

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

COMMERCIAL ARBITRATION APPLICATION NO. 383 OF 2024

Vardhaman Builders

...Applicant

Versus

1. Narendra Balasaheb Ghatge

2. Nilesh Vasant Ghatge

...Respondents

Mr. Kevic Setalvad, Senior Advocate *a/w Mr. Jehan Lalkaka, Ms. Rashna Khan, Ms. Poorva Garg and Mr. Simon Mascarenhas i/b Mulla & Mulla And Craigie Blunt & Caroe, for Applicant.*

Mr. Mayur Khandeparkar *a/w. Ms. Disha Jain i/b Kevin Pereira, Advocates for Respondent Nos.1 & 2.*

CORAM: SOMASEKHAR SUNDARESAN, J.

Reserved on : April 21, 2025

Pronounced on: November 3, 2025

JUDGEMENT:

1. This is an Application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (“***the Act***”) seeking appointment of an arbitrator to adjudicate disputes and differences between the parties in connection with a Memorandum of Understanding dated August 27, 2005 (“***Development Agreement***

2. The controversy about appointment of an arbitrator is linked to the peculiar and chequered history of the litigation between the parties. According to the Applicant, Vardhaman Builders (“**Vardhaman**”), the existence of the arbitration agreement is writ large on the face of the record; an earlier arbitral award has been set aside; and therefore, this Application must simply be allowed.

3. According to the Respondents, Narendra Balasaheb Ghatge and Nilesh Vasant Ghatge (“**Ghatges**”), this is the third application seeking constitution of an arbitral tribunal filed by Vardhaman. On the last attempt, a Learned Single Judge of this court had firmly rejected the application, which was also not interfered with by the Supreme Court. Therefore, it is contended that this Application deserves to be dismissed.

4. The Development Agreement entailed redevelopment of a building standing on the land owned by the Ghatges. Vardhaman was to pay Rs. 1.5 crores for rights to develop the property on an exclusive basis, with the Ghatges giving up an earlier entitlement to 30% of the net profits accruing as a result of the development and exploitation of the property. A sum of Rs. 22 lakhs were paid by Vardhaman to the Ghatges upon execution of the Development Agreement. Two flats of

1,000 square feet each were to be provided to the Ghatges free of cost, with a third flat at a discounted rate.

5. The following summary of facts would be relevant:

- i) On *July 24, 2006*, the Ghatges terminated the Development Agreement and sought to refund the amount of Rs. 22 lakhs to Vardhaman, which refused the refund, alleging a blatant breach of a binding agreement;
- ii) Vardhaman invoked arbitration under Section 21 of the Act by a notice dated *September 2, 2006*;
- iii) An arbitral award came to be passed on *November 22, 2011* (“***Arbitral Award***”) rejecting the Vardhaman’s claim for specific performance and damages;
- iv) Arbitration Petition No.286 of 2016 (“***Petition 286***”) filed under Section 34 of the Act by Vardhaman came to be allowed, whereby the aforesaid Arbitral Award rejecting the specific performance and damages, was quashed and set aside on *February 8, 2017*;

v) An appeal by the Ghatges under Section 37 of the Act, being Arbitration Appeal 257 of 2017 (“***Appeal 257***”) was dismissed by a Learned Division Bench of this Court, thereby upholding the order of the Section 34 Court quashing and setting aside the Arbitral Award;

vi) A fresh Section 11 Application No. 78 of 2018 (“***Application 78***”) came to be filed by Vardhaman on the basis of the original invocation notice dated September 2, 2006;

vii) The Section 37 Order upholding the Section 34 Order was challenged by the Ghatges in the Supreme Court, which remanded the Appeal 257 back to the Learned Division Bench of this Court on *April 6, 2018*;

viii) Upon such remand, in view of Appeal 257 having been remanded, Application 78 was withdrawn by Vardhaman on *April 12, 2018*;

ix) The Section 37 Appeal is pending till date;

x) Meanwhile, the Ghatges executed a new development agreement with D.M. Realty, another developer on *June 25, 2018* for redevelopment of the same property;

xi) A second Section 11 Application bearing Application No.165 of 2023 (“***Application 165***”) was filed by Vardhaman on *July 5, 2023*. A new invocation is said to have been made by a notice dated *June 20, 2023*, this time also impleading D.M. Realty. Vardhaman is said to have learnt about the D.M. Realty’s role only in 2023;

xii) A Section 9 Petition No. 321 of 2023 (“***Petition 321***”) was also filed by Vardhaman, which led to *ad interim* reliefs, which continued until *June 15, 2023*. However, Petition 321 was dismissed by the Learned Single Judge by a judgment dated *July 11, 2023*;

xiii) The order rejecting relief under Section 9 in Petition 321 was set aside by way of remand by a Learned Division Bench of this Court by an order dated December 19, 2023, and Petition 321 came back for consideration by the Learned Single Judge;

xiv) On *April 19, 2024*, by a common judgment, Application 165 and Petition 321 were dismissed by the Learned Single Judge of this Court (“***Earlier Rejection Order***”);

xv) On *September 2, 2024*, the Supreme Court refused to entertain a Special Leave Petition against the dismissal of the Application 165 and Petition 321 (“***SLP Dismissal Order***”); and

xvi) On *October 4, 2024*, the third Section 11 Application No. 383 of 2024 (“***Application 383***”) has been filed, but yet again, on the basis of the original invocation notice dated September 2, 2006.

Analysis and Findings:

6. What is apparent from the foregoing is that the invocation notice remains the original one, based on which the eventual Arbitral Award was passed, rejecting Vardhaman’s claim. That Arbitral Award was set aside in two concurrent rounds but an appeal in the Supreme Court has led to the matter being remanded to the Section 37 Court.

7. If the Arbitral Award is upheld, the arbitration agreement, insofar as it relates to the disputes for which arbitration had been originally invoked, would have worked itself out and there would be no scope to arbitrate the same disputes again, and that would mean Application 383 cannot be entertained, since on the face of it, the arbitration agreement, for purposes of resolving the very same disputes, would not subsist.

8. However, if the Arbitral Award is set aside again, the arbitration agreement would subsist insofar as it relates to the disputes for which arbitration had been originally invoked, which would lead to Application 383 being capable of consideration.

9. It is in that context that one must examine the facts as they have transpired. Application 78 was withdrawn on the premise that the Supreme Court had remanded the Section 37 Appeal back to the Learned Division Bench of this Court. In other words, Vardhaman preferred to await what transpire in the remanded appeal, to then consider whether to invoke arbitration afresh.

10. Yet, Application 165 was filed in 2023, based on a fresh invocation notice dated June 20, 2023. However, this time, a third party, D.M. Realty, the new developer appointed by the Ghatges, was

sought to be added, potentially as a veritable party. Application 165 was dismissed by the Earlier Rejection Order dated April 19, 2024 passed by a Learned Single Judge of this Court. When considering Application 165, the Learned Single Judge also considered Petition 321 filed under Section 9 of the Act, which had been remanded to the Learned Single Judge. By this time, the new developer, D.M. Realty, was already constructing and redeveloping on the land that had been subject matter of the Development Agreement.

11. The Earlier Rejection Order is emphatic in its terms – that the Application 165 was time barred. However, the Earlier Rejection Order had, at its core, emphasised the absence of any justification for issuance of any protective relief under Section 9 of the Act. The core focus of the Earlier Rejection Order is that it is not possible to grant relief in anticipation of specific performance particularly when the construction by D.M. Realty was well underway. The Learned Single, in multiple references in the Earlier Rejection Order, has explicitly stated that damages can always be claimed for wrongful termination by the Ghatges, and has also indicated that the claim for damages can always await the finality of the decision of the Appeal.

12. Vardhaman, at that time, had been insistent on specific performance and was pressing for serious inroads into the project that was underway, under Section 9 in Petition 321, which was heard along with Application 165. Both proceedings have been dismissed by the common judgment contained in the Earlier Rejection Order. The Earlier Rejection Order also held that the withdrawal of Application 78 was without liberty to file afresh.

13. On challenge, the Supreme Court did not entertain the special leave petition against the Earlier Rejection Order and passed the SLP Dismissal Order. The implication of this development, as canvassed on behalf of the Ghatges, is that nothing survives in the current Application 383 under Section 11 since it is the same as the Application 165, which has been emphatically rejected in the Earlier Rejection Order, and not interfered with by the Supreme Court in the SLP Dismissal Order.

14. It is apparent that the challenge by Vardhaman was directly by way of a special leave petition since the Earlier Rejection Order was a combined order under both Section 9 and Section 11 of the Act. Normally the appeal from a Section 9 Order would go to a Learned

Division Bench under Section 37 of the Act, but a special leave to appeal was petitioned and rejected.

15. This leaves Vardhaman in a piquant situation. Mr. Kevic Setalvad, Learned Senior Advocate for Vardhaman has instructions to submit that Vardhaman has no intention of pursuing specific performance. He would submit that he has instructions to submit that Vardhaman's claim is solely restricted to damages. Yet, Vardhaman is relying solely on the earlier invocation notice dated September 2, 2006.

16. I have given my careful consideration to the situation at hand. On the one hand, in the Earlier Rejection Order, Vardhaman has been held to be capable of pursuit of damages and not specific performance. In the same breath, the Section 11 Application (Application 165) was rejected on the premise of being time-barred. This is where one has to consider the import of the SLP Dismissal Order. It is now well declared law that rejection of a petition seeking special leave to appeal, with or without reasons, would not lead to a merger. Yet, if reasons are set out as to why the special leave petition is being rejected, such reasons would be law declared by the Supreme Court for purposes of Article 141 of the Constitution of India.

