

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5483 OF 2015

Smt.Yamuna Ashok Tandel & Ors.

.. Petitioners

vs.

M/s.Puranik Builders Pvt.Ltd. & Anr.

.. Respondents

Mr.Sandesh D. Patil with Ms.Anusha Amin for the petitioners

Mr.P.K.Dhakephalkar, Sr.Counsel i/b Mr.Jaydeep Deo for respondent no.1

CORAM : K. K. TATED, J.
DATE : AUGUST 8, 2016

PC.:

- 1 Heard the learned counsel for the parties.
- 2 By consent of both the parties, matter is taken on board for final hearing at the stage of admission.
- 3 By this Petition under Article 227 of Constitution of India, the petitioner original plaintiff challenges the order dated 17.4.2015 passed by 4th Joint Civil Judge, Senior Division, Thane below Exhibit-20 in Regular Civil Suit No.266 of 2014 allowing respondent no.1 defendant no.1's application under Section 8 of the Arbitration and Conciliation Act, 1996 referring the suit matter to the Arbitrator.

4 For the sake of convenience, the nomenclature of the parties as is stated in the suit will be referred to hereinafter as the petitioner original plaintiff and respondent no.1 original defendant no.1 and respondent no.2 original defendant no.2.

5 Plaintiff and defendant no.1 entered into development agreement dated 12.04.2007 in respect of the suit property bearing Survey No.5, Hissa No.5 (Part) i.e. Old Survey No.69, Hissa No.5 (d) admeasuring O H 2 R etc. Because of dispute between plaintiffs and defendant no.1, the plaintiff filed Regular Civil Suit No.266 of 2014 in the court of Civil Judge, Senior Division, Thane for declaration that agreement dated 12.4.2007 executed between plaintiffs and defendant no.1 stand cancelled and to restrain the respondent no.2 Municipal Corporation of Thane from giving any permission, sanction, NOC in favour of defendant no.1 or any other person or persons claiming through it for the purpose of development of the suit property with following prayers:

“(a) The Agreement executed on 12/04/2007 by the plaintiffs, be declared as cancelled and the defendant no.1 or its agents or any other persons claiming through to it has no right, interest or claim of whatsoever nature in the suit property.

(b) It may be declared that the Defendant no.1 has no right to act upon the agreement dated 12/04/2007 on the strength of power of attorney executed in favour of the defendants on 12/04/2007 and said power of attorney stands cancelled and ineffective.

(c) It may be declared that in case any transaction has been entered between defendant no.1 and any other person or persons in respect of the suit property same stands cancelled and shall not be binding upon the plaintiffs.

(d) The defendant no.1 its agents, servants, hire lingers or any other person or persons claiming through it, be restrained from entering into the suit property or its any part by the order of perpetual injunction of this Hon'ble Court.

(e) Pending hearing of the suit, the defendant no.1 its agents, servants, hire lingers or any other persons or persons claiming through it, be restrained from entering into the suit property or its any part by the order of interim injunction of this Hon'ble Court.

(f) The defendant No.1 its Agents, Servants, Hire Lingers or any other person or persons claiming through it, be restrained from creating third party interest in the suit property or its any part by the order of perpetual injunction of this Hon'ble Court.

(g) Pending hearing of the suit, the defendant No.1 its Agents, Servants, Hire Lingers or any other person or persons claiming through it, be restrained from creating third party interest in the suit property or its any part by the order of interim or ad-interim injunction of this Hon'ble Court.

(h) The defendant No.2 be restrained from giving any permission, sanction, NOC in favour of defendant No.1 or any other person or persons claiming through it for the purpose of development of the suit properties by the order of perpetual injunction of this Hon'ble Court.

(i) Pending hearing of the suit, the defendant No.2 be restrained from giving any permission, sanction, NOC in favour of defendant No.1 or any other person or persons claiming through it for the purpose of development of the suit properties by the order of interim or ad-interim injunction of this Hon'ble Court.

(j) Cost of the suit be awarded in favour of the plaintiffs.

(k) Any other and further relief be granted in favour of the plaintiffs as this Hon'ble Court may deem it proper.

6 In that Suit, plaintiff preferred application under Order XXXIX Rule 1 and 2 read with section 151 of the Civil Procedure Code, 1908 for an order of injunction restraining the defendant from entering into the Suit property and or taking any steps for development. Plaintiff also prayed for order of injunction against defendant no.2 Corporation from issuing any permission, sanction NOC in favour of defendant no.1 for the purpose of development of the Suit Property.

