
(2014) 10 BOM CK 0009

In the Bombay High Court

Case No : Notice of Motion (L) No. 2410 of 2014 In Suit (L) No. 867 of 2014

Ajay Wadhwa

APPELLANT

Vs

Symphony Co-operative Housing Society Limited

RESPONDENT

Date of Decision : 29-10-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 2(1)(h), 34, 5, 8
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(d), 9
Constitution of India, 1950 — Article 227

Citation : (2014) 10 BOM CK 0009

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : P.K. Samdhani, Senior Advocate a/w Aparna Devkar and Jinal Gogri i/b Maniar Srivastav, Associates, Advocate for the Appellant; Arun Panicker, Udayan Jain, Mittal Oza and Mukul Lather i/b S.K. Srivastav and Co, Advocate for the Respondent

Judgement

R.D. Dhanuka, J.—By this Notice of Motion filed by defendant no.9 it is prayed that this court be pleased to frame preliminary issue of jurisdiction under section 9A of the Code of Civil Procedure, 1908 and adjudicate upon the same first in point of time and also seeks stay of all civil proceedings in the suit till disposal of this Notice of Motion. Some of the relevant facts for the purpose of deciding this Notice of Motion are as under :-

2. The defendant no.9 is one of the member of the defendant no.1 society. Defendant no.1 society had passed a resolution for inviting offers in order to redevelop the suit property on 12th June, 2011. The society ultimately entered into a development agreement with the plaintiff on 23rd June, 2012.

3. Clause 24 of the said development agreement provides for arbitration agreement which is extracted as under :-

24.1 Any dispute, controversy, claim or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement

or the breach, termination or invalidity thereof ("Dispute") shall be referred to and finally resolved by agreement. This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration proceeding, which award, if appropriate, shall determine whether and when any termination shall become effective.

24.2 The seat of the arbitration shall be at Mumbai, India and the arbitration proceedings shall be conducted under, and in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory re-enactment thereof in force in India at the time such arbitration is commenced.

24.3 The arbitration proceeding shall be conducted by a sole Arbitrator ("the Tribunal") to be mutually appointed by the Parties and failing such mutual agreement on the appointment, the sole arbitrator shall be appointed in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

24.4 The language of the arbitration proceeding shall be English.

24.5 The award rendered by the Tribunal shall be in writing and shall set out the reasons for the Tribunal's decision. The award shall allocate or apportion the costs of the arbitration, as the Tribunal deems fair. The Tribunal shall also be entitled to grant any injunction and/or specific performance if it considers such remedy appropriate.

24.6 The Parties agree that the arbitration award shall be final and binding on the Parties.

24.7 The Parties expressly waive and forego any right to punitive, exemplary, or similar damages in connection with any Dispute and no such damages shall be awarded or provided for in any Dispute resolution proceeding under this Article[25].

24.8 Notwithstanding anything to the contrary contained herein, the Parties shall have the right to approach courts of competent jurisdiction at any point of time for suitable interim relief, including injunctions as may be needed to maintain the status quo in aid of the arbitration to any Tribunal.

24.9 The provisions contained in this Article [25] shall survive the termination of this Agreement.

4. The plaintiff has filed a notice of motion for interim reliefs. In the plaint, the plaintiff has prayed for a declaration that the development agreement dated 21st June, 2012 executed by and between the defendant no.1 and the plaintiff is valid, binding and subsisting and also seeks order and injunction against defendant nos. 2 to 24 and their family members, servants, agents and/or person or persons claiming through or under them to comply with the terms of the development agreement and to vacate and handover the flats and garages in their respective possession to the plaintiff. Some of the defendants including defendant no.9 have filed affidavit in reply opposing the reliefs in Notice of

Motion on various grounds. The said notice of motion is pending.

5. In so far as this Notice of Motion is concerned, it is filed on the premise that there is an arbitration agreement exist as recorded in Article 24 of the development agreement entered into between the plaintiff and the society and in view of such agreement, in view of section 5 of the Arbitration and Conciliation Act, 1996, this court has no jurisdiction to entertain this suit. Defendant no.9 therefore seeks that the preliminary issue of jurisdiction under section 9 of the Code of Civil Procedure, 1908 be framed by this court. After hearing the learned counsel for the parties, following issue is framed under section 9A of the Code of Civil Procedure, 1908 :-

Whether this court has jurisdiction to entertain, try and dispose off this suit ?

