



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2899 OF 2024 WITH
ARBITRATION APPLICATION NO. 28 OF 2022 WITH
CIVIL APPLICATION NO. 2197 OF 2024

M/s Shree Prakash Developers & JV (regd.) .. Petitioner

versus

M/s Atharwa & Sunil Developers & others .. Respondents

Mr. V. D. Salunke, Advocate for Petitioner in Writ Petition.

Mr. A. P. Bhandari, Advocate for intervenors in Civil Application No. 2197/2024.

Mr. P. B. Gapat, Advocate for Applicant in Arbitration Application No. 28/2022.

Ms. Anjali Bajpai Dube, Advocate for Respondent in Arbitration Application No. 28/2022.

CORAM : R. M. JOSHI, J.

RESERVED ON : 28th JUNE, 2024.

PRONOUNCED ON : 8th JULY, 2024.

ORDER :

1. Since both the proceedings are interconnected, by consent of both sides, they are heard and decided by this common judgment.

2. Parties (1) M/s Shree Prakash Developers & Joint Venture, (2) M/s Atharwa & Sunil developers (3) Chhatrapati

Sambhajanagar Municipal Corporation are referred to as Joint Venture (JV), Assignee and Corporation respectively for the sake of convenience.

3. Writ Petition No. 2899/2024 is filed by JV for taking exception to order dated 19.01.2024 passed in Special Civil Suit No. 699/2023 whereby application filed by JV i.e. Defendant therein invoking provisions of Section 8 of Arbitration and Conciliation Act (for short 'the Act') is rejected by the Trial Court.

4. The facts which lead to filing of this Petition as well as application under Section 11 of the Act are thus :-

Corporation intended to develop the property at Gat No. 612, CTS No. 20723, at Siddharth Garden, Central Bus Stand, Aurangabad for construction of parking space, shopping complex, garden shops etc. Tender was published by the Corporation. JV participated in the said tender and was a successful bidder. Registered BOT agreement was executed between the Corporation and JV on 27.09.2006. It seems that since JV was not in a position to carry out the said work, registered Assignment Deed was executed by JV with Assignee. After execution of such registered deed of

Assignment, Corporation entered into Deed of Correction which is registered on 23.06.2009. It is the case of Assignee that after the Deed of Assignment is executed, no interest of JV remains in the said project.

5. Assignee filed suit being Special Civil Suit No. 699/2023 seeking following declaration :-

“A]Declaration that the Sub-lease agreements bearing registration no. 5933/2022, 5934/2022, 6203/2022, 6204/2022, 6941/2022, 6942/2022, 6946/2022, 7734/2022, 9442/2022 & 8443/2022 executed by the Defendant No. 1 & 2 in favour of Defendant No. 3 to 14 are without competency/authority and consequently same are null & void and are not binding on the Plaintiff.

B]Restoration of Possession of Shop Nos. Shop Nos. C-GF-4, C-GF-5, C-GF-6, C-GF-7, B-GF-2, B-GF-3, C-GF-1, B-GF-12, B-GF-13, constructed over CTS No. 20723/Part, Survey No. 4, Gut No. 612 being and situated at Siddharth Garden, Central Bus Stand, Aurangabad.

C]Perpetual Injunction restraining Defendant No. 1 to 13 from transferring, alienating and/or creating third party interest in any manner over the constructed portion constructed over CTS

No. 20723/Part, Survey No. 4, Gut No. 612 being and situated at Siddharth Garden, Central Bus Stand, Aurangabad.”

The said suit is filed with averments as recorded hereinabove. In addition thereto, it is the case of Assignee before the Trial Court that in order to deny the rights of Assignee, certain acts are done by the Corporation and JV which are prejudicial to the interest of Assignee. Such acts included mutating PR card in the name of Corporation, allotment of shops etc. It is specifically alleged that the sub-lease agreement was executed by Defendant Nos. 1 and 2 in the suit i.e. Jayshree Kisanrao Nade and Aparna Dhananjay Naade. Pursuant to the said sub-lease agreement, interest in the shop was created in favour of third person. With these averments, the suit came to be filed. Along with plaint, copy of deed of partnership of Assignee and other relevant documents were placed on record.

