

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

REVIEW APPLICATION NO.64 OF 2020
IN
ARBITRATION APPLICATION NO.5 OF 2016

SATISH BUDHAJI SHINDE AND ANOTHER
VERSUS
BAJIRAO BUDHAJI SHINDE AND OTHERS

...
Shri G.K. Thigale (Naik), Advocate for the Applicants.
Shri A.K. Gawali, Advocate for Respondent No.1.
Shri D.B.Bide, Advocate for Respondent No.2.
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CORAM : SMT. BHARATI H. DANGRE, J.

DATE :- 20th January, 2022

Per Court:

1. Heard Shri Thigale, the learned advocate for the applicants.
2. The Review Application is filed seeking review of the order passed by the learned Single Judge on 31.01.2020 in Arbitration Application No.5/2016 under which, the dispute came to be referred to arbitration, keeping the contentions of the applicants and respondents expressly open.
3. The order dated 31.01.2020 is sought to be reviewed on the ground that it is contrary to the basic principles of jurisdictional scope and extent of Section 11 of the Arbitration and Conciliation Act, 1996. The learned counsel, Shri Thigale, places reliance on the decision of the

Hon'ble Apex Court in the case of ***S.B.P. and Company vs. Patel Engineering Ltd. And another, (2009) 10 SCC 293.***

4. On the factual aspect, review is sought on the ground that respondent No.1 has misrepresented and posed himself to be the partner of the firm, whereas, it is admitted by him that he has been expelled from partnership firm in the year 2009 itself and in this backdrop, it is the submission of Shri Thigale that misrepresentation on the part of respondent No.1 and also material suppression thereof, debars him from claiming any relief, much less an equitable relief.

5. In the backdrop of the above arguments, when the order dated 31.01.2020 is perused, it is specifically noted that the applicant in the arbitration application, who claims that he was and is partner of M/s Shinde and Sons, a partnership firm, along with respondent No.1, had filed RCS No.53/2010. In the said suit, an objection was raised for continuation of the civil suit on the ground of existence of an arbitration agreement and accordingly, Section 8 of the Arbitration and Conciliation Act, 1996 was invoked and the application was allowed by the learned Civil Judge. The order was, thereafter, reviewed and revoked, which constrained the respondent to file the writ petition before this Court and by order dated 02.09.2010, the writ petition came to be allowed by setting aside the order of revocation of the order granting the application under Section 8 of the Arbitration and Conciliation Act, 1996. Resultantly, the

order passed under Section 8 came to be restored. This order was also upheld in Letters Patent Appeal No.290/2010 with specific observations to the following effect :-

“6. *We are not inclined to interfere in the impugned order. We clarify that the Appellant’s right to raise issue in respect of jurisdiction of the Arbitral Tribunal in accordance with the provisions of Section 16 of the Arbitration and Conciliation Act, 1996 shall not be affected due to observations made by the learned Single Judge in Para No.8 of the impugned order. The Letters Patent Appeal is dismissed.*”

In view of the aforesaid, the civil suit was withdrawn by the applicant on 02.07.2012.

7. The applicant issued notice to the respondents on 01.03.2016 seeking their willingness and consent for arbitration in the wake of clause 21 of the agreement i.e. deed of admission-cum-retirement, which contemplated that in case of any dispute between the partners in respect of business matters, it shall be resolved by the arbitrator under the Arbitration and Conciliation Act, 1996 or any other law or Act prevailing in place at that time and the decision of the Arbitrator shall be final and binding on all the parties. Since there was no response to the said notice, after waiting for substantial period, the applicant approached this Court by filing the arbitration application seeking appointment of an Arbitrator.

8. The Review Applicant, who was the respondent in the arbitration application, opposed the relief of reference to the Arbitrator on

the ground that the arbitration clause does not survive and the reference is barred by limitation. In the wake of the aforesaid, the learned Single Judge recorded as under :-

- “7. In my considered view, it would be appropriate if the dispute is referred to arbitration and every contention, whether expressly raised herein, by the petitioner or by the respondents in rebuttal, is kept expressly open. I have chosen to adopt such course as some factual controversy may have to be resolved and the learned Arbitrator would be in a better position to do so.”*
- 8. The learned Retired Judge of this Court Shri Justice P.B. Gaikwad is appointed as the Arbitrator.*
- 9. The Registry is directed to request the learned Arbitrator to forward the statement of disclosure, if the learned Arbitrator consents to accept the assignment.”*

This order is sought to be reviewed.

9. The scope of review being very limited in itself and unless and until an error apparent is pointed out, the order does not call for its review and when clause 7 of the order of which review is sought, is perused, it is worth to note that on the dispute being referred to arbitration, the learned Single Judge has kept every contention, whether, explicitly raised by the applicants or by the respondents in rebuttal, open. This leads to an inference that it is open for the learned Arbitrator to deal with any objection including an objection of limitation and also an objection as regards suppression of facts, when he treads upon path of arbitration. Existence of arbitration clause was not contested and the latest position of law about the scope of power of the Arbitrator being put

to rest in the case of *Vidya Drolia and others vs. Durga Trading Corporation, (2021) 2 SCC 1*, where, the law has been summarized to the following effect:-

“Thus, the law can be summarized as follows:-

- (i) Sections 8 and 11 of the A&C Act have the same ambit with respect to judicial interference.*
- (ii) Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or Section 11 of the Act, unless it is a clear case of deadwood.*
- (iii) The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*
- (iv) The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.*

10. In the wake of the aforesaid position of law being settled, the order passed by the learned Single Judge does not warrant any interference, by exercising powers of review, since there being no error apparent on the face of it. The Review Application is, therefore, rejected. No order as to costs.