

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

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signed by
SHRADDHA
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**SUMMONS FOR JUDGMENT NO. 71 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO. 1111 OF 2019**

1. **Taru Meghani**]
Aged : 73 years, residing at Ram Niwas,]
Ground floor, Navroji Lane, Ghatkopar]
West, Mumbai – 400076,]
Through his Constituted Attorney]
Ms. Shraddha Khandhadia]
Presently residing at 404,]
Rama's Towers S.N. Road,]
Mulund (West), Mumbai 400 080]

2. **Mahendra Meghani**]
Aged : 76 years, residing at Ram Niwas,]
Ground floor, Navroji Lane, Ghatkopar]
West, Mumbai – 400076,]
Through his Constituted Attorney]
Ms. Shraddha Khandhadia]
Presently residing at 404,]
Rama's Towers S.N. Road,]
Mulund (West), Mumbai 400 080]

3. **Kamal Khandhadia**]
Aged : 65 years, Presently residing at 404]
Rama's Towers S.N. Road,]
Mulund (West), Mumbai 400 080].. Applicants
Through his Constituted Attorney] (Orig.
Ms. Shraddha Khandhadia] Plaintiffs

Presently residing at 404,
Rama's Towers S.N. Road,
Mulund (West), Mumbai 400 080

IN THE MATTER BETWEEN :

1. **Taru Meghani**]
 Aged : 73 years, residing at Ram Niwas,]
 Ground floor, Navroji Lane, Ghatkopar]
 West, Mumbai – 400076,]
 Through his Constituted Attorney]
 Ms. Shraddha Khandhadia]
 Presently residing at 404,]
 Rama's Towers S.N. Road,]
 Mulund (West), Mumbai 400 080]

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 Mulund (West), Mumbai 400 080]
 Through his Constituted Attorney]
 Ms. Shraddha Khandhadia]
]
 Presently residing at 404,]
 Rama's Towers S.N. Road,]
 Mulund (West), Mumbai 400 080].. Plaintiffs

Versus

1. **Shree Tirupati Greenfield**]
(Shree Tirupati Greenfield Developers)]
 Diwanchand Hansraj Compound,]
 Kolshet Road, Dhokali Naka,]
 Thane (W), Thane 400 607]

And Also at -

Abhiman II Building Opp Karur
Vysya Bank, Teen Hath Naka,
Thane (W), Thane – 400 602.

2. Haresh Gurbau Daulatani

Aged : Adult, Occ : Business,
Residing at 1101/1102 Phase II,
Siddhanchal Pokharan Road No.2,
Near Vasant Vihar, Thane West
Thane 400 602.

3 Arvind Satpal Gupta

Aged : Adult, Occ : Business,
Residing at – Flat No.2, 5th floor,
Mitra Kunj, 16th Peddar Road,
Mumbai – 400026.

4 Sunil Satpal Gupta

Aged : Adult, Occ : Business
Residing at Flat No.2, 5th floor,
Mitra Kunj, 16th Peddar Road,
Mumbai – 400026

Also Having Address at :

803, Sai Samarth, Near Vasant
Service Centre, Deonar Village,
Govandi East, Mumbai 400 088.

And Also at :

Plot No. 257, Building No.3,
Central Avenue Road, Behind Road
No.10, Chembur, Mumbai – 400 071

.. Defendants

**ALONG WITH
INTERIM APPLICATION NO. 1 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO. 1111 OF 2019**

1. Shree Tirupati Greenfield
(Shree Tirupati Greenfield Developers)
& Ors.

.. Applicants/Orig. Defendants

In the matter between :

Taru Meghani
& Ors.

.. Plaintiffs

Vs.

1. Shree Tirupati Greenfield
(Shree Tirupati Greenfield Developers)
& Ors.

.. Defendants

Mr.Narayan Sahu i/b Adv. Shrinath Kamta Dubey for plaintiffs.

Mr. Saurab Oka for defendants/applicants in interim application.

CORAM : N.J. JAMADAR, J.

DATE : 10th JANUARY 2020

ORAL JUDGMENT :

1. This commercial division summary suit is instituted for recovery of a sum of Rs.1,24,08,764.54 on the basis of a memorandum of understanding and the negotiable instruments.

2. The claim of the plaintiffs is that on the representation of the defendants that the handsome return could be earned in the event of

making an investment in the projects which the defendant No.1 was developing, the plaintiffs had collectively advanced a sum of Rs. 54 lakhs. The initial investment was of Rs. 35 lakhs. The defendants executed a Memorandum of Understanding, dated 22nd July 2014 ('MOU') and assured to repay the said amount along with interest @ 33% per annum at quarterly rest. The defendants, in order to instill a sense of confidence and security, had paid interest @ 33% per annum till December 2015. The plaintiff Nos. 2 and 3 advanced a further sum of Rs.19 lakhs to the defendants. The defendants had drawn bills of exchange in favour of plaintiff Nos.2 and 3. The defendants had drawn cheques towards the repayment of the said amount. However, the cheques were returned unencashed on presentment. Hence, the suit for recovery of the said amount alongwith interest.

