

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION APPLICATION NO.305 OF 2015

Shri. Tulsi Chunilal Bhimjyani & Ors. Applicants

Vs.

Shri. Rashmi Chunilal Bhimjyani & Ors. Respondents

Mr. Iqbal Chhagla, Senior Advocate, Mr. Sharan Jagtiani, Mr. Nishit Dhruva, Mr. Prakash Shinde, Ms. Khushbu Chheda i/by M/s MDP & Partners, for the Applicants.

Mr. Mahendra Ghelani alongwith Ms. Sneha Wani i/by Law Charter for the Respondents.

Coram : Smt. R.P. SondurBaldota, J.

Date : 4th January, 2016

PC :

1 This application filed under Sections 11, 14 and 15 of the Arbitration and Conciliation Act seeks appointment of a sole Arbitrator in the place of “Mr. Manish Parekh”. Section 11 of Arbitration Act provides for appointment of Arbitrators. Section 14 provides for termination of mandate of an Arbitrator on account of “failure or impossibility to act”. Section 15 provides for termination of mandate and substitution of an Arbitrator, in the circumstances, specified

therein which are in addition to the circumstances referred to in Sections 13 and 14 of the Arbitration Act.

2 The facts, stated in brief, giving rise to the present application are as follows :

 The applicants and the respondents are the members of Bhimjyani family. In October, 2010, they executed a document named as “Umbrella Memorandum of Family Arrangement” for distribution of the assets of the family (hereinafter referred to as “the Memorandum”). Clause 25 thereof, which is relevant for the present purposes, is titled as “Disputes Resolution/Arbitration”. Sub-clause (a) of Clause 25 records confirmation by the parties of settlement of the disputes inter-se and sub-clause (b) provides for arbitration in specified limited terms. The Clause 25 reads as under :

25 Disputes Resolution/Arbitration

(a) The parties hereto agree and confirm that all the disputes, differences of opinion, claims and counter-claims, if any, between them have been settled and that save and except as provided herein, none of the parties hereto has any other claim or demand of any kind or nature whatsoever against the other or others of them.

(b) the parties hereto mutually agree that if any problem arises in drafting of the documents between the parties hereto or implementing any part of the family arrangement as contained herein, or if any dispute or question of interpretation arises, the same shall be amicably settled amongst the parties hereto. In the event of the failure to do so, the same shall be

settled only by the Sole Arbitrator, Mr. Tulsibhai Tanna, residing at 7/8, Zinia Abad, L.D. Ruparel Marg, Malabar Hill, Mumbai – 400 006, failing whom Mr. Tusharbhai Tanna residing at 7/8, Zinia Abad, L.D. Ruparel Marg, Malabar Hill, Mumbai – 400 006, in accordance with the provisions of the Arbitration and Reconciliation Act, 1996. The site of the Arbitration shall be in Mumbai. The language of the Arbitration shall be English. The decision, direction and the Award of the Sole Arbitrator shall be final and binding on all the parties hereto, and shall be without reason. The parties hereto agree to fully and unconditionally abide by the decision, direction and the Award of the Sole Arbitrator Mr. Tulsibhai Tanna failing which Mr. Tusharbhai Tanna, as the case may be.”

It appears that some time thereafter, the parties had approached Mr. Tulsibhai Tanna, the Arbitrator named in Clause 25, for resolution of certain disputes. The application does not disclose details of the invocation of arbitration. By two interim awards dtd. 8th September, 2012 and 5th December, 2013 passed on the consent of the parties, two more persons came to be introduced into the dispute resolution process. They are one Mr. S.K. Tuteja and one Mr. Manish Parekh.

3 The first interim award dtd. 8th September, 2012, passed in terms of the interim understanding arrived at between the parties, recorded the agreement between the parties regarding distribution of two of the flats. It further provided for finalisation of the accounts by Mr. S.K. Tuteja, which finalisation was to be binding on all the parties.

Upon finalisation of the accounts, Mr. S.K. Tuteja was to forward the same to the learned Arbitrator for passing award in terms thereof.

