

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

ARBITRATION APPLICATION NO.9 OF 2022

SIDDHANT S/O SHIRISH GADIYA
VERSUS
GANESH S/O RAMRAO WAGHCHAURE AND ANOTHER

...

Mr. R L Chhabda advocate for applicant
Mr. S.C.Arora, advocate for respondent no.1.
Mr. S V Adwant, advocate for respondent no.2.

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CORAM : SANDEEP V. MARNE, J.
DATED : 24 NOVEMBER, 2022

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COURT'S ORDER :-

1. This is an application filed under section 11(6) of the Arbitration and Conciliation Act 1996 (hereinafter for short referred to as 'the Act of 1996') for appointment of an arbitrator.

2. Disputes have arisen between petitioner and respondent no.1 pursuant to agreement to assignment dated 16.3.2021 executed between them under which respondent no.1 agreed to purchase a bungalow from the petitioner. Under clause 35 of the Agreement, there is an arbitration clause. Notice dated 29.10.2021 came to be served by petitioner to respondent no.1 seeking to terminate agreement to assignment dated 16.3.2021 alleging non-performance of obligations therein, which inter alia included failure to pay the balance amount of consideration agreed under the
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agreement. On that count termination of the agreement was sought for. By reply dated 15.11.2021 Respondent no.1 disputed the contents of the notice and sought various information from petitioner.

4. By this time, it appears that Respondent no.1 availed credit facilities from respondent no.2, who disbursed loan amount of Rs. 45,00,000 directly in Petitioner's account. Therefore Petitioner served one more notice dated 24.11.2021 on respondent nos.1 and 2 seeking to terminate agreement to assignment dated 16.3.2021 and requested respondent no.2 bank to remove its charge from the property in question. By reply dated 13.12.2021, Respondent no.2 Bank/respondent conveyed readiness and willingness on the part of respondent no.1 to perform the part of the agreement and advised petitioner to directly contact respondent no.1 to resolve the issue.

5. As disputes remained unresolved, petitioner invoked arbitration clause and served notice on 27.1.2022 on respondent nos.1 and 2 suggesting name of a retired judge of this Court to be appointed as an arbitrator. Respondent no.1 sent reply dated 9.3.2022 disputing the contents of the notice. Respondent no.1 demanded interest @ 18% p.a. on the amount of Rs.22.00 Lakh paid to petitioner and called
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him upon to hand over the possession of the bungalow. Respondent no.1 also disclosed his intention of filing civil proceedings for specific performance of assignment deed dated 16.3.2021. Respondent no.2 also gave its own reply to the notice invoking arbitration on 14.2.2022 requesting petitioner not to initiate arbitration proceedings against respondent no.2.

5. As respondents did not accede to reference of the disputes to the Arbitrator suggested by petitioner, present petition is filed seeking the appointment of sole arbitrator under the provisions of section 11 (6) of the Act of 1996.

6. Petition is resisted by respondent no.1 by filing affidavit-in-reply raising several contentions relating to the merits of the disputes between the parties. So far as the issue of appointment of an arbitrator is concerned, following averments are made in the affidavit-in-reply :-

“4. I say that, the applicant has not made out a substantial cause to invoke the arbitration clause in view of the agreement dated 16.3.2021. His intention is to litigate the issue unnecessarily without any cause and also to avoid the execution of the sale deed.”

Rest of the contentions in the affidavit-in-reply of respondent no.1 relate to the merits of the disputes between him and petitioner.

6. Respondent no.2 bank has also tendered affidavit-in-reply opposing the petition. It is contended that respondent no.2 cannot be roped in the arbitration proceedings as it is not signatory to the agreement.

7. Appearing for petitioner Mr. Chhabda, the learned counsel would submit that serious disputes have arisen between petitioner and respondents arising out of the agreement to assignment dated 16.3.2021. Referring to clause 35 of the agreement, Mr. Chhabda would contend that disputes are required to be referred to an arbitrator appointed by this Court. He would further submit that all efforts for amicably settling the disputes have failed and only recourse available to petitioner is to seek adjudication of disputes by way of arbitration.

8. Per contra, Mr. Arora the learned counsel appearing for respondent no.1 would oppose the petition. He would submit that clause no.35 of the agreement to assignment does not postulate reference of disputes to arbitration. He would deny existence of any agreement between the parties to refer

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disputes to arbitration. Alternately, Mr. Arora learned counsel would submit that correct interpretation of the clause no.35 of the agreement would mean that the parties are first required to amicably settle the disputes by mutual discussion. He would submit that petitioner never invited respondent no.1 for such mutual discussions and that since there is no failure to settle the disputes amicably by mutual discussions, stage had not arrived for petitioner to invoke arbitration clause by seeking appointment of arbitrator.