3. The defendants entered appearance in response to the writ of summons. The plaintiffs took out the summons for judgment.

4. The defendants have preferred this interim application seeking the reference of the dispute to arbitration in view of an arbitration clause in the MOU. The defendants have contended that the transaction between the parties was of an investment in the project which was being developed by the defendants. The transaction was

evidenced by the MOU. Apart from the other terms, the MOU contains an arbitration clause, which reads as under :

“n If at any time, any dispute, difference or question shall arise, between the parties hereto, touching, pertaining, affecting concerning or relating to the terms of this MOU or meaning of these presents or the rights or liabilities, hereunder, which cannot be resolved by or between the parties themselves, then, every such dispute difference or question shall be referred to an arbitrator to be appointed by the parties under the provisions of Arbitration and Re-Conciliation Act, 1996 or any statutory amendment or re-enactment thereof.”

As the plaintiffs have approached the Court with a claim for recovery of an amount advanced thereunder and the dispute is clearly covered by the arbitration clause, the reference under section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) is warranted.

5. The plaintiffs have resisted the application by filing an affidavit in reply. It is averred that there was a series of transactions between the plaintiffs and the defendants. As of now, five suits have been instituted against the defendants by the plaintiffs and other investors. Some of the transactions are not covered by Memorandum of Understanding, though forming part of one and the same bargain. In the case at hand, the subsequent loan of Rs. 19 lakhs is not covered

by the MOU. The said advance is against the bills of exchange, which falls out of the purview of the dispute covered by the arbitration clause in the MOU. Thus, the subject matter of the suit cannot be bifurcated. The application under section 8 of the Act, therefore, becomes untenable. It is further contended that the plaintiffs are the senior citizens. In the event of reference of the dispute to arbitration, the plaintiffs would be required to wait for an indefinite period for an admitted claim. Thus, the prayer for reference to arbitration be rejected.

6. Heard Mr.Narayan Sahu, the learned counsel for the plaintiffs and Mr.Saurab Oka, the learned counsel for the defendants/applicants.

7. Mr. Oka, the learned counsel for the defendants submitted that the arbitration clause, extracted above, in the MOU is required to be given effect to. There is no dispute about the existence of the arbitration clause in the MOU dated 22nd July 2014 under which the sum of Rs. 35 lakhs was initially advanced. In the backdrop of the undisputed contract between the parties, there is no other go but to make an arbitral reference under section 8 of the Act, urged Mr. Oka.

8. The learned counsel for the plaintiffs joined the issue by canvassing a twofold submission. As regards the first tranche of Rs. 35 lakhs, without disputing the execution of the MOU and the arbitration clause therein, the learned counsel attempted to wriggle out of the situation by putting forth a submission that despite there being an arbitration clause, as extracted above, in the peculiar facts of the case, when there are multiple transactions between the parties, resulting in as many as five suits, the reference of the dispute to arbitration would lead to conflicting decisions in diverse proceedings.

9. Secondly, the learned counsel mounted a legal challenge based on impermissibility of bifurcation of the subject matter of the dispute for referring a part of the dispute to arbitration and adjudicating the rest by the Court. This submission was premised on the ground that, in the case at hand, the plaintiffs seek to recover an amount which was not advanced under the MOU. The arbitration clause thus does not govern the dispute in respect of repayment of the said amount of Rs. 19 lakhs, advanced against the bills of exchange. Resultantly, if the submission on behalf of the defendants of referral of the entire dispute to arbitration is accepted, according to the learned counsel for the plaintiffs, it would necessarily involve the reference of the dispute

to arbitration, which is not covered by the arbitration clause. Conversely, the dispute as regards the amount covered by the MOU also cannot be referred to arbitration as it would entail the consequence of the bifurcation of the subject matter of the dispute, which is legally impermissible.

10. To lend support to the aforesaid submission, the learned counsel for the plaintiffs placed a strong reliance on the judgment of the Supreme Court in the case of *Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Anr.*¹. In the case of *Sukanya Holdings (P) Ltd.* (Supra), the Supreme Court repelled the submission on behalf of the appellant that a dispute which is covered by an arbitration agreement between the parties, can be referred to arbitration, despite the suit having been filed claiming certain reliefs in respect of a dispute, which was not subject matter of arbitration, and it having been instituted against the persons who were not parties to the arbitration agreement. The Supreme Court observed, *inter-alia*, as under :-

“12 For interpretation of [Section 8](#), [Section 5](#) would have no bearing because it only contemplates that in the matters governed by Part-I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except [Section 8](#), there is no other provision in the Act that in a pending suit, the dispute is required to be referred to

1 (2003) 5 SCC 531

the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that [Arbitration Act](#) does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub- sections (1) & (2) of [Section 8](#) of the Act.

