

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO.56 OF 2016

Cogent Enterprises Pvt. Ltd.	... Petitioner
vs.	
Shri Vijay Kumar Jagdishray Chawla	... Respondent

Mr. Deepak Dhingra a/w Mr. S.C. Wakankar for the Petitioner.
Mr. Harshad Sathe and Mr. Saurabh Butala for the Respondent.

Coram : **A.A.Sayed, J.**
Date : 17 March 2017.

ORAL JUDGMENT:

1 This Arbitration Petition has been filed under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') for appointment of an Arbitrator to adjudicate the disputes between the Petitioner Company and the Respondent arising out of an arbitration agreement contained in the Memorandum of Understanding (MOU) dated 6 July 2011.

2 The case of the Petitioner Company is as follows:

(i) A Memorandum of Understanding dated 6 July 2011 came to be executed between the Petitioner Company and the Respondent wherein the Respondent agreed to purchase two Villas to be constructed by the Petitioner Company for a total consideration of

Rs.1.5 Crores payable in three installments. The Respondent did not make payment in accordance with the schedule fixed in the Agreement and paid only an amount of Rs.1 Crore. The Respondent invited one of the Directors of the Petitioner Company, Shri Girimon P.T. to his residence on 18 December 2013 on the pretext of amicably settling the matter. When the said Director visited the residence of the Respondent, he was thoroughly beaten up by the Respondent and his goons who insisted that the Director should draw up cheques in favour of the Respondent for a sum of Rs.1,65,81,000/- towards the cancellation of the said Agreement. The said Director was also made to sign a document written in Marathi alongwith few other blank pages. The Respondent compelled the said Director to write cheques and since the said Director did not carry the cheques of the Petitioner Company, he was made by the Respondent and his goons to sign cheques from his own personal account and the said cheques were later used to file a summary suit. The Respondent thereafter filed a Special Summary Suit in the Court of Civil Judge, Senior Division, Pune against the Petitioner Company as also its Directors alleging the Petitioner Company had unconditionally undertaken to pay an amount of Rs.1,65,81,000/- to the Respondent and in furtherance of the said writing they had issued 8 cheques worth Rs.1,65,81,000/- and said cheques were dishonored. The said summary suit was based on the Agreement referred to as MOU as also the cheques. The Respondent

ignored the arbitration clause contained in the MOU dated 6 July 2011 and filed summary suit under the provision of Order XXXVII of the Code of Civil Procedure, 1908. The trial Court allowed the Application for leave to defend filed by the Petitioner Company, subject to furnishing bank guarantee for the amount claimed in the suit by an order dated 26 October 2015. After passing of the order dated 26 October 2015 of the trial Court the Petitioner Company filed an Application under section 8 of the Arbitration Act. The said Application was dismissed by the trial Court on 18 December 2015.

(ii) Against the order dated 26 October 2015 of the trial Court granting conditional leave to defend and before the Application under section 8 of the Arbitration Act was dismissed by the trial Court by its order dated 18 December 2015 the Petitioner Company preferred Writ Petition being Writ Petition (Stamp) No.24983 of 2015 and by an order dated 7 October 2015 this Court modified the condition for grant of leave to defend and reduced the amount of bank guarantee to Rs.1 Crore and as also allowed the Petitioner Company to file its Written Statement within 15 days.

(iii) The Petitioner Company filed Writ Petition before this Court impugning the order dated 18 December 2015 dismissing the Application of the Petitioner Company under section 8 of the Arbitration

Act. The said Writ Petition came to be dismissed by judgment and order dated 22 January 2016 (Coram: R.G. Ketkar, J.). The said judgment and order was challenged before the Apex Court by way of Special Leave Petition No.4465 of 2016 which came to be dismissed. Review was also filed against the said order, which was stated to be pending as on the date of filing of the Petition i.e. 10 March 2016. Notwithstanding the above, the Petitioner Company has a right to get its claims adjudicated in terms of the arbitration clause in the Agreement. The Petitioner Company served the Respondent with a notice dated 29 January 2016 invoking arbitration clause contained in MOU dated 6 July 2011 to adjudicate the disputes and differences amongst the parties and suggested the name of a retired Judge of the Supreme Court be the sole Arbitrator and called upon the Respondent to accord his consent. By Reply dated 17 February 2016 through his Advocate the Respondent declined to the suggestion of the Petitioner Company for appointment of an Arbitrator. Hence, the present Petition under section 11 of the Arbitration Act for appointment of an Arbitrator.

