

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CIVIL APPELLATE JURISDICTION

**Arbitration Petition (st) No.13370 OF 2019**

Indapur Dairy And Milk Products Limited Thr.its Authorised  
Person Dhananjay Hira Galande ...Petitioner

*Versus*

Global Energy Private Limited Thr. It's Managing Director ...Respondent

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Mr.Sandesh Shukla with Mr.Vivek Patil and Amit Singh, Paras Yadav I/b.  
Sumant Patale, for the Petitioner.

Mr.Abhishek Adke with Mr.Rohan Bangar, for Respondent.

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**CORAM : G.S. KULKARNI, J.**

**DATE : 24 July 2019**

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**ORAL JUDGEMENT**

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act,1996 (for short 'the Act') whereby the petitioner has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties under the Agreement dated 13 March 2015. The arbitration agreement is contained in Clause No.13.1 of the said agreement which reads thus:-

“13. Dispute Resolution

13.1 If any dispute or difference of any kind whatsoever (“Dispute”) shall arise between the parties in connection with or arising out of this Agreement or out of the breach, termination or invalidity of the Agreement hereof, the Parties shall resolve them by resort to the following in the order so mentioned:

(a) Parties shall attempt for a period of 30 days after receipt of notice by the other Party of the existence of a Dispute to settle such Dispute in the first instance by mutual discussions between the parties.

(b) In the event of such differences between the parties failing settlement through mutual discussions amongst Parties concerned within one month, any Party may by a written notice of 30 days to the other Party or Parties refer the dispute for arbitration. The party having a grievance shall appoint an arbitrator of his own choice and serve a notice on the other party asking them to appoint an arbitrator of their choice within 30 days. The appointed arbitrators shall then appoint a Presiding Arbitrator.

(c) The arbitration proceedings shall be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof. The arbitration proceedings shall be conducted in the English Language and the venue of the arbitration shall be Pune and the cost of arbitration proceeding would equally be shared by both the parties unless decided otherwise by the arbitration pursuant to award of Arbitration.

(d) Courts in Pune shall have exclusive jurisdiction in respect of any dispute arising under this Agreement.”

2. There is no dispute on the existence of the arbitration agreement. Respondents have appeared and have also filed a reply affidavit. The principal objection as urged on behalf of the respondents is that the petitioner had earlier approached the Court of Civil Judge, Jr. Division at Pune, by filing Special Civil Suit No.760 of 2018 inter alia against the

respondent and the Janata Sahakari Bank, Pune. The contention is that once a suit has been filed for the reliefs against the respondent and a third party namely 'Janata Sahakari Bank', who had furnished a bank guarantee on behalf of the petitioner, and as a prayer is made against the respondent in regard to a bill dated 16 February 2018, the present petition filed under Section 11 of the Act would not be maintainable. The petitioner has waived its rights for an arbitration and/or to invoke the arbitration agreement.

3. The second objection although vaguely raised in paragraph 7 of the reply affidavit is on the agreement in question being not adequately stamped. In paragraph 7 of the reply, following averments are made in this regard:-

“7. Without prejudice to the above, the Respondent submits that the Power Supply Facilitation Agreement dated 13<sup>th</sup> March, 2015 under which appointment of an arbitrator is sought is insufficiently stamped in view of which the reliefs as sought by the Petitioner ought not to be granted.”

4. Learned Counsel for the respondent has however not disputed that the respondent is yet to appear in the suit, although summons has been issued. Learned Counsel for the petitioner would submit that the summons was dispatched but was returned 'unclaimed'.