7 In the said proceeding, defendant no.1 preferred application below Exhibit-20 under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the matter/dispute to the Arbitrator. In the said application, defendants submitted that the plaintiffs have with malafide intention impleaded defendant no.2 Corporation as party in the Suit. Plain reading of the pleading of the plaint makes it clear that the plaintiff have not sought any final relief of whatsoever nature against defendant no.2. Defendant no.1 pleaded that as per the development agreement if there is any dispute between the parties, same is required to be referred to the Arbitrator. Hence, defendant no.1 by his letter dated 1.11.2013 before filing suit by the plaintiff through his Advocate invoked Arbitration clause by appointing Justice A.A.Halbe (Retd.) as its Arbitrator and requested plaintiff to appoint Arbitrator of their choice and refer the dispute to the Arbitral Tribunal. The said letter dated 1.11.2013 was duly served on the plaintiff. Instead of appointing Arbitrator, the plaintiff filed the present Suit.

8 The Trial Court considering the submission made by both the counsel at length and considering the various authorities of Apex Court as well as our High Court, held that defendants made out a case for allowing their application. Hence, Trial Court passed following order:

- “1) Application at Exhibit-20 is allowed.
- 2) The parties to the suit are hereby referred to arbitration as per Section 8 of the Arbitration and Conciliation Act, 1996.
- 3) The suit stands disposed off.”

9 Being aggrieved by the said order, petitioner plaintiff preferred the present Writ Petition.

10 The learned counsel for the petitioner plaintiff submits that the Trial Court erred in coming to the conclusion that defendant no.1 made out a case for referring the matter to the Arbitration as per the provisions of Section 8 of the Arbitration and Conciliation Act, 1996. He submits that the Trial Court failed to consider the scope of Section 8 of the Arbitration Act. He submits that in the present proceeding, plaintiff filed suit for cancellation of development agreement dated 12.4.2007 and also restraining defendant no.2 Corporation from granting any permission to the defendant no.1 for developing the Suit property. He submits that admittedly, defendant no.2 was not party to the agreement dated 12.4.2007. He further submits that Civil court has jurisdiction to pass an order of injunction. He submits that the Corporation is not party to the said agreement and hence, even if matter is referred to the Arbitrator, Arbitrator cannot decide the same in view of third party i.e. Municipal Corporation.

11 The learned counsel for the plaintiff submits that the Trial Court failed to consider the fact that without joining defendant no.2 Corporation as a party defendant in the Suit, plaintiffs' legal rights

cannot be protected. He submits that if the Corporation allows defendant no.1 to develop the suit property, the same will affect their rights. In support of this contention, the learned counsel for the petitioner relies on following authorities:

a) ***Bombay Isle Developers Pvt.Ltd. vs. Kamladevi Jagdish Diwan and Anr.***¹. He submits that in this authority our Hon'ble Court held that if reliefs claimed in the Suit were outside the scope of Arbitration Agreement then the Suit is maintainable. He relies on paragraph 5 and 6 of the Judgment which reads thus:

“5. The respondent has rightly invited my attention to the averments in paragraph No. 37 onwards of the plaint to contend that the respondent-plaintiff had no option but to rush to the Court. According to the plaintiff although the development agreement dated 31st October, 2001 was terminated by the plaintiff, the appellant continued with the development activity unabated. As a consequence, the plaintiff had no option but in the first place to rush to the municipal authority. Initially, some response was given by the officers of the municipal authority but the appellant continued with the construction activity after obtaining commencement certificate. In my opinion, there is substance in the grievance made by the plaintiff that in such a situation, the respondent-plaintiff had no other option but to rush to the Civil Court so as to seek appropriate direction also against the municipal authority directing it to abjure from issuing any permission or allowing the appellant-defendant to continue with the construction activity for the reasons noted in the plaint.”