6. Learned counsel appearing for the applicant in the Notice of Motion submits that though there is an arbitration agreement between the plaintiff and defendant no.1 society and the defendant no.9 and other members of the society who are claiming through the society are joined as party to this proceedings, instead of filing the arbitration proceedings, the plaintiff has deliberately chosen to file civil suit. This court has no jurisdiction to entertain, try and dispose of the suit. Reliance is placed on section 5 of the Arbitration and Conciliation Act and it is submitted that since suit is not one of the proceedings provided under the provisions of Arbitration and Conciliation Act, 1996, this court has no jurisdiction to entertain this suit. It is submitted that since suit is not one of the proceeding provided under the Arbitration and Conciliation Act, no court can intervene in this proceedings.

7. In support of this submission, learned counsel placed reliance on the judgment of Delhi High Court in case of The Handicrafts & Handlooms Exports Corporation of India Limited vs. Ashok Metal Corporation and Another rendered on 25th May, 2010 in RFA 219/2009. Reliance is placed on paragraphs 2, 5, 15, 21, 24 and 29. It is submitted that almost the plaintiffs could have filed the interim application before civil court till arbitration agreement was invoked by the plaintiff and not a suit of this nature by which the plaintiff has prayed for substantive reliefs.

8. Learned counsel also placed reliance on the judgment of the Supreme Court in case of Chatterjee Petrochem Co. and another vs. Haldia Petrochemicals Ltd. and others rendered on 10th December, 2013 in Civil Appeal No.10932 of 2013. It is submitted that since the arbitration agreement exist in the development agreement between the plaintiff and defendant no.1 and the members of the society are claiming through defendant no. 1 society, members of the society are entitled to file this proceedings for framing preliminary issue under section 9(A) of the Code of Civil Procedure. It is submitted that this suit is thus not maintainable before this court in view of the arbitration agreement.

9. Learned counsel appearing for the society opposes this Notice of Motion on the ground that in the affidavit in reply filed by defendant no.9 and some of the other defendants in the Notice of Motion filed by the plaintiff, these defendants

have disputed the development agreement. My attention is invited to the paragraphs 22 and 57 of the affidavit in reply filed by those defendants in which they have disputed the development agreement itself. It is submitted that those defendants are blowing hot and cold by raising different pleas which are inconsistent to each other. It is submitted by the learned counsel that the jurisdiction of the civil court is not barred. Defendant no.1 society who is party to the arbitration agreement has not raised any issue of jurisdiction of this court or that the suit is not maintainable.

10. Learned counsel appearing for the other defendants are supporting the applicant to this Notice of Motion and have adopted the submissions made by the learned counsel appearing for the applicant.

11. Mr.Samdhani, learned senior counsel appearing for the plaintiff on the other hand would submit that under section 9 of the Code of Civil Procedure, the court has jurisdiction to try all suits of the civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Learned senior counsel submits that an arbitration agreement is recorded between the plaintiff and defendant no.1 society in the development agreement, jurisdiction of civil court is not barred. If any such civil suit is filed which is between the parties who are parties to the arbitration agreement and the subject matter of the suit and the arbitration agreement are the same, the defendant can apply for referring the parties to the arbitration under section 8 of the Arbitration and Conciliation Act,1996. It is submitted by the learned senior counsel that the Notice of Motion filed by the defendant no.9 is not by way of an application under section 8 of the Arbitration and Conciliation Act but the defendant no.9 only seeks that this court shall frame a preliminary issue under section 9(A) of the Code of Civil Procedure, 1908. It is submitted that since there is no application made by defendant no.9 under section 8 of the Arbitration and Conciliation Act, this court cannot refer the parties to arbitration. It is submitted that the applicant being not party to the arbitration agreement, the applicant could not file application even under section 8 of the Act.

12. Learned senior counsel placed reliance on the judgment of the Gujarat High Court in case of Marwadi Shares and Finance Pvt. Ltd. Company Vs. Kishorkumar Nagjibhai Mavani, and in particular paragraphs 6, 11.1, 11.2, 12 and 13 and would submit that merely because an arbitration clause exist in the agreement entered into by the parties, jurisdiction of the civil court is not barred but is subject to the provisions of section 8 of the Arbitration and Conciliation Act, 1996. If those conditions are satisfied, the court can refer the parties to arbitration. Paragraphs 6, 11.1, 11.2, 12 and 13 of the said judgment of Gujarat High Court read thus:-

6. The short but an interesting question of law posed for consideration of this Court as stated hereinabove is whether in view of the arbitration Clause in the contract note and the bye- laws of the National Stock Exchange framed under the Securities Contracts (Regulation) Act, 1956 providing for resolving the

dispute by arbitration and considering the provisions of the Arbitration Act, 1996, whether the jurisdiction of the civil court is ousted?

