

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

AC No. 38 of 2025

(SMT. VEENA TAPARIA AND OTHERS Vs SHRI SUDHIR KUMAR UPADHYA)

Dated : 16-06-2025

*Shri Vishal Baheti, learned senior counsel with Shri Nipun Soni,
learned counsel for the applicants.*

Shri K.K. Chaturvedi, learned counsel for the non-applicant.

1. The applicants have filed this application under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator in terms of agreement dated 8.6.2022.

2. The applicants stated in their claim as under.

2.1 The applicants are the owners of property situated at Prakosthas No.101, 102, 103, 104, 201, 202, 203 and 204 situated at Prem Kutir, 577/2, M.G.Road, Indore (hereinafter referred to as the disputed property). The approximate area of the said property is 8150 sq.ft.

2.2 The applicants entered into Memorandum of Understanding with the non-applicant on 8.6.2022 for the above said property for development of residential building on the same. The non-applicant in terms of MOU is entitled to 38% portion of the developed area in the disputed property, while the applicants would get remaining 62% of the developed area.

2.3 In terms of the MOU the non-applicant was required to pay a sum of Rs.1,19,00,000/- to the applicants as interest free deposit upon signing of the development agreement. According to the applicants, the non-applicant was further required to pay a sum of Rs.Five lacs per month to the applicants

for a period of five months beginning from 1.12.2022. However, as per the applicants only a sum of Rs.Fifty Six lacs was paid by the non-applicant to them at the time of signing of MOU and no further amount was paid by the non-applicant.

2.4 It has further been stated by the applicants that non-applicant was required to complete the construction of residential building on the disputed property within a period of two years from the date of signing of MOU. All the permissions/approvals required for construction were to be obtained by the non-applicant, but he has failed to even apply for said permissions/approvals. It is for this reason non-applicant was unable to construct residential building on the disputed property. As such the applicants have failed to comply with the terms of MOU in both ways i.e. neither the construction has been started nor the payment has been made. Applicants further submitted that they have tried to negotiate with the non-applicant for a construction of residential building on the subject property informing payment in terms of the MOU, but the non-applicant failed to comply with the same. As such the applicants sent notice dated 18.10.2024 to the non-applicant thereby informing termination of the MOU on account of breach of terms of the same and by invoking Clause 6.1 of the said MOU proposed name of Shri Vaibhav Bhagwat as Conciliator between the applicants and non-applicant to resolve their inter-se dispute.

2.5 The applicants further submitted that the non-applicant replied to the above said notice on 24.10.2024 thereby denying existence of any dispute/difference between the parties and also rejected the applicants'

proposal of appointment of Conciliator.

2.6 The applicants on receiving the reply of non-applicant sent a counter reply on 4.11.2024 thereby reiterating the appointment of Shri Vaibhav Bhagwat as an independent Conciliator to which the non-applicant again responded by his reply dated 21.11.2024 rejecting the proposal.

2.7 The applicants submitted that in view of the above facts and circumstances a notice for arbitration was sent by them to the non-applicant on 8.3.2025 (Annexure A/6) thereby proposing names of two persons for appointing anyone of them as sole Arbitrator for arbitration of the dispute between them.

2.8 The non-applicant vide his communication dated 18.3.2025 denied to give consent for appointment of sole Arbitrator, it has also been stated by the applicants that on one hand the non-applicant has rejected the proposal of appointment of above two persons and on the other hand also not proposed any name for appointment of Arbitrator. As such the applicants did not have any other way except to file present Arbitration Case under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.

3. The non-applicant filed his reply, wherein following submissions have been made by him.

3.1 The non-applicant submits that the arbitration application has been filed by concealing material facts. It has been stated by the non-applicant in his reply that the applicants have entered into an agreement (MOU) for redevelopment of their bungalow/house by promising that they will develop multi-storied building, but they have failed to do so. Instead, they have

entered into an agreement for the same property with a third party for selling the same and have taken money from the third party.

3.2 It has also been stated by the non-applicant that no sooner than he learned about the misdeed of the applicants, he has issued notice to the applicants as well as the third party and has also proposed criminal/legal action for criminal breach of trust and cheating against the applicants.

3.3 As per the non-applicant it is only on this notice and proposed legal action the applicants have filed this application for appointment of Arbitrator.

