

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

**CIVIL WRIT PETITION (STAMP) NO.35221 OF 2017**

Suman Baburao Thapa, ]  
Age : Adult, ]  
Residing at Vahal, Taluka Panvel, ]  
District : Raigad. ] .... Petitioner

***Versus***

1. Jigar K. Mehta, ]  
Age : 54 years, Occ. Builder. ]  
2. Anand Pawar, ]  
Age : 62 years, Occ. Builder, ]  
Both having their office address at ]  
Shop No.5, F-2 Building, Sector-15, ]  
Nerul, Navi Mumbai - 400 706. ]  
3. Chief Land and Survey Officer, ]  
CIDCO Bhavan, CBD Belapur, ]  
Navi Mumbai. ] .... Respondents

Mr. Rafeeq Peermohideen, a/w. Mr. Suresh M. Sabrad, Ms. Preetam Gupta and Mr. Amey Sawant, i/by Mr. Jeetendra Sachdev, for the Petitioner.

Mr. Bhushan Walimbe, i/by Mr. Amol B. Jadhav, for Respondent Nos.1 and 2.

**CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.**

**RESERVED ON : 13<sup>TH</sup> MARCH 2018.**

**PRONOUNCED ON : 20<sup>TH</sup> MARCH 2018.**

**JUDGMENT :**

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage

of admission itself, by consent of Mr. Peermohideen, learned counsel for the Petitioner, and Mr. Walimbe, learned counsel for Respondent Nos.1 and 2.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 17<sup>th</sup> November 2017 passed by the Joint Civil Judge, Senior Division, Panvel, below the application at “Exhibit-19” in Special Civil Suit No.566 of 2011.

3. The application at “Exhibit-19” was preferred by the present Petitioner, who is Defendant No.1 before the Trial Court, for referring the dispute to the Arbitrator, under Section 8 of the Arbitration and Conciliation Act, 1996, (*for short*, “*Arbitration Act*”).

4. Respondent Nos.1 and 2 herein had filed this Suit before the Trial Court for specific performance of the contract in respect of an 'Agreement of Sale' dated 4<sup>th</sup> July 2010, executed by the Petitioner in their favour. It pertains to the plot of land bearing No.A-57, admeasuring 850 sq.mtrs., situate at Sector No.16 at Village Ulave-II, Taluka Panvel, District Raigad, allotted by Respondent No.3-City and Industrial Development Corporation, (*for short*, “*CIDCO*”), by the ‘Letter of Intent’ dated 8<sup>th</sup> March 2010.

5. In the said Suit, on her appearance, Petitioner filed the present

application at “Exhibit-19”, under Section 8 of the Arbitration Act, for referring the dispute to the 'Arbitrator', in view of Clause No.(9) of the said 'Agreement of Sale'. This application was strongly resisted by Respondent Nos.1 and 2 herein, contending *inter alia*, that, as per Clause No.(9) of the 'Agreement of Sale', the dispute can be referred to the 'Arbitrator' only when it pertains to payment of the consideration amount. As, in the instant case, Respondent Nos.1 and 2 had already paid the entire consideration amount by cash and cheque, Clause No.(9) in the 'Agreement of Sale' is not attracted and, therefore, the application at “Exhibit-19”, which is filed by the Petitioner merely to protract the hearing of the Suit, needs to be dismissed.

6. The Trial Court, vide its impugned order, by accepting the contention raised by Respondent Nos.1 and 2, was pleased to reject the said application “Exhibit-19”; hence, the instant Writ Petition.

7. While challenging the impugned order passed by the Trial Court, the submission of learned counsel for the Petitioner is that, when the 'Agreement of Sale' contains an arbitration clause, then, it is obligatory and mandatory on the part of the Court to refer the dispute to the 'Arbitrator', in view of the provisions of Section 8 of the Arbitration Act. It is urged that, neither Respondent Nos.1 and 2, nor the Court can interpret the said clause to decide which subject matter of the dispute is

to be referred to the 'Arbitrator' and which subject matter is to be conducted by the 'Court'. It is urged that, it is for the 'Arbitrator' to interpret the said clause and decide the dispute accordingly.