12 Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

13 Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under [Section 24](#) of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15 The relevant language used in [Section 8](#) is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of [Section 8](#).

The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement."

(emphasis supplied)

11. I have given anxious consideration to the aforesaid submissions. Before advert to deal with the submissions, it may be apposite to advert to certain clauses of the MOU. Clauses (c), (d), (e) and (h) of the MOU read as under :-

*(c) The Second Part/Investors agreed to pay on execution of this MOU to the First Part / Developer the sum of **Rs. 35,00,000/- (Rupees Thirty Five Lakhs Only)** as the short term loan for a period of 12 months. The Second Part/Investor shall pay the said amount of **Rs.35,00,000/- (Rupees Thirty Five Lakhs Only)** as the following payment schedule :*

CHEQUE NO.	AMOUNT	DATED	DRAWN ON
201487	12,50,000/-	17-06-2014	Corporation Bank
129403	12,50,000/-	17-06-2014	Corporation Bank
040167	10,00,000/-	17-06-2014	IDBI Bank

*(d) The First Part/ Developers agrees and undertake to repay these amount of **Rs. 35,00,000/- (Rupees Thirty Five Lakhs Only)** at the end of 12 months from the date of the MOU or from the date of last months from the date of this MOU or from the date of last payment made by the Second Part / Investor whichever is later.*

*(e) The First Part / Developers shall also pay **Rs.2,88,750/- (Rupees Two Lakhs Eighty Eight Thousand Seven Hundred Fifty only)** by cheque / cash as quarterly interest @ 33% per annum on account of*

appreciation profit on the said investment. This said amount of quarterly interest is payable by the First Part / Developers at the end of each quarter.

.....

(h) In case default on the part of the First Part/Developer to repay the amount mentioned in clause (c) above, then the Second Part / Investor will have all right either retain the said Flat for their own use or shall be entitled to sale the said Flat to any other Purchaser of his own choice by executing necessary documents and registering the same and for that purpose. The First Part / Developer shall execute simultaneously with this document, Special Power of Attorney for executing and registering the said Agreement for Sale and transfer of the said Flat in favour of the prospective Purchaser and receive consideration in their name.”

12. A conjoint reading of the aforesaid clauses of the MOU leads to a legitimate inference that not only the amount was advanced, under the MOU, but the terms of repayment, including the interest at which the amount was to be repaid and the consequences, in the event of default in repayment, were explicitly provided therein. Clause (h) provides that the investors will have right to retain the said flat for their own use or will be entitled to sell the said flat to any other purchaser.

13. In this backdrop, reverting to the arbitration clause, extracted above, it becomes crystal clear that the arbitration clause is

comprehensive and covers all the disputes including the failure on the part of the defendants to repay the amount, as agreed.

14. From the text of section 8 of the Act, referral of the parties to arbitration becomes imperative, if the following conditions are satisfied :

- (i) there is an arbitration agreement;*
- (ii) a party to the agreement brings an action in the court against the other party;*
- (iii) subject-matter of the action is the same as the subject-matter of the arbitration agreement;*
- (iv) the opposite party applies to the judicial authority for referring the parties to arbitration before it submits his first statement on the substance of the dispute.*

15. In the facts of the instant case, so far as the first transaction of advance of Rs. 35 lakhs, all the aforesaid conditions appear to have been satisfied, in the sense that, there is an arbitration clause in the MOU; the plaintiffs, who are parties to the said agreement, have brought an action based thereon, the subject matter of the action is governed by the arbitration clause and the defendants have sought referral of the parties to arbitration before the defendants have submitted their first statement on the substance of the dispute.

16. In the aforesaid backdrop, the crucial question which wrenches to the fore is, whether the effect and force of the aforesaid arbitration clause gets diluted on account of inclusion in the suit, of a claim in respect of a dispute which is not governed the arbitration clause. In the case of *Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Anr.*, the Supreme Court has held in clear and explicit terms that where a suit is commenced "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of section 8. The words 'a matter' indicate that the entire subject matter of the suit should be subject to arbitration agreement. There is no provision for splitting the causes or parties and referring the subject matter of the suit to arbitrators.

17. The question posed by the facts of the instant case, however, is required to be considered from the perspective of the legislative object contained in section 8 of the Act. It is trite that the language of section 8 is peremptory in nature. In the cases where there is an arbitration clause in the agreement, the Court is enjoined to refer the dispute to arbitration in terms of the arbitration agreement and the Court would have no jurisdiction to adjudicate the dispute after such

an application seeking a reference under section 8 of the Act. Can this salutary object of the Act be defeated by adding a claim over and above the claim in respect of the matter which is squarely covered by arbitration agreement ?

