



shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA**APPL. FOR APPOINTMENT OF ARBITRATOR NO.18
OF 2024**

1)M/s. Esperenca- Dr. Estibeirol
Clinic, A Partnership Firm,
Constituted under the Indian Partnership
Act, 1932, and having its principal
office at 781, St. Mary's Colony,
Miramar, Panaji, Goa-403001,
Represented by its Authorised partner
Dr. Maria Ines Esteberio,
83 years, c/o Adv. D. E. Robinson,
8/304/4, Dias Apartment, Altinho,
Panaji-Goa 403001

...APPLICANT

VERSUS

Dr. Eugene D'Silva,
Resident of 480, La Campala,
Housing Society, Miramar,
Panaji-Goa-403001.

... RESPONDENT

Mr. Clayton A. Fonseca, Advocate for the Applicant.
Mr. Vledson Braganza & Mr. B. Fernandes, Advocate for
Respondent.

CORAM:- NIVEDITA P. MEHTA, J.
DATED :- 28th March, 2025

ORDER

1. This is an application seeking appointment of an
Arbitrator in terms of Section 11 of the Arbitration and
Conciliation Act, 1996 (hereinafter, referred to as "the Act").

2. The applicant herein is a Partnership Firm who had entered a Deed of Lease (hereinafter referred to as “the deed”) dated 31.07.2010 for 14 years with the respondent herein. The subject property of this deed is a hospital situated at 781, St. Mary’s Colony, Miramar, Panjim, Goa. By way of this deed, the respondent was granted rights as a lessee against the consideration of rent and a share in the profits in terms of a related agreement also dated 31.07.2010.

3. A dispute had arisen on an earlier occasion between the parties in respect of non-payment of lease rent due and payable under deed. The applicant, subsequently, invoked the arbitration clause contained in clause 52 of the deed and moved an application under Section 11 of the Act for appointment of an arbitrator. Vide order dated 12.03.2021 in AAR.226/2021(F), this Court was pleased to allow the application, and the dispute was accordingly referred to arbitration.

4. In the arbitration proceedings arising out of the aforesaid dispute, vide award dated 30.05.2023, the arbitrator was pleased to allow the claim of the applicant. This award is presently

subject to an application under section 34 of the Act pending before the Principal District Judge in Arbitration Petition No. 3 of 2023.

5. On 12.07.2024, the applicant issued a notice for termination of the deed in terms of clause 31, which empowers either party to terminate the lease in the event of violation of any terms stipulated therein; as well as the profit-sharing agreement. The notice, *inter alia*, sought the handover of the physical possession of the leased premises to the applicant. In response to the notice for termination, the respondent addressed a reply dated 18.07.2024 objecting to the notice on the ground that the signatories to the notice were not the same as the ones who had signed the deed and expressed their desire to ensure that all partners of the applicant were consonant with the contents of the notice. Further, it was stated in the response that the conduct of the respondent could, in no manner, constitute a breach of clause 22 of the deed. Therefore, the respondent contested handing over physical possession of the premises.

6. Thereafter, in view of the reply addressed by the respondent, the applicant issued a notice under Section 21 of the Act, offering to proceed for arbitration proposing the name of various arbitrators for the respondent to choose from. The respondent addressed a reply dated 16.08.2024, claiming that the notice under Section 21 of the Act was unfounded.

7. In this factual context, the applicant has moved the instant application for the appointment of an arbitrator, since the respondent has failed to participate in the appointment of the arbitrator within the statutory time.

8. Mr. Clayton Fonseca, learned counsel for the applicant submits that during the arbitration proceedings, the applicant found that the respondent was in breach of clause 22 of the deed. Clause 22 of the deed disallows the lessee from sub-letting or creating any third-party rights over the subject premises of the deed. The respondent has violated clause 22 of the deed by effecting payments of the lease rentals to the Bank of Maharashtra (hereinafter referred to as “the bank”) creating third-party rights in their favor.

9. *Per contra*, the learned counsel for respondent submits that this is the action they had to undertake in accordance with the law purely on account of a mortgage having been created in respect of the leasehold property and the subsequent failure to redeem the mortgage. In this respect, the learned counsel for the respondent, further submits that the same partners that were signatories to the notice of termination dated 12.07.2024 were also signatories to the mortgaging agreement with the bank and alleges that the instant application has been filed with a *malafide* intention to harass and encumber the respondent with further arbitral proceedings.

10. Further, it has been submitted by the learned counsel for the respondent that their conduct does not amount to a breach of Clause 22 or any terms of the deed because the premises have not been sublet by them, whereas it was the applicant who mortgaged the property in favour of the bank. Therefore, the bank has issued notices of possession under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as, “SARFAESI Act”). It is their case that upon issuance of such

notices, they were compelled to comply with the requirements of the law under Section 13(4)(d) of the SARFAESI Act. In support of this submission, the respondent has relied upon the order of this Court in Writ Petition No.531/2024(Filing) filed by the petitioner against the respondent. It has been observed that apprehension of the respondent to the claim or the entitlement of the bank to the rental dues under the deed is well founded and further, they were directed by this Court to direct payments of part of 45% of the total quantum of the rent, to the bank.

11. With respect to the arbitral award dated 30.05.2023, the respondents have filed an application under Section 34 of the Act stating that the award is illegal because it imposes an injunction against the action of the bank under Section 13(4) of the SARFAESI Act.

12. The respondent has resisted the invocation of the arbitration clause stating that the deed is still valid and subsisting and that the arbitration proceedings that the applicant seeks to draw them into, is barred by law and is an abortive

exercise due to the lack of an arbitrable dispute. It is the case of the respondent that in the exercise of Section 11, under the guise of invocation of the arbitration clause, this Court must ascertain whether there exists an arbitrable dispute that requires to be decided. Further, the counsel for the respondent states that otherwise any party to an agreement where there is an arbitration clause would raise a fake allegation that there is a dispute that has arisen, and then the effect is that the respondent must face the turmoil of going into such arbitration proceedings. The respondent submits that while the position of the Hon'ble Supreme Court is clear that while entertaining an application under Section 11 of the Act, the Courts should be slow in venturing into something which would be in the arena of Arbitral Tribunal nonetheless it is the duty of the Court to see whether there is an arbitrable dispute. The learned counsel for the respondent places reliance on the ruling *in Sanjeev Prakash v. Seema Kukreja; (2021) 9 SCC 732* to substantiate his submissions.

13. Heard learned counsels for both parties. Rival contentions fall for determination.

14. The existence of an arbitration agreement is not disputed by either of the parties. It is an uncontested fact that such an arbitration agreement can be found in clause 52 of the deed. The arbitration clause is extracted hereunder:

*“52. All disputes and/or differences arising from and/or directly in connection with this **DEED OF LEASE** shall be subject to the territorial jurisdiction of Courts, Tribunal and other Judicial and/or Quasi Judicial Fora in Panaji, Goa. However, the **PARTIES** hereto agree that in the first instance any dispute arising between them in respect of the lease and/or this **DEED OF LEASE** shall be referred to arbitration before a person appointed by the **PARTIES** hereto by mutual agreement, failing which the appointment of an Arbitrator shall be secured by following avenues as may be available under the law currently in force. The **PARTIES** agree that the seat of the arbitration shall be at Panaji, Goa. All arbitral proceedings shall be governed and the dispute shall be decided in accordance with, the provisions of the Arbitration and Conciliation Act, 1996 [or such other Act that may replace it to govern matters dealt with by it] and all other laws in force in India at the time the dispute arises.”*

15. Before we proceed further, it is pertinent to look into judicial pronouncements of the Hon'ble Supreme Court in this regard. The scope of interference of the Courts in an application filed under Section 11 of the Act is limited as has been delineated by a myriad of pronouncements of the Hon'ble Supreme Court. ***In SBI General Insurance Co. Ltd. v. Krish Spinning; 2024 SCC OnLine SC 1754***, the Hon'ble Supreme Court summarized the scope of judicial interference in applications under Section 11 of the Act. A portion of the judgment has been extracted hereunder for convenience:

“93. Thus, the position after the decisions in Mayavati Trading (supra) and Vidya Drolia (supra) is that ordinarily, the Court while acting in exercise of its powers under Section 11 of the Act, 1996, will only look into the existence of the arbitration agreement and would refuse arbitration only as a demurrer when the claims are ex-facie frivolous and non-arbitrable.”

16. This position has been re-iterated in ***Goqii Technologies Private Limited vs. Sokrati Technologies Private Ltd.; (2025)***

2 SCC 192. A portion of the judgment has been extracted hereunder for convenience:

“19. As observed in Krish Spinning (supra), frivolity in litigation too is an aspect which the referral court should not decide at the stage of Section 11 as the arbitrator is equally, if not more, competent to adjudicate the same.

20. Before we conclude, we must clarify that the limited jurisdiction of the referral Courts Under Section 11 must not be misused by parties in order to force other parties to the arbitration agreement to participate in a time-consuming and costly arbitration process. This is possible in instances, including but not limited to, where the claimant canvasses the adjudication of non-existent and mala fide claims through arbitration. With a view to balance the limited scope of judicial interference of the referral Courts with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration. Having said that, it is clarified that the aforesaid is not to be construed as a determination

of the merits of the matter before us, which the Arbitral Tribunal will rightfully be equipped to determine.”

