

BDPPS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO. 571 OF 2015
IN
ARBITRATION PETITION NO. 974 OF 2011**

Sachin C. Shah)
of Mumbai, Indian Inhabitant)
residing at T-2, Planet Godrej,)
KK Marg, Mahalaxmi, Mumbai)
- 400011) Appellant
(Original Petitioner)

V/s

1. Hemant D. Shah)
2. Kokila H. Shah)
3. Samir H. Shah)
4. Vipul H. Shah)
all of Mumbai, Indian Inhabitants,)
residing at 1803, Rajul "A")
Apartments, 9, S.J. Mehta Rd;)
Mumbai – 400 006)
5. Hemant D. Shah (HUF))
through its Karta, Hemant D. Shah)
having address at 1803, Rajul "A")
Apartments, 9, S.J. Mehta Rod,)
Mumbai – 400 006)

AND

6. Chittaranjan D. Shah)
7. Dr. Viral C. Shah)
8. Parul V. Shah)
all of Mumbai, Indian Inhabitants,)
residing at 2501, Om Vikas Towers)
105, Walkeshwar Road,)
Mumbai – 400 006)

9. Chittaranjan D. Shah (HUF))
through its Karta Chittaranjan D.)
Om Vikas Towers,105,Walkeshwar)
Road, Mumbai – 400 006)
10. Gayatri R. Shah)
representing the estate of late)
Smt. Sarla Chittaranjan Shah)
residing at T2, Planet Godrej, KK)
Marg, Mahalaxmi,Mumbai-400011) ...Respondents.
(Org. Respondents)

Mr. N. Ganpanthy Senior Counsel a/w Mr Sanjay Sareen, Mr. Prayag Joshi i/b Mr. Bipin Joshi for the Appellant.

Mr. Rafique Dada, Senior Counsel a/w Mr. Riyaz Chagla, Mr. Vibhav Krishna Devang Lakhotia i/b Juris Consillis for Respondent Nos. 1 to 5.

**CORAM: V. M. KANADE &
MRS. SWAPNA JOSHI, JJ.**

DATE: 14th September, 2016

JUDGMENT: (Per V.M. Kanade, J.)

1. Appellant in this appeal is challenging the order passed by the learned Single Judge dated 06/05/2015. Appellant herein is the son of Chittaranjan D. Shah who is the Appellant in connected Appeal (L) No.572 of 2015. Briefly stated, his contention is that, initially, all the parties including himself had appointed Mr. Justice V.D. Tulzapurkar (Retd.) as a sole Arbitrator to decide the dispute between the parties on the issue as to whether Respondents were seeking specific performance of the MOU/Family Settlement dated 09/03/1994. His contention is that after the sole Arbitrator Mr. Justice V.D. Tulzapurkar (Retd.) passed away and Mr. Justice D.R. Dhanuka (Retd.) was appointed in his place, at that time his consent for appointment of Mr. Justice D.R. Dhanuka (Retd.) was not

obtained. It is his case that when an order appointing Mr. Justice D.R. Dhanuka (Retd.) was passed by Mr. Justice D.K. Deshmukh (as he then was), he was not made a party to that application and his consent therefore was not taken. Secondly, no notice also was given to him by Mr. Justice D.R. Dhanuka (Retd.), though he was a proper and necessary party. It is his contention that Mr. Justice D.R. Dhanuka (Retd.) did not have jurisdiction to decide the dispute since his consent for his appointment was not taken.

2. It is necessary to give a brief background of the dispute between the parties.

3. On 09/03/1994, MOU was entered into between Chittaranjan D. Shah group (For Short "CDS group") and H.D. Shah group viz Respondent Nos. 1 to 5 herein (For short "HDS group") as and by way of Family Settlement of Concerns and the properties belonging to the two groups. Differences and disputes between the parties arose even after the MOU and Respondents – HDS group filed a Suit being Suit No.1421 of 1997 seeking specific performance of the said MOU/Family Settlement.

4. On 09/02/2000, this dispute was referred to the arbitration of Mr. Justice V.D. Tulzapurkar (Retd.). The arbitration proceeded before Mr. Justice V.D. Tulzapurkar (Retd.) for almost 4 to 5 years, till he expired on 27/06/2005. An application was filed for appointment of Mr. Justice D.R. Dhanuka (Retd.) in place of late Mr. Justice V.D. Tulzapurkar and, thereafter, arbitration continued before the new Arbitrator Mr. Justice D.R. Dhanuka (Retd.)

5. On 30/09/2008, Appellant preferred an application before the

Arbitrator under Section 16 of the said Act, contending that the Arbitrator did not have jurisdiction to proceed with the arbitration since his consent was not obtained when he was appointed as an Arbitrator.

6. The learned Arbitrator vide detailed order dated 10/06/2009 rejected the application filed by the Appellant herein under Section 16 of the said Act and thereafter passed an Award allowing the claim of the Respondents - HDS group and rejecting the counter-claim of the Respondents – CDS group on merits as well as on limitation. This order was modified under Section 33 of the said Act on 24/08/2011.

7. Appellant challenged the said Award by filing Arbitration Petition No.974 of 2011 firstly on the ground of jurisdiction and secondly on merits. CDS group also challenged the said Award by filing Arbitration Petition No.1069 of 2011 on various grounds.

8. The learned Single Judge by his Judgment and Order dated 06/05/2015 dismissed the Arbitration Petition No.974 of 2011 filed by the Appellant – Sachin C. Shah and the Arbitration Petition No.1069 of 2011 filed by other members of CDS group.

9. Two appeals have been filed against the said Judgment and Order passed by the learned Single Judge; one by the Appellant herein and other by other members of CDS group.

10. Mr. Ganpanthy, the learned Senior Counsel appearing on behalf of the Appellant – Sachin C. Shah firstly submitted that he was adopting the arguments which were to be advanced in other appeal filed by CDS group

and he was restricting his arguments in this appeal only on the issue of jurisdiction of the Arbitrator in proceeding with the arbitration without obtaining the consent of the Appellant – Sachin C. Shah.

11. It must be mentioned herein that initially the Appellant herein had approached the learned Single Judge who had appointed Mr. Justice D.R. Dhanuka (Retd.) for recalling his order of appointment of Arbitrator on the ground that his consent was not taken. The learned Single Judge rejected the said application. Appellant thereafter preferred an application under Section 16 before the learned Arbitrator Mr. Justice D.R. Dhanuka (Retd.), which application was dismissed.

12. It is well settled that if an application under Section 16 is dismissed, the aggrieved party can challenge the said order after final Award is passed by filing a Petition under Section 34 of the said Act.

13. Mr. Ganpanthy, the learned Senior Counsel appearing on behalf of the Appellant submitted firstly that the claimants after the death of Mr. Justice V.D. Tulzapurkar (Retd.) could not file application under Sections 11(2), 11(5) and 11(6) of the said Act to fill up the vacancy caused by the expiry of the said Arbitrator. He submitted that therefore the appointment of Mr. D.R. Dhanuka (Retd.) as an Arbitrator without filing an application under Section 11 of the said Act was bad in law and therefore he did not have jurisdiction to pass the impugned Award. Secondly, he submitted that Mr. Justice D.R. Dhanuka (Retd.) was appointed by the learned Single Judge before whom the Petition bearing Arbitration Petition (L) No.238 of 2005 was kept for hearing on 27/06/2005. The Respondents/Claimants had filed a Petition under Section 9 of the said Act, challenging the sale of

the property allotted to CDS group, which was sold by public auction. He submitted that in this Petition Respondents/Claimants were represented by lawyers and Respondent Nos. 2, 3, 7, 6 and 8 were also represented by lawyers. Appellant/Respondent No.5 in the said Petition had no notice of the Petition and he was not served with the copy of this Petition. It was submitted that the learned Single Judge (D.K. Deshmukh J.[as he then was]) by his order dated 27/06/2005 recorded the consent of parties to the appointment of Mr. Justice D.R. Dhanuka (Retd.). It was submitted that the consent of the Appellant/Respondent No.5 was not recorded in these proceedings since he was not served with the notice of the said Petition. Thirdly, it was submitted that even the Court did not record that the Appellant's father had given consent on behalf of Respondent No.5 to the said appointment and fourthly it was contended that lawyer for the Claimants did not bring to the notice of the Court the fact that the Appellant/Respondent No.5 remained unserved in the matter. It was then submitted that Mr. Justice D.R. Dhanuka (Retd.) issued notices to all the parties except the Appellant/Respondent No.5. Thereafter, numerous meetings/hearings of Arbitral Tribunal were held but no notice was ever issued to the Appellant/Respondent No.5. It was then contended that the Appellant/Respondent No.5 became aware of the arbitral proceedings when the Appellant's mother Mrs. Sarla Shah expired on 25/07/2007 and his wife came to be impleaded as party to the arbitral proceedings as an executor of the Will of Late Sarla Shah

14. It was then contended by the learned Senior Counsel appearing on behalf of the Appellant that the Appellant, after coming to know of the arbitral proceedings, tendered a Written Statement under protest on

10/09/2008, which was not taken on record by the learned Arbitrator and on 30/09/2008, Appellant filed an application under Section 16 of the said Act, challenging the jurisdiction of the Arbitral Tribunal.

15. It was submitted by the learned Senior Counsel appearing on behalf of the Appellant that the finding given by the learned Arbitrator while rejecting the application filed by the Appellant under Section 16 is contrary to the provisions of section 25(b) of the Arbitration and Conciliation Act. He has taken us through the reasons given by the sole Arbitrator while rejecting the application of the Appellant under Section 16 and also the reasons given by the learned Single Judge. Further, the learned Senior Counsel appearing on behalf of the Appellant placed reliance on Section 16 and 14(2) of the said Act and contended that the Appellant could never have applied to the Court to vary the order appointing new Arbitrator since the law did not permit the Court to interfere once the Arbitral Tribunal was constituted. Reliance was also placed on para 36 and para 46(ix) of the Judgment of the Apex Court in *M/s S.B.P and Co vs. M/s. Patel Engineering Ltd. & Anr.*¹. He submitted that there was a serious lapse on the part of the Claimants in not effecting the service on the Appellant/Respondent No.5. He submitted that the learned Single Judge erred in drawing an inference that the Appellant/Respondent No.5 had knowledge of the arbitral proceedings. In this context, he relied on para 36 of the Judgment in *M/s S.B.P and Co.* (supra). He then invited our attention to para 46(ix) of the said judgment in *M/s S.B.P and Co* (supra). Clause (ix) of para 46 of the said judgment reads as under:-

1 2006 (1) G.L.H. 105

“46. We, therefore, sum up our conclusions as follows:

(i) to (viii)

(ix) “In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.”

It was submitted by the learned Senior Counsel for the Appellant that the learned Single Judge, who appointed Mr. Justice D.R. Dhanuka (Retd.) as an Arbitrator, did not ensure that consent of the Appellant was obtained. It was then submitted that the learned Single Judge had erred in holding that the consent of all parties was taken. It was submitted that consent of the Appellant was not taken and he was not served with the notice of the proceedings of 27/06/2005.

16. On the other hand, Mr. Dada, the learned Senior Counsel appearing on behalf of the Respondents, firstly submitted findings recorded by the sole Arbitrator were confirmed by the learned Single Judge under section 34 of the Arbitration & Conciliation Act, 1996 and thus in this case concurrent findings were recorded. He submitted that it is well settled position in law that, normally, whenever findings are given by the Tribunal and they are confirmed by the learned Single Judge under Section 34, these concurrent findings should not be interfered with, unless the Court comes to the conclusion that the findings which are given are contrary to law and are not based on material which is placed on record. Reliance has been placed on the Judgment of the Apex Court in *Associate Builders vs.*

*Delhi Development Authority*¹ (para 33) and also on the Judgment of the Apex Court in *P.R. Shah & Stock Brokers (P) Ltd vs. B.H.H. Securities (P) Ltd.*². Secondly, he submitted that the learned Single Judge in the impugned judgment has taken into consideration several circumstances and facts and material on record for the purpose of coming to the conclusion the sole Arbitrator had jurisdiction to decide the dispute and confirmed the finding recorded by the learned Arbitrator in the application filed by the Appellant under section 16 of the Arbitration & Conciliation Act. Thirdly, he submitted that MOU dated 09/03/1994 being family settlement was required to be interpreted differently from any other formal commercial settlement and should not be disturbed by the Court on technical grounds. Reliance has been placed on the Judgment of the Apex Court in *Hari Shankar Singhania & Ors. vs. Gaur Hari Singhania*³ (paras 43, 54 and 59) and also on the Judgment of the Apex Court in *Kale & Ors. vs. Deputy Director of Consolidation and Ors*⁴ (para 44) as well as on the judgment of the learned Single Judge of this Court in *Vijaypat Singhania Vs. Hari S. Singhania*⁵ and upheld by the Judgment of the Division Bench reported in 2013 (7) Bom.C.R. 563.

17. Mr. Dada, the learned Senior Counsel appearing on behalf of the Respondents, has taken us through the order passed by the sole Arbitrator Mr. Justice D.R. Dhanuka (Retd.) and also the order passed by the learned Single Judge. He submitted that, both, the Arbitrator as well as the learned Single Judge, have considered all the circumstances and have rightly come to the conclusion that the MOU was consented to and acquiesced by all the

1 (2015) 3 SCC 49

2 (2012) 1 SCC 594

3 AIR 2006 SC 2488

4 AIR (1976) SC 807

5 2009(6) Bom.C.R. 303

parties including the Appellant and therefore it was not open for the Appellant to challenge the jurisdiction of the Tribunal. He submitted that an attempt was being made to raise a fresh plea through the Appellant after other pleas were not accepted by the sole Arbitrator.

18 We have heard both the learned Senior Counsel appearing on behalf of both the parties at length.

19. At the outset, it must be noted that Mr. Ganpanthy, the learned Senior Counsel appearing on behalf of the Appellant submitted that he was adopting the arguments which were being advanced by the Appellant's father viz. Chittaranjan D. Shah & his group in the connected appeal. So far as merits of the case are concerned, he proposed to argue only on the point of jurisdiction of the sole Arbitrator and dismissal of the application of the Appellant under Section 16 of the said Act.

20. We are not persuaded by the submissions made by the learned Senior Counsel appearing on behalf of the Appellant. From the sequence and chronology of events, it appears that filing of this application challenging the jurisdiction of the sole Arbitrator was a well thought strategy made by and on behalf of the CDS group. It is not in dispute that MOU/Family Settlement was arrived at on 09/03/1994. Substantial compliance was made of the terms and conditions of the said MOU/Family Settlement. In principle, it was

agreed that since two groups did not get along well, it was decided to part ways. Several Firms were established in which members of both groups were partners. In principle, it was agreed that in those Firms where members of other groups were partners they should resign and handover the Firms to other group and vice versa. Even in respect of properties which were jointly owned, similar arrangement was to be made. After substantial compliance of the MOU/Family Settlement, dispute remained regarding certain properties. According to the Respondents, dispute was in respect of five properties and according to the Appellant, dispute was in respect of the properties mentioned in the Chart. Be that as it may, since the entire compliance was not made of the terms and conditions of the MOU/Family Settlement, a suit was filed by HDS group for specific performance of the MOU/Family Settlement. This suit was filed in 1997. The suit remained pending. Mr. Sachin C. Shah, Appellant herein was a party to the said suit alongwith other group members of his group. Appellant herein did not file separate Written Statement. After the matter remained pending for some time, upon suggestion being made by the learned Single Judge, both the parties agreed for referring the matter to the sole Arbitrator. Accordingly, by consent of all the parties including the Appellant herein, the matter was referred to Mr. Justice V.D. Tulzapurkar (Retd.) for arbitration. The arbitration continued till 2005. However, unfortunately, Mr. Justice V.D. Tulzapurkar (Retd.) expired on 27/06/2005.

21. Thereafter, HDS group filed an application under Section 9 of the

Arbitration & Conciliation Act, which came up before the learned Single Judge. Appellant was a party to the said Section 9 application. It is the case of the Respondents that all the Respondents were represented by a common lawyer. This however is now disputed by the Appellant. The fact of the matter is that in those proceedings before the learned Single Judge, the consent order was passed by which arbitration proceedings were referred to Mr. Justice D. R. Dhanuka (Retd.) In effect, apparently, Mr. Justice D.R. Dhanuka (Retd.) was substituted in place of the earlier Arbitrator. The arbitration proceedings then proceeded before Mr. Justice D.R. Dhanuka (Retd.) from 2005 to 2008. In the meantime, in those proceedings, wife of the Appellant was brought on record as an heir of mother of the Appellant. For the first time in 2008, the Appellant took out application before the learned Single Judge, alleging that since his consent was not obtained before passing the said order, the order should be recalled. The learned Single Judge observed that the Appellant could apply under Section 16 of the said Act and in view of that order an application was filed under Section 16. Initially, an application was filed for taking on record the Written Statement of the Appellant. Secondly, the application was filed challenging the jurisdiction of the Tribunal under Section 16. The learned Judge permitted the Appellant to lead evidence and he was cross-examined in detail by the Counsel for the Respondents. The learned Arbitrator, by giving cogent reasons, dismissed the application under Section 16. Against this order, an appeal under Section 37 was filed by the Appellant. The learned Single Judge also has considered all the circumstances and has dismissed the said appeal.

22. After having heard both the learned Senior Counsel at length,

we are of the view that it is not possible to accept the submissions made by the learned Senior Counsel appearing on behalf of the Appellant. The first submission was that the consent of the Appellant was not taken and therefore arbitration proceedings were without jurisdiction. Secondly, it was submitted that no written notice was served either by Respondents or by Arbitrator and the Appellant was not made a party to the proceedings. Thirdly, it was submitted that proper course of action was to file an application under Section 11(2), 11(5) and 11(6) of the Arbitration & Conciliation Act, 1996 and in the absence of application under Section 11, the appointment of Arbitrator under Section 9 application was bad in law.

23. In our view this submission is without any substance. The sequence of events will clearly show that the Appellant, all along, was adopting the stand taken by his father and at several places his father has signed on behalf of the Appellant. Apart from that, there is gross delay of almost three years in filing this application after the new Arbitrator was appointed. The explanation given by the Appellant that he was in US and therefore was not aware of the proceedings cannot be accepted. It is inconceivable that the party who was a part of the proceedings right from 1992 would not inquire about the proceedings which are pending. The sole Arbitrator has rightly observed that implied or express consent can be gathered from the facts and circumstances of each case. The learned Single Judge has gone to the extent of examining and appreciating all oral evidence adduced by the Appellant in the cross-examination and has rightly held that the case of the Appellant was unacceptable.

24. The learned Single Judge has very elaborately considered all

these facts in detail and has recorded concurrent finding. It is therefore not possible to accept the submissions made by Mr. Ganpanthy, the learned Senior Counsel appearing on behalf of the Appellant. He has chosen to pick out certain stray observations made by the Arbitrator and by the learned Single Judge and on that basis has sought to built up a case, which, in our view, has no foundation since it is well settled that findings have to be examined in the context in which they are given and reliance cannot be placed on any stray observations made here and there.

25. We concur with the view taken by the learned Single Judge and the learned Arbitrator. There is absolutely no substance in the submissions made by the learned Senior Counsel appearing on behalf of the Appellant. Appeal is therefore dismissed.

(MRS SWAPNA JOSHI, J.)

(V.M. KANADE, J.)