18. In the facts of the case, the question which crops up for consideration is whether there would be splitting of cause of action in the event the arbitration agreement in the MOU is given effect to. There appears a fine distinction between splitting of a single cause of action into parts, each being made a subject matter of a distinct proceedings and the separation of causes of action which are joined together, albeit in conformity with the provisions of the Code of Civil Procedure, 1908 ('the Code').

19. The plaintiffs are within their rights in joining multiple causes of action against the defendants. In fact, the provisions contained in the Code envisage such joining of several causes of action by the plaintiffs against the defendants. Rules 3 and 6 of Order II of the Code, read as under :

“Rule 3 Order II of the Code

"Joinder of causes of action" : (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Rule 6 Order II of the Code :

"Power of Court to order separate trials" Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

20. A conjoint reading of the aforesaid provisions would indicate that Rule 3 provides for joinder of causes of action and permits the plaintiffs to unite in the same suit, several causes of action against the same defendants. The remedy for any possible embarrassment, delay or inconvenience on account of the joinder of causes of action in one suit is provided in Rule 6. It authorizes the Court to order separate trials or make other order as may be expedient in the interest of justice, where the joinder of causes of action in one suit, though permissible under Rule (3)(1), would result in embarrassment, inconvenience or delay.

21. On the one hand, the Code permits the plaintiff to unite multiple causes of action against the same defendants in one suit. On the other hand, in the event of possibility of embarrassment, delay or inconvenience, the court is empowered to direct separate trials or pass such other order as would advance the cause of justice. If a Court is empowered to order separate trial when it finds that the joinder of causes of action would embarrass or delay the trial or it is otherwise inconvenient, a fortiori a Court cannot be said to be divested of the authority to direct separation of causes of action when the joinder of causes of action, in pursuance of an enabling provision like Rule 3 has the effect of defeating the provisions of a special law, like section 8 of the Act.

22. The aforesaid legal position is required to be considered coupled with the approach which is expected of the Court where an application seeking reference of the dispute to arbitration on the strength of an arbitration clause is preferred. Such an application, in substance, constitutes a plea of statutory exclusion of the jurisdiction of the court. A useful reference in this context can be made to the judgment of the Supreme Court in the case of *Sundaram Finance*

Limited & Another Vs. T. Thankam ², wherein the Supreme Court delineated the approach expected of the Civil Court in dealing with an application under section 8 of the Act, in Paragraph 13 :

“13 Once an application in due compliance of 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 of 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.”

23. In the light of the aforesaid exposition of the legal position, I am of the considered view that the broad submission on behalf of the plaintiffs that the reference of the dispute to arbitration as regards the first transaction, would entail the bifurcation of the subject matter of the suit and, thus, it is impermissible in law, cannot be accepted in an unqualified manner. The submission is fraught with the danger of defeating an arbitration agreement by simply adding a cause of action

2 (2015) 14 SCC 444

the plaintiff may have against the defendants, which is not covered by the arbitration agreement. If such a course is readily accepted, it has the propensity to give a long leash to the plaintiff to circumvent the arbitration agreement by uniting a cause of action which is beyond the purview of the arbitration agreement. It would have the effect of denuding section 8 of the Act of its force and vigour. Such an interpretation would also derogate from the object which the Arbitration and Conciliation Act, 1996 is intended to achieve; of minimum judicial intervention where parties have agreed to arbitrate the dispute.

24. In the peculiar facts of the case, in my view, the Court would be justified in referring the dispute to arbitration in respect of first transaction, as it is squarely covered by the arbitration clause and all the conditions of section 8 of the Act are fulfilled, and exercising its power under Order II Rule 6 of the Code to direct the plaintiffs to institute a separate suit in respect of the second tranche of Rs.19 lakhs.

25. Hence, the interim application deserves to be partly allowed. Thus, the following order :-

- (i) Interim Application is partly allowed.

(ii) In respect of the first transaction of Rs.35 lakhs advanced under the MOU, dated 22nd July 2014, the parties are referred to arbitration in accordance with arbitration clause contained therein.

(iii) An Arbitrator shall be appointed by the parties in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

(iv) As regards the second transaction of loan of Rs. 19 lakhs, the plaintiffs are at liberty to institute a fresh suit in the Court of competent jurisdiction.

(v) In view of the reference of the parties to arbitration, with liberty to the plaintiffs to institute a fresh suit in respect of the cause of action for recovery of the sum of Rs.19 lakhs, along with interest thereon, the commercial suit No.1111 of 2019 stands disposed of.

No costs.

(v) The plaintiffs are entitled to refund of court fees, if any, in accordance with rules.

(vi) In view of disposal of the commercial

summary suit, Summons for Judgment No.71 of 2019 also stands disposed of.

[N.J. JAMADAR, J.]