SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO. 295 OF 2014
WITH
ARBITRATION PETITION NO. 1073 OF 2014

Daya Builders & Anr … Applicants/ Petitioners/

~ versus ~

Ashish Enterprises & Ors …Respondents

Mr DD Madon, Senior Advocate*, with Gautam Ankhad, Ankur Shah, Viral Shukla, Priti Patel, & Rupali Padgulekar, i/b M/s Shukla & Associates, for the Petitioners.*
Mr Pravin Samdani, Senior Advocate*, with Sharan Jagtiani, Karl Tamboli, Nirman Sharma, Manoj Agre, & GB Kedia, i/b Divya Sanghi, for the Respondents.*

CORAM: G.S. PATEL, J
DATED: 6th February 2017

PC:-

1. I have before me an arbitration application under Section 11 and an arbitration petition under Section 9 of the Arbitration and Conciliation Act 1996 (**“the Act”**).

2. Mr Madon for the Petitioners submits that of the three documents between the parties, the second does contain an arbitration clause, albeit less felicitous in its cast than might have been desired. The Court's duty, he says, is to strain every nerve to give effect to an arbitration agreement. This is, after all, the contract to which the parties bound themselves, and neither the law nor a court will allow one of the parties to resile from it. Mr Samdani for the Respondents denies any arbitration agreement exists. The contracting parties agreed on a dispute resolution process. That process contemplated a consensus is the appointment of an arbitral tribunal, a reference to an agreed sole arbitrator. The clause also said in terms that should there be no consensus on the appointment of the arbitrator, there would be no arbitration agreement. Admittedly, parties did not agree on a sole arbitrator. Therefore, there is no arbitration agreement and, consequently, both petitions must be dismissed.

3. Having heard both counsel and considered their submissions and the material on record, I am not persuaded that Mr Madon's submission is correct or capable of being accepted. I have dismissed both the application and the petition. My reasons follow.[1]

4. A brief background: In 2004, the Petitioners (collectively, **"Daya Builders"**) owned an immovable property at Gokuldham, Goregaon, a substantial tract of land of nearly 8000 sq mts. Two years later, the Respondents (collectively, **"Ashish Enterprises"**) became the owners of another, even larger, immovable property of

1 Page references follow the Arbitration Petition.

over 20,000 sq mts at Malad (East). Both Daya Builders and Ashish Enterprises proposed to redevelop their properties under the Development Control Regulation 33(14).

5. On 16t March 2006, parties entered into what is called a 'Clubbing Agreement'. Clause 17 of the Clubbing Agreement had a provision for dispute resolution by arbitration:[2]

> "17. If any dispute arises between the parties hereto in respect of this Agreement, the same shall be referred to Arbitration under The Arbitration and Conciliation Act, 1996 or any Arbitration Act as may be in force."

6. This is straightforward. Had matters rested at this, Mr Madon might have been correct. But this was not the only agreement between these parties. On 14th February 2007, they entered into a second agreement. This is called a 'Development Agreement'. It is Clause 30 of this agreement that is controversial. It is reproduced below *verbatim*:[3]

> "30. All the disputes/differences between the parties hereto arising out of any matter concerning of relating to this Agreement as to the true meaning of the recitals or covenants or to the construction thereof. Then the same shall be referred to the arbitration of a sole Arbitrator if the parties can agree upon the appointment of the sole Arbitrator. If the parties do not arrive at a common sole Arbitrator then in the event this Arbitration clause shall be deemed to be redundant, rescinded, Canceled and the parties may proceed in the matter as if there is no

2 Arbitration Petition, Exhibit "D", *pp.* 58-71, at *p.* 68.

3 Arbitration Petition, Exhibit "F", *pp.* 73-110, at *pp.* 96-97.

> Arbitration then the proceedings shall be covered under the provision of the Indian Arbitration and Reconciliation Act 1996."

7. There is then a Deed of Modification-cum-Rectification ("**Modification Deed**") dated 15th December 2007. It has no explicit arbitration clause. What it does have is this, in Clause 13:[4]

> "13. The parties hereto agreed that the present agreement shall prevail upon all the earlier agreement enter between the parties and all the terms and conditions contrary to mentioned herein shall not be binding upon the parties."

8. This is the last of the three contractual documents. Mr Madon begins, as of necessity he must, with the Modification Deed. He says Clause 13 of the Modification Deed carries forward the arbitration agreement found in the Development Agreement's Clause 30 — the provisions of the latter are not 'contrary to' those of the former. I will assume this is so. What remains, however, is whether there is any surviving arbitration agreement under Clause 30 of the Development Agreement.

