

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
ARBITRATION APPEAL NO. 3 OF 2025  
WITH  
INTERIM APPLICATION NO. 1436 OF 2025  
IN  
ARBITRATION APPEAL NO. 3 OF 2025

M/S Sab Developers Through Partners ...Appellant  
i) Mr. Zohar H Zojwalla  
ii) Sanjay Shamji Gala

***Versus***

M/S. Vijay Enterprises Through Partners ...Respondents  
1. Mr. Bipin Vrajlal Shah & Ors.

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**Mr. Rajesh S. Datar**, a/w *Druti Datar, Akshay J. Khandarkar*, for  
the Appellant.

**Mr. Anilkumar Patil**, a/w *Bhavik Lalan (through VC), Zeel Jain,*  
*Digvijay Patil, i/b Sachin Bhavar*, for Respondents.

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CORAM : SOMASEKHAR SUNDARESAN, J.  
DATE : JULY 16, 2025

**Oral Judgement:**

**Context and Factual Background:**

1. This is an Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (“***the Act***”), challenging an order dated October 21, 2024 (“***Impugned Order***”) that rejected an Application of the Appellant filed under Section 8 of the Act before Learned Civil Judge, Senior Division, Kalyan.

2. The Respondent, M/s. Vijay Enterprises (“**Vijay**”) entered into a Development Agreement dated April 30, 2004 (“**Development Agreement**”) with the ‘Dhone Family’ to develop the suit property belonging to the latter. The Appellant, M/s. Sab Developers (“**Sab**”) entered into an agreement dated August 23, 2005 with Vijay, to develop that property (“**Subject Agreement**”).

3. It is common ground that the Subject Agreement has an arbitration agreement at Clause 23 (page 45). Accordingly, the parties have agreed that all disputes and differences between them in respect of any of the terms and conditions of the Subject Agreement or in respect of interpretation of any provision in that agreement or in respect of any other matter, cause or thing even if not contained therein or otherwise not provided for or relating to that agreement shall be resolved by reference to arbitration.

4. Vijay filed Special Civil Suit No. 188 of 2018 (“**Suit 188**”) before the Learned Civil Judge on June 20, 2018 in relation to disputes and differences with Sab. An Application under Section 8 was filed by Sab, on October 23, 2018. At the time Suit 188 was instituted, the plaint entailed the Kalyan Dombivli Municipal Corporation (“**KDMC**”) as Defendant No.2. However, a plain reading of the reliefs sought originally in Suit 188 would indicate that they were primarily for

rescission and cancellation of the Subject Agreement and to handover vacant and physical possession of the suit land to Vijay.

5. The documentation executed between the parties, including the Subject Agreement and power of attorney, both dated August 23, 2005, were sought to be declared as illegal and void, and various other connected and consequential reliefs were sought. Purely as an interlocutory measure, in prayer clauses (i) and (j), relief was sought against KDMC seeking that they be restrained permanently from taking any action against the suit property during the subsistence of the disputes between the parties.

6. The plaint in Suit 188 came to be amended much later on August 12, 2024 to seek additional prayers against KDMC. The Section 8 Application had not been adjudicated until then.

**Impugned Order:**

7. Eventually, when the Section 8 Application was heard and dealt with by the Learned Civil Judge it was ruled in the Impugned Order that that Sab could not postpone the payment of remaining consideration for an indefinite period. Vijay was held to be entitled to terminate the Subject Agreement unilaterally in view of Section 27 of the Specific Relief Act, 1963. Therefore, since the Subject Agreement

was held to be validly and finally rescinded, no arbitration agreement would subsist for referral of disputes under the Subject Agreement to arbitration.

8. The Impugned Order also holds that the reliefs sought against KDMC would not have been amenable to arbitration. Such reliefs being *in rem*, would be beyond the scope of arbitration, and therefore it was held that arbitration could not be the avenue to restrain KDMC from taking action against the suit property on account of non-payment and other violations as alleged by KDMC. With the aforesaid observations, the Learned Civil Judge was pleased to reject the Application filed under Section 8 of the Act and directed that Suit 188 must proceed and that the dispute was not amenable to arbitration.