6. Defendant No. 15 filed application invoking provisions of Section 8 of the Act by moving Exhibit 18. It is the contention of this Defendant/Petitioner herein that the suit cannot be entertained as the agreements between the parties consist arbitration clause. A reference is made to BOT agreement, Deed of Assignment etc. This

application was opposed by the Assignee and by passing the impugned order, it came to be rejected. Hence, this Petition.

7. On the other hand, JV has filed application under Section 11 of the Act for appointment of Arbitrator in terms of Arbitration Agreement between JV and Corporation. In the said application, Assignee filed Civil Application as intervenor. The contentions in the plaint filed in Special Civil Suit No. 699/2023 are reiterated and it is claimed that the intervenor is a necessary party in all proceedings in relation to tender floated by Corporation.

8. Learned counsel for JV submits that as far as challenge to order passed by the Trial Court is concerned, the Trial Court has committed error in not considering that the BOT agreement and Deed of Assignment cannot be separated. According to him, there is no dispute that in both agreements, arbitration clause is incorporated. Thus, it is his contention that in respect of dispute about either of the agreements, the provisions of Section 8 of the act are rightly invoked. According to him, Trial Court has committed error in observing that the subject matter of both proceedings are

different and that Defendant No. 15 is not party to BOT agreement as well as Assignment Deed.

9. Learned counsel for intervenor/Assignee submitted that there is serious dispute with regard to the constitution of M/s Shree Prakash Developers and JV. It is his contention that at the time of BOT agreement, constitution of said company was different than the one now exists. It is his submission that the Trial Court has prima facie recorded findings that Defendant No. 15 is not the same person in whose favour BOT Agreement was executed by the Corporation. Thus, it is his contention that the Trial Court has rightly rejected the application under Section 8 of the Act. As far as application under Section 11 of the Act is concerned, he sought to canvass that in view of the Deed of Assignment, no right survives even with JV on the basis of BOT Agreement and hence in any dispute with regard to the BOT agreement, present intervenor is a necessary party. He also submits that even if this Court comes to the conclusion that dispute with regard to both the agreements are required to be decided together, at this stage, application under Section 11 of the Act is not tenable for the reason that the intervenor has not been issued with

the notice and in absence of notice, arbitration proceeding cannot be said to have been initiated.

10. Learned counsel for Corporation has not disputed the fact that there was BOT agreement and there was Deed of Assignment and both these agreements contained arbitration clause.

11. While considering challenge to order of rejection of application under Section 8 of the Act, it would be relevant to note the said provision which reads thus :-

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.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by

the original arbitration agreement or a duly certified copy thereof:

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application alongwith a copy of the arbitration agreement a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Having regard to the above provision, a Court is required to be satisfied that (i) there is arbitration agreement (ii) A party to an agreement brings an action in the Court against the other party (iii) subject matter of both suit and arbitration agreement is same and other party moves before the Court for referring parties to arbitration. The language of this section mandates the Court to refer

the parties to arbitration in terms of arbitration agreements if above requisite conditions are satisfied.

12. In order to appreciate the scope of proceeding under Section 8 and 11 of the Act, it would be relevant to take into consideration judgment of Hon'ble Supreme Court in case of NTPC Ltd. vs. M/s SPML Infra Ltd., **SCC OnLine SC 389**. The Hon'ble Supreme Court by taking into consideration law on the point has decided the parameters in which the referral Court is required to enquire into the aspects involved in the case. It is held in paragraph Nos. 22 to 28 as under :-

“22. The entire case law on the subject was considered by a three-Judge Bench of this Court in Vidya Drolia, and an overarching principle with respect to the pre-referral jurisdiction under Section 11(6) of the Act was laid down. The relevant portion of the judgment is as follows : (SCC pp. 120-21 paras 153-54)

“153. Accordingly, we hold that the expression “existence of an arbitration agreement” in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the

referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc. the Court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading “Who Decides Arbitrability?” can be crystallised as under :

154.1 Ratio of the decision in Patel Engg. Ltd. 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 9-8-2019), is no longer applicable.

154.2 Scope of judicial review and jurisdiction of the Court under Sections 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 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 deadwood. The Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration to 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 a firm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

(emphasis in original and supplied)

23. *The limited scope of judicial scrutiny at the pre-referral stage is navigated through the test of a “prima facie review”. This is explained as under :*

(Vidya Drolia case, SCC pp 110-13, paras 133034 & 138-40)

“133. Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the Referral Court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.

