

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM. ARBITRATION APPLICATION NO. 103 OF 2025

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Riyad Rashid Sattar Omerbhoy

...Applicant

Versus

Nadeem Majid Omerbhoy & Ors.

...Respondents

Mr. Firoz Bharucha a/w. *Mr. Purazar Fouzdar and Ruddhi Bhalekar i/b Purazar Fouzdar, for Applicant.*

Mr. Kirti Munshi, Senior Advocate a/w. *Mr. Vyom Shah, Z.A. Jariwala, Ganesh Ambekar i/b Jariwala Associates, for Respondent Nos. 1a, 1b and 1c.*

Mr. Aniesh Jadhav a/w. *Ms. Preeti Agarwal i/b Harish Joshi & Co., for Respondent No. 2.*

Mr. Kunal Dwarkadas a/w. *Neil Dutta and Ayan Roy i/b Wadia Ghandy & Co., for Respondent Nos. 5 to 8.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Date : March 21, 2025

P. C.

1. This is an Application under Section 11 of the Arbitration and Conciliation Act, 1996 ("***the Act***").

2. The disputes and differences between the parties relate to a Partnership Deed dated August 7, 1986. The arbitration agreement is contained in Clause 26 (Page 47 of the Application). In the interest of

brevity, the arbitration agreement is not being extracted here. Suffice it to say that this matter falls within the jurisdiction of this Court.

3. The objections are primarily from Respondent Nos. 1a, 1b and 1c. The objections are manifold. The first objection is that the father of the Applicant has himself filed a suit in connection with the disputes with the other members of the family. Although he later unconditionally withdrew the suit during his lifetime, the submission is, the election to file a suit was a conscious election to waive the arbitration agreement for all time to come. Consequently, it is submitted, his heirs namely the Applicants would not be entitled to invoke arbitration now even if at this stage the cause of action is primarily for rendition of accounts. This is an issue about arbitrability rather than about existence of the arbitration agreement. Whether there is a waiver, and to what extent it would have been a waiver in respect of which cause of action, are all mixed questions of fact and law. The determination of these questions fall squarely in the domain of the arbitral tribunal.

4. The second objection is that the invocation notice under Section 21 of the Act has not been appropriately invoked against Respondent Nos. 1a and 1c, namely, Heena Majid Oomerbhoy and Nargis Majid Oomerbhoy. A plain reading of the invocation notice dated August 16, 2024 (found at Page No.

50) would show that the two individuals are named as addressees in the said invocation notice. Even if there is a dispute about whether those two individuals received the invocation notice at the time it was issued, the fact is that the notice is annexed to the Application. After the receipt of the notice, Learned Senior Counsel has received instructions from these two individuals to resist this Application. Consequently, going by the substance and the overall objective of the Act, no useful purpose would be served expending further judicial scrutiny on this issue of invocation.

5. The third issue is about the power of attorney issued by the Applicants to an individual who has affirmed the Application. The submission is that the contents of the verification clause and the contents of the power of attorney are mutually inconsistent inasmuch as it would not have been possible for the individual who executed the Application to have personal knowledge about the facts for her to be able to depose as to the facts in the Application. This facet too does not need to detain my attention, considering the scope of jurisdiction of the Section 11 Court, namely, confining itself to ascertaining the existence of an arbitration agreement under Section 11(2A) of the Act. The verification clause of the individual who has executed this Application makes it clear that the knowledge purported to be had by the Applicant is based on the record available. That the despondent has a power of attorney

is not inconsistent with the verification based on the fact that the knowledge and belief is derived from a review of the record. Learned Counsel for the Applicant submits that the Applicant is personally present in Court and can ratify all the contents of the Application. In any case, I would not need to deal with this facet of the matter considering the scope of jurisdiction of the Section 11 Court.

6. Finally, another objection is on the basis that the only asset of the Partnership Firm was a tenanted flat at a premises called Jer Mansion in respect of which claims can no longer lie as a matter of fact. This would again be a matter of fact that would necessitate delving into the evidence and the material on record, which clearly lies solely in the domain of the arbitral tribunal.

7. The scope of review under Section 11 is explicitly set out in Section 11(6A) of the Act. It is now trite law, with particular regard to the decisions of a seven-judge bench in the *Interplay Judgement*¹ followed by multiple others, including *SBI General*² and *Patel*³ that the Section 11 Court ought not to venture beyond examining the existence of a validly existing arbitration agreement that has been formally executed. Even questions of existential

¹ *In Re: Interplay Between Arbitration Agreements Under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899 – (2024) 6 SCC 1*

² *SBI General Insurance Co. Ltd. v. Krish Spinning – 2024 SCC OnLine SC 1754*

³ *Ajay Madhusudan Patel v. Jyotrindra S. Patel – 2024 SCC OnLine SC 2597*

substance is a matter that falls squarely in the domain of the arbitral tribunal, in view of Section 16 of the Act.

8. Considering the law now being declared very clearly by the Supreme Court that the Section 11 Court must confine itself to ascertaining the existence of the arbitration agreement, i.e., the formal existence rather than answering existential questions about the arbitration agreement, this Application deserves to be disposed of finally.

9. At this stage, Learned Counsel for the parties jointly submit that it would be appropriate to name Justice (Retd.) Akil Kureshi, Former Chief Justice of Rajasthan High Court as the arbitrator for adjudicating the disputes in the aforesaid reference. Consequently, the Application is ***finally disposed of*** in the following terms :

A] Justice Akil Kureshi, Former Chief Justice of Rajasthan High Court and Tripura High Court, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;

Office Address:-617, Raheja Chambers, 6th
Floor, Free Press Journal Marg, 213 Nariman
Point, Mumbai –400021.

Email : akil.kureshi@gmail.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Petitioner within a period of one week from today. The Petition shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

10. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

11. 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.]