8. In support of this submission, learned counsel for the Petitioner has relied upon the order passed by the Trial Court in the similar such matter in Special Civil Suit No.566 of 2011, wherein the arbitration clause in the 'Agreement of Sale' was exactly in the same words and despite that, the matter was referred to the 'Arbitrator' and the said order was confirmed by this Court and not disturbed by the Hon'ble Supreme Court also. According to learned counsel for the Petitioner, therefore, in the identical facts of this case, the Trial Court should not have rejected the Petitioner's application. Hence, the impugned order passed by the Trial Court needs to be quashed and set aside.

9. Per contra, learned counsel for Respondent Nos.1 and 2 has supported the order of the Trial Court by submitting that, the Court has to see the subject matter of the dispute, in respect of which the arbitration clause in the 'Agreement' requires reference to the 'Arbitrator'. In the instant case, the Arbitration Clause No.(9) in the 'Agreement of Sale' clearly restricts its scope. According to it, only the dispute, which pertains to payment of consideration amount, could be referred to the 'Arbitrator'. As in this case, there is no dispute about the

payment of the amount, the Trial Court was justified in not referring the parties to the 'Arbitrator'.

10. Secondly, it is submitted that, Respondent No.3-CIDCO is a party to the Suit; however, it is not party to the 'Agreement of Sale' and, therefore, the 'Reference' of the dispute could not have been made to the 'Arbitrator'.

11. Thirdly, it is submitted that, such application, under Section 8 of the Arbitration Act, needs to be filed not later than the date of submitting the first written statement on the substance of the dispute, in view of the amendment made to Section 8 of the Arbitration Act. In this case, the period for submitting the first statement on the substance of the dispute has already expired. Therefore, as the 'Reference' is not sought within time, as provided under Section 8 and is barred by limitation prescribed in Section 43 of the Arbitration Act, the application is rightly rejected by the Trial Court.

12. Now coming first to the 'Agreement of Sale' dated 4<sup>th</sup> July 2010, it definitely contains 'Clause No.(9)', which provides for 'Reference' to the 'Arbitrator'. It states that, if the entire amount of consideration is not received by the 'First Party' from the 'Second Party', then, both the parties were to refer the dispute to the 'Arbitrator' and complete the transaction.

13. The Trial Court has accepted the interpretation placed by learned counsel for Respondent on the said 'Clause No.(9)' to mean that, only when there is dispute relating to payment of consideration amount, the arbitration clause was to be invoked. Accordingly, the Trial Court held that, as already the amount of Rs.25,07,500/- is received out of the total consideration amount of Rs.59,50,000/- and the present Petitioner has not raised any dispute about the receipt of the said amount or she has also not raised the dispute that, for want of payment of remaining consideration amount, she is avoiding to execute the 'Sale-Deed', it was not necessary to refer the dispute to the 'Arbitrator'.

14. However, as rightly submitted by learned counsel for the Petitioner, it will be definitely for the 'Arbitrator' to decide the interpretation of this relevant Clause No.(9) and neither for the Respondents-Plaintiffs nor for this Court. Once Respondent Nos.1 and 2 admitted that the 'Agreement of Sale' contains the arbitration clause, then, as the language of Section 8 of the Arbitration Act is peremptory in nature, it is obligatory for the Court to refer the parties to the 'Arbitrator', in terms of their 'Agreement of Sale', and nothing remained to be decided in the original action, after such an application is made, except to refer the dispute to the 'Arbitrator'. As held by the Apex Court in the case of *Refrigeration and Appliances Vs. Jayaben Bharkatkar*, 2003 DGLS 376,

*“If it is agreed by the parties in an 'Agreement' between them before the Civil Court that there is a clause of arbitration, it is mandatory for the Civil Court to refer the dispute to an 'Arbitrator'”.*

15. Moreover, in this case, the interpretation made by Respondent Nos.1 and 2 to 'Clause No.(9)' of the 'Agreement to Sale' is also incomplete, because, the said clause provides not only that, in case of dispute regarding the payment of consideration, the dispute is to be referred to the 'Arbitrator', but it further provides that, as per the decision given by the 'Arbitrator', the transaction was to be completed. Therefore, the second part of this clause clearly states that, it will be for the 'Arbitrator' to decide the entire dispute between the parties for completion of the transaction. The plain interpretation of the said clause, therefore, is that, if there is any dispute or difference between the parties with respect to the completion of the transaction, then, the matter is to be referred to the 'Arbitrator'. It will be for the 'Arbitrator' alone to decide the subject matter of the dispute. This Court has also, in the case of *Smt. Barkibai Undir Gharat and Ors. Vs. M/s. Madhuraj Engineers & Builders and Ors.*, in Civil Revision Application No.307 of 2007, held that, *“even a dispute in respect of the interpretation of the arbitration clause can be decided by the 'Arbitrator'.”*

