
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
IN COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 2 OF 2024

Mr Imtiyaz Ahmed Gulam Nabi Peerzada ... Petitioner

Vs.

Mr Deepak Varandmal Wadhwa & Anr. .. Respondents

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Ms. Nishtha Garg *a/w. Aashka Shell, for Petitioner.*

Mr. Nikhil Waje *a/w. Jasim Shaikh, Vishesh Srivasatav, Prem Gada,
Siddhi Sawant, Anubhav Singh and Pratik Thorat, for Respondents.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Date : June 23, 2025

Order :

1. This is a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“***the Act***”).
2. The arbitration agreement in this case is contained in the Articles of Association of a company called Majestic Infra Projects Private Limited (Clause at Page 66 of the Petition). As drafted, the arbitration agreement brings within its fold, disputes and differences between directors of the company. This Petition is explicitly seeking the appointment of an arbitrator in connection with disputes among directors of the company.

3. The jurisdiction of this Court is restricted to examining existence of an arbitration agreement. On the face of it, it would have been normal to refer this matter to arbitration. However, on facts, it appears *prima facie* that the agreement no longer exists in respect of the disputes for which the invocation notice was issued.

4. The invocation notice is dated January 27, 2023 raising various disputes about alienation of properties of the company by the other directors, who are Respondents in these proceedings. However, about half a year later, on June 16, 2023, a suit was instituted by this very Petitioner arraying as defendants, these very Respondents, other related parties of these Respondents, as also purchasers of flats developed on the property owned by the said company in whose articles the arbitration agreement is found. The Section 11 Petition has been filed on October 6, 2023, which is well after the suit.

5. With the assistance of Counsel for the parties, the prayers in the Suit were examined and compared with the contents of the invocation notice. There is obviously a substantive overlap between the two and potentially the suit did not gain traction. The Petitioner has sought to invoke the arbitration clause which is indeed in existence, but evidently has been foregone in the respect of in respect of this cause of action.

6. Learned Counsel for the Petitioner the submits that some of the prayers in the suit were not prayers that would have been granted by the arbitral tribunal, in particular the prayer for cancellation of deeds of transfer in favour of third parties, and therefore, the suit had been filed. Learned Counsel for the Petitioner would submit that as regards other reliefs which would not impede on third party rights, the arbitration can commence.

7. I am unable to agree. The composite bundle of facts which led to the cause of action have already led to the filing of the suit that would effectively constitute a waiver of the arbitration agreement and to that extent it appears that the arbitration agreement's existence insofar as it relates to the dispute raised in the invocation notice would come to an end.

8. One view of the matter that was attractive at first blush was to leave this determination to the arbitral tribunal by making note of the fact that this Court would only look at formally valid existence of an arbitration agreement and treat the overlap as a matter of substantive existence which would need to be dealt with by the arbitral tribunal. However, it is writ large on the face of the record that a detailed plaint has been filed covering literally the same cause of action contained in the arbitration agreement. Therefore, I am inclined to take the view that the existence of the arbitration agreement has been undermined by the filing of the suit.

9. Consequently, this view is restricted to existence of an arbitration agreement not being found insofar as the arbitration agreement may relate to the disputes for which it is sought to be invoked. In the peculiar facts of this case, the Petition deserves to be *dismissed*.

10. At this stage, Learned Counsel for the Petitioner submits that the objections that have been accepted by this Court are but objections raised by the Respondents in its affidavit in reply and therefore, the Respondents ought not to file a Section 8 Application in the suit. On the face of it, this order is explicitly clear that insofar as these disputes are concerned, the arbitration agreement does not exist and therefore, there can be no scope for filing an application under Section 8 – the Respondents cannot have it both ways.

11. Likewise, should the Petitioner be advised to modify/amend the plaint and take up any facet that had been reserved for arbitration, the Petitioner shall be free to do so. Should the Respondents pursue such effort as advised, the same shall be dealt with by the Civil Court in accordance with law.

12. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]