

JSN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMON NO. 511 OF 2013
IN
SUIT NO. 1287 OF 2012

Kamlaben Girdharlal Javeri ...Plaintiff
Versus
Alka Sameer Javeri & Ors. ...Defendants

Ms. Faiza Dhanani, *i/b Dhruve Liladhar and Company for Defendants Nos.3, 4 and 5.*
Mr. Ashish Kamath, *with Gaurav Mehta, Abhijeet Mahadeokar, for Respondent in CHS.*
Mr. Shailesh Mendon, *with Mr. Prakash Shah, i/b M/s. Prakash and Company for Defendants Nos. 1 and 2 / Applicant.*
Mr. Suraj Iyer, *i/b Ganesh and Company for Defendants Nos.6 & 7.*

CORAM: G.S. PATEL, J
DATED: 22nd September 2016

PC:-

1. This is an application by Defendant No.1 under Section 8 of the Arbitration and Conciliation Act 1996 to refer parties to arbitration in view of an agreement dated 12th October 2009.¹
2. I have heard learned counsel for the parties. There are two difficulties in the 1st Defendant's way. The first is that Defendant No.2, Upasana Sameer Javeri, the daughter of the 1st Defendant /

1. Affidavit in Support, pp.18-22.

Applicant, Alka Sameer Javeri, is not a party to the agreement. It is not in dispute that at the time of the agreement Upasana was a minor. This fact, however, does not assist the 1st Defendant because the agreement does not say that Upasana's interest are in any way represented in the making of that agreement. Having regard to the decision of the Supreme Court in *Sukanya Holdings (P) Ltd. V. Jayesh H. Pandya and Another*,² I do not see how I can, by implication, proceed on the footing that Upasana must be 'deemed' to have been a party to this agreement. Mr. Kamath is correct, in my view, in submitting that this is not the purport of Section 8 of the Arbitration and Conciliation Act.

3. Mr. Kamath also points out that clause 10 of the agreement makes it extremely doubtful that this agreement is at all in force. Clause 10 reads as follows:

10. **It is agreed that the provisions contained in the present Agreement shall come into effect only after the demise of Kamlaben and not otherwise.** During lifetime of Kamlaben all the rights and interest including the joint use and enjoyment of the said flat and parking space by Kamlaben and Alka shall not be interfered with or objected by anyone including Alka.

(Emphasis added)

4. Kamlaben is the Plaintiff and she is very much alive. The first part of Clause 10 therefore does not permit that any arrangement regarding partition, etc., is to be effected under that Agreement

2. (2003) 5 SCC 531.

during her lifetime. There is, therefore, no governing Agreement regarding partition, and therefore nothing to arbitrate.

5. Mr. Mendon's answer to this is a reference to clauses 5 and 6 which say that the flat in question is being occupied and maintenance charges are being paid. I believe this is quite beside the point because clause 3 of the agreement speaks of a division of the flat or its transmission upon the death of the Plaintiff in favour of the 1st Defendant. There is no question of a partition of the flat so long as the Plaintiff Kamlaben is alive. In any case, I have the gravest of reservations about the legality of the second portion of clause 3 in which parties by consent have purported to restrict the Plaintiff's testamentary dispositive powers. It is one thing, in my view, to provide for a division or partition of property *inter vivos*. It is quite another to say that a certain person is restrained by an agreement by making a testamentary disposition. That issue is left open.

6. There is no merit in the Chamber Summons. It is dismissed. There will be no order as to costs.

(G. S. PATEL, J.)