**Analysis and Findings:**

**Application of Section 8:**

9. Having heard the Learned Counsel for parties and having perused the record with their assistance, I have examined the Impugned Order. It is seen that the Impugned Order returns detailed findings on the rescission of contract and its validity. It is noteworthy that the termination notice was issued on September 25, 2017; Suit 188 was filed on June 20, 2018; and the Section 8 Application was filed on October

23, 2018. Therefore, the Court's jurisdiction had been invoked after the 2015 Amendments to the Act were given effect on October 23, 2015. Therefore, the amended provision of Section 8 of the Act would need to be applied to the Application filed by Sab. The provisions of Section 8(1) as applicable, are noteworthy, and are extracted below:-

*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.*

*[Emphasis Supplied]*

10. When an Application under Section 8 is filed before the Court on the premise that the disputes are amenable to the jurisdiction of arbitration the Court is required to examine the subject matter of the suit and compare that with the subject matter of the arbitration agreement whose existence is claimed. Specifically, the subject matter of Suit 188 was the cancellation of the Subject Agreement. The

arbitration agreement contained in Clause 23 of the Subject Agreement is a wide-ranging provision that would bring within its sweep every dispute and difference between the parties including the interpretation of the Subject Agreement. Once it is found, *prima facie*, that the arbitration agreement exists, and that the subject matter of the proceedings before the judicial authority is covered by the arbitration agreement, the judicial authority is required by law to refer the parties to arbitration.

11. The only requirement is that an application by a party to the arbitration agreement has to be made before making the first statement on the substance of the dispute. It is common ground that the Section 8 Application filed by Sab was within this deadline. In my opinion, the Learned Civil Judge ought to have restricted the scope of enquiry to examining the existence of the arbitration agreement, and whether the subject matter of Suit 188 was covered by the arbitration agreement.

12. Section 8(1) of the Act, after the amendment, provides that notwithstanding any judgment, decree or order of the Supreme Court or any Court, the judicial authority must refer a party to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. The need for the legislature to insert a *non obstante* provision in connection with any judgment of the Supreme Court or any other Court

is now well understood to have been aimed at various judgments on the subject. A need was felt to make a departure from the law declared in ***Sukanya Holdings***<sup>1</sup>, in which it was held that if a cause of action involved multiple strands, one of which entailed arbitration, the strands could not be segregated and therefore, the judicial forum must continue with the proceedings that would otherwise attract arbitration. The 246<sup>th</sup> Law Commission Report that led to the 2015 Amendments specifically indicated that the amendment to Section 8 was intended to depart from the declaration of the law in ***Sukanya Holdings***.

13. The departure in the standard to be applied, led to the position that the judicial authority must return a finding on the existence (or absence) of an arbitration agreement. The subject matter of the proceedings before the judicial authority must be compared with the subject matter of the arbitration agreement. If the two are the same, the Court is obligated to refer the parties to arbitration.

**Purported Reasons in Impugned Order:**

14. The reasoning in the Impugned Order is contained in Paragraphs 9 and 10, which would bear reproduction:

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<sup>1</sup> *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Anr – (2003) 5 SCC 531*

“9. Perused record. Heard both side. Though, in the agreement it is not specifically mentioned that time was the essence of the contract, Developer could not postpone the payment of remaining consideration for indefinite period. The opponents issued notice for termination of agreement, rescission of the contract, could be unilateral in view of Section 27 of the Specific Relief Act. It is well settled that contract may be rescinded without consent of the parties on grounds laid down in Section 27 (1)(a) and (b) and no aid of the court is necessary. By ground of declaration that contract has been validly rescinded, the Court does not create a right in favour of party. It only decided the validity of the rescission made by the party. The contract can be unilaterally rescinded by the opponents when the consideration was not paid within reasonable time. Therefore development agreement itself is not in existence which is unilaterally. Hence question does not arise to refer for arbitration.

10. By issuing agreement termination notice opponents have refused to perform their part of contract. But till date applicant had not demanded specific performance of contract. Said relief is already barred by limitation. Arbitration cannot be used to enforce the specific performance of contract. Opponents are also seeking relief against K.D.M.C. to restrain from taking cognizance for auction of suit property. Said issue cannot be tried by Arbitrator. Considering all reason discussed above, there is no question to refer the suit claim for arbitration. Therefore, application is liable to be rejected. Accordingly following order is passed.

[Emphasis Supplied]

15. I find from the Impugned Order that there is no discussion on the scope of Section 8 and how it is applied to the facts of the case. The amendment to the plaint to bring in new prayers in Suit 188 in relation to specific actions of KDMC were effected only on August 12, 2024. The Impugned Order discusses the KDMC element only in passing. The core finding is fundamentally premised on the proposition that the Subject Agreement was validly rescinded and that upon rescission, the arbitration agreement contained in it would not survive.

16. That apart, the Impugned Order wades deep into firm determinative findings on termination of the Subject Agreement; whether any claim on specific performance was barred by limitation; and that termination was permissible, bordering on declaring on the merits of the termination being valid. Such an approach is not permissible at all, when the jurisdiction being exercised was under Section 8 of the Act.

