the said decision, the Supreme Court has held that its prior decisions in ***Damodar Valley Corpn. Vs. K.K. Kar*** [16] and ***Union of India Vs. Kishorilal Gupta & Bros***. are redundant, this would be confined to the context of the plea that the contract is void, illegal or fraudulent affecting the entire contract alongwith the arbitration clause. This is on account of the enactment of the Arbitration Act, 1996 enabling Indian Courts to give effect to the separability presumption with general impetus. Paragraphs 115 and 116 of the said decision read thus :-

> " 115. The separability presumption has undergone a significant evolution in India. Initially, the

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Indian courts viewed an arbitration agreement as an integral part of the underlying contract without any existence beyond such contract. For instance, in *Union of India v. Kishorilal Gupta & Bros.,* the issue before this Court was whether an arbitration clause in the original contract survived after the enactment of a subseuent contract. K. Subba Rao (as the learned Chief Justice then was) considered *Heyman* but distinguished it on the ground that it only dealt with repudiation, where rights and obligations of parties survive the termination of contract. It was held that in situations where the original contract is superseded by a subsequent contract, the arbitration clause in the original contract will also cease to exist. K. Subba Rao, J., speaking for the majority, held that *first*, an arbitration clause is a collateral term of a contract as distinguished from its substantive terms, but nonetheless it is an integral part of it; *second*, the existence of the underlying contract is a necessary condition for the operation of an arbitration clause; *third*, if the underlying contract was non est in the sense that it never came legally into existence or was void ab initio, the arbitration clause also cannot operate; *fourth*, if the parties put an end to a validly executed contract and substitute it with a new contract, the arbitration clause of the original contract also perishes with it; and *fifth*, in situations such as repudiation, frustration, or breach of contract, only the performance of the contract comes to an end, the arbitration clause persists because the contract continues to exist for the purposes of disputes arising under it.

116. In *Damodar Valley Corpn. Vs. K.K. Kar,* a two-Judge Bench of this Court held that the plea that a contract is void, illegal or fraudulent affects the entire

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> contract along with the arbitration clause. However, the enactment of the Arbitration Act in 1996 enabled the Indian Courts to give effect to the separability presumption with greater impetus. Section 16(1)(b), which provides that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause, renders the decisions in *Kishorilal Gupta* and *Damodar Valley Corpn.* redundant. Consequently, even if the underlying contract is declared null and void, it will not ipso jure result in the invalidity of the arbitration agreement.

Thus, the said decision refers to Section 16(1)(b) of the Arbitration Act which provides that a decision of the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the Arbitration Clause.

33. The findings of the Supreme Court in ***Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and stamp Act, 1899*** (supra) do not disturb the finding in ***Union of India Vs. Kishorilal Gupta & Bros***. (supra), namely that if the parties put an end to a validly executed contract, the arbitration clause of the original contract also perishes with it. In the present case, by subsequently executing the Conveyance Deed / Sale Deed, the said Agreement has come to an end and with it the Arbitration Clause also perishes.

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34. I also find much merit in the submission on behalf of Respondent Nos.1 to 5 that the MoU and the Allotment letter are a separate transaction from the said Agreement. Further, the claims in the present Suit do not arise out of a single transaction. The obligations in the MoU and the Allotment letter are to be performed in accordance with the terms therein and the entitlement of Respondent Nos. 1 to 5 will be triggered as soon as the Conveyance Deed is executed.

35. This is clear not only from the MoU at page 105 of Arbitration Appeal which has been extracted above, but also from the said Agreement and in particular Clauses 10, 15(j) and 15(l) thereof. Further, this is also clear from the Allotment letter at page 112 to the Arbitration Appeal. Thus, I do not find any merit in the submissions on behalf of the Appellants that the Agreement for Sale is the main / principal document and the MoU and the Allotment letter are intertwined and integrally connected. This finding is on the presumption that the Agreement for sale is still in existence and its efficacy is not over upon the execution of the Conveyance Deed.

36. I further find merit in the submission on behalf of Respondent Nos.1 to 5 that the reference in the Plaint to the said

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Agreement is only by way of historical reference and not because the said Agreement is the subject matter of the Suit. The Suit is for declaration, injunction, recovery and specific performance in respect of the MoU and Allotment Letter and not in respect of the said Agreement which has comes to an end by execution of the Conveyance.

37. The Appellants have contended that the decision of the Supreme Court in ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** Is not applicable to the present case. There is an attempt made by the Appellants to contend that the said case was one of two contracts as against the present case of a single transaction. I do not find any such distinction. In my view, the present case is also one where there are two contracts i.e. one governed by the said Agreement and another governed by the MoU and the Allotment Letter. Thus, I find that the decision of the Supreme Court in ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** is applicable to the present case.

38. Further, in ***NBCC (India) Vs. Zillion Infraprojects Pvt. Ltd.*** (supra), the Supreme Court has also held that there must be a specific reference to the arbitration clause contained in a prior document, in the subsequent document which the parties are enforcing. In ***MR. Engineers and Contractors Pvt Ltd. Vs. Som Datt Builders Ltd***. (supra),

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it is held that a general reference to a prior agreement in the subsequent agreement would not have the effect of incorporating the arbitration clause from the prior agreement into the subsequent agreement between the parties. In the present case, there is only a general reference of the prior Agreement of Sale / the said Agreement, in the MoU which is the subsequent agreement. There is absence of any specific reference to the arbitration agreement in the MoU. Hence, there is no incorporation of the arbitration agreement by reference in the MoU. The MoU is a separate writing which does not contain any arbitration clause. This would equally be apply to the Allotment letter and hence the parties to the MoU and the Allotment letter never intended to go for arbitration in respect of the disputes under the independent agreement.

39. The Judgments which have been referred to by the Appellants in support of their contention that under Section 8 of the Arbitration Act only a *prima facie* inquiry is required and not a mini trial, are not applicable in the present case as there is no question of any mini trial. It is a matter of law that the said Agreement having merged into the Deed of Conveyance / Sale Deed is rendered redundant which in turn makes the arbitration clause ineffective.

40. I accordingly do not find any infirmity in the findings of the

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Trial Court that upon the execution of the Sale Deed the rights, obligations and responsibilities in the said Agreement for Sale have perished by the virtue of it having merged into the Sale Deed.

41. In view thereof, the above Arbitration Appeal is dismissed. There shall be no order as to costs.

42. In view of dismissal of Arbitration Appeal, Interim Application No.9968 of 2024 does not survive and is disposed of.

Vina Khadpe

[R. I. CHAGLA J.]

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