9. That clause is not totally without a provision for arbitration. What it says is this: should there be any differences between the parties, these are to be taken to the arbitration of the sole Arbitrator to be nominated by consent. It is the next portion that presents a difficulty — what if the parties are unable to agree on an Arbitrator? Mr Madon submits that rest of this clause only says that the parties

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4 Arbitration Petition, Exhibit "G", *pp.* 111-138, at *p.*126

will then not be required to go to the arbitration of a sole Arbitrator but an application under Section 11 is nonetheless possible. This, in his submission, is the only possible interpretation that harmonizes all portions of the second part of this clause. For clarity, I will reproduce that portion again, with added emphasis:

> "30. ……… If the parties do *not* arrive at a common sole Arbitrator then in the event *this Arbitration clause shall be deemed to be redundant, rescinded, Canceled* and *the parties may proceed in the matter as if there is no Arbitration* then the proceedings **shall be covered** under the provision of the Indian Arbitration and Reconciliation Act 1996."

10. It is not in dispute that on 26th November 2012, Ashish Enterprises, through its Advocate's notice, terminated the Development Agreement and the later Modification Deed.[5] Some correspondence followed, and Mr Madon refers to this to support his case, but I will return to that later. Daya Builders responded *inter alia* on 17th December 2012,[6] and nominated a senior counsel as a sole Arbitrator.[7] The Respondents did not agree.[8] The second part of Clause 30 of the Development Agreement came into play.

11. Looking more closely at the disputed clause, I believe the phrases "*this arbitration clause shall be deemed to be redundant, rescinded and cancelled*" and "*the parties may proceed in the matter as if there is no arbitration*" must receive some meaning. Mr Madon

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5 Arbitration Petition, Exhibit "K", *pp.* 159-160.

6 Arbitration Petition, Exhibit "A", *pp.* 37-55.

7 Arbitration Petition, Exhibit "A", *pp.* 37-55, at *p.* 54, paragraph 29.

8 Ashish Enterprises' Advocate's letter dated 24th December 2012, Arbitration Petition, Exhibit "L", *pp.* 161-162, at *p.* 162, paragraph 9.

suggests these phrases must be construed to mean that the parties may proceed in the matter as if there is no reference *to a sole Arbitrator*, and it is only this that is 'redundant, rescinded and cancelled'. In that scenario, that is to say, without a reference to the arbitration of an agreed sole Arbitrator, the disputes would, in his submission, nonetheless be covered by the Act and Section 11 could properly be invoked.

12. I find it impossible to accept this. It seems to me to postulate a situation wholly internally inconsistent and self-contradictory: (1) no agreement on a sole arbitrator; (2) clause deemed to be redundant, rescinded, cancelled; (3) parties to proceed as if there is no arbitration; and yet (4) arbitration act to apply. What this argument suggests, therefore, is that Section 11 has application even in the absence of an arbitration agreement.

13. Mr Samdani agrees with Mr Madon on at least this much: this clause is, to use their exquisitely delicate description, 'unhappily' worded. Mr Samdani suggests there is plainly a typographical error in its wording; just one word has been omitted. Supply that word, he says, and the entire clause from start to finish is complete and coherent. No other interpretation is rationally possible. This is how he says I should that clause:

> "30. ……… If the parties do not arrive at a common sole Arbitrator then in the event this Arbitration clause shall be deemed to be redundant, rescinded, Canceled and the parties may proceed in the matter as if there is no Arbitration then the proceedings shall **NOT** be covered

> under the provision of the Indian Arbitration and Reconciliation Act 1996."

14. I agree. That one word reconciles every portion of the clause from beginning to end. No inconsistency remains requiring complex or awkward reasoning. The clause is then internally consistent and correctly covers both situations, i.e., first, if the parties agree on a sole Arbitrator, and, second, what is to be done if they do not. Mr Madon's interpretation on the other hand leaves unexplained how a clause in Arbitration Agreement can clearly be said to be redundant, rescinded and cancelled, and how parties may be said at liberty to proceed as if there is *no arbitration*, and yet invoke Section 11 of the Act. Between the two, Mr Samdani's interpretation is the more plausible. Certainly it is not perverse.