134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration

agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the Court should not get lost in thickets and decide debatable questions of fact. Referral proceedings are preliminary and summary and not a mini trial....

* * *

138.On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

139. We would not like to be too prescriptive, albeit observe that the Court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an interse yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the Court becomes too reluctant to

intervene, it may undermine effectiveness of both the arbitration and the Court. There are certain cases where the challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

140. Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the Courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the Courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes.”

(emphasis supplied)

24. Following the general rule and the principle laid down in *Vidya Drolia*, this Court has consistently been holding that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In *Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.*, *Sanjiv Prakash v. Seema Kukreja*, and *Indian Oil Corpn. Ltd. v. NCC Ltd.*, the parties were referred to arbitration, as the *prima facie* review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the exception to the general principle that the Court may not refer parties to arbitration when it is clear that the case is manifestly and *ex facie* non-arbitrable, in *BSNL v. Nortel Networks (India) (P) Ltd.* (hereinafter “Nortel Networks”) and *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons*, arbitration was refused as the claims of the parties were demonstrably time-barred.

Eye of the needle

25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant’s privity to the said agreement. These are matters which require a

thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie non-arbitrable. Explaining this position, flowing from the principles laid down in Vidya Drolia, this Court is a subsequent decision in Nortel Networks held : (Nortel Networks case SCCp, 764, para 45)

“45. ...45.1.... While exercising jurisdiction under Section 11 as the judicial forum, the Court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute.”

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral Courts must not undertake a full review of the

contested facts; they must only be confined to a primary first review and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bonafide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is no even a vesting of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration.

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia, if this duty within the limited compass is not exercised and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator as explained in DLF home Developers Ltd. v. Rajapura Homes (P) Ltd.

13. It is thus open for referral Court as well as Court exercising power under Section 11 of the Act, to go into existence and validity of agreement of arbitration as well as arbitrability of the dispute, however, such ascertainment would only be on prima facie consideration of the case and that it is not expected from the Court at this stage to venture into the details of the objections in this regard.

14. In the present case, there is no dispute about the fact that BOT agreement came into existence between JV and Corporation. Further there is no denial that JV executed Deed of Assignment with Assignee, which is duly approved by the Corporation. No one disputes the fact that both agreements consist arbitration clause. Further apparently there exist dispute between parties on issues touching to agreements in questions.

15. A question that arises before this Court is as to whether there can be single arbitration proceeding in respect of any dispute that arises from BOT agreement as well as Deed of Assignment. Prima facie perusal of the agreements in question indicate that project of development of property of the Corporation was entrusted to JV. By virtue of said agreement, the rights are created in favour of

JV. JV, on the other hand, having executed Deed of Assignment in favour of Assignee, all rights in the BOT agreement stood transferred in favour of Assignee with additional obligations interse between them. It is thus clear that if any dispute arises between the parties to BOT agreement as well as Deed of Assignment, the same cannot be independently decided by any forum.

16. As far as arbitrability of the dispute is concerned, clause of arbitration is wide enough to cover the dispute between parties. It can be seen that any dispute or difference which arises between the parties touching the business of firm or interpretation of any provision or otherwise whatsoever related to the firm or its business, the same shall be referred to the Arbitrator appointed with the consent and approval of all partners and shall be governed by the Arbitration and Conciliation Act, 1996. Clause of arbitration in agreement sufficiently covers any dispute touching to terms agreed between the parties to the agreement in respect of the project in question.

17. Next question which falls for consideration is as to whether Assignee could become a party for arbitration proceeding in

respect of BOT Agreement or not. Though Assignee is not a signatory to the said agreement, by virtue of Deed of Assignment, practically Assignee is responsible for compliance of all the terms and conditions of BOT agreement. Thus, merely because the Assignee is not a signatory to the said document, it cannot be held that he is not a necessary party to the proceeding of arbitration as he is bound by the terms therein.