5. Learned Counsel for the petitioner referring to the provisions of Section 8 of the Act and in that context referring to the decision of the Supreme Court in “*Sukanya Holdings Pvt. Ltd. Vs. Jayesh H.Pandya & Ors.*”<sup>1</sup>, would contend that there is no bar for the petitioner to invoke the arbitration agreement and seek appointment of an arbitral tribunal. He submits that the suit was filed principally on a cause of action whereby the respondent was invoking the bank guarantee of the Janata Sahakari Bank furnished by the petitioner. It is submitted that in the invocation notice dated 15 November 2018 issued by the petitioner, the petitioner has set out in detail its claim which is completely *dehors* all the reliefs as prayed in the suit and it is an independent cause of action. It is thus submitted that the petitioner was justified in invoking the arbitration agreement. It is submitted that invocation notice has not been replied by the respondent and therefore, it is required to be presumed that the contents of the invocation notice are also admitted by the respondent. Learned Counsel for the petitioner submits that for these reasons the objection as raised on behalf of the respondent, for the first time in the present proceedings, namely that the petitioner has given up or waived its rights of an arbitration, ought not to be accepted.

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1 Manu/sc/0310/2003

6. I have heard the learned Counsel for the parties also I have perused the record. At the outset some admitted facts relevant for these proceedings are required to be noted.

7. It is not in dispute that there is an arbitration agreement between the parties. It is also not in dispute that by a notice dated 15 November 2018 issued on behalf of the petitioner to the respondent, the arbitration agreement was invoked by the petitioner seeking appointment of an arbitral tribunal, setting out various disputes which have arisen between the parties. In paragraph 44 of the said notice, the petitioner has taken a position that the suit which was filed has become infructuous and the petitioner should apply for withdrawal of the said suit. It is relevant to note the contents of paragraph 44 of the said notice, which reads thus:-

“44. Our client states that our client has performed its contractual obligations sincerely and flawlessly under the agreement. However, you are not acknowledging your obligations towards our client and have malafidely withdrawn the said Invoice amount of Rs.25,04,608/- from the Bank Guarantee No.112/2015 on 5 June 2018, In spite of the Order of status quo passed by the Civil Judge Senior Division, Pune on 04<sup>th</sup> June 2018 on an application in Special Civil Suit No.670/2018 filed by our client, after notice issued to you was received unclaimed, for wrongful gain and the dispute about the said amount between our client and you, could not be resolved amicably by mutual discussion due to your non co-operation in spite of efforts by our client for the last several months. Our client is withdrawing the said suit as it has become infructuous, with liberty to take appropriate steps for Arbitration as the Agreement.”

8. A straight jacket contention is urged on behalf of the respondent that once a suit was filed by the petitioner, the petitioner waived its rights to invoke arbitration or to seek adjudication of the disputes in arbitral proceedings. Such a blanket contention cannot be accepted. In this context it would also be relevant to note the provisions of Section 8 of the Act. The provisions of Section 8 of the Act pre the 2016 Amendment Act (Act 3 of 2016) and as amended by the Amending Act of 2016 read as under:-

| Pre amended Section 8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Amended Section 8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
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| <p><b>8. Power to refer parties to arbitration where there is an arbitration agreement-</b></p> <p>(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.</p> <p>(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.</p> <p>(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.</p> | <p><b>“8. Power to refer parties to arbitration where there is an arbitration agreement-</b></p> <p>(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, <u>if a party to the arbitration agreement or any person claiming through or under him,</u> so applies not later than the date of submitting his first statement on the substance of the dispute, then, <u>notwithstanding any judgment, decree or order of the Supreme Court or any Court,</u> <u>refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.</u></p> <p>(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:</p> <p>(Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party</p> |

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|  | <p>to that agreement, then, the party so applying shall file such application alongwith a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.</p> <p>(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.</p> |
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9. A perusal of the amended provision shows that the canvass of sub-section (1) of Section 8 has been widened as now the words “if a party to the arbitration agreement or any person claiming through or under him” have now been incorporated along with the further addition of the words “notwithstanding any judgment, decree or order of the Supreme Court or any Court, the judicial authority shall refer the parties to arbitration unless it finds that prima facie there is no valid arbitration agreement exists”. It is thus clear that the judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, would have jurisdiction, to mandatorily (as clear from the words “shall”) refer the parties to arbitration unless it finds that prima facie there no valid arbitration agreement exists. Thus what is required to be noted is that sub-section (1) of Section 8 confers such right “on a party to the