16. As to the Judgment relied upon by the Trial Court, that of *Satish*

*Raghuveerchand Sood Vs. Gujarat Telelinks Private Limited, 2013 (6) Mh.L.J. 420*, in my considered opinion, it cannot be made applicable to the facts of the present case, because, in that Suit, considering the serious allegations pertaining to fraud and malpractice made in the Suit, it was held that, such allegations are required to be tried by the Civil Court and the 'Arbitrator' will not be competent to deal with such matters, which requires production of oral and documentary evidence by either of the parties to prove the fraud and misrepresentation, and in that context, it was held that, such disputes can be decided only by the 'Civil Court' and not by the 'Arbitrator'. In the instant case, the nature of the dispute is not such, which 'Arbitrator' cannot decide. Conversely, he is the best person to decide the said dispute, as he can assist the parties in completion of the transaction. Thus, once the parties have made their intention clear to refer the dispute to the 'Arbitrator' for resolving the same, then, the Court should direct the parties to the 'Arbitrator', instead of interpreting the relevant clause, to decide whether only part of the dispute was to be referred and in case of certain eventuality only.

17. As to the next contention raised by learned counsel for Respondent Nos.1 and 2, which was, admittedly, not taken up before the Trial Court, pertains to the application under Section 8 of the Arbitration Act, not being filed before the Trial Court within the prescribed time. In the first place, it is submitted that, in view of the amendment made to Section 8

of the Arbitration Act, w.e.f. 23<sup>rd</sup> October 2015, by Act No.3 of 2016, such application for reference to arbitration has to be made, not later than the date of submitting the first written statement on the substance of dispute by the Defendants.

18. Reliance is placed by learned counsel for Respondent Nos.1 and 2 on the decision of Delhi High Court in the case of *Krishan Radhu Vs. The Emmar MGF Construction Pvt. Ltd., 2016 Supreme(Del) 4484*, wherein this relevant clause was interpreted to mean that, after the amendment of Section 8 of the Arbitration Act, such application for reference to arbitration cannot be entertained, once the period prescribed for filing of the written statement has expired. It is submitted that, in this decision of Delhi High Court, it was held that, as per the earlier Section 8(1) of the Arbitration Act, prior to amendment, the party was permitted to apply for reference to arbitration, even while submitting the reply or written statement. However, now such application for reference has to be made within the time stipulated for filing of written statement. In the present case, therefore, as the application is made after the time stipulated for filing of written statement has expired, such application cannot be allowed.

19. However, in my considered opinion, this Judgment of Delhi High Court cannot be made applicable to the facts of the present case, as the

said case, particularly, pertains to the commercial dispute. In respect of commercial dispute, as observed in this Judgment, in view of amendment to Order 8 Rule 1 of CPC, in the year 2015, the period of 120 days is stipulated for filing of the written statement and such period, as observed in this authority, cannot be extended. Therefore, the discretion, which the Court has in the Suits, other than commercial disputes, of extension of this period of 90 days also for filing of written statement, is not at all available in the commercial disputes. In that view of the matter, it was held that, the application for reference to the 'Arbitrator', if not made in the time stipulated for filing of written statement, it cannot be entertained.

20. This is an ordinary Suit, to which the provisions of commercial disputes are not applicable and hence, in this Suit, the Court has discretion to extend the time stipulated for filing of written statement, as held by the Hon'ble Supreme Court in number of its decisions that, the provisions of Order 8 Rule 1 of CPC are not of mandatory nature but of a directory nature. Hence, the contention raised by learned counsel for Respondent Nos.1 and 2 in this respect cannot be accepted.