4 Thereafter the parties, on 4th December 2013, signed consent terms and requested the learned Arbitrator to pass interim award in terms thereof. Accordingly, the second interim award dtd. 5th December, 2013 came to be made by the learned Arbitrator. This interim award referred to deposit of documents in respect of the shares of “Pegasus Assets Reconstruction Private Limited” with Mr. Manish Parekh. It recorded the agreement of the parties that the report of Mr. S.K. Tuteja shall be accepted as it is and neither party shall challenge or question the same except for any omission by Mr. Tuteja to decide on any item falling within or arising from the Memorandum. In that event the party could approach Mr. Tuteja for clarification. Upon such approach, Mr. Tuteja, on his confirmation of omission, was to decide the issue finally, failing which, the issue was to be decided by Mr. Manish Parekh. Mr. Tuteja was requested to give his final report within 15 days and Mr. Parekh was requested to give his decisions within 30 days thereafter. Clause 7 refers to a note handed over to Mr. Parekh with an agreement that all the other points mentioned in the note were to be left to the decision of Mr. Parekh, whose decision was to be final and binding. The note referred to at para 7 of the interim award, handed over to Mr. Manish Parekh, has neither been produced by either side before the court nor any reference made by them to the contents thereof.

5 Apparently, issues relating to Pegasus Assets Reconstruction Pvt. Ltd. and the land at Alibaug were resolved before Mr. Manish Parekh. Thereafter there was some dispute between the parties about continuation of Mr. Manish Parekh. According to the respondents, Mr. Manish Parekh had declined to act further under the second interim award. Finally Mr. Manish Parekh vide his letter dtd. 4th August, 2015 called upon the parties to collect the documents from him. Within a few days thereafter, the learned Arbitrator, by his letter dtd. 11th August, 2015 submitted his resignation. The reasons stated by him in the letter for the resignation read as follows:

“I have tried my best to resolve the issue between two brothers to the best of my ability. Since the matter was not getting resolved in a family atmosphere and as requested by the Bhimjyani brothers, I had transferred the arbitrator rights first to Mr. Himanshu Kotecha. Since Himanshu Kotecha could not also address the issues, the same was subsequently transferred to Mr. Tuteja. Mr. Tuteja had worked out the financial and given his the decision. But again, it has questioned by the Bhimjyani brothers. Thereafter both the Bhimjyani brothers jointly agreed to give the matter to Mr. Manish Parekh.

So it has been quite some time since I have attended this arbitration proceeding and due to my ill-health, I submit my resignation herewith”.

The letter of resignation is thus seen to reveal that there was one more person involved in the process of dispute resolution i.e. Mr. Himanshu Kotecha.

6 The respondents, thereafter by their Advocate's letter dtd. 29th August, 2015 informed Mr. Tushar Tulsidas Tanna that in view of Clause 25(b) of the Memorandum, his appointment as an Arbitrator had become operative and effective on the resignation of the learned Arbitrator and called upon him to continue with the arbitration proceedings. Mr. Tushar Tanna then, by his letter dtd. 9th October, 2015, convened a preliminary meeting on 15th October, 2015. The applicants by their Advocate's letter of even date objected to his appointment. Mr. Tushar Tanna, however, continued with the arbitration proceedings. Therefore, the applicants claim that, they have, by way of abundant precaution, filed an application before Mr. Tulsidas Tanna challenging his appointment as an Arbitrator. The respondents have filed an application for interim reliefs under Section 17 of the Arbitration Act before Mr. Tushar Tanna.

7 Extensive arguments have been advanced by both the sides on (i) interpretation of Clause 25(b) of the Memorandum, (ii) continuation of the arbitral proceedings thereunder by Mr. Tushar Tanna and (iii) appointment of Mr. Manish Parekh in the place of Mr. Tulsidas Tanna to arbitrate the dispute between the parties.

8 Mr. Chhagla, the learned Senior Counsel representing the applicants submits that resort to Clause 25(b) by the respondents for appointment of Mr. Tushar Tanna to continue the proceedings pending before the learned Arbitrator is not correct. He argues that on it's proper construction, Clause 25(b) must be held to have exhausted itself once the learned Arbitrator, Tulsibhai Tanna acted upon as an Arbitrator and continued with the arbitration proceedings for substantially long time. The second option under Clause 25(b) of Mr. Tushar Tanna as an Arbitrator was available to the parties only at the inception of the Arbitration proceedings and not for continuation of the pending arbitral proceedings. The clause cannot be read to interpret that on resignation by the learned Arbitrator, the Arbitral proceedings could be continued by Mr. Tushar Tanna as the sole Arbitrator. Mr. Chhagla argues that, in the circumstances, new Arbitrator can be appointed only by this court in exercise of it's powers under Section 11 read with Sections 14-15 of the Arbitration Act.