*Arbitration Agreement Survive Termination:*

17. The Impugned Order is also diametrically opposed to well-settled law that the arbitration agreement would survive termination of any agreement in which it is contained, and that disputes and

differences between the parties would continue to be governed by the arbitration agreement. The foundation of this principle is Section 16(1) (a), which bears reproduction:

*16. Competence of arbitral tribunal to rule on its jurisdiction.—*

*(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*

*(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*

*(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

*[Emphasis Supplied]*

18. Therefore, even if the Subject Agreement is held to be validly terminated, the arbitration agreement in Clause 23 would survive. Therefore, the disputes between the parties including disputes relating to the termination, would be arbitrable. The Learned Civil Judge ought to have only considered the existence of the arbitration agreement, and whether the subject matter of Suit 188 was covered by the scope of coverage of the arbitration agreement. Even if the Learned Civil Judge were of the view that the Subject Agreement had been rescinded, he

could not have returned a finding that the arbitration agreement did not survive.

19. Consequently, I am of the opinion that the Impugned Order is not sustainable. The Impugned Order has embarked upon pronouncing on the very subject matter of Suit 188, which was the cancellation of the Subject Agreement. If Vijay, the Plaintiff in the suit had sought the termination to be confirmed and declared by the Court as being valid, that would be the final relief that he would seek, for which trial would need to be conducted. Perhaps what the Learned Civil Judge intended to state was that *prima facie*, the termination was valid.

20. However, for the reasons stated above, that would have no relevance to the existence of the arbitration agreement. When considering a Section 8 Application, the Court must examine the existence of an arbitration agreement. The finding in the Impugned Order that the arbitration agreement does not exist is based on the Subject Agreement having been, purportedly, validly and conclusively rescinded. This very finding is contrary to the foundational principle of arbitration law – that the arbitration agreement would survive the termination of the agreement containing it.

21. As regards the element of reliefs having been sought against KDMC, which are said to be impossible to pursue in arbitration, it was for Vijay as *dominus litis* to have opted for the various means available to him to challenge actions of KDMC and to seek reliefs against KDMC. Merely because six years after the suit was initiated, substantive prayers were added against KDMC, it would not follow that the Section 8 Application filed six years earlier would get undermined. Suit 188 was for the final declaratory relief of valid termination of the Subject Agreement, and the arbitration agreement is contained in the Subject Agreement. Interpretation of the Subject Agreement including whether it was validly terminated would squarely fall in the domain of arbitration proceedings.

*Conclusions and Costs:*

22. Consequently, the analysis in Paragraphs 9 and 10 of the Impugned Order is wholly untenable and cannot be sustained. The Impugned Order is erroneous and is liable to be set aside.

23. Learned Counsel for Vijay submits that during the pendency of this Appeal, Sab has purported to sell its rights in the Subject Agreement to a third party, namely, Neha Developers. Such third party is not a party to the arbitration agreement, and consequently, the

contention is that regardless of the contents of the Impugned Order, a dispute which would necessarily entail assailing the interests of Neha Developers cannot lend itself to adjudication by arbitration. On the other hand, Learned Counsel for Sab submits that even Vijay has taken other actions during the pendency of the Appeal. According to him, a Confirmation Deed has been executed by Vijay in favour of itself purporting to act on a power of attorney given to Vijay by the Dhone Family.

24. All these are facets of merits and developments after the Impugned Order, which have no relevance for purposes of this Court's consideration of the validity of the Impugned Order, and examining whether the dismissal of the Section 8 Application was valid. This is an appellate jurisdiction. In the absence of the forum of the first instance having dealt with something, it would not be appropriate for this Court to comment on the implications of subsequent events. Any new developments may present the parties with new elements of a cause of action and they are left to their own devices and their rights in law, contract and equity to pursue such action as advised, in accordance with law.

25. My jurisdiction being a creature of an appeal provision, the analysis contained herein is restricted to its relevance for purposes of

examining the validity of the Impugned Order. For purposes of this Appeal, I have restricted myself to examining the validity of the Impugned Order.

26. Needless to say, nothing in this judgment is an expression of an opinion on merits of the case. In fact, the foundation of this judgment is that the Impugned Order fell into grave error in commenting on the merits and that too on a facet which was subject matter of final relief in the suit, and worse, making that comment the basis on which the Section 8 Application was rejected. The scope of review for purposes of this judgment is strictly limited in terms of Section 8(1) i.e. examining the *prima facie* existence of an arbitration agreement covering the subject matter of the suit, read with Section 37 of the Act.

27. Nothing contained in this judgement is meant to impinge upon Vijay's rights to seek relief against KDMC or Neha Developers in such forum as available in law. The Impugned Order, *in its terms*, is untenable and is set aside for that reason. Any other course of action available in law to Vijay are not meant to be pronounced upon in this judgement.

28. With the aforesaid observations, the Impugned Order is quashed and set aside. Considering the outcome in this Appeal and the conduct of the parties, I have been persuaded to hold that costs need not follow the event. No costs are imposed.

29. 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.]**