

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 191 OF 2015

Ramesh Baburao Patil & Ors. ... Applicants
Vs.
Siddhi Real Estate Developers & Ors. ... Respondents

**WITH
CIVIL REVISION APPLICATION NO. 192 OF 2015**

Bhasheeka Sujay Patil & Ors. ... Applicants
Vs.
Siddhi Real Estate Developers & Ors. ... Respondents

Mr. Rajendra B. Mokashi, Advocate for the applicants.
Mr. P.K. Dhakephalkar, Senior Advocate I/b. Mr. Amol P. Mhate,
Advocate for respondent no. 1.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **30th July, 2018.**

P.C.:

In both these Civil Revision Applications, the order dated 10th February, 2015 passed by the learned Civil Judge, Senior Division, Thane thereby rejecting the Applications Exhibit 117 and Exhibit 65 in Special Regular Civil Suit No. 249 of 2014 is challenged.

2. The respondent no. 1, who is the original plaintiff, has filed the suit for specific performance based on the Agreement dated 18th December, 2002. The defendant nos. 1, 2, 4 and 5/petitioners have

filed Application Exhibit 117 and the defendant nos. 3, 6 and 7/petitioners have filed Application Exhibit 65 praying that the matters be referred for Arbitration under section 8 of the Arbitration and Conciliation Act, 1996. The trial Court has rejected the said Applications. Hence, these Civil Revision Applications.

3. The learned counsel for the applicants has submitted that in the said Agreement, there are two clauses, i.e. Clause Nos. 16 and 20. Clause 16 enable the parties to go to the Civil Court. However, Clause 20 states that if at all there is any dispute in respect of the Agreement, its scope and interpretation, then the matter is to be referred to Arbitrator. He relied on the judgment of Hon'ble Supreme Court in the case of **Sundaram Finance Ltd. & Anr. vs. T. Thankam, reported in (2015) 14 SCC 444**. He has further submitted that when there is an Arbitration Clause, then the Court has no option but the matter is to be sent to Arbitrator for speedy disposal of the matter. He also relied on the judgment of Hon'ble Supreme Court in the case of **Today Homes and Infrastructure Private Ltd. vs. Ludhiana Improvement Trust and Anr. reported in (2014) 5 SCC 68**. The learned counsel has submitted that Clause 20 of the Agreement will prevail upon Clause 16 of the Agreement.

4. The learned senior counsel Mr. Dhakephalkar for respondent no. 1, while interpreting the said Agreement, has relied on the following judgments:

- (i) Judgment of Hon'ble Supreme Court in the case of **Wellington Associates Ltd. vs. Kirit Mehta, reported in (2000) 4 SCC 272.**
- (ii) Judgment of Single Judge of the Himachal Pradesh High Court in the case of **Rajesh Kumar Bansal vs. Countryside Builders, reported in (2004) 2 HLJ 1055.**

The learned senior counsel submitted that as per Clause 16, if the parties have any grievance against the other party, then the aggrieved party after giving notice of 30 days can prosecute the other party in the Court. Pursuant to Clause No. 16, the petitioners have sent notice dated 3rd March, 2014 for complying and fulfilling the obligations under the Agreement dated 18th December, 2002 and supplementary Agreement dated 12th December, 2007 within the period of 30 days from the receipt of the said notice. Thus, the learned counsel has submitted that the petitioners have in fact understood the meaning of Clause No. 16 and also Clause No. 20. They were aware that the parties are required to go to the Civil Court

for the execution of the Agreement and obligations of the parties. The learned senior counsel while distinguishing Clause Nos. 16 and 20 has pointed out that the consent to the parties to approach Arbitrator is contemplated in Clause No. 20 and therefore, the respondents/plaintiffs have rightly approached the Civil Court by filing the suit for specific performance for the said Agreement.

5. Considered the submissions, perused the order and the documents placed on record.

6. In the case of **Sundaram Finance Ltd.** (*supra*), the Hon'ble Supreme Court has held that bifurcation of cause of action is not permissible. It is further held that -

“Once an application in due compliance with Section 8 of the Arbitration Act is filed, the approach of the Civil Court should be not to see whether the Court has jurisdiction . It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the Court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the Civil Court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law – *generalia specialibus non*

derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the Court.”

7. In the case of **Today Homes and Infrastructure Private Ltd.** (*supra*), it is held that there cannot be automatic invalidation of Arbitration Clause but it continued to remain in existence. The Arbitration Agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void.

8. The facts of the case of **Wellington Associates Ltd.** (*supra*) and the facts of the case in hand are similar. In **Wellington**, in the Agreement by Clause No. 4, the parties may go to Civil Courts in Mumbai if the dispute arise and as per Clause No. 5, if they agree to go before the Arbitrator, the matter can be referred for Arbitration. The Supreme Court while interpreting these two clauses, has distinguished that when the phrase “may be referred to”, it implies mutual consent of both the parties. The Court also held that the intention of the parties is to be gathered while deciding whether the

parties have agreed to it or not. The Supreme Court has held that the word “may be referred to” is not without reason and in Clause no. 4, the parties have agreed and in Clause no. 5, they have asked that it may be referred to Arbitration.

9. In the case of **Rajesh Kumar Bansal** (*supra*), the Single Judge of Himachal Pradesh High Court has held that -

“The intention of the parties has to be gathered from the language used in the agreement and it should be essentially born by the language used that the parties had clearly and unambiguously agreed that the disputes should be determined in a quasi judicial manner, that is, by arbitrator. If the agreement provides or keeps open any remedy other than the settlement by arbitrator for redressal of the dispute, it cannot be said to be mandatory and binding arbitration clause. In such a case, the party seeking redressal of disputes will have the option either to get the dispute settled by arbitration or by other mode as may be provided in the agreement or may be legally available to it.”

10. On the background of the ratio laid down by the Hon'ble Supreme Court and other High Courts, it is amply clear that the Court while reading the Agreement has to see the language of the Agreement and on the basis of that, gather the intention of the

parties. In the present case, Clause No. 16 is very unambiguous. Clause no. 16 is preceding clause wherein it is mentioned that the parties may go to Civil Court if dispute arise. However, before approaching the Court, it is mandatory on the party approaching the Court to issue notice of 30 days to the other party. In the present case, the petitioners have issued notice of 30 days and have demanded the performance of the obligation in the Agreement. In subsequent Clause No. 20, the parties have mentioned that if there is dispute in respect of Sale Agreement, its scope and interpretation, then they will solve the dispute at Mumbai and will appoint Arbitrator by consent of both the parties. In this matter, the respondents do not agree for the appointment of Arbitrator and consent of both the parties to appoint the Arbitrator is required condition as per Clause 20. Thus, the option of further agreement is stated in the present Agreement and therefore, the matter cannot be automatically be referred to Arbitration unless the parties further agree to appoint a particular Arbitrator.

11. In view of this, no illegality is found in the order the order dated 10th February, 2015 passed by the learned Civil Judge, Senior Division, Thane. Hence, the order of the trial Court is maintained.

Civil Revision Applications are dismissed.

12. The learned counsel for the applicants wants to challenge this order before the Hon'ble Supreme Court and hence prays for stay of this order.

13. The learned senior counsel for respondent no. 1 opposed this prayer.

14. As there was a stay granted earlier, hence it is continued for the period of six weeks to enable the applicants to approach the Hon'ble Supreme Court.

(MRIDULA BHATKAR, J.)

**Vidya
Suresh
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