9 The other argument of Mr. Chhagla is that the parties had, by the interim award dtd. 5th December, 2013, agreed to refer all the disputes to the arbitration of Mr. Manish Parekh. This fact had been subsequently confirmed by the learned Arbitrator himself in his letter of resignation dtd. 11th August, 2015. With the appointment of Mr. Manish Parekh, the learned Arbitrator became *functus officio*. Consequently, there was no question of Mr. Tushar Tanna assuming the role of an Arbitrator under Section 25(b) in the place of the learned

Arbitrator. He argues that in view of Sections 14 and 15 of the Arbitration Act, the mandate of the learned Arbitrator stood terminated by the interim award dtd. 5th December, 2013. Since Mr. Manish Parekh has resigned as an Arbitrator, it has become necessary to appoint a substitute Arbitrator.

10 Mr. Ghelani, the learned Advocate for the respondents has vehemently opposed the application by contending firstly that, in view of Section 16 of the Arbitration Act, the applicants cannot be permitted to raise any claim or controversy as regards jurisdiction of the Arbitrator, Mr. Tushar Tanna. On merits, he alleges that the applicants are guilty of suppression of material facts. He argues that Mr. Manish Parekh was not appointed as an Arbitrator, at any point of time. According to him, the parties had agreed and consented to seek only assistance of Mr. S.K. Tuteja and Mr. Manish Parekh on certain specified issues, all of which did not even strictly fall within the scope of arbitral proceedings. Further at no stage, neither, the parties nor their Advocates nor the learned Arbitrator nor Mr. S.K. Tuteja nor Mr. Manish Parekh had agreed to consider to treat the limited specified role of Mr. S.K. Tuteja or Mr. Manish Parekh as being substitution or transfer of the role of the learned Arbitrator. The learned Arbitrator had only sought assistance from the two persons. As regards Mr. Himanshu Kotecha, Mr. Ghelani submits that he is only a well wisher of the parties who had attempted to intervene and bring about settlement, but could not succeed. Mr. Ghelani submits that Clause

25(b) of the Memorandum cannot be subjected to narrow interpretation as suggested on behalf of the applicants and that substitution of Mr. Tulsidas Tanna by Mr. Tushar Tanna thereunder extends to the pending arbitral proceedings also.

11 Undisputedly, the first arbitration agreement between the parties is contained in Clause 25 of the Memorandum. It consists of two parts sub-clause (a) and sub-clause (b). Sub-clause (a) records confirmation of settlement of all the disputes between the parties. Sub-clause (b), specifies the disputes that are arbitrable. The disputes described are : (i) any problem arising in drafting of the documents between the parties, (ii) any problem arising in implementation of any part of family arrangement as contained in the Memorandum and (iii) any dispute or question of interpretation of the Memorandum. Sub-clause (b) first provides for amicable settlement of the problems under the three situations and in the event of the parties failing to arrive at amicable settlement to arbitration by a sole Arbitrator. This would mean that the scope of arbitration was not extended to the disputes between the parties in respect of which settlement is recorded by Clause (a) and that it is limited, in essence, to implementation of the settlement recorded to have been arrived at between the parties.

12 As regards the choice of the Arbitrator to arbitrate the disputes, the clause states that the dispute shall be settled “only by the sole Arbitrator, Mr. Tulsibhai Tanna”. On his failing to act as the sole

Arbitrator, Mr. Tushar Tanna was to act as the sole Arbitrator.

