

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

COMMERCIAL ARBITRATION APPLICATION NO.414 OF 2019

Wadhwa Group Holdings Private Limited	.. Applicant
v/s.	
Homi Pheroze Ghandy & Anr.	.. Respondents

Mr. Mayur Khandeparkar a/w Ms. Sachi Udeshi, Bhakti Mehta, Pooja Rathi i/b. Wadia Ghandy & Co. for the applicant.

Mr. Vishwajit Sawant, Sr. Advocate a/w Ms. Priyanka Ved, Priya Rombade & Mr. Sharan Shetty i/b. Deven Dwarkadas & Partners for the respondents.

CORAM : A. K. MENON, J.

DATED : 7TH MARCH, 2022.

P.C. :

1. The application seeks appointment of a Sole Arbitrator pursuant to notice invoking clause 25 of a writing dated 23rd September, 2006 titled "Heads of Agreement". The agreement is between the applicant in its earlier name Vishwaroop Infotech Private Limited and Homi Pheroze Ghandy-respondent no.1 and Kersi Pheroze Ghandy (since deceased). Respondent no.2 is the Executor of the Will of late Kersi Ghandy. Clause 25 of the agreement is the

Arbitration clause, which is reproduced below for ease of reference;

“25. In the event of any disputes or differences arising between the parties the same shall be referred to arbitration under the Arbitration and Conciliation Act, 1996.”

2. Vishwaroop Infotech Private Limited is now known as Wadhwa Group Holdings Private Limited. The notice invoking arbitration is dated 15th May, 2019, copy of which is at Exhibit ‘G’ sets out that disputes and differences have arisen between the parties and suggests the name of three persons all Advocates of this court, one of whom is to be appointed as Sole Arbitrator. The invocation letter is issued by the Advocates for the applicant and which is seen to be addressed to the two respondents. The respondents have vide their letter of 13th June, 2019 contended that the notice is premature and the matter is yet decided conclusively and hence the notice is barred by Res Judicata since an appeal is pending before this court and being sub-judice, no arbitrator is required to be appointed. In view of this denial, the present application has been filed.

3. Mr. Khandeparkar who appears for the applicant has taken me

through the facts which reveal that on 23rd September, 2006 respondent no.1 and late Kersi Ghandy had agreed to sell and assign the right, title and interest in immovable property described therein to the applicant for consideration of Rs.24 crores. After the disputes arose, Commercial Arbitration Petition no.618 of 2012 came to be filed and vide an order dated 17th July, 2012 the High Court referred the disputes to a Sole Arbitrator.

4. By his award dated 22nd April, 2013 the Arbitrator dismissed the claim on the ground of limitation. By a separate award of 14th August, 2014 the Sole Arbitrator dismissed the counter claim of the applicant on the ground of Res Judicata and limitation. Thereafter the applicant filed Arbitration Petition no.487 of 2014 and 688 of 2015 under Section 34 of the Act challenging both the aforesaid awards. On 22nd January, 2019 this court allowed Arbitration Petition no.688 of 2015 and set aside the award dismissing the counter claim. Thereupon Arbitration Petition no.487 of 2014 also came to be disposed since it did not survive. The respondent therein being aggrieved by the order of the Single Judge filed an Appeal under Section 37 of the Arbitration and Conciliation Act on 22nd February, 2019 and that appeal is said to be pending.

5. During the pendency of the appeal, the applicant herein invoked arbitration as aforesaid. The application is opposed on behalf of the respondents on the basis that it is premature due to the pendency of the appeal. Mr. Khandeparkar submitted that notwithstanding pendency of the appeal, this application can proceed. In support of his contention, he relies upon a decision of the Delhi High Court in *Décor India P. Ltd. v/s. National Building Const. Corpn. L.*¹ in which he has relied upon the decision to demonstrate that there can be no automatic stay during the pendency of an appeal. He submits that as recorded in paragraph 15 of that judgment, there is no automatic stay in appeals or orders or decrees of suit, it cannot be contended that the legislature intended to provide protection to the defendants by providing automatic stay on filing an appeal under Section 37. Mr. Khandeparkar submits that the decision in *Décor India* (supra) deals with the situation that is presently faced by the parties. Mr. Khandeparkar submits that the respondent cannot prevent an arbitrator from being appointed.

6. Mr. Khandeparkar also relies upon a decision of the Supreme Court in *Indian Oil Corporation Ltd. v/s. M/s. S.P.S. Engineering*

¹ 2007 (97) DRJ 428(DB)

*Ltd.*² which dealt with the issue whether a claim is barred by Res Judicata can be adjudicated pursuant to a Section 11 application. He therefore submits that the application is liable to be allowed and the Sole Arbitrator is required to be appointed.