arbitration agreement”. The provision would contemplate such application to be made by a defendant, being a party to the arbitration agreement, praying for reference of the disputes in the suit to arbitration before filing his first statement on the substance of the disputes. It cannot be accepted to be an interpretation of Section 8 that on one hand it would confer a right on the defendant to pray that the disputes in the suit be referred to arbitration, there being an arbitration between the parties, and on the other hand it would not permit the plaintiff to withdraw the suit before the defendant files his first statement on the substance of the dispute. Section 8(1) certainly does not create such an anomaly.

10. Before the defendant submitting the first statement on the substance of the dispute, certainly it is permissible for the Civil Court to consider an application of the plaintiff to permit withdrawal of the suit, when there is an arbitration agreement, and refers the parties for arbitration.

11. It cannot be conceived that sub-section (1) of Section 8 when it confers a right on the defendant to object to the suit and seek reference of disputes to arbitration as to why before a stage as contemplated by sub-

section (1) is reached, it would not confer a right on the plaintiff, and in any case before the defendant appears, to contend before the civil court, that there is an arbitration agreement between the plaintiff and defendant and being a party to the arbitration agreement, the plaintiff be permitted to withdraw the suit, and espouse arbitration.

12. Further considering the provisions of Section 8(1) in my opinion, the objection as raised on behalf of the respondent on the petitioner having waived its right to arbitration, cannot be accepted, even referring to Section 4 of the Act. The provisions of Section 8 are required to be read harmoniously with Section 4. If the argument on behalf respondent is accepted, it would render Section 8 otiose. This apart Sub-section (3) of Section 8 clearly provides that notwithstanding that an application has been made under sub-section (1) and even if the issue is pending before the judicial authority, the party would have right to commence arbitration and/or the arbitration could be continued and an arbitral award can be passed. Sub-section (3) is in fact a clear indication of the legislative intent of a party autonomy so as to give a complete effect to the arbitration agreement as arrived between the parties and when an arbitration agreement exists then the party should not be precluded from

commencing the arbitration proceeding. Commencing of the arbitration proceeding would be by issuing of notice as Section 21 of the Act would contemplate.

13. It would be profitable to refer to same decisions in this context. In ***“A. Tosh and Sons (India) Ltd. Vs. Happy Valley Tea Company Pvt.Lt.”***<sup>2</sup>, a learned Single Judge of Calcutta High Court held that as the suit filed by the petitioner was withdrawn, the petitioner was entitled to proceed with the arbitration reference. The Court in paragraph 6 observed thus:-

“6. ... .. It is true that the petitioner approached the Civil Court in 1999 suppressing the arbitration clause in the said suit. Before the written statement was filed the suit was withdrawn by the petitioner who was the plaintiff in the said case. It appears from the order of the learned civil Judge that the application for withdrawal was made in view of pendency of the arbitration proceeding. Mr. Ahmed submits that since the suit was withdrawn with liberty to file afresh the petitioner is only entitled to file a fresh civil proceeding and nothing else. Such submission of Mr. Ahmed is not tenable in law. Even if the suit has been pending today it was and still is the duty of the Arbitrator to proceed with the reference irrespective of pendency of the suit in view of Section 8(3) of the said Act of 1996. However, once the Court's attention was drawn, the suit was allowed to be withdrawn. Hence the contention of Mr. Ahmed to the extent that the petitioner is not entitled to proceed with the arbitration reference, in my view, cannot be sustained and is thus rejected.”

