

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.1546/2022

Shamsher Ali Sher Ali

...Versus...

Moh. Ibrahim Moh. Ismail (Chudiwale) and another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Shri P.D. Sharma, Advocate for petitioner
Shri S.D. Chande, Advocate for respondent no.1
Mrs. Sunita S. Kulkarni, Advocate for respondent no.2

CORAM : AVINASH G. GHAROTE, J.

DATE : 05/08/2022

1. Heard Shri Sharma, learned counsel for the petitioner, Shri Chande, learned counsel for the respondent no.1 and Mrs. Kulkarni, learned counsel for the respondent no.2.

2. The petition challenges the order dated 16/09/2021, passed on an application under Order VII Rule 11 of the Code of Civil Procedure (for short, "CPC" hereinafter) filed by the original plaintiff, in the counter-claim raised by the defendant no.1 in respect of Pilkapar project, which was to be undertaken, commenced and completed under the partnership-deed dated 29/09/2015, which contained an arbitration clause, whereby the parties insofar as

the disputes relating to the Pilkapur project is concerned, are referred to arbitration.

3. Shri Sharma, learned counsel for the petitioner/original defendant no.1, submits that since there was no application under Section 8 of the Arbitration and Conciliation Act, 1996 (for short, “the A & C Act” hereinafter), the learned Court below was precluded from exercising the powers under Section 8 of the A & C Act *suo motu*. Relying upon ***M/s. “Convinio Shopping Nine 2 Nine” rep. by its Partner Mr. Muthu Palaniappan, Chennai – 603 103 Vs. M/s. Olympia Opaline Owners Association rep. by its authorised signatories, Chennai - 603 103, 2019 AIR (Madras) 130 and Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and anr. 2003 (5) SCC 531*** (para 12), it is contended, that what was filed before the learned Court below was an application under Order VII Rule 11 of CPC for rejection of the plaint and therefore, the learned Court could not have invoked the power under Section 8 of the A & C Act.

4. Shri Chande, learned counsel for the respondent no.1/original plaintiff supports the impugned order and submits that though the application is styled as one under Order VII Rule 11 of CPC, what is material is that it raises a ground regarding the arbitration clause, as contained in the deed of partnership dated 29/09/2015 and therefore, the

learned Court below was correct in exercising the power under Section 8 of the A & C Act. Section 8 (1) of the A & C Act reads as under :

“8. Power to refer parties to arbitration where there is an arbitration agreement. - (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.”

5. A perusal of the above would indicate that the power under Section 8 (1) of the A & C Act would be exercised, considering the language used therein, if a party to the arbitration agreement or any person claiming through or under him so applies under Section 8 of the A & C Act not later than the date of submitting his first statement on the substance of the dispute then the Court shall have to refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

6. In the instant case, it is not disputed by Shri Sharma, learned counsel for the petitioner that the deed

of partnership dated 29/09/2015 in respect of the Pilkapar project contains an arbitration clause. Copy of the agreement is placed on record along with pursis dated 12/07/2022 and Clause-17 therein, indicates the existence of the arbitration clause. That, as indicated above, is not disputed by Shri Sharma, learned counsel for the petitioner. Thus, the existence of a valid arbitration agreement is not in dispute.

7. It is also not in dispute that the respondent no.1 herein who is the plaintiff before the learned lower Court has not filed his written statement to the counter-claim filed by the present petitioner, in which the dispute regarding the partnership-deed dated 29/09/2015 in relation to the Pilkapar project has been raised. Thus, the second requirement of Section 8 of the A & C Act also stands satisfied.

8. The question, which falls for consideration, is what can be construed to mean an application by a party as contemplated under Section 8 of the A & C Act. The requirement therefore will have to be viewed in the contextual background of the language of Section 8 of the A & C Act. When Section 8 (1) of the A & C Act contemplates that a party applies raising a plea under Section 8 of the A & C Act, what is material is that such a plea as contemplated under Section 8 of the A & C Act has to be raised by the party in an application filed in the proceedings, so as to bring the plea to the notice of

the Court. No doubt, in the instant matter, an application under Section 8 of the A & C Act has not been filed. It is equally not in dispute that such a plea has been raised in para 5 of the application under Order VII Rule 11 of CPC for rejection of the counter-claim. For the sake of ready reference, para 5 of the application filed by the original defendant under Order VII Rule 11 of CPC is quoted as under :

“5. It is submitted that, the defendant no.1 is seeking the prayer for dissolution of the partnership deed dated 29/09/2015. In this document the Arbitration Clause is there and clearly stated that in case of any dispute regarding the partners for dissolution of partnership deed, share profit or share assets and the disputes solve by the Arbitrator then the defendant no.1 hence the present counter claim filed by the defendant no.1 is barred by the virtue of the Arbitration clause and therefore this Hon’ble Court does not have jurisdiction over the subject matter of the counter claim.”

9. A bare perusal of the averment in para 5 of the application under Order VII Rule 11 of CPC would indicate that a specific plea has been raised that since the deed of partnership dated 15/09/2015 contains an arbitration clause, the counter-claim as filed by the petitioner (original defendant no.1) would be beyond the jurisdiction of the learned lower Court.

10. The purpose of filing of an application, is to bring to the notice of the Court, by a written plea, the existence of an arbitration clause, and the intention of the objector/applicant to be bound by it, and consequently the requirement of the Court to relegate the parties to such agreement, to the forum, which they have decided their disputes to be referred to, thereby contending that the Civil Court before whom the action is brought is denuded of its jurisdiction to decide the issue on account of the existence of a valid arbitration agreement. In my considered opinion, what is material is the substance and not the label or the form. Though the application is styled as an application under Order VII Rule 11 of CPC in sum and substance, it is an application filed by the original plaintiff, bringing to the notice of the learned lower Court the existence of an arbitration agreement between the parties, which requires the parties to be referred to arbitration, as a dispute had arisen between them. That being the position, the requirement of Section 8 of the A & C Act, namely, that a party should apply to the Court bringing to its notice the arbitration clause, stands satisfied.

11. It is, therefore, apparent that this is not a case, in which the Court has taken *suo motu* cognizance of the arbitration clause and referred the parties to arbitration, as held in *M/s. "Convinio Shopping Nine 2 Nine"* (supra). *Sukanya Holdings Pvt. Ltd.* (supra) also contemplates the

filing of an application under Section 8 of the A & C Act by a party bringing to the knowledge of the Court, the existence of an arbitration clause, which in the instant case is satisfied by the averments, as contained in para 5 of the application under Order VII Rule 11 of CPC, as what the Court is called upon by the application is to hold that the plea raised in respect of a dispute in which there is an arbitration clause would be beyond the jurisdiction of the Court, which plea the learned Court has upheld while passing the impugned order on the application under Order VII Rule 11 of CPC, considering the arbitration Clause-17 as contained in the partnership-deed dated 01/10/2015 by exercising the power under Section 8 of the A & C Act. That being the position, I do not see any infirmity in the impugned order. The writ petition is therefore without any merits and is dismissed accordingly. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar