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An arbitration agreement cannot be enforced if the mandate for a subsequent event in the main contract has not been fulfilled
Kalpataru Ltd. v. Middle Class Friends Coop HSG Society Ltd.

Case No.	Commercial Arbitration Petition (L.) No. 11890 of 2021
Date	16 December 2021
Court	High Court of Bombay
Coram	Hon'ble Mr. Justice G.S. Patel

1. **FACTUAL MATRIX AND PROCEDURAL HISTORY:**

- 1.1 Middle Class Friends Coop HSG Society (“**Respondent**”) issued a public notice in February 2019 for redevelopment of its property. Kalpataru Ltd. (“**Petitioner**”) bid for the Respondent’s redevelopment and a Letter of Intent (“**LoI**”) was entered into on 18 October 2019.
- 1.2 Clause 2 of the LoI provided for the Parties to execute the formal agreement comprising of the Proposed Development Documents. A draft of the formal Development Agreement (“**DA**”) was sent by Petitioner on 3 December 2019. After a series of negotiations and amendments to the DA, Respondent terminated the Contract on 18 May 2021.
- 1.3 Consequently, the Petitioner filed an application before the High Court of Bombay (“**High Court**”), under Section 9 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) for interim relief. It sought to restrain the Respondent from acting on its termination letter.

2. **ISSUE:**

- 2.1 Whether the LoI containing the Arbitration Agreement is unenforceable since the subsequent agreement was not executed?

3. **CONTENTIONS OF THE PETITIONER:**

- 3.1 The Petitioner submitted that the Respondent has not complied with the requirements for a notice and cause period option mentioned in the LoI for termination of contract. It was further submitted that the formal DA was not a necessity and hence the contract was concluded between the Parties. All requirements of contract mentioned under Section 10 of the Indian Contract Act, 1872 (“**the Contract Act**”) were fulfilled. Petitioner stated that the execution of the DA was not an essential term of the contract.
- 3.2 The Petitioner also submitted that the time limit of 18 months mentioned in the LoI for execution of the DA was extended due to the conduct of the Parties. Respondent had breached the terms of the LoI which mandated confidentiality. The Petitioner placed reliance on various judgements to prove that a contract had been concluded.

4. **CONTENTIONS OF THE RESPONDENT:**

- 4.1 The Respondent relied on Clause 2 of the LoI which provided for the 180 days-time-line for the execution of the formal DA. The clause represented that only an inchoate contract was entered into and not a concluded contract. It was further submitted that without the execution of the DA, the Petitioner cannot enforce the contract.

5. **JUDGEMENT OF THE HIGH COURT:**

- 5.1 The High Court relied on three factors while addressing the case. These included the relative position of the Parties; the state and nature of the property; and the balance of convenience test. The conflict of balance of convenience was considered by the High Court to adjudicate upon the matter.
- 5.2 The High Court noted that even though the LoI was entered into, there existed no consensus on basic details of the project since they were to be ascertained by the execution of the formal DA. It rejected Petitioner’s reliance on *Kollipara Sriramulu*¹,

¹ Kollipara Sriramulu v. T. Aswatha Narayana, 1968 AIR 1028.

and stated that execution of every future agreement is not a formality but is a test of substance. If the parties have agreed that important aspects of the contract are yet to be agreed and will be included through a future agreement, then the earlier agreement cannot be enforceable.

- 5.3 In light of the specific facts, the High Court concluded that the DA formed an essential requirement for conclusion of the contract. There was no *consensus ad idem* on basic elements of the contract, i.e., the form, nature and precise configuration of the Society's component. The High Court accepted Respondent's reliance on *Kalpataru Properties*² and *Subodh Chandra Nandy*³ to hold that no contract had been concluded.
- 5.4 Furthermore, the High Court also held that if the main contract containing an arbitration agreement had not been concluded, then it would not be enforceable. It was stated that reliance on Section 10 of the Contract Act would be an over-simplification. Therefore, every agreement is not necessarily enforceable if the contract had not been concluded.

6. PSL OPINION:

- 6.1 The present judgement has emphasized on the nature of a concluded contract if a future agreement has not been entered into. It has also noted the effect it will have on the arbitration agreement. The test of substance has been given importance to determine whether there existed *consensus ad idem* between the Parties. Ultimately, balance of convenience test would be taken into consideration to decide upon the enforceability of the contract.

² *Kalpataru Properties Pvt. Ltd. v. Majitha Nagar CHSL*, 2014 SCC OnLine Bom 984.

³ *Subodh Chandra Nandy and Ors. v. Himanshu Bala Bose and Ors.*, (1955-56) 60 CWN 423.