11.1 Therefore if the conditions provided under Section 8 of the Act of 1996 are not satisfied, the civil court is not required to refer the dispute/parties to the arbitration. It is also required to be noted at this stage that even the aggrieved party who is aggrieved by the award of the arbitrator can submit an application for setting aside the arbitral award under Section 34 of the Arbitration Act, 1996. Therefore even the arbitral award is subject to the order passed by the civil court subject to limitation under Section 34 of the Act of 1996 and therefore to that extent there is no finality attached to the award by the arbitrator. Learned advocate appearing on behalf of the petitioner has failed to satisfy the court and/or point out any provisions either under the bye-laws of the National Stock Exchange of India Limited and/or under the Arbitration Act, 1996, excluding the jurisdiction of the civil court where there is an arbitration Clause or there is an arbitration agreement between the parties. Learned advocate appearing on behalf of the petitioner has failed to point out any provision by which the jurisdiction of the civil court is specifically barred and/or ousted in a case where there is an arbitration Clause and/or an arbitration agreement between the parties and the dispute is required to refer to the arbitration.

11.2 As observed by the Hon''ble Supreme Court in the case of S. Vanathan Muthuraja (supra), considering Section 9 of the CPC and the question of exclusion of civil court's jurisdiction, the Hon''ble Supreme Court has observed and held that when a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the civil courts would take cognizance of it. It is further observed by the Hon''ble Supreme Court in the said decision that the normal Rule of law is that civil courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded. The Rule of construction being that every presumption would be made in favour of the existence of a right and remedy in a democratic set-up governed by Rule of law and jurisdiction of the civil courts is assumed. The exclusion would, therefore, normally be an exception. Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded.

12. At the end of the above discussion, therefore it is to be held that merely because there is an arbitration Clause and/or bye-laws provides for referring the dispute and the claim to the arbitration, the civil court's jurisdiction is not barred but the same is subject to Section 8 of the Arbitration Act, 1996. Under the circumstances, it cannot be said that the court below has committed any error and/or acted illegally in dismissing the application submitted by the defendant submitted under Order 7 Rule 11(d) of the CPC by which it was prayed to reject the plaint. No illegality has been committed by the trial court in dismissing the said applications, which calls for interference of this Court in exercise of the powers under Article 227 of the Constitution of India.

13. For the reasons stated above, all the petitions fail and deserves to be dismissed and are accordingly dismissed, and as stated above, it is held that merely because there is an arbitration agreement the civil court's jurisdiction is not ousted at all, however the same would be subject to Section 8 of the Arbitration Act of 1996 and other relevant provisions of the Arbitration Act. Rule is discharged in each of the petitions. In the facts and circumstances of the case, there shall be no order as to costs.

13. Learned senior counsel also placed reliance on the judgment of Madras High Court in case of Manoharamma Hotels and Investments Pvt. Ltd. Vs. Aruna Hotels Ltd. and Others, . Reliance is placed on paragraphs 31, 37, 41 and 42 of the judgment in support of the submission that the jurisdiction of the civil court is not barred even if arbitration agreement exist. Paragraphs 31, 37, 41 and 42 of the said judgment reads thus :-

31. In the last judgment cited above, a Division Bench of the Honourable Apex Court has :

"For interpretation of Section 8, Section 5 would have no bearing. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if : (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under Sub-sections (1) and (2) of Section 8 of the Act.

Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement."

37. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for all the parties, at the outset it is relevant to focus attention on the prayer of the petition in order to ward-off many confusions and confrontations. The prayer is to the extent of grant of an order of temporary injunction restraining the respondents and their men from in any manner interfering with the applicant's peaceful possession and enjoyment of the schedule "C" property with all such facilities annexed to the same till the suit claim is discharged. It is pertinent to point out that primarily this is an

interim protection that is sought for on the part of the petitioner pending disposal of the suit and it has absolutely no clash with the suit claim at all and therefore the question of maintainability of such an application before this Court in view of the suit alleged to have been instituted by the petitioner in C.S. No. 667 of 2003 is ruled out.