14. In ***“Dharmendra Construction Co. Vs. State of Rajasthan & Ors”***<sup>3</sup> the Supreme Court observed that as the civil suit filed by the applicant

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2 AIR 2006 Calcutta 90

3 (2008)17 SCC 601

therein was withdrawn, while setting aside the order passed by the High Court, the High Court was directed to decide Section 11 application. The Supreme Court in paragraph 3 observed thus:-

“3. It has not been brought to the notice of this Court that the civil suit filed by the appellant has already been withdrawn. A copy of the same has already been filed in this Court with an affidavit. In this view of the matter, the impugned order is set aside and the High Court is directed to decide the application filed by the appellant under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator which was registered as SB Arbitration Application No.6 of 2005 before the High Court of Judicature for Rajasthan, Jaipur Bench. It is expected that the said application shall be decided by the High Court as early as possible preferably within six months from the date of supply of a copy of this order.”

15. Similarly, a learned Single Judge of Madhya Pradesh High Court in ***Smt. Charanjit Kaur v. S. R. Cable through its Partner Sanjay Mahor***<sup>4</sup> held that

“14. In the context of the said legal position the facts of the present case required to be appreciated. It is undisputed that an arbitration agreement dated 1-6-2006 was entered in between the parties, wherein Clause 14 provides for arbitration, as per the provisions of Arbitration and Conciliation Act, 1996. Undisputedly, applicant had filed a suit for declaration and permanent injunction on 4-2-2008, wherein the relief of temporary injunction was refused, later on 31-3-2008 the suit was permitted to be withdrawn by the Court. But because on the same date counter-claim was filed by the defendant/non-petitioner, which was entertained treating it as suit, therefore, on the first date i.e. 9-4-2008 petitioner has applied under Section 8 of the Arbitration and Conciliation Act to refer the parties for arbitration. The said application was rejected by the order impugned upholding the plea of waiver and presuming that the action of petitioner is amounting to approbate or reprobate the relief. In the present case the suit filed by applicant was withdrawn on 31-3-2008 in view of an arbitration agreement entered between the parties. When the counter-claim of the defendant was entertained by the Court,

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4 AIR 2009 Madhya Pradesh 66

then immediately on the next date i.e. 9-4-2008, petitioner has filed an application under Section 8 of the New Act showing his unequivocal intention questioning the maintainability which was rejected by the order impugned. So far as refusal of the application of temporary injunction is concerned, it is suffice to say those are supplemental or incidental proceedings and the part of the main suit, which was already withdrawn and not the part of the present proceedings, therefore, on such basis, wherein no written statement was filed till withdrawal, the plea of defendant of waiver cannot be accepted. It is trite law that merely withdrawal of the suit without decision on merit, the subject-matter on the pretext does not debar the plaintiff to take defence for the subject-matter. The principle of res judicata applies to bring a fresh suit for same cause of action, thus, in view of the foregoing it is clear that immediate on the next date of entertaining the counterclaim of the defendant, petitioner has submitted his objection under Section 8 of the New Act to refer the parties for arbitration under the Arbitration agreement. Therefore, it qualifies the expression specified under Section 8 i.e. "first statement on the substance of the dispute". However, in the facts and circumstances of the present case, the rejection of objection of the petitioner, upholding the plea of waiver cannot be sustained and the findings recorded by the learned Court in the order impugned is liable to be set-aside.

15. Accordingly and in view of the discussion as made hereinabove the order impugned dated 5-5-2008 passed in both the cases rejecting the application under Section 8 of the Arbitration and Conciliation Act is set aside, and the dispute, if any between the parties in hereby referred in terms of arbitration agreement. In consequence thereto the suit or the counter-claim of defendant pending in the trial Court be treated as consigned to record. In the facts and circumstances of the case, parties to bear their own costs."

16. In "*Ministry of Sound International Ltd. VS. Indus Renaissance Partners*"<sup>5</sup>, a learned Single Judge of the Delhi High Court has held that "mere filing of civil suit would not amount to party abandoning or waiving its rights under arbitration clause."