3 An Affidavit-in-Reply has been filed on behalf of the Respondent opposing the Petition. The case of the Respondent in the Affidavit-in-Reply is as follows:

The Petition is barred by principles of res-judicata, estoppel and waiver and the Petition is an abuse of process of law and the same

ought to be dismissed on this ground only. The Petitioner Company does not have any right to file the present Petition as the Application of the Petitioner Company under section 8 of the Arbitration Act, is already rejected. Thereafter the suit was heard by the Civil Court and the same was decided finally on merits. Mr. Girimon Pattupara Thankappan had approached the Respondent for the sale of the Villas and relying upon the assurance of Mr. Girimon Pattupara Thankappan, the Respondent had agreed to purchase the Villa Nos.1 and 2 for a total consideration of Rs.1.50 Crores and accordingly the parties entered into MOU dated 6 July 2011. From time to time the Respondent had paid an amount of Rs.1 Crores to the Petitioner Company towards part payment. However, the front elevation of the said Villas were not constructed as per the plan and there was delay on the part of the Petitioner Company in construction of the Villas and it was mutually agreed between the parties to terminate the MOU date 6 July 2011 and accordingly the MOU was mutually terminated. The Petitioner Company agreed to refund the money paid by the Respondent alongwith compensation. The Petitioner Company executed an undertaking on 18 December 2013 and agreed to refund an amount of Rs.1,65,81,000/- and issued cheques for the said amount. However, the cheques were dishonoured and the Respondent has also initiated criminal action. As the Petitioner Company failed and neglected to pay the amount, the Respondent has filed Summary Suit

No.25 of 2015 against the Petitioner Company wherein the Petitioner Company had filed an Application for leave to defend. By order dated 26 August 2015 the Civil Judge, Senior Division, granted conditional leave on the condition of furnishing guarantee for the said amount of Rs.1,51,26,000/-. This order came to be modified by this Court by an order dated 7 October 2015 and the Petitioner Company was directed to furnish bank guarantee of Rs.1 Crore within a period of four weeks to defend the summary suit filed by the Respondent. Though two extensions were granted, the Petitioner Company failed to furnish bank guarantee and the request of further extension was rejected by this Court. The Petitioner Company has not complied with the order of this Court though the Petitioner Company has submitted to the jurisdiction of this Court by submitting its first statement on the substance of the dispute before making an Application under section 8 of the Arbitration Act. The said Application under section 8 of the Arbitration Act was rejected by the Civil Judge, Senior Division. The said order was confirmed by this Court. The Petitioner Company thereafter sought time from this Court to challenge the order before the Supreme Court and in the meantime the Petitioner Company wrongly issued notice for reference of the dispute to arbitration by seeking to appoint an Arbitrator. The issue of reference of the dispute to arbitration between the parties is already decided on the request of the Petitioner Company and has been rejected. The Petitioner Company therefore does not

have any authority to once again agitate the same. The Petitioner Company had failed to perform its part of the Agreement and as the Agreement was mutually terminated and cheques were issued towards repayment. Consequently, the Respondent has filed the suit against the Petitioner Company and the said suit is now decreed in favour of the Respondent. Therefore, now the Petitioner Company does not have any right to raise claim of specific performance and recovery of amount and damages as the issue is already decided and attained finality in the suit.

4 I have heard the learned Counsel for the Petitioner Company and the learned Counsel for the Respondent.

5 Learned Counsel for the Petitioner Company has placed reliance on the following judgments - (i) A. Ayyasamy vs. A. Paramasivam & Ors, in Civil Appeal Nos.8245-8246 of 2016, decided on 4 October 2016 by the Supreme Court; (ii) Everest Holding Limited vs. Shyam Kumar Shrivastava & Ors., (2008) 16 SCC 774; (iii) Reva Electric Car Company Private Limited vs. Green Mobil, (2012) 2 SCC 93; (iv) Enercon (India) Limited & Ors. vs. Enercon GMBH & Anr. (2014) 5 SCC 1; (v) Ashapura Mine-Chem Limited vs. Gujarat Mineral Development Corporation, (2015) 8 SCC 193; (vi) Branch Manager, Magma Leasing and Finance Limited & Anr. vs. Potluri Madhavilata & Anr., (2009) 10 SCC 103. Learned Counsel for the Respondent on the

other hand has relied upon the judgment in the case of Anil s/o Jagannath Rana & Ors. vs. Rajendra s/o Radhakishan Rana & Ors. (2015) 2 SCC 583. I have given due consideration to the submissions made by the learned Counsel for the Petitioner Company and the learned Counsel for the Respondent. I have also perused the material on record as well as the judgments cited by the learned Counsel.

6 The Petitioner Company is seeking appointment of Arbitrator in terms of clause 8 of the MOU dated 6 July 2011. Clause 8 reads as under:

“8. All disputes and differences of whatsoever nature that shall arise during the pendency to or their respective representative or between any of them touching these presents of construction or application thereof be made hereinafter or relating to the said Agreement or affairs the roof of rights, duties or obligations or liabilities of any person under these presents shall be referred to the common single arbitrator by mutual understanding by both parties, in accordance with the provisions of the Indian Arbitration & Conciliation Act 1996 or as amended upto the date thereof for the time being in force and his decision will be final and binding upon the parties to arbitration.”

7 It is noted that the Petitioner Company and its Directors had admittedly filed an Application under section 8 of the Arbitration and Conciliation Act seeking reference to arbitration before the trial Court in the Summary Suit filed by the Respondent under the

provisions of Order XXXVII of Code of Civil Procedure, 1908. The trial Court had dismissed the said Application by its order dated 18 December 2015. The Petitioner Company had challenged the aforesaid order by filing Writ Petition before this Court. By judgment and order dated 22 January 2006 the learned Single Judge of this Court (R.G. Ketkar, J.) dismissed the Writ Petition. The learned Single Judge held in para 28 as follows:

"28. In the facts and circumstances of the present case and also from the conduct of defendants no.1 to 5 I am more than satisfied that defendants no.1 to 5 have submitted to the jurisdiction of the civil Court and have waived their right to seek reference to arbitration."

(emphasis supplied)

8 In para 31, the learned Single Judge observed:

"31. Butala submitted that the present proceedings are abuse of process of court and abuse of process of law. I find merit in the submission. It has come on record that the plaintiff had paid Rs.1 Crore for purchasing Twin Villas and the said fact is specifically asserted in paragraphs 12 to 14 of the plaint. Defendants no.1 to 5 admit receipt of one crore. They dispute receipt of balance amount. The plaintiff has instituted Summary Suit on the basis of eight dishonoured cheques. Defendants no.1 to 5 have participated in the proceedings by applying for condonation of delay in causing appearance in the suit by filing application on 17.3.2015 at Exh.15 and application dated 19.6.2015 at Exh.22 for leave to defend. Again they have applied under section 8 on 11.9.2015 at

Exh.41 for referring the matter to the arbitration. It is only when defendants no.1 to 5 could not comply conditional order passed by this Court for leave to defend, they have pressed application Exh.41. Learned trial Judge has rightly rejected the application on 18.12.2015. In my opinion, the present proceedings are nothing but abuse of process of court as also abuse of process of law. Petition being devoid of any substance, is liable to be rejected and is dismissed subject to imposing exemplary costs of Rs. 50,000/-. Costs shall be paid to the plaintiff within four weeks from today. Copy of this order may be forwarded to Collector, Pune for recovering of this amount as land revenue from defendants no.1 to 5, in case they do not pay to plaintiff or deposit in the trial Court within four weeks from today. In case defendants no.1 to 5 obtain suitable order from higher Court, they shall forthwith communicate the said order to the Collector, Pune. Order accordingly.

(emphasis supplied)

9 The aforesaid order of the learned Single Judge was carried to the Apex Court. By an order dated 22 February 2016 the Apex Court dismissed the Special Leave Petition. Thus, the finding of the learned Single Judge that the Petitioner Company and its Directors (Defendant Nos.1 to 5 in the suit) “had submitted to the jurisdiction of the Civil Court and have waived their right to seek reference to arbitration” had attained finality. The learned Single Judge also imposed costs of Rs.50,000/- on the Petitioner Company and its Directors.

10 The contention of the learned Counsel for the Petitioner Company that the Summary Suit was based on cheques and not MOU and therefore the Petitioner Company would be within its rights to seek reference to arbitration cannot be accepted. This contention is contrary to the averments in the Petition itself. In paragraphs 9 and 15 of the Petition it has been averred as follows:

“9) The Petitioner submits that the respondent thereafter filed a Special Summary Suit in the court of Civil Judge, Senior Division, Pune against the Petitioner Company as also its directors alleging that Petitioner had unconditionally undertaken to pay an amount of Rs.1,65,81,000/- (Rupees One Crore Sixty Five Lac and Eighty One Thousand only) to Respondent and in furtherance of the said writing, they had issued 8 cheques worth Rs.1,65,81,000/- and that since the said cheques have not been honoured, the said summary suit was filed. The Petitioner submits that the said summary suit was based upon the Agreement referred to above as also the said alleged cheques drawn up by the director of the Petitioner company from his personal account.

...

15) The Petitioner submits that it has a right to seek specific performance against the respondent as also damages for the loss suffered by the Petitioner due to the acts of omission and commission committed by the respondent and the said estimated loss runs into approximately Rs.2 crores. The Petitioner submits that admittedly there does not exist a document by which the said MOU was terminated and/or rescinded and/or

cancelled. The respondent himself has agitated and based his suit upon the Agreement dated 06/07/2011. Petitioner states that notwithstanding the arbitration clause yet survives and the Petitioner has a right to get his claims against the respondent adjudicated and the proceedings referred above by the Petitioner in the summary suit filed by the respondent, in no manner does take away the right of the Petitioner to have his claim adjudicate through arbitration in terms of clause contained in the Agreement amongst the parties.” (emphasis supplied)

The Petitioner Company, in my view, cannot approbate and reprobate as and when it suits it.

11 The issue whether an Application under section 11 of the Arbitration Act for appointment of Arbitrator would be maintainable after either of the parties had invoked section 8 of the Arbitration Act by filing an Application for reference to arbitration and is rejected, is no more res integra. In **Anil s/o Jagannath Rana & Ors. vs. Rajendra s/o Radhakishan Rana & Ors.** (supra), the Supreme Court in paragraph 1 set out the issues which arose before it in the following terms:

“ .. Once a judicial authority takes a decision under Section 8(1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) declining to refer the dispute pending before it to arbitration and the said decision having become final, whether either party to the proceedings can thereafter invoke the jurisdiction of the Chief Justice under Section 11(6) of

the Act, is the question arising for consideration in this case. The scope of Section 8(3) of the Act is also an ancillary issue.”

In paragraphs 9, 12 and 15 the Supreme Court held as follows:

“9. The facts as narrated by us hereinbefore would show that the application filed by the respondents herein under Section 11 of the Act is nothing but an abuse of process. The partnership firm itself is the first plaintiff in the suit. The dispute between the parties is the subject of the suit. Precisely for that reason, the appellants sought the matter to be referred to the arbitrator. That was opposed by the respondents. When the suit is at the final stage, the respondents have sought appointment of an arbitrator under Section 11(6) of the Act. Having approached the civil court and having opposed the reference to arbitration under Section 8(1) of the Act and the decision of the court in that regard having become final, the respondents cannot invoke jurisdiction under Section 11(6) of the Act; it is hit by the principle of issue estoppel.

12. In the suit instituted by the firm and some of the respondents, the order passed by the civil court that it was well within its jurisdiction to try the suit, despite the objection regarding the existence of a clause for arbitration, has become final. Thereafter, Section 11(6) jurisdiction of the Chief Justice cannot be invoked by either party. The principle of res judicata will also be attracted in such a case.

15. The principles as discussed above on res judicata have been consistently followed by this Court. And the recent judgments in that regard are in

Subramanian Swamy v. State of T.N., (2014) 5 SCC 75 : (2014) 3 SCC (Civ) 134 and in Surjit Singh v. Gurwant Kaur, (2015) 1 SCC 665. Thus, once the judicial authority takes a decision not to refer the parties to arbitration, and the said decision having become final, thereafter Section 11(6) route before the Chief Justice is not available to either party.”

In my view, the Petitioner Company, in the facts and circumstances of the case, is now estopped from seeking reference of the disputes to arbitration by appointing an Arbitrator under section 11 of the Arbitration Act.

12 It is pertinent to note that the Summary Suit filed by the Respondent has now been decreed on 30 April 2016, after leave to defend was refused earlier by the trial Court and confirmed by this Court. In these circumstances, if the matter is now referred to the Arbitration by appointing an Arbitrator, there would be a likelihood of two inconsistent orders being passed. In the facts and circumstances of the case, the contention on behalf of the Petitioner Company that in view of section 11 (6-A) which provides that “the Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement” and the Court is obliged to appoint an Arbitrator if there is an arbitration agreement, is without merit. It is also not

possible to accept the submission that it can be left open to the Respondent to apply under section 16 before the Arbitrator to rule on the objections raised by the Respondent after the Arbitrator is appointed. In the facts of the present case, the judgments cited by the learned Counsel on behalf of the Petitioner Company would have no application. In my view, the present Arbitration Petition is clearly an abuse of process of law.

13 For all the aforesaid reasons the Arbitration Petition is liable to be dismissed with exemplary costs. Hence, the following order:

O R D E R

The Arbitration Petition is dismissed with costs of Rs.1,00,000/- to be paid by the Petitioner Company to the Respondent within a period of four weeks from the date this judgment is uploaded.

(A.A.Sayed, J.)