41. The controversy regarding whether it is the suit or application of this sort that could be maintained or both side by side or to what extent each of these could be maintained, no straight line could be drawn and the judgments cited on the part of the respondents to this effect are only suggestive in nature in the given circumstances of each and every case and the possibility of filing of an application is not at all ruled out which greatly depends on the Intention of parties entering into the agreement and it could be remembered that the Arbitration and Conciliation Act, which is a special Act, does not oust the jurisdiction of the civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under subsections 1 and 2 of the Section 8; that there is also no provision in the Act that the subject-matter of the suit Includes the subject-matter of the arbitration agreement as well as other disputes; that the matter Is required to be referred to arbitration and there is also no provision for splitting the causes of action or parties and referring the subject-matter of the suit to the Arbitrator and that there is also no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement, as it has been ruled by the Honourable Apex Court In its latest decision cited by the applicant reported In [2003]3SCR558 (extracted supra).

42. In these circumstances, this Court is unable to arrive at the conclusion that either the jurisdiction of this Court is ousted in entertaining the above application or filing of the regular suit in the civil forum of law, or on account of the applicant coming forward to withdraw the LAS, prior to filing of this application and hence he would not have the locus standi to file such an application before this Court. The simple answer for all the above legal questions raised is that it is perfectly right on the part of this Court to have the jurisdiction to entertain an application of this sort and there is no impediment to pass an order positively in favour of the applicant and that the applicant is also fully entitled to maintain an application of this sort before this Court in spite of a suit filed by him is kept pending before the civil forum and further, since no interim application is kept pending in the suit for any relief, the only conclusion that could be arrived at is that this application could be very well maintained before this Court in the circumstances of the case.

14. Learned senior counsel distinguished the judgment of the Delhi High Court and Supreme Court relied upon by learned counsel appearing for defendant no.9 on the ground that in both the matters the defendants in the arbitration proceedings filed a suit after the plaintiffs had invoked arbitration agreement. The plaintiffs in those suits had prayed for a declaration that arbitration

agreement was illegal. It is submitted that in that context both the courts took a view that whether arbitration agreement exist or not or had become void or not, this issue can be decided by the arbitrator under section 16 of the Act and no separate suit is maintainable for such declaration.

15. A perusal of the Notice of Motion and affidavit in support filed by the applicant (original defendant no.9) clearly indicates that Notice of Motion is not filed under section 8 of the Arbitration and Conciliation Act, 1996. The only prayer in the Notice of Motion is that this court shall frame preliminary issue of jurisdiction under section 9A of the Code of Civil Procedure, 1908 and adjudicate upon the same first in point of time and further seeks stay of the further proceedings in the suit till this issue is decided by this court. A perusal of the affidavit in reply filed by defendant no.9 in opposition to the notice of motion filed by the plaintiff clearly indicates that defendant no.9 and the other defendants who have filed the said affidavit have disputed the development agreement which records the arbitration agreement. In spite of taking such a plea in the affidavit in reply, in paragraph 5 of the affidavit in support of this notice of motion, the applicant has placed reliance on the arbitration agreement recorded in Articles 24 and 25 of the development agreement.

16. Under section 9 of the Code of Civil Procedure, 1908 a court has jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In so far as pecuniary and territorial jurisdiction of this court is concerned, there is no dispute raised by the applicant. The question then arises for consideration of this court is whether this suit is expressly or impliedly barred in respect of the reliefs claimed in the suit in view of the arbitration agreement recorded in the development agreement between the plaintiff and defendant no.1 society.

17. In my view there is no provision in the Arbitration and Conciliation Act, 1996 which bars filing of a civil suit even if arbitration agreement exist. A remedy of the defendants, if all the terms and conditions of section 8 are satisfied, is to file an application under section 8 for referring the parties to the arbitration. However in this case there is no such application made by the applicant under section 8 of the Arbitration and Conciliation Act, 1996. Even if all the parties to the suit are parties to the arbitration agreement, such parties may choose not to apply for referring the parties to arbitration and may continue the civil proceedings. It is thus clear that unless conditions of section 8 of the Act are satisfied and an application is made by the defendants for referring the parties to arbitration, suit continues to be within the jurisdiction of a civil court.

18. Gujarat High Court in case of Marwadi Shares & Finance Pvt. Ltd. Company (supra), has after adverting to the judgment of the Supreme Court has held that merely because there is arbitration clause, a civil court jurisdiction is not barred but the same is subject to section 8 of the Arbitration and Conciliation Act, 1996. In my view