3.4 The non-applicant has further submitted that he has paid an amount of Rs.Fifty Six Lacs to the applicants in the account of M/s Marvel Agrex Ltd. in advance as per their instructions and subsequently after signing of MOU an additional amount of Rs.Ten Lacs was also transferred to applicant No.1 Smt. Veena Taparia in her bank account through RTGS. As such total amount of Rs.Sixty Six Lacs has been paid to the applicants.

3.5 It has also been stated by the non-applicant in his reply that applicants have failed to provide vacant possession of the plot on which Prem Kutir (disputed property) is situated. It is more than two years after signing of MOU, but the mortgage created by the applicants in favour of ICICI bank against the outstanding debt of Rs.2.35 crores has not been cleared, though, it was promised by the applicants in Clause 1.5 of MOU that vacant possession of the property (disputed property) shall be given by the owners.

3.6 The non-applicant further submitted that after signing of MOU he

has published notice in daily newspaper Dainik Bhaskar edition dated 1.8.2022 in a routine process so as to ascertain clear and marketable title, but in response to said public notice objections from Mourya Regency Building Management Association were received thereby pointing out that adjacent building and disputed property are constructed on single plot of land for which a common map was sanctioned by Indore Municipal Corporation, available FAR for the said piece of land has already been utilized. As such additional construction after demolition of Prem Kutir will not be permitted by them (objectors).

3.7 The non-applicant further stated that there is existence of one more agreement between the non-applicant and another person, who has published a public notice on 19.10.2024 through his Advocate Shri Murtaza Arif in Dainik Bhaskar and Dainik Agniban edition on 19.10.2024. As such the non-applicant submits that the applicants are indulged in creating documents for disposal of the same property to various persons thereby causing wrongful gain to themselves and in turn causing wrongful loss to all those parties including the non-applicant. According to the non-applicant the applicants have acted under well planned conspiracy. Thus, a Police complaint was filed by him on 30.1.2025.

4. In view of the above, non-applicant denied each and every submission of the applicants, but in para 14 of his reply he has specifically stated thus:-

"With reference to Para 4 of the application, as referred in clause 6.2 of MOU (refer page 28 of application), non-applicant has no objection for appointment of Mr. Vinod Kumar Jain as sole

Arbitrator, which is agreed in the MOU itself subject to condition that arbitration has to be done for the refund of money paid by non-applicant, interest thereon and compensation for holding the non-applicant idle and his capital kept reserved for the project and breaches of terms and conditions of MOU."

5. Heard learned counsel for the parties and perused the record.

6. The MOU dated 8.6.2022 has been entered between Smt. Veena Taparial and Shri Rahul Taparia as one party and Shri Sudhir Kumar Upadhyay as other party.

Clause 6.1 and 6.2 of the MOU provides as under :-

"6.1 If any dispute or difference of any kind whatsoever shall arise between the parties in connection with or arising out of this MOU (including disputes or differences between the parties), the parties hereto shall promptly and in good faith negotiate with a view to its amicable resolution and settlement. In the event no amicable resolution or settlement is reached within a period of thirty (30) days from the date on which the dispute or difference arose, such dispute or difference shall be referred to an independent person for conciliation within 30 days thereof for deriving settlement between the parties.

6.2 In the even no amicable resolution or settlement is reached within a period of sixty (60) days from the date on which the dispute or difference arose, such dispute or difference shall be referred to a sole Arbitrator.

Mr. Narendra Singhal or Mr. Vinod Kumar Jain are hereby named as the Sole Arbitrator. The parties need to obtain the consent from these gentlemen. In case of their inability or non-availability any other suitable person shall be appointed as sole Arbitrator.

The arbitration proceedings shall be held in Indore in English language under the Arbitration & Conciliation Act, 1996 including any statutory modification or amendment thereof."

7. From a bare perusal of the above quoted clauses it is crystal clear that there is undisputable existence of arbitration agreement. Further, in terms of clause 6.3 of the MOU the award of the Arbitrator shall be final and binding on the parties. The non-applicant in para 14 of his reply has

consented for appointment of **Mr. Vinod Kumar Jain** as sole Arbitrator (which is also agreed in the MOU itself), but this consent has been preempted by a condition that arbitration has to be done for the refund of money paid by the non-applicant, interest thereof and compensation holding the non-applicant idle and his capital kept reserved for the project and breaches of terms and conditions of MOU. In para 15 it has also been set out by the non-applicant as a pre-condition for arbitration that non-applicant shows his readiness for limited point of amount of compensation after fulfilling pre-requisites or selling outright at the cost agreed with third party without any adverse effect on ongoing process of criminal action.