17. Mr. Setalvad has repeatedly insisted that there has been no fresh invocation. This would lead to his contention flying in the teeth of the Earlier Rejection Order. Indeed, the Earlier Rejection Order has not merged into the SLP Dismissal Order, which is also not an order with reasons. The Supreme Court was simply disinclined to entertain a special leave petition. No Civil Appeal came into existence. Therefore, even while I have to note that the SLP Dismissal Order does not lead to the Earlier Rejection Order merging into a view expressed by the Supreme Court, the Earlier Rejection Order and the analysis in its terms is firmly in existence.

18. Yet, one cannot lose sight of the fact that if Appeal 257 were to be rejected, it would follow that the Arbitral Award was always validly set aside. That would lead to the arbitration agreement subsisting, warranting adjudication in arbitration from square one, indeed this time focussing solely on damages for wrongful termination, and not on specific relief. If one were to consider that the time to invoke arbitration has passed and it can never be invoked ever again, that would be in conflict with the aforesaid position.

19. It is because Vardhaman has made no change in its pleaded terms in the fresh Section 11 Application, that this Application cannot be

allowed in its terms. If Vardhaman can invoke arbitration after disposal of Appeal 257, it can invoke arbitration now too on the premise that the Arbitral Award, at present, is not in existence. It was set aside by the Section 34 Court, and such setting aside was upheld by the Section 37 Court. The Supreme Court was not satisfied with the reasoning of the Section 37 Court and has remanded the matter back to the Learned Division Bench. Therefore, the stage at which the matter lies is that the Arbitral Award is not in existence and it is the decision in Appeal 257 that would lead to an outcome as to whether Arbitral Award would spring back to life.

20. Appeal 257 has been formally admitted on January 7, 2019 and is still pending. That apart, the record clearly shows that the Ghatges indeed participated in discussions on constituting an arbitral tribunal through 2018, and since the parties could not agree, it led to filing of Application 165, which in turn was rejected in the context of Vardhaman insisting on specific relief and in that context being regarded as time-barred. Therefore, while it would not be possible to entertain yet another Application under Section 11 on the very same terms, relying merely on a statement made across the bar that specific performance is not being sought, one cannot ignore the fact that the arbitration agreement has not hit the end of the road. If the Learned

Division Bench dismisses the Ghatges' appeal, it would follow that the Arbitral Award would remain quashed and set aside, which can only mean that the arbitration agreement that subsists, still has to run its course.

21. It is only because of the ambiguity in the stance of Vardhaman and its insistent reliance on the invocation notice of September 2, 2006, and the emphatic ruling on that invocation found in the Earlier Rejection Order, that this Application cannot be allowed as framed.

22. Therefore, in my opinion this Section 11 Application i.e. Application 383 deserves to be ***disposed of*** in the following terms:-

- a) Application 383 is disposed of without making a reference to an arbitral tribunal since it is yet another attempt under Section 11 of the Act, on precisely the very same terms as pleaded in Application 165, which has been emphatically dismissed by a Learned Single Judge of this Court in terms of the Earlier Rejection Order;

- b) However, Vardhaman is given liberty to issue a fresh invocation notice to the Ghatges, putting them clearly to notice as to what precisely is sought to be pursued at this stage, and making it clear that there is no question of specific reliefs being sought, and that damages for wrongful termination of the Development Agreement alone are being pursued, in the terms articulated by the Learned Single Judge in the Earlier Rejection Order as being capable of pursuit;
- c) Should the Ghatges not co-operate with constituting an arbitral tribunal, the cause of action to file a fresh application under Section 11, this time in terms of the fresh invocation notice that is different from the earlier invocation notices dated September 2, 2006 and June 20, 2023 would arise. Such application may then be filed; and
- d) All of the aforesaid and any arbitration that commences pursuant to such renewed fresh invocation shall be subject to the outcome in the

Appeal 257, which has been admitted and is pending before the Learned Division Bench.

23. This Application is therefore *disposed of* as not being maintainable in its terms on account of the earlier adjudication on the very same premises as ruled on in the Earlier Rejection Order, but with liberty being given as above. Indeed, Vardhaman cannot be left remediless in its pursuit for damages for wrongful termination in the teeth of the Section 34 Court having ruled that the Arbitral Award deserves to be set aside and the Supreme Court having remanded the matter to the Section 37 Court, and even the Earlier Rejection Order having held that a claim for damages may be pursued. Needless to reiterate, all such proceedings would be subject to the outcome in the Appeal 257, as articulated above, and any further appeal from such outcome.

24. 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.]