7. Mr. Sawant very firmly opposed the application. According to Mr. Sawant since the appeal is admittedly pending, there is no occasion to agitate the issue once again. He submits that till the appeal is decided, this application cannot proceed. On 24th January, 2022, Mr. Sawant, on instructions, submitted that since notice invoking arbitration has been dealt with in an Advocate's reply dated 13th June, 2019, copy of which is annexed to the petition, the respondents did not intend to file any reply to this application. Mr. Sawant has taken me through the factual matrix to the extent it pertains to his client's point of view inter alia contending that the appeal filed by the respondents has been admitted and once the appeal is admitted, it stands to reason that no further proceeding must continue since there is always a possibility that the order impugned in the appeal may be set aside. If that be so, Mr. Sawant submitted that award would revive and this application would be rendered infructuous. He therefore

² Civil Appeal no.1282 of 2011 (SC)
arising out of SLP(c)no.11903/2010

submits that the present application is liable to be rejected as premature since there is always a likelihood that he may succeed in the appeal and if he does, the award will revive. Revival of the award would render the application and the appointment of an arbitrator unnecessary.

8. Mr. Sawant has invited my attention to the order passed by the Division Bench of this court in *Siddhivinayak Realities Pvt. Ltd. v/s. V. Hotels Limited and others*³ in which a motion was taken out by the original defendant no.1 for a summary judgment of dismissal of the suit. He invited my attention to the observation of the court in respect of Section 43(4) of the Arbitration and Conciliation Act in particular the reference to exclusion of time and the fact that the court had decided that the words “order of the court” referred in Section 43(4) would mean a final order which is not subjected to any further challenge or the order in appeal if the original order setting aside an award is carried in appeal and affirmed. In that situation there is a case for treating an appeal as a continuation of the original proceeding for setting aside the award.

³ NMS No.119 of 2016 in COMS No.133 of 2018
dated 30th April, 2021

9. This Mr. Sawant submitted that is the very same principle that has been laid down by the Federal Court in *Lachmeshwar Prasad Shukul v/s. Keshwar Lal Chaudhuri and others*⁴. Mr. Sawant submitted that in a *Lachmeshwar Prasad* (supra), the court was dealing with an issue under the Bihar Money Lenders Act, in a retrospective action. The decree of the High Court in that case was not final since an appeal was pending before the Division Bench. The three judge bench of the court observed that if appeal were to be allowed on any ground, the court would be bound to comply with the provisions of the new Bihar Act. Mr. Sawant canvassed this aspect inter alia observing that more recently the Supreme Court had in the case of *Union of India v/s. Varindera Constructions Limited*⁵ in relation to Section 37 read with Section 34 of the Arbitration and Conciliation Act observed that the Supreme Court had repeatedly observed that an appellate proceeding is a continuation of the original proceeding as held in *Lachmeshwar Prasad* (supra). This he submitted would be the correct position in law and therefore till the appeal filed by the respondents is disposed finally, the fate of the award is still unknown and therefore this application would be premature and

⁴ 53 L.W. 373 (Patna)

⁵ (2020) 2 SCC 111

that the reference would be bad.

10. Mr. Sawant also relied upon the observation of the Supreme Court in *DLF Home Developers Limited v/s. Rajapura Homes Private Limited & Anr.*⁶ that the High Court is not required to mechanically appoint an Arbitrator but can examine whether a prayer for appointment can be denied if the dispute does not correlate to the agreements.

11. I have heard the learned counsel for the parties at length. The opposition to this application effectively seeks a stay of proceedings in this arbitration application. The fact that arbitration is considered expeditious remedy, is an aspect that the respondent is obviously aware of but the respondent in the present case effectively seek postpone the fate of the notice invoking arbitration and that is not contemplated in the Act.

12. Section 11 of the Act requires this court to appoint an Arbitrator where the parties have failed to act either for want of a procedure for appointing an arbitrator or on account of not observing such a procedure. Chapter III of the Arbitration and Conciliation Act deals with composition of an arbitral tribunal. It

⁶ 2021 SCC Online SC 781

deals with number of arbitrators, appointment of arbitrators, grounds for challenge, procedure for challenge, termination of the mandate for failure of impossibility to act and for substitution of a tribunal. The merits of the case are not required to be gone into at those stages. The High Court is concerned with the appointment of an arbitrator. The contentions raised by the respondents in the present case are obviously tied in with the fate of the appeal and in my view considering the facts at hand the invocation of arbitration cannot be subjected to the fate of the appeal.