8. This Court while considering an application under Section 11 of the Arbitration & Conciliation Act, 1996 has to confine itself to examination of the existence of an arbitration agreement. In the instant case as quoted above the arbitration agreement is not only present, but unambiguous in its intent. It not only provides arbitration and suggests agreed names of Arbitrators, but it also holds in clause 6.3 that award passed by the Arbitrator shall be final and binding on the parties. As such existence of arbitration agreement is very much there. As to the procedure, which a party failed to adhere it is seen from the pleadings of respective parties that the applicants have proposed appointment of Arbitrator by sending notice dated 8.3.2025 (Annexure P/6), which was replied by the non-applicant vide its reply dated 15.3.2025 (Annexure P/7), whereby denying consent for appointment of Arbitrator. As such it is clear that parties have failed to appoint Arbitrator through consent. Thus, this application under Section 11 has come before this Court.

9. The Hon'ble Apex Court in the case of Office for *Alternative Architecture Vs. Ircon Infrastructure and Services Ltd.*, reported in 2025 SCC Online SC 1098, has held as under :-

"6. The short question that falls for out consideration is whether while exercising power under Section 11 of the 1996 Act, the Court has to confine its consideration as to the existence of an arbitration agreement between the parties. If so, whether it would be permissible, while exercising jurisdiction under Section 11, to hold that some of the claims raised are non-arbitrable or fall within excepted category.

7. Sub-section (6A) of Section 11, which was inserted by Act 3 of 2016, with effect from 23.10.2015, makes it clear that while considering an application under sub-section (4) or sub-section (5) or sub-section (6), the Supreme Court or the High Court, as the case may be, shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

.....

10. The significance of the use of expression "not other issues" in the statement of objects and reasons of the 2015 amendment was noticed by a seven-Judge bench of this Court *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act*.

"209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an Arbitrator shall '*examine the existence of prima facie arbitration agreement and not other issues*'. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceeding."

11. Relying on the above observations made by this Court in *In Re: Interplay* (supra), a three-Judge bench of this Court in "*SBI General Insurance Co.Ltd. Vs. Krish Spinning*" observed:

"114. that the scope of enquiry at the stage of

appointment of Arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia Vs. Durga Trading Corporation (supra) and adopted in 'NTPC v. SPML Infra Limited (supra) that the jurisdiction of the referral Court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re: Interplay (supra)".

Emphasis Supplied

12. As the above decision has been rendered by a three-Judge bench of this Court after considering the seven-Judge bench decision of this Court in In Re: Interplay (supra), we are of the view that the respondent cannot profit from certain observations made by a two-Judge bench of this Court in *Emaar* (supra). In our view, therefore, the High Court fell in error in bisecting the claim of the appellant into two parts, one arbitrable and the other not arbitrable, when it found arbitration agreement to be there for settlement of disputes between the parties. The correct course for the High Court was to leave it open to the party to raise the issue of non-arbitrability of certain claims before the arbitral tribunal, which, if raised, could be considered and decided by it."

10. Now, in reply to application, the non-applicant has agreed vide para 14 of its reply that he has no objection for appointment of Mr. Vinod Kumar Jain as sole Arbitrator in terms of MOU. As such, this Court is of the considered view that he can be appointed as Arbitrator for arbitration of dispute between the applicants and non-applicant.

11. In view of the competing submissions made by the parties it is crystal clear that it is not possible to resolve dispute between the parties through mutual discussion. Thus, this Court hereby proposes the name of **Mr. Vinod Kumar Jain for appointment as Sole Arbitrator** for adjudication of the

dispute between the parties subject to his consent.

12. As regards exclusion of certain aspects of dispute the same cannot be done in the proceedings under Section 11 of the Arbitration & Conciliation Act by this Court. Thus, the same is left for the discretion of the proposed Arbitrator to adjudicate upon the arbitraribility of the different aspects of the disputes between the parties.

13. Let a declaration in terms of Section 11(8) and 12(1) of the Arbitration & Conciliation Act, 1996 in the prescribed form as contained in sixth Schedule of the Act be obtained from the proposed Arbitrator by the Principal Registrar of this Court before the next date of hearing.

14. The details (including address) of proposed Arbitrator shall be furnished by the parties within five days from today before the Principal Registrar.

Let the matter be fixed for further orders on 21.7.2025.

(PAVAN KUMAR DWIVEDI)
JUDGE

patil