9. Mr. Arora has also made extensive submissions on the merits of the matter. He would submit that 92% of the amount due under agreement has already been paid by respondent no.1, despite which petitioner has failed to complete the construction of the bungalow. He would submit that, if at all there is any delay in payment of any amount due under the agreement, there is a self operational clause for payment of interest and that therefore the agreement could not have been terminated.

10. In support of his contentions, Mr. Arora would rely upon following judgments :-

i. **Mahanandi Coalfields Ltd and another Vs. IVRCL AMR Joint Venture** reported in **2022 SCC online 960.**

ii. **Indian Oil Corporation Limited Vs. NCC Limited** reported in **2022 SCC online 896.**

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11. Mr. Advant, the learned counsel appearing for respondent no.2 Bank has also opposed the application. Referring to the provisions of section 7 and sub-section (6) of Section 11 of the Act of 1996, Mr. Advant would submit that invocation of arbitration clause by petitioner itself is unwarranted. He would submit that parties to the agreement have not agreed to refer the dispute to the arbitrator straightaway and that there is a condition precedent of holding mutual discussions for amicable settlement of disputes, which has not been satisfied. Mr. Advant would alternatively submit that, there is no privity of contract between petitioner and respondent no.2 and that, therefore, respondent no.2 cannot be roped in disputes between petitioner and respondent no.1.

12. In support of his contentions, Mr. Advant has relied upon the following judgments :-

- i. **Sukanya Holdings Pvt. Ltd., Vs Jayesh H. Pandya and anr. Reported in (2003) 5 SCC 531.**
- ii. **Jagdish Chander Vs. Ramesh Chander reported in 2007 (5) SCC 719.**
- iii. **Deutsche Post Bank Finance Ltd. Vs. Tanduri Shridhar and anr. Reported in 2011 (11) SCC 375.**

iv. **D.P. Construction Vs. Vishwaraj Environment Pvt. Ltd., reported in 2022 SCC online Bom. 1410.**

13. Since there is a serious dispute over existence of as well as interpretation of Arbitration Clause, it would be necessary to straightaway reproduce Clause no.35 of the agreement, which reads thus :-

“35. All or any disputes arising out or touching upon or in relation to the terms and conditions of this Agreement, including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties, shall be settled amicably by mutual discussion, failing which the same shall be settled through the sole Arbitrator who shall be appointed by the Promoter. The sole Arbitrator shall be any retired District and Sessions Judge or any retired Judge of the Hon’ble High Court of Bombay. The seat of the arbitration proceeding shall be at Aurangabad. The arbitral proceedings shall be conducted as per the provisions of the Arbitration and Conciliation Act. The jurisdiction of the Civil Courts and any other Courts are barred as there is exclusive arbitration clause for resolving and adjudicating all disputes arising out of the Agreement.”

14. There can be no doubt that clause 35 provides for reference of disputes to arbitration. Therefore submissions of

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Mr. Arora disputing existence of arbitration agreement merits summary rejection. He has also made extensive submissions relating to the merits of disputes between the parties, which, in my view are wholly irrelevant at this stage while deciding the present application filed under the provisions of Sub-Section 6 of Section 11 of the Act of 1996. Those submissions, therefore also deserve to be ignored.

15. The only issues that need determination and about which there are serious disputes amongst parties is whether a stage has arrived for reference of the disputes to arbitration and whether the dispute is arbitrable or not.

16. Perusal of clause 35 of agreement to assignment dated 16.3.2021 would show that parties were first required to explore the possibilities of settling the dispute amicably by mutual discussions. It is only upon failure to settle the disputes amicably, that same is required to be referred for adjudication to a sole arbitrator. Thus, existence of arbitration clause as such is not in dispute. Main dispute sought to be created by Mr. Arora and Mr. Adwant is about non-performance of per-condition of amicable settlement of the disputes by mutual discussions before disputes could be referred to arbitration. I therefore, proceed to decide whether

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pre-condition of an attempt to amicably settle the disputes by mutual discussions has been fulfilled or not.

17. To examine whether there was an attempt to amicably settle the disputes by mutual discussions, it would be necessary to refer to the correspondence that has taken place between the parties before invocation of arbitration clause. By notice dated 29.10.2021, petitioner contended that the construction of the bungalow was complete and that despite giving several reminders to pay balance consideration, respondent no.1 failed to pay the same. Notice refers to previous communication dated 20.7.2021 by which a demand was made by petitioner for payment of the balance amount of consideration. It is further stated that on 16.10.2021 an online fund remittance of Rs.45 Lakhs was received from HDFC Bank, which did not satisfy the balance amount due. The notice refers to multiple reminders given for payment of balance amount of consideration. Respondent no.1 called upon to execute cancellation deed and to collect amount of Rs.14, 50,000/-.