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5 156(2009) Delhi Law Times 406

17. It is thus clear that although a suit was filed by the petitioner before the Civil Court and the respondent-defendant is yet to appear in the said suit, the petitioner had a right to withdraw the said suit. Even if the defendant/respondent was to appear and file an application under section 8(1) objecting to the suit, the civil court would have nonetheless referred the parties to arbitration, considering the shape of the suit. Further considering the nature of the suit as filed by the petitioner, it appears that the suit was more in the nature of an injunction application against invocation of a bank guarantee. A perusal of the invocation notice, however, would demonstrate that the petitioner is raising disputes purely on the agreement between the parties, which is not exactly a similar cause which was being pursued by the petitioner in the suit.

18. Having discussed the consequence which would flow from Section 8 of the Act as applicable in the facts of the present case, it may be observed that the decision of this Court in “*Mallikarjun Gurlingappa Valikhindi Vs. Shrikant Panachand Shah (decd) through legal heirs*”<sup>6</sup>, as relied on behalf of the respondent would not be applicable in the present facts. This was the case where the suit was filed in the year 2001 and which was dismissed in the year 2011. The suit had proceeded upto the stage of

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6 Arbitration Petition no.93 of 2017 Order dt.12/6/2019

evidence and in that situation the petitioner having abandoned the proceedings of the suit, had invoked the arbitration agreement. It is in this context the Court came to a conclusion that the proceedings under Section 11 are not maintainable.

19. The decision of the learned Single Judge in “***Cogent Enterprises Pvt.Ltd. Vs. Shri.Vijay Kumar Jagdishray Chawla***<sup>7</sup> would also not assist the respondent. That was the case in which an application under Section 8 was dismissed on adjudication. The said order passed by the trial Court on the Section 8 application, was upheld by this Court. Further the orders passed by the learned Single Judge were challenged before the Supreme Court and the Special Leave Petition was dismissed. It is in these circumstances, the Court came to a conclusion that the petitioner was estopped from seeking reference of disputes to arbitration.

20. The reliance on behalf of the respondent on the decision of the learned Single Judge in “***Mohd.Rafique Moh.Hussain Tinwala vs. M/s.S.S.Enterprises & Ors.***”<sup>8</sup> is also not well founded. In this case proceedings before this Court had arisen from an order passed by the trial Court permitting withdrawal of a suit exercising power under Order XXIII

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<sup>7</sup> Arbitration Petition no.56 of 2016, Order dt.17/3/2017

<sup>8</sup> Civil Revision Appln(st) no.26883/18, Judgment dt. 23/10/2018

Rule (1)(3)(b) of the Code of Civil Procedure, considering the facts of the case, the Court opined that it was not permissible for the Court to permit withdrawal of the suit exercising powers under Order XXIII Rule 1 read with Section 151 of the Code of Civil Procedure.

21. It needs to be stated that in the present case the petitioner has taken a clear position that the petitioner is withdrawing the suit and steps to that effect would be immediately taken. In these circumstances, there is no impediment for this Court to appoint an arbitral tribunal.

22. In the light of the above discussion, the petition would be required to be allowed. Hence, the following order:-

**ORDER**

- i) Mr.Anurag M.Jain, Advocate of this Court is appointed as a prospective Sole Arbitrator to arbitrate the disputes and differences between the parties under the the Agreement dated 13 March 2015;
- ii) The prospective Sole Arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act,1996, to the Registrar (Judicial (I)), to be placed on record of this proceeding with a copy to be forwarded to both the parties;

- iii) The fees payable to the arbitral tribunal shall be governed in accordance with the fees prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018;
- iv) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;
- v) All contentions of the parties are expressly kept open;
- vi) The petition is accordingly disposed of in the above terms. No costs.
- vii) Office to forward a copy of this order to the learned Arbitrator on the following address:-

“Mr. Anurag M. Jain, Advocate.

Office: Varun Capital, Office no. 501, CTS No. 364+365/13,  
Next to Hotel Sudama, Opp. Jangli Maharaj Temple,  
Shivajinagar, Pune 411 005.

Mobile: 9833759856

Email: ajassociateslaw@gmail.com.

**(G.S.Kulkarni, J.)**