15. In construing a contract, is it permissible to supply omitted words? Mr Samdani cites the Supreme Court decision in *Enercon (India) Ltd & Ors v Enercon GmBH & Anr*,[9] to submit that not only can this be done, but that, in an appropriate case, it *must* be done. The *Enercon* court said:

> 91. Dr Singhvi has rightly submitted that the unworkability in this case is attributed only to the machinery provision. And the arbitration agreement, otherwise, fulfils the criteria laid down under Section 44 of the Indian Arbitration Act, 1996. **Given that two arbitrators have been appointed, the missing line that "the two arbitrators appointed by the parties shall appoint the third arbitrator" can be read into the arbitration clause. The omission is so obvious that the**

9 (2014) 5 SCC 1.

court can legitimately supply the missing line. In these circumstances, the Court would apply the *officious bystander* principle, as explained by MacKinnon, L.J. in *Shirlaw v. Southern Foundries* (1926) Ltd. [(1939) 2 KB 206 : (1939) 2 All ER 113 (CA), on appeal from 1937 S 1835] , to interpret the clause. In *Shirlaw* [(1939) 2 KB 206 : (1939) 2 All ER 113 (CA), on appeal from 1937 S 1835] , it was held that: (KB p. 227)

> "… 'prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'"

In construing an arbitration clause, it is not necessary to employ the strict rules of interpretation which may be necessary to construe a statutory provision. The court would be well within its rights to set right an obvious omission without necessarily leaving itself open to the criticism of having reconstructed the clause.

92. Further, we find support in this context from the following extract of *Halsbury's Laws of England* (Vol. 13, 4th Edn., 2007 Reissue):

> "The words of a written instrument must in general be taken in their ordinary or natural sense notwithstanding the fact that such a construction may appear not to carry out the purpose which it might otherwise be supposed the parties intended to carry out; but if the provisions and expressions are

> contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words; and where the literal (in the sense of ordinary, natural or primary) construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned."

93. Mr Rohinton Nariman had very fairly submitted that it is permissible for the court to construe the arbitration clause in a particular manner to make the same workable when there is a defect or an omission in it. His only caveat was that such an exercise would not permit the court to rewrite the contract. In our opinion, in the present case, the crucial line which seems to be an omission or an error can be inserted by the Court. In this context, we find support from judgment of this Court in S*hin Satellite Public Co. Ltd. [Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, (2006) 2 SCC 628] , wherein the "offending part" in the arbitration clause made determination by the arbitrator final and binding between the parties and declared that the parties have waived the rights to appeal or an objection against such award in any jurisdiction. The Court, inter alia, held that such an objectionable part is clearly severable being independent of the dispute that has to be referred to be resolved through arbitration. By giving effect to the arbitration clause, the Court specifically noted that

> "it cannot be said that the Court is doing something which is not contemplated by the parties or by 'interpretative process', the Court is rewriting the contract which is in the

> nature of '*novatio*'. The intention of the parties is explicitly clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a court of law can be separated and severed by using a '*blue pencil*' ". (SCC p. 637, para 26)

(*Emphasis added*)

16. Therefore, if supplying a single word, manifestly omitted through inadvertence, would lend coherence and meaning to a clause, avoiding all inconsistency or incongruity, then it is a course that is both legitimate and desirable. Mr Madon submits that this is not a case that is pleaded. That can hardly make a difference. Even if there was no reply affidavit at all, I should still be required to consider whether there is any arbitration agreement.

17. Mr Madon's next submission is that the post-termination correspondence shows that the parties themselves understood Clause 30 as containing a surviving arbitration agreement. He refers to paragraph 9 of Ashish Enterprises' Advocate's letter dated 24th December 2012,[10] which says that the agreement itself having come to an end, Ashish Enterprises were unwilling to appoint an arbitrator. Mr Madon submits this is an acceptance by Ashish Enterprises that there is a surviving arbitration agreement.

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10 Arbitration Petition, Exhibit "L", *pp.* 161-162, at *p.* 162.

18. I do not think this is entirely accurate. This is in response to Daya Builders' Advocate's letters 10th December 2012 and 17th December 2012 in reply to Ashish Enterprises' termination notice of 26th November 2012.[11] In paragraph 29 of their Advocate's letter of 17th December 2012, Daya Builders invoked arbitration and nominated a sole arbitrator. All that Ashish Enterprises' lawyer's reply of 24th December 2012 says, in substance, is that Ashish Enterprises did not accept that nomination. Whether the reason is good or bad is irrelevant. In any case, this kind of tangential 'interpretation' cannot be invoked to *create* an inconsistency and incoherence in the arbitration clause; yet this is precisely the effect of Mr Madon's submission, for the reasons I have already considered earlier.

19. Once the parties failed to agree on a sole arbitrator, they were firmly placed in the frame of the second part of Clause 30, i.e., where they were set at large, freed from any arbitral agreement. I am unable to agree with Mr Madon that there is an Arbitration Agreement. In the result, the Arbitration Petition and the Arbitration Application are dismissed. No costs. The Petitioners are, of course, at liberty to pursue their claim in appropriate proceedings.

(G. S. PATEL, J.)

11 Arbitration Petition, Exhibit "K", *pp.* 159-160.