15. Respondent no.1 responded on 15.11.2021 contending that construction of the bungalow was still incomplete. The letter refers to meeting between respondent no.1 and Architect of petitioner on 11.11.2021. He demanded interest
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on amount paid by him. Petitioner, thereafter, addressed one more notice dated 24.11.2021 once again seeking to terminate the agreement. This notice was replied by respondent no.2/Bank but not by respondent no.1.

16. Thus, prior to invocation of arbitration clause vide notice dated 20.7.2021, series of correspondence has taken place between the parties, particularly, between petitioner and respondent no.1. It appears that, respondent no.1 did meet the Architect of the petitioner on 11.11.2021, however it appears that the disputes between them remained unresolved. From the contents of above correspondence, it is difficult to believe that there still remained a possibility of amicable settlement by mutual discussions.

17. If the submissions of Mr. Arora and Mr. Advant about mandatory per-condition of settlement of disputes by mutual discussions before invocation of arbitration clause is to be accepted, the same would lead to absurdity as one of the parties may never hold such discussions to prevent the other party from invoking the arbitration clause. In my view, the attempt to resolve disputes amicably is to be gathered from conduct and correspondence between the parties. Considering the exchange of correspondence between the parties, it is safe to assume that stage of exploring amicable
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resolution of the disputes by mutual discussion had been crossed before invocation of arbitration clause on 27.1.2022. Therefore, contentions of Mr. Arora and Mr. Advant in this regard deserve to be rejected.

17. Mr. Arora has relied upon the judgment of the Apex Court in **Indian Oil Corporation Limited Vs NCC Limited** (supra). Paragraph no.89 of the said judgment reads thus :-

“89.Having heard learned Counsel appearing for the respective parties and in the facts and circumstances of the case, the issue / aspect with regard to ‘accord and satisfaction’ of claims is seriously disputed and is debatable. Whether, in view of the acceptance of Rs.4,53,04,021/ by the respondent NCCL which was released by IOCL on the offer / letter made by the respondent NCCL dated 02.11.2016 there is an instance of ‘accord and satisfaction’ of the claims is a good and reasonably arguable case. It cannot be said to be an open and shut case. Therefore, even when it is observed and held that such an aspect with regard to ‘accord and satisfaction’ of the claims may/can be considered by the Court at the stage of deciding [Section 11](#) application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in the case of Vidya Drolia (supra). Therefore, in the facts and circumstances of the case, though it is specifically observed and held that aspects with regard to ‘accord and satisfaction’ of the claims can be considered by the Court at the stage of deciding [Section 11\(6\)](#) application, in the facts and circumstances of the case, the High Court has not committed any error in observing that aspects with regard to ‘accord and satisfaction’ of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal. However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of SubSection (6A) in [Section 11](#) of the Arbitration Act, scope of inquiry by the Court in [Section 11](#) petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the disputes at hand. We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and nonarbitrability, the same can also be considered by the Court at the stage of deciding [Section 11](#) application if

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the facts are very clear and glaring and in view of the specific clauses in the agreement binding between the parties, whether the dispute is nonarbitrable and/or it falls within the excepted clause. Even at the stage of deciding [Section 11](#) application, the Court may prima facie consider even the aspect with regard to 'accord and satisfaction' of the claims.

18. Relying on the aforesaid findings of the Apex Court, Mr. Arora has contended that 'accord and satisfaction' of claims are required to be considered by this Court at the time of deciding the application u/s 11 of the Act of 1966. I fail to understand as to how the said decision can be of any assistance to respondent no.1. The observations of the Apex Court about 'accord and satisfaction' essentially refer to satisfaction of claim by one of the parties to the dispute, in which case the Court may refuse to appoint arbitrator under section 11 of the Act of 1966. In the present case, it is not a case of respondent no.1 that the petitioner ever admitted satisfaction of its claim in any manner. So far as the later findings of the Apex Court are concerned, it is held that while deciding the application under section 11 of the Act, the Court is also required to take into consideration whether the dispute is arbitrable or not?. The disputes between petitioner and respondent no.1 in the present case are clearly arbitrable. No defence is raised by respondent no.1 either in the affidavit-in reply that any part of the dispute is non-arbitrable. The dispute of non-performance of obligations under the agreement are in *personam*, they are not in *rem*.
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Therefore seen from both angles, the judgment in **Indian Oil Corporation Limited** (supra) has no application to the facts and circumstances of the present case.

