

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 200 OF 2019

Chhaya Vishnu Tirodkar

...Applicant

vs.

M/s. Navkar Group Private Limited
& 2 Ors.

...Respondents

Mr.Arsh Mishra i/b M.V. Kini for applicant.

Ms.Sindhu Shajee Edachali a/w. Adv.Dhara Majithia for respondents.

CORAM : N. J. JAMADAR, J.

DATE : 28th MARCH, 2022

ORAL ORDER :

1. This application is preferred under section 11 of the Arbitration and Conciliation Act, 1996 ('the Act, 1996') to appoint an arbitrator to resolve the disputes arising between the applicant and the respondent under the Agreement, dated 19th May 2015, which according to the applicant, contains an arbitration clause.

2. The applicant has approached the Court with a case that the respondent No.1, through its Directors-respondent Nos.2 and 3 evinced interest to purchase the property admeasuring 849.63 sq. yards with built-up area on the ground and first floor, situated at Plot No.6, Othav Nagar Village, Dahisar, Taluka Borivali, which was jointly owned by the applicant and her siblings, namely, Shri Chintaman Vishnu Tirodkar, Shri Vijay Vishnu Tirodkar and Shri

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Prasad Ramesh Pandit. An Agreement for Sale was executed on 8th May 2015 whereunder the applicant along with the other co-owners received consideration of Rs.2.25 Crore, each.

3. On 19th May 2015, the respondent Nos.2 and 3 entered into another Agreement for Sale for a flat along with a car parking space, in the project to be developed by the respondents, on the property which was sold by the applicant and other co-owners vide Agreement for Sale, dated 8th May 2015. Under the said Agreement dated 19th May 2015, a consideration of Rs.1.21 Crore was to be paid to respondent No.1. The latter committed default in the delivery of possession of the flat and one car parking space, as agreed. Hence, the applicant, in terms of clause 43 of the said Agreement, dated 19th May 2015, which provided for resolution of disputes through arbitration, invoked the arbitration, by addressing a notice to the respondents on 14th May 2018. A reply was issued thereto on behalf of the respondents, wherein the respondents did not dispute the existence of the agreement or the arbitration clause therein.

4. In the meanwhile, the applicant preferred Arbitration Petition No.891 of 2018 for interim measures. By an order dated 18th June 2019, this Court was persuaded to reject the said

petition holding that, *prima-facie*, there was substance in the contention on behalf of the respondents that the Agreement dated 19th May 2015 was not to be acted upon. The fact that there were multiple blank spaces in the said Agreement also weighed with the Court in declining to exercise the discretion under section 9 of the Act, 1996.

5. The applicant preferred this application for appointment of the Arbitrator as there was no response from the respondents, to the requisition to appoint the arbitrator.

6. The respondents have resisted the application by filing an affidavit-in-reply. The substance of the resistance was that the agreement in question was never intended to be acted upon by the parties and once the Agreement for Sale was executed on 8th May 2015, there was no question of further transaction between the parties, as is evidenced by the agreement in question.

7. Since the issue of the agreement in question being inadmissible for having been not adequately stamped was raised, by an order dated 18th June 2019, the agreement was impounded and the Collector of Stamps was directed to adjudicate the deficit stamp duty and penalty.

8. By a communication dated 10th February 2021, the Collector

of Stamps, Boriwali has submitted that the stamp duty and penalty on the agreement have been adjudicated and the applicant is intimated to deposit a sum of Rs.6,05,000/- towards deficit duty and Rs.8,47,000/- towards the penalty, within 15 days thereof.

9. In the aforesaid context, Mr.Mishra, the learned counsel for the applicant submitted that now there is no impediment to appoint the Arbitrator by exercising the power under section 11 of the Act, 1996.

10. Placing reliance upon the judgment of the Supreme Court in the case of *Intercontinental Hotels Group (India) Pvt. Ltd. and Anr. Vs. Waterline Hotels Pvt. Ltd.*¹ which has been followed by a learned Single Judge of this Court in the case of *Vivek Mehta and Anr. Vs. KaRRs Designs and Developments & Ors.*², Mr.Mishra would urge that even pending adjudication of the deficit stamp duty and penalty, the appointment of an arbitrator is commended. In the case at hand, the Collector of Stamps had already adjudicated the duty and penalty. Thus, the applicant's case stands on a better footing.

11. Ms.Sindhu Edachali, the learned counsel for the

1 2022 SCC OnLine SC 83

2 Arbitration Application No. 101 of 2016 dt. 28-02-2022.

respondents resisted the prayer for appointment of Arbitrator by canvassing a two-fold submission. First, in the order dated 18th June 2019 passed in Arbitration Petition No.891 of 2018, this Court has recorded a categorical finding that the Agreement for Sale, dated 19th May 2015 was not to be acted upon. Thus, according to the learned counsel for the respondents, the applicant cannot agitate the said issue. Second, the case of the applicant is inherently improbable. Since the same dispensation was not given to the other co-owners, who also executed the Agreement for Sale in favour of the respondents on 8th May 2015, it is a pointer to the fact that no such agreement was ever intended to be arrived at and acted upon.

12. I have given my anxious consideration to the rival submissions.

13. To begin with, from the perusal of the order dated 18th June 2019, it becomes evidently clear that the thrust of the submission on behalf of the respondents was that the document was not to be acted upon and the said document was executed as a part of a deal which culminated with the execution of Agreement for Sale on 8th May 2015. Indeed, after advertent to the blank spaces in the agreement in question and the consequences which, *prima-facie*,

emanate therefrom, this Court found substance in the submission on behalf of the respondents that the said document was not to be acted upon and, therefore, declined the interim measure.

14. I am afraid, the aforesaid order of declining to exercise the discretion to grant interim measures under section 9 of the Act, 1996, would be of decisive significance in considering the application for appointment of the Arbitrator under section 11 of the Act, 1996. In an application under section 11 of the Act, 1996, the Court has to consider whether there exists an arbitration agreement. The question as to whether an arbitrable dispute has essentially arisen between the parties is a matter to be decided by the Arbitral Tribunal. In the case at hand, there is not much controversy over the execution of the Agreement, dated 19th May 2015. What the respondents endeavoured to impress upon the Court is that though the Agreement for Sale has been executed, yet, it was not to be acted upon.

15. The nature of enquiry in an application under section 11 of the Act, 1996 is explicated by the Supreme Court in the case of *Vidya Drolia and Ors. Vs. Durga Trading Corporation*³, as under :-

3 (2021) 2 SCC 1

“154.1 Ratio of the decision in Patel Engineering Ltd. [(2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

154.2 Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3 The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4 Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex-facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably ‘non-arbitrable’ and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

16. In view of the aforesaid exposition of law on the aspect of the limited nature of the enquiry in an application under section 11 of the Act, 1996, in my considered view, the question as to whether the agreement was not to be acted upon, is a matter which squarely falls within the ambit of arbitration.

17. In view of the above, I deem it in the fitness of things to allow the application and appoint Arbitrator, with the consent of the learned counsels for the parties.

18. Hence, the following order :

O R D E R

(i) The arbitration application stands allowed.

(ii) Mr. Shanay Shah, an Advocate practicing in this Court is appointed as Sole Arbitrator to adjudicate upon claims and counter claims, if any and/or all the disputes which emanate from the Agreement for Sale, dated 19th May 2015, between the parties.

(iii) The learned Arbitrator is requested to file his disclosure statement under section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996 within two week with the Prothonotary and Senior Master and provide copies to the parties.

(iv) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.

(v) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

The Arbitration Application stands disposed in the above terms.

No costs.

(N. J. JAMADAR, J.)