13 In my careful consideration, the language of sub-clause (b) can only mean that the choice of the Arbitrator was to take place at the very inception of the arbitral proceedings. If on invocation of the arbitration, Mr. Tulsibhai Tanna were to decline to act as an Arbitrator, the second choice of the named Arbitrator available was of Mr. Tushar Tanna. There is nothing in the clause to indicate that the arbitral proceedings commenced by Mr. Tulsibhai Tanna are to be continued by Mr. Tushar Tanna on the failure on the part of Mr. Tulsibhai Tanna to complete the same. Acceptance of any interpretation other than this would amount to reading into the Memorandum, agreement for substitution of the Arbitrator, Mr. Tulsibhai Tanna by another Arbitrator, Mr. Tushar Tanna. Therefore, I find substance in the argument of Mr. Chhagla that the option of Mr. Tushar Tanna as an Arbitrator was available to the parties only at the inception of the arbitration proceeding. Once Mr. Tulsibhai Tanna acted as an Arbitrator, sub-clause (b) got exhausted and there could be no continuation of the arbitral proceedings by Mr. Tushar Tanna by resort to the sub-clause.

14 This brings me to the claim of the applicants to appointment of Mr. Manish Parekh as the Arbitrator and the prayer for his substitution. As already noted above, the undisputed agreement for arbitration between the parties was contained in Clause 25 of the

Memorandum. According to the applicants, that clause stood exhausted and a fresh arbitration agreement was arrived at between the parties, as disclosed in the consent terms dtd. 4th December, 2013 read with the second interim award dtd. 5th December, 2013. Perusal of the second interim award however makes it difficult to accept the claim of fresh arbitration agreement between the parties. It refers not just to Mr. Manish Parekh but also to Mr. Tuteja and assigns specific roles to them. Clause (3) thereof required the Arbitral Tribunal to handover the report of Mr. Tuteja to the parties preferably on the same day. Clause (4) provides for resolution by Mr. Tuteja of dispute as regards his report, limited to omission, in his report, from consideration of any item under the Memorandum. It further provides that on failure on the part of Mr. Tuteja to decide the issues, the same would be decided by Mr. Manish Parekh. By clauses (1) and (2), Mr. Manish Parekh with whom the documents in respect of shares of Pegasus Assets Reconstruction Private Limited were deposited was given discretion to hand the same over to the respondents herein. Further Mr. Manish Parekh was to decide upon, the formats of documents pertaining to transfer of agricultural lands, the need for redrafting of the documents deposited with him by the parties and the need of their registration. Clause (6) of the interim award was a request to Mr. Tuteja to give his further report, if any, within 15 days and the decisions by Mr. Manish Parekh within 30 days thereafter. Clauses (8) and (9) record withdrawal of the allegations by the parties against each other and the Arbitral Tribunal. Clause (7) of the interim

award needs to be reproduced for its appreciation and the same reads as under:

“7 All the other points mentioned in the note handed over to Mr. Manish Parekh are left to the decision of Mr. Manish Parekh whose decision shall be final and binding and shall not be questioned to any party.”

As already mentioned hereinabove, no note is produced by either party. Also no reference is made to the contents of the note.

15 It is obvious from the second interim award that there was no fresh arbitration agreement between the parties thereunder. The very fact that it was an interim award indicates that the arbitration by Mr. Tulsibhai Tanna was to continue. All the steps mentioned therein to be taken by both, Mr. Tuteja and Mr. Manish Parekh were part of the process of pending arbitral proceedings except for clause (7). Therefore, there is substance in the argument of Mr. Ghelani that the two persons were only assisting the learned Arbitrator. Even if clause (7) quoted above is to be treated as arbitration agreement between the parties, the same was clearly not in respect of the dispute described in clause 25(b) of the Memorandum. It referred to “other” points which can only mean other than those described in clause 25(b). Further, the agreement thereunder must be held to be vague for want of description of the arbitrable dispute. In the circumstances, it is clear that there is no arbitration agreement between the parties other than

clause 25 of the Memorandum. Consequently there was no appointment of Mr. Manish Parekh as an Arbitrator at any point of time. Therefore, there can be no question of substitution of Mr. Manish Parekh as an Arbitrator.

16 In the above peculiar facts of the case and in view of the fact that the dispute between the parties as regards implementation of the Memorandum remains unresolved, I had enquired with counsel for both the sides whether they are agreeing for an independent arbitration. Unfortunately only one side responded positively to the suggestion.

17 For the reasons stated above, the application is dismissed.

(Smt. R.P. SondurBaldota, J.)