21. The third contention raised by learned counsel for Respondent Nos.1 and 2, which was again not raised before the Trial Court, pertains to the provisions of Section 43 of the Arbitration Act, which lays down

that, *“Limitation Act shall apply to the arbitrations, as it applies to the proceedings in the Court”*. It is submitted that, sub-section (3) of Section 43 of the Arbitration Act provides that,

*“Where an Arbitration Agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred, unless some step to commence arbitral proceedings is taken within a time fixed by the agreement and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case, undue hardship would otherwise be caused and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, to extend the time for such period as it thinks fit.”*

22. Here in the case, it is urged that, the Petitioner has not taken any steps for referring the dispute to the 'Arbitrator' within a reasonable time, if, according to her, there is a dispute relating to payment of the consideration amount and in such situation, reference to the dispute is time barred.

23. However, in my considered opinion, this provision can hardly be applicable to the facts of the present case. Here in the case, no such time limit is prescribed in the 'Agreement of Sale', within which dispute was to be referred to the 'Arbitrator', and immediately after appearance in the Suit, the Petitioner has filed such application.

24. The next contention raised by learned counsel for Respondent Nos.1 and 2 is about the CIDCO, i.e. Respondent No.3 herein, not being party to the 'Arbitration Agreement'. Again this contention was not raised before the Trial Court, but then, in order to resolve the dispute, even if this contention is taken up at this stage, as both the parties have argued thereon, the perusal of the plaint clearly goes to show that, Respondent No.3 - CIDCO is merely a formal party. Only a consequential relief of injunction is claimed against the CIDCO, it being the owner of the said plot.

25. It is pertinent to note that, in the similar facts of the case, in Special Civil Suit No.252 of 2008, the Trial Court has allowed the 'Reference', under Section 8 of the Arbitration Act, to the 'Arbitrator' and when the said 'Reference' was challenged before this Court in the case of *Narayan Shankar Thakur Vs. Sitabai Sitaram Thakur (Since Deceased)*, through Legal Heirs, in Writ Petition No.1882 of 2010, dated 1<sup>st</sup> August 2013, on the ground that, the CIDCO was a party to the Suit, but was not party to the 'Agreement', it was held by this Court that, as the CIDCO is the owner of the property, it has been joined as necessary and proper party in the Suit. As the specific performance of the 'Agreement of Sale' is sought after obtaining allotment from the CIDCO, it was necessary to include CIDCO as party to the Suit, but as no relief was claimed against

the CIDCO and there was specific averment in the plaint that Plaintiff has no claim against it, reference made to the 'Arbitrator' by the Trial Court cannot be set aside. Though the said order of this Court was challenged in Special Leave Petition No.27231 of 2013, the said Special Leave Petition came to be dismissed.

26. Here in the case, though it is true that, a relief is claimed against the CIDCO, it is merely of an ancillary or of a consequential nature. Such relief can be granted or refused, depending on whether Plaintiff's Suit for specific performance can be decreed or not. As held by another Single Bench of this Court in the case of *M/s. Fiza Construction Vs. Smt. Parvati K. Thakur and Ors.*, in Writ Petition No.943 of 2010, dated 10<sup>th</sup> February 2010, CIDCO being a Statutory Authority, would be required to consent to the transfer, once the Suit is decreed. It is, therefore, a formal party and would abide by the decision of the 'Arbitrator' and the decision of the 'Court'. Like in the said Suit, the main dispute in this case is also between the Petitioner and Respondent No.1.

27. As a result, the Writ Petition is allowed.

28. The impugned order passed by the Trial Court is quashed and set aside.

29. In consequence, the application filed by the Petitioner before the Trial Court at “Exhibit-19”, under Section 8 of the Arbitration Act, is allowed.

30. Parties to the Suit, namely, the Petitioner and Respondent Nos.1 and 2, are referred to the 'Arbitrator', in terms of Clause No.(9) of the 'Agreement of Sale' dated 4<sup>th</sup> July 2010.

31. Rule is made absolute in the above terms.

32. At this stage, learned counsel for Respondent Nos.1 and 2 seeks stay to the operation of this Judgment and Order, in order to enable the Respondents to approach the Hon'ble Supreme Court against this order. In the interest of justice, the request for grant of stay is allowed. Accordingly, the operation of this Judgment and Order is stayed for a period of six weeks from today.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**