17. In respect of the Court’s scope of interference vis-à-vis the principle of arbitral autonomy and judicial non-interference, in ***Krish Spinning (Supra)*** while elucidating upon the doctrine of *competence-competence* observed as under:

“101. Section 16 of the Act, 1996 recognises the doctrine of competence-competence and empowers the arbitral tribunal to rule on its own jurisdiction. The policy consideration for the same is, firstly, to recognise the intention of the parties in choosing arbitration as the method for resolving the disputes arising out of the contract and secondly, to prevent the parties from initiating parallel proceedings before courts and delaying the arbitral process.

102. The negative aspect of competence-competence is aimed at restricting the interference of the courts at the referral stage by preventing the courts from examining the issues pertaining to the jurisdiction of the arbitral tribunal before the arbitral tribunal itself has had the opportunity to entertain them. The courts are allowed to review the decision of the arbitral tribunal at a later stage”

18. In light of the ratios in the aforementioned authorities, the position has been made crystal clear that the scope of judicial review and jurisdiction in a Section 11 application of the Act is very limited. The doctrine of *competence-competence* dictates that the arbitral tribunal has the power to rule on all questions pertaining to non-arbitrability. As a sequitur of the *competence-competence* principle, the courts are granted the powers to review the decision of the arbitral tribunal once the award has been granted by the tribunal under section 34 of the act.

19. The upshot of the authorities is that the interference of this Court is restricted to a *prima facie* test of arbitrability and based on the materials placed before this Court, it cannot be concluded that the matter is demonstrably non-arbitrable. At the intersection of the principles of arbitral autonomy and judicial non-interference that is clearly espoused by the Act, it would be improper to usurp the powers of the Arbitral Tribunal and decide upon non-arbitrability at this stage.

20. The case of the respondent rests on the argument of non-arbitrability supported by two limbs, one that there is no contravention of clause 22 of the deed, this would fall squarely in the ambit of the merits of the case, that is decidedly in the realm of the adjudication by the Arbitral Tribunal. Secondly, in view of the peculiar facts and circumstances of this case, non-arbitrability may also be discerned based on the nature of the dispute being an issue *in rem* and not an issue *in personam*. It is the case of the respondent that issues *in rem* can never be adjudicated upon by a private forum such as an arbitrator. On a *prima facie* view, it cannot be stated that just because there is a purported violation of clause 22 of the deed in light of the proceedings under the SARFAESI Act, it is rendered an issue *in rem* as opposed to an issue *in personam*.

21. The learned counsel for the respondent has placed reliance upon the ruling in ***Sanjeev Prakash (supra)*** wherein the Hon'ble Supreme Court has observed that parties are empowered to raise objections at the stage of an application under Section 11 of the Act and further that the Court may conduct a *prima facie* but intensive scrutiny. In this light, this

Court does not find any demonstrable non-arbitrability upon its review. In this Court's view, to conclusively rule on non-arbitrability would necessitate a deeper appreciation of the facts of this case, which this Court is not inclined to indulge in at this stage considering the settled position of law.

22. Both the learned Counsel, on instructions, submit that the parties are ready and willing to appoint an Arbitrator to decide the dispute. Both the learned Counsel suggest the name of Mr. R. G. Ramani, Senior Advocate to decide the disputes between the parties.

23. In these circumstances, the following order is passed:

- a. The Application is allowed.
- b. Mr. R. G. Ramani, Senior Advocate, is appointed as the sole Arbitrator to decide the dispute between the parties.
- c. A copy of this order be communicated to the learned sole Arbitrator by the Advocate for the Applicant, within a period of one week from today.
- d. The learned sole Arbitrator is requested to forward his Statement of Disclosure under Section 11 (8)

read with Section 12 (1) of the Arbitration Act to the Advocate for the Applicant so as to enable him to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Application and a copy of the same shall be furnished by the Advocate for the Applicant to the Advocate for the Respondents.

- e. The parties shall appear before the learned sole Arbitrator on such date and at such place as he nominates to obtain appropriate directions with regard to fixing a schedule for completing pleadings etc. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.
- f. Contact and communication particulars shall be provided by both sides to the learned sole Arbitrator within a period of one week from today. This information shall include a valid and functional email address as well as the mobile numbers of the respective Advocates.
- g. The parties have agreed that the sole Arbitrator shall charge his fees as per the 4th Schedule of the Arbitration and Conciliation Act, 1996 read with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018. The parties have further

agreed that all the arbitral costs and the fees of the Arbitrator will be borne by the Applicant and the Respondents equally and will be subject to the final Award that may be passed by the Tribunal.

- h. The parties have agreed that the seat of the arbitration will be at Panaji, Goa. However, the venue of the Arbitration shall be decided by the sole Arbitrator taking into consideration convenience of the parties as well as his convenience.

24. It is re-iterated that all contentions of the parties including that of non-arbitrability are left open for the arbitral tribunal to decide.

25. The application for appointment of arbitration is disposed of in the aforesaid terms. There shall be no order as to costs.

NIVEDITA P. MEHTA, J.