13. Disposal of the appeal could lead to one of two results. If the order in appeal is affirmed, the award is rendered inconsequential. If the order is set aside, the award revives. The question is whether the commencement of a fresh round of arbitration by virtue of the current invocation can be prevented, given the uncertainty. In my view that would not lie within the scheme of the Act which calls upon the court to act for a party who does not avail of his right of appointment of an arbitrator. While Mr. Sawant may be correct in his submission that a fresh suit would be hit by Res Judicata, I find that the institution of the

suit cannot be prevented. Res Judicata may be a good defence but in an arbitration at the Section 11 stage the objection on the ground of Res Judicata is forming part of the defence to be considered by an arbitrator.

14. In my view in the facts of the case the court under Section 11 is not required to deal with that aspect since that would not fall for consideration under the extent limited scope of High Courts jurisdiction under Section 11(6) of the Act. Section 11(6) clearly provides for different situations which would require the appointment to be made by the High Court. Furthermore, as we have seen the award is not set aside on merits but this court has set aside the award and in that view of the factual aspects, a decision of this court in Associated Constructions (supra) would be of relevance. Moreover, a decision in Indian Oil Corporation (supra) also clearly sets out that the objection on the ground of Res Judicata does not arise for consideration under provisions of Section 11 and that it should be exempted by an arbitral tribunal.

15. In the present case it is not in dispute the award was not passed on merits of the rival claims and therefore the decision in

Associated Constructions (supra) will come to the assistance of the applicant. The basis of the application is the fact that the award having been set aside and the Award not being on merits, principles of Res Judicata cannot be attracted. It is also contended that under Order 41 Rule 5 of the Code of Civil Procedure, merely filing an appeal will not operate stay of further proceedings. There is no prohibition against a new tribunal being appointed or the applicant being restrained in any manner from prosecuting this application.

16. The need to expedite the pre-appointment process and clear roadblocks in that process also finds support in the recent decision of the Supreme Court in *Interncontinental Hotels Group (India) Pvt. Ltd. and Another v/s. Waterline Hotels Pvt. Ltd.*⁷ in which the court has observed that the jurisdiction of the court to adjudicate issues at the pre-appointment stage is very limited and that a prima facie view is to be taken. The issues of arbitrability / validity are matters to be adjudicated by the arbitral tribunal and only exception that courts can adjudicate to cut the deadwood. It describes the watch word for the courts under section 11 as follows; “*when in doubt, do refer*”.

⁷ 2022 SC OnLine SC 83

17. In *Indian Oil* (supra) the Supreme Court observed that a question whether a claim is barred by Res Judicata cannot arise for consideration under Section 11 of the Arbitration and Conciliation Act and such an issue would have to be considered by the tribunal since it will require consideration of pleadings. Adverting to the scope of Section 11, the Supreme Court observed that the provisions does not permit examination of the maintainability or tenability of the claim on facts or in law. There can be no threshold consideration and rejection of a claim on the ground of Res Judicata, while considering an application under Section 11 of the Act. This is one aspect that has been pressed into service. This court has in *Associated Constructions v/s. Mormugoa Port Trust*⁸ observed that once an award is set aside for reasons other than merits, the applicants could commence arbitration.

18. In the present case also we are at the pre-appointment stage and as stated above, Post appointment it is always open to raise all defences before the tribunal including the aspect of Res Judicata. Therefore the lack of finality of the award before the arbitral tribunal would be a view on the matter on merits. In DLF

⁸ 2010 (5) Mh.L.J. 739

(supra) the issue the court considered as in the content of examining whether the dispute correlate to the agreement between the parties. That does not fall for consideration in the case at hand and hence the respondent cannot get an assistance from that decision. In Varindera Consultants (supra), the court was considering the bar of limitation, hence of no assistance to the respondents. In my view the other aspects of Res Judicata may be taken up before the tribunal.

19. In view of the above, I am of the view that the application is liable to be allowed. Accordingly, I pass the following order;

- (i) Mr. Karl Tamboly, Advocate, is appointed as Sole Arbitrator to adjudicate upon claims and counter claims, if any.
- (ii) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) and Section 12(1) within four weeks with the Prothonotary and Senior Maser and provide copies to the parties.
- (iii) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.
- (iv) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

- (v) Arbitration Application is disposed in the above terms.
- (vi) No costs.

(A. K. MENON, J.)