19. Mr. Arora has also relied upon the judgment of the Apex Court in **Mahanandi Coalfields Ltd.** (supra), in which, referring to earlier decision in Jagdish Chandar Vs. Ramesh Chander reported in 2007 (5) SCC 719, the Apex Court has held that mere a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, would not constitute a valid or binding arbitration agreement. Clause 5 of the contract in that case provided that before referring the matter to arbitration, consent of a contractor was necessary. On the basis of such a stipulation in clause no.5 of the agreement, the Apex Court has held in paragraph no.16 as under :-

“16. The communication dated 7 April 2017 merely indicates a desire on behalf of CIL to have disputes related to work contracts settled by arbitration. It requires both the parties to arrive at a further agreement to proceed to arbitration when the dispute arises. Therefore, in view of the principles laid down in Jagdish Chander (supra), following a line of precedent, clause 5 in the aforesaid communication cannot be construed as an arbitration agreement between the appellants and the respondent in terms of [section 7](#) of the 1996 Act so as to compel the appellants to appoint an arbitrator.

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In the present case, consent of respondent no.1 is not necessary before referring the disputes to arbitration. The arbitration clause is clear and unambiguous. Therefore the judgment **Mahanandi Coalfields Ltd.** (supra) would be of no assistance for deciding the issue involved in the present case.

20. Mr. Advant has placed reliance on the decision of this Court in **D.P. Construction Vs. Vishwaraj Environment Pvt Ltd** (supra). In that case, clause no.29 of the agreement provided that all the disputes arising out of the work order, failing amicable settlement at site, would be referred to VEPI whose decision was final and binding on both the parties. It was further provided that upon failure of decision by VEPI, disputes shall be referred to arbitration. Thus, in addition to stipulation for resolution of the disputes by amicable settlement, there was an additional condition in the contract for reference of disputes to VEPI. In the light of above factual position, this Court held that it could be called upon to exercise jurisdiction under section 11 (6) of the Act only when the procedure agreed between the parties under section 11(2) had met with failure. In the present case, there is no such agreed mechanism of referring the disputes for decision to any other institution before invoking arbitration
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and, therefore, judgment in **DP construction** (supra) is clearly distinguishable.

21. Other judgments relied upon by Mr. Advant, are about non-applicability of arbitration clause to respondent no.2/Bank, who is not privy to the contract between petitioner and respondent no.1. This is something which is required to be decided in the arbitration proceedings, in the event petitioner proceeds to implead respondent no.2 also in proceedings filed before arbitrator. I am not expressing any opinion on this issue and all the points and contentions of the parties in this regard are expressly left open.

22. In the result, I conclude that, there is existence of valid and binding arbitration agreement between the parties mandating adjudication of the disputes between petitioner and respondent no.1 by appointment of a sole arbitrator. Therefore, the disputes between them are required to be referred by appointment of sole arbitrator. After the decision was pronounced, counsels for the parties have suggested name of Mr. Justice S.P. Deshmukh, Former Judge of this Court for being nominated as the sole Arbitrator. Accordingly, I proceed to pass the following order.

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O R D E R

1. The Arbitration Application is allowed and disposed of in following terms :-

- a) **Appointment of Arbitrator :-**

Hon'ble Mr Justice Sunil P. Deshmukh, Former Judge of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Partnership Deed.

- (b) **Communication to Arbitrator of this order :-**

- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.

- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses :-

Arbitrator : Hon'ble Mr Justice Justice Sunil P. Deshmukh, Former Judge of this Court.

Address :- "Neelprabha", Bhagya Bagat, Beside Hotel Green Olive, Near Baba Petrol Pump, Aurangabad Aurangabad 431091

Mobile No. 95450 28282

E-mail sunilpdeshmukh@gmail.com

- (c) **Disclosure :-**

The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Registrar of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will be retained

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by the Registrar on the file of this application. Copies will be given to both sides.

(d) **Appearance before the Arbitrator :-**

Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

(e) **Contact/communication information of the parties :-**

Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.

f) **Section 16 application :-**

The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) **Interim Application/s :-**

(i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator.

(ii) Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(h) **Fees :-**

The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018/ as per Schedule.

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(i) Sharing of costs and fees :-

Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) Consent to an extension, if thought necessary.

Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) Venue and seat of arbitration :-

Parties agree that the venue and seat of the arbitration will be in Aurangabad.

2. There shall be no order as to costs.

(SANDEEP V. MARNE, J.)

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