“6. Assuming that the appellant is justified in contending that the relief claimed in prayer (c) to (e) are dependent on the outcome of the decision on relief claimed in prayer Clause (a) which is amenable to arbitration proceedings. However,

¹ 2006 (5) BCR 704

for the nature of the entire controversy in the plaint, the plaintiff had no option but to invoke the jurisdiction of the Civil Court so as to seek appropriate relief even against the defendant No. 2-municipal authority. In any case my understanding of the plaintiffs case in relation to relief in terms of prayer Clauses (b) and (f) claimed in the plaint, the same cannot be considered in arbitration proceedings. The same is in respect of not complying with the conditions of the I.O.D. and in spite of that commencement certificate is issued by the Corporation, as a consequence the appellant started construction activities. In the background of that allegation the plaintiff has sought relief against the defendant No. 2 to issue stop work notice to the appellant and also to cancel and revoke the commencement certificate issued in favour of the appellant-defendant No. 1. The said relief by no stretch of imagination can be considered in arbitration proceedings. The decision in the case of *Sukanya* in my opinion, squarely covers the controversy on hand. In that decision, the Apex Court has taken a view that there is no provision for "splitting the cause" or "parties" and referring the subject-matter of the suit to the arbitrator. In other words, as the relief in terms of prayer Clauses (b) and (f) is outside the scope of arbitration agreement and inseparable, the course suggested by the appellant cannot be acceded to. For, in paragraph No. 17 of the decision in the case of *Sukanya*, it is observed that such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

b) The learned counsel for the petitioner also relies on the judgment of the Apex Court in the matter of *Sukanya Holdings Pvt.Ltd. vs. Jayesh H. Pandya and Anr.*² He relies on paragraph 13, 15 and 16 which reads thus:

² 2003(5) SCC 531

“13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.”

“15. The relevant language used in Section 8 is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.”

“16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.”

c) The counsel for plaintiff relies on the judgment of the ***Rajasthan High Court in the matter of Lalit Narayan Shah vs.***

*Jitendra Kumar & Ors.*³ in which Rajasthan High court followed the principle laid down by this court in the matter of *Bombay Isle Developers Pvt.Ltd. vs. Kamladevi Jagdish Diwan and Anr.* (Supra).

12 On the basis of these submissions and the authorities, the learned counsel for the petitioner plaintiff submits that the Trial Court failed to consider the fact that the Suit filed by the plaintiff, do not affect, in view of Section 8 of the Arbitration and Conciliation Act, 1996. He submits that the Corporation was not party to the said agreement. He further submits that the reliefs claimed against the defendant are beyond the jurisdiction of Arbitral Tribunal. He submits these facts were not considered by the Trial Court on its own merits. Hence, the impugned order passed by Trial Court below Exhibit-20 is required to be set aside, holding that Civil Court has Jurisdiction to entertain the Regular Civil Suit No.266 of 2014 filed by the plaintiff as it is.

13 On the other hand the learned Senior counsel for the respondent defendant no.1 vehemently opposed the present Writ Petition. He submits that there is no dispute between the parties that in agreement for development dated 12.4.2007, the Corporation was not party. He submits that as per agreement dated 12.4.2007, plaintiff permitted defendant no.1 to apply to Corporation for issuing sanction plans for developing the suit property. He submits that bare reading of agreement for development shows that it is not necessary for the defendants to take any permission from plaintiff for development of property. Defendant no.1 have taken appropriate steps to develop the suit property. He submits that plaintiff with malafide intention in order

3 2013(3) CDR 1280 (Raj)

to come out from the clutches of section 8 of the Arbitration and Conciliation Act, 1996 joined the respondent no.2 Corporation as party defendant no.2 and claimed some relief. He submits that in the Suit, plaintiff is seeking injunction against the Corporation from issuing any permission in favour of defendant no.1 for carrying out development activity on the suit property. He submits that the relief claimed by the plaintiffs against the defendant no.2 can be considered by the Arbitrator in appropriate proceeding. Hence, there is no substance in the submission made by the learned counsel for the plaintiff that the Trial Court has jurisdiction to go on with the suit as it is filed by the plaintiff. In support of this contention, the learned counsel for the defendant no.1 relies on the judgment of the Apex Court in the matter of *Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and Others*.⁴ He particularly relies on paragraph 54.5, 54.7. He further submits that this Hon'ble Court in the matter of *A.B.K.Dubhash, FN.Petit, Lady Laila Petit and D.S.Cambatta VS. Petit Towers Co-operative Housing Society Limited and Ors*.⁵ held that even if the Suit is filed along with third party challenging the agreement having clause for appointment of Arbitrator, matter required to be referred to Arbitrator under section 8 of the said Act only. He relies on paragraph 11 of this authority. On the basis of these submissions, the learned Senior counsel for the defendant no.1 submits that there is no substance in the present Writ Petition and same is required to be rejected with costs.

