

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

WRIT PETITION NO. 1210 OF 2021

Purushottam s/o Tulsiram Badwaik and Ors.

Vs.

Anil s/o Hariram Malewar and Ors.

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

Court's or Judge's Orders.

Ms. Shiba Thakur, Advocate h/f Mr. S.S Sanyal, Advocate for
petitioner.

Mr. N.B. Kalwaghe, Advocate for respondent Nos.1 to 3.

CORAM : MANISH PITALE J.

DATE : 07.04.2022.

By this writ petition, the petitioners have challenged order dated 06.02.2020 passed by the Principal District Judge, Bhandara, whereby two applications were allowed. One application pertains to Section 9 of the Arbitration and Conciliation Act, 1996 and the other application was purportedly filed for appointment of an Arbitrator.

2. By the said order, the application under Section 9 of the aforesaid Act was disposed of by a direction to the rival parties not to create any third party rights in the property in question, till Arbitration proceedings are decided. Along with the said direction, in the impugned order it was also

directed that a particular individual stands appointed as an Arbitrator.

3. This Court issued notice in the present writ petition on 01.03.2021, recording the contention raised on behalf of the petitioners that while deciding the application under Section 9 of the said Act, the Court of Principal of District Judge, appointed an Arbitrator, as if an application under Section 11 was also placed for consideration.

4. Upon notice being issued, the respondents entered appearance and contended that an application for appointed of Arbitrator was moved on 28.01.2020, before the Court of Principal District Judge, wherein specific no objection was recorded on behalf of the petitioners. Attention of this Court was invited to an endorsement on the said application, whereby the counsel representing the petitioners stated that the petitioner had no objection for appointment of any one of the named Arbitrators in the said application.

5. Ms. Shiba Thakur, learned counsel holding for Mr. S.S. Sanyal, learned counsel for the petitioners submitted that the order appointing the Arbitrator was wholly without jurisdiction, because the only

proceeding for consideration before the Court of Principal District Judge, was the application under Section 9 for interim measures filed by the respondents herein. According to the learned counsel appearing for the petitioners, it was unknown to law that in such an application an Arbitrator could be appointed. On this short ground, the learned counsel for the petitioners submitted that the impugned direction deserved to be set aside.

6. On the other hand, Mr. Kalwaghe, learned counsel appearing for the respondents placed reliance on the application dated 28.01.2020, purportedly filed for appointment of an Arbitrator on behalf of the respondents, which contained an endorsement recording no objection on the part of the petitioner for appointment of any of the named Arbitrators. It was submitted that in the face of agreement between the parties, it could be said that the appointment was made by the procedure agreed upon between the parties and could be referable to Section 11(2) of the aforesaid Act.

7. A perusal of the material on record shows that the backdrop in which the application for interim measures was filed under Section 9 of the said Act, was that there was an agreement between the parties

and in a proceeding under Section 8 of the aforesaid Act, the District Court and this Court had taken a view that the application under Section 8 of the said Act deserved to be rejected. On a challenge raised by the petitioner No.1 before the Hon'ble Supreme Court, the appeal was allowed and the order passed by this Court was set aside. While doing so, the Hon'ble Supreme Court directed as follows :

“19. We therefore set aside the judgment and order passed by the High Court and accept the appeal preferred by the appellant. The matter will have to be dealt with by the trial Court in terms of Section 8 of 1996 Act. The parties shall appear before the trial Court on 14th May, 2018 for effectuating the arbitration agreement.”

8. It is an admitted position that thereafter there was no progress in the aforesaid proceedings before the District Court. It is in this backdrop that the application for interim measures was filed under Section 9 of the said Act, on behalf of the respondents. During pendency of the said application, a one page application for appointment of Arbitrator dated 28.01.2020, was moved on behalf of the respondents, giving names of three persons who could be appointed as Arbitrators. The said application indeed shows an endorsement given by

the counsel appearing for the petitioners, stating that the petitioners had no objection to appointment of any of the named persons as Arbitrator.

9. It appears that the Court of Principal District Judge proceeded on the basis of such no objection given by the counsel representing the petitioners to appoint one of the named persons as Arbitrator. The question that arises for consideration is, as to whether such an application could at all have been filed by the respondents before the Court of Principal District Judge while an application under Section 9 of the said Act for interim measures was being considered. In other words, whether there was any specific provision of the said Act invoked on behalf of the respondents, while moving such an application and further, whether such an application was at all maintainable before the Court of Principal District Judge.

10. This Court has considered the application dated 28.01.2020. Quite apart from the fact that it does not refer to any provision of the aforesaid Act, it cannot be traced to any provision, much-less Section 11 of the aforesaid Act for such a prayer regarding appointment of an Arbitrator. Even if, there exists in arbitration clause, which would ultimately lead to an

arbitration proceeding between the parties, appointment of Arbitrator can take place only in accordance with law. Merely because no objection was endorsed by the counsel appearing for the petitioners on the aforesaid one page application, it would not *ipso facto* mean that the Court of Principal District Judge was foisted with the jurisdiction to entertain the prayer made in such an application.

11. This demonstrates that the Court of Principal District Judge clearly erred in entertaining the prayer and casually appointing one of the named persons as the Arbitrator. No objection endorsed by the counsel appearing for the petitioners on the said application can be of no consequence, when it is found that the Court of Principal District Judge could not have exercised power in the first place to entertain the application for the prayer made therein. To that extent the impugned order deserves interference. As regards, the direction given while disposing of the application under Section 9 of the said Act, this Court is in agreement with the Court of Principal District Judge, whereby rival parties have been directed not to create any third party rights in the property in question.

12. In view of the above, the writ petition is partly allowed. Clauses (c) and (d) of the impugned order dated 06.02.2020 are quashed and set aside and rest of the order is maintained.

13. Needless to say, the parties would be at liberty to take such steps as available in law for appointment of Arbitrator.

JUDGE

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GABHANE

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by PRITY S
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2022.04.08
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