

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO. 219 OF 2022**

M/s. Gandhi and Associates,

Through partners, Navneet Uttamchand Gandhi & ors. ... Petitioner

vs.

Rahul Bhaskar Mhaske and another ... Respondents

Mr. S. C. Wakankar for petitioner.

Mr. Rahul Mhaske, respondent No.1 appearing in-person.

CORAM : MANISH PITALE, J

DATE : 9th FEBRUARY, 2023

P.C. :

. Heard learned counsel for the petitioner as well as respondent-in-person. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of sole arbitrator, in order to resolve the dispute between the parties. Upon notice being issued, the respondent was served and appears in-person.

2. The petitioner has invoked clause 39 of the agreement of sale dated 16th February, 2008, executed between the parties. The said clause reads as follows:

“39. In case of any dispute between the Promoter and the Purchaser regarding interpretation of any of the terms of this Agreement or regarding any aspect of the transaction including quality of construction work, defective service by the Promoter, delay in construction work and/or sale deed, alterations in the plan, parking arrangement, grant of exclusive uses, rendering of account etc. then such dispute shall be referred to the arbitration of a single arbitrator to

be appointed by the Promoter whose decision shall be final and binding on both the parties.”

3. On an earlier occasion, the petitioner had invoked the arbitration clause, claiming that the respondents were liable to pay amount towards Value Added Tax (VAT). The respondents denied such liability. An arbitrator was appointed in terms of the procedure, contemplated in the above-quoted clause. The arbitral award dated 10th April, 2017, was rendered by the arbitrator, whereby the claim raised by the petitioner was allowed. Aggrieved by the same, the respondents approached this Court, challenging the said award. By order dated 20th October, 2022, the award was set aside only on the ground that the unilateral appointment of the arbitrator, in terms of the above-quoted clause, was hit by Section 12(5) of the said Act r/w. Seventh Schedule and in the light of the judgment of the Supreme Court in the case of *TRF Limited v/s. Energo Engineering Projects Limited*, [(2017) 8 SCC 377] and in the case of *Perkins Eastman Architects DPC & Anr. v/s. HSCC (India) Limited*, (2019 SCC Online SC 1517).

4. After the said award was quashed and set aside, the petitioner invoked the arbitration clause again by sending notice to the respondents on 11th November, 2022. The respondents sent reply on 23rd November, 2022, raising various objections to the invocation of the arbitration clause.

5. This Court issued notice in the present petition and the respondent No.1 has appeared in-person. The principal contention raised on behalf of the respondents is that since one round of arbitration proceeding and award passed therein was set aside by this Court, there was no way in which, the petitioner could have again invoked the arbitration clause. It is submitted that the arbitration clause itself is illegal. Procedure prescribed therein being

hit by Section 12(5) r/w. Seventh Schedule of the said Act, the said clause could not have been invoked on behalf of the petitioner. It is submitted that the respondents have already suffered tremendous hardships and to send the matter for arbitration again would not be appropriate.

6. On the other hand, learned counsel for the petitioner submitted that there was no question of applicability of the concept of *res judicata*. It is submitted that as per the law laid down by the Supreme Court in the cases of *McDermott International Inc. v/s. Burn Standard Co. Ltd. and others*, [(2006) 11 SCC 181] and *Ssangyong Engineering & Construction Company Ltd. v/s. National Highway Authority of India (NHAI)*, [(2019) 15 SCC 131], the only option available to the petitioner, after the earlier award was set aside, was to invoke the arbitration clause afresh.

7. This Court has perused the notice dated 11th November, 2022, issued by the petitioner. It is evident from the perusal thereof, that the petitioner is now conscious of the fact that the procedure prescribed in the above-quoted clause cannot be resorted to, as it is in the teeth of Section 12(5), read with the Seventh Schedule of the said Act. The petitioner has, therefore, nominated the name of a retired District Judge as the sole arbitrator, while invoking the said arbitration clause.

8. There is substance in the contention raised on behalf of the petitioner, since the Supreme Court, in the case of **McDermott International Inc. v/s. Burn Standard Co. Ltd. and others**, (*supra*), after examining the scheme, held as follows:

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few

circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

9. Insofar as the contention raised on behalf of the respondents, that the arbitration clause, once found to be invalid, cannot be invoked again, is concerned, this Court is of the opinion that the parties had agreed for resolution of their disputes through arbitration and such an agreement exists, despite the fact that in the earlier round, this Court found that the procedure contemplated under the said clause, was unsustainable. A perusal of the above-quoted clause shows that the agreement between the parties is for referring disputes to arbitration and thereupon, the procedure has been prescribed. Even if the procedure under the clause is found to be unsustainable, there cannot be any escape from the fact that the parties agreed for resolution of their disputes through arbitration. In other words, the arbitration clause exists and that is the limited enquiry, which this Court can conduct in the present proceedings.

10. Insofar as the question as to whether the dispute itself can be said to be arbitrable and other questions raised by the respondents, all such questions can be kept open for determination by the arbitrator.

11. At this stage, the learned counsel for the petitioner as well as respondent-in-person left it to this Court to appoint the arbitrator. Since the dispute emanates from Pune, a retired District Judge available at Pune can

be appointed as the sole arbitrator.

12. Accordingly, Mr. S. M. Deshmukh, Retired District Judge, available at Pune, is appointed as sole arbitrator for resolution of disputes between the parties. Details of the learned arbitrator are as follows:-

Block No.13/14, Building No. 'O',
Kumar Park, Off Kondhwa Road,
Bibwewadi, Pune-411037
Phone: 020-24216979

13. Parties undertake to inform the learned arbitrator immediately about the order passed today.

14. The learned arbitrator is requested to submit his consent and disclosure statement in terms of Sections 11(8) and 12(1) of the aforesaid Act within four weeks from today to the Registrar (Judicial) of this Court. The fees of the learned arbitrator shall be as per the Fourth Schedule to the said Act.

15. All questions are left open for determination by the learned arbitrator.

16. The petition stands disposed of.

(MANISH PITALE, J)

Priya Kambli