14 I have heard both the sides at length. As per section 8 of the Arbitration and Conciliation Act, 1996, a judicial authority before

4 2013(1) SCC 641

5 2011(5) BCR 168

which an action is brought in a matter which is the subject of arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. In the case of *P. Anand Gajapathi Raju and others vs. P.V.G. Raju (Dead) and others*.⁶ Supreme Court held that the language of section 8 is per-emptory. It is obligatory for the court to refer the parties to Arbitration in terms of their arbitration agreement. In paragraph 5 thereof, Hon'ble Court Supreme Court has laid down the conditions which are required to be satisfied under sub section 1 and 2 of the Section 8 of the said Act before the court can exercises its powers. Those conditions are as under:

- a) There is an arbitration agreement
- b) A party to the agreement brings an action in the Court against the other party.
- c) Subject matter of the action in the same as the subject matter of the arbitration agreement.
- d) The other party moves the Court for referring the parties to Arbitration before it submits his first statement on the substance of the dispute.

15 It is not disputed that the agreement dated 12.4.2007 is between plaintiff and defendant no.1 for carrying out development of the property. In that agreement, plaintiff allowed defendant no.1 to do various acts on behalf of plaintiff to complete the construction work including power to make application on behalf of plaintiff before the government authorities, Corporations, in courts etc. It is specifically stated in the said agreement that if any dispute arise between the parties then they will be refer the matter to the Arbitrator.

6 2000(4) SCC 539

16 In the present proceeding, plaintiff filed the Suit for cancellation of the Agreement dated 12.4.2007 and made the Corporation a party being defendant no.2 restraining them from issuing any permission for development of the suit property in favour of defendant no.1. Same relief can be considered by the Arbitrator on the basis of terms and conditions as described in agreement dated 12.4.2007.

17 If suit filed by joining Corporation as a party, seeking same relief or direction against the defendant, upon the clauses of the agreement, is nothing but overlook the mandate of Section 8 of the Act. The overall and totality of the pleadings and prayers need to be considered while deciding aspects of section 8 of the said Act. The third party to the Suit and Arbitration Agreement itself cannot be the sole criteria to reject application under section 8 of the said Act. The plaintiff by joining local authority or third person as party, wants to frustrate the object of arbitration process though specifically agreed by them. Even if the relief sought by the plaintiff against the Corporation is considered as a basic relief, still, that it itself, cannot be reason to permit the plaintiff to continue with the Suit.

18 So keeping in mind the above principal, if considered the case in hand, in the present case, plaintiffs have sought relief against defendant no.2 Corporation to the effect that defendant no.2 should not give any further permission, NOC in respect of the suit property to defendant no.1, but the pleading shows that main reliefs were sought against defendant no.1 only. There is arbitration agreement between plaintiff and defendant no.1 as discussed above. Plaintiffs have joined defendant no.2 Corporation as party so as to frustrate the object of arbitration clause.

19 The authority cited by the plaintiffs as stated hereinabove are not applicable in the facts and circumstances of the present case. The reliefs which the plaintiffs was claiming in the plaint can be considered by the Arbitrator on the basis of terms and conditions of the agreement dated 12.4.2007. Even the Apex Court in the matter of ***Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and Others.*** (Supra) held that even if third party joined in the Suit as defendant challenging the agreement having arbitration clause, court can refer the matter to the Arbitrator.

20 In the case in hand, defendant no.1 by his letter dated 1st November, 2013 through his advocate invoked Arbitration Clause by appointing Justice A.A.Halbe (Retd.) as its Arbitrator and required Plaintiffs to appoint Arbitrator. Instead of appointing Arbitrator, plaintiff filed Suit on 23.2.1999. Hence, present matter squarely covers under the provisions of Section 8 of the said Act.

21 Considering these facts and the law declared by the courts, I am of the opinion that petitioners plaintiffs failed to make out any case to entertain present Writ Petition setting aside the well reasoned order passed by Trial Court dated 17.4.2015 below Exhibit-20 in Regular Civil Suit No.266 of 2014. Hence, following order is passed:

22 Writ Petition stands dismissed with costs.

JUDGE