18. On the other hand, the dispute between the Assignee and Defendants in Special Civil Suit No. 699/2023, though the said dispute is said to have occurred out of the Deed of Assignment, however, while considering the terms and conditions of Deed of Assignment, agreement between the parties in terms of BOT Agreement cannot be ignored. Both the agreements are so interconnected that they cannot be separated for any purpose whatsoever. In such circumstances, the learned Trial Court has erred in not accepting contentions with regard to reference of the said dispute to the Arbitrator by invoking provisions of Section 8 of the Act.

19. As far as compliance of Section 8(2) of the Act is concerned, now BOT Agreement as well as Assignment Deed and Confirmation Deed by Corporation are before this Court. Similarly, existence of arbitration clause in both agreements is not in dispute. Thus, there would be no impediment in referring the dispute to arbitral tribunal.

20. It is pertinent to note that while deciding application under Section 8 also, the Court has to prima facie consider as to whether there is valid arbitration agreement or not and also arbitrability of the dispute. It is not expected from the Court to go into the details of any objection raised to that effect but the Court has to only record prima facie findings in this regard. Learned Trial Court seems to have committed error in going in depth into the issue as to whether Defendant No. 15 in the suit is the same party as party to BOT Agreement or not. If there is any dispute as to whether the same entity has entered into BOT Agreement, such issue would be touching to the dispute in respect of that agreement itself. Hence, no other forum but the Arbitral Tribunal could adjudicate upon the said issue. The Trial Court, thus, was not right in holding that Defendant No. 15 is not the entity who has executed BOT Agreement.

21. As far as arbitrality of the dispute is concerned, the Trial Court has committed error in not taking into account the fact that the deed of Assignment is not independent agreement but necessarily is based upon the terms and conditions of BOT Agreement. If it is so, any dispute with regard to the Deed of Assignment also would be covered for the purpose of arbitration dispute. Impugned order passed by the Trial Court therefore, cannot sustain hence the same is set aside. Application Exhibit 18 stands allowed. Parties are referred to arbitration.

22. It needs to be noted that even by conduct of parties to this proceeding, it can be seen that they do not dispute interconnectivity of both agreements. JV objects tenability of suit filed by Assignee, where as Assignee seeks intervention in application under Section 11 of the Act.

23. In the light of above discussion, it is clear that the intervenor is a necessary party to the present application under Section 11 for appointment of Arbitrator. As such, Civil Application No. 2197/2024 stands allowed.

24. Learned counsel for the Assignee however submits that since no notice has been issued by the JV to the Assignee, application under Section 11 of the Act is not tenable.

25. In this regard, it would be relevant to take note of provisions of Section 21 of the Act which reads thus :

21. Commencement of arbitral proceedings – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

This provision clearly shows that arbitration proceeding would commence only when a request for such dispute to be referred to Arbitrator is received by the Respondent. It is settled law that unless there is a notice as contemplated by Section 21 of the Act, arbitration proceeding cannot be said to have been commenced. In this regard reference can be made to the case of State of Goa vs. Praveen Enterprises, (2012) 12 Supreme Court Cases 581 and Anacon Process Control Pvt. Ltd. vs. Gammon India Limited, MANU/MH/3116/2016.

26. In view of the settled position of law, application under Section 11 of the Act would not be tenable unless the party seeking appointment of Arbitrator issues notice under Section 21 of the Act. In this case, admittedly, no notice is issued by the applicant to the Assignee. As a consequence of which, no order can be passed on the application as of today. Arbitration Application No. 28/2022 therefore stands disposed of.

27. It is however open to the applicant to issue notice to the Respondent under Section 21 of the Act and if there is non-compliance of requisition made therein, fresh application under Section 11 of the Act can be filed.

28. In view of above deliberations, Petition stands allowed.

(R. M. JOSHI)
Judge

Later on :

1. Learned counsel for Assignee on instructions submits that since application filed by JV under Section 8 of the Act is allowed, an Arbitrator may be appointed in application under Section 11 of the Act.

2. Learned counsel for respective parties made a joint request to appoint Justice Shri Sunil P. Deshmukh (Retd.) as Arbitrator.

3. By consent of both sides, Justice Shri Sunil P. Deshmukh (Retd.) is appointed as Arbitrator. This order be communicated to learned Arbitrator by the parties. Both proceedings are disposed of in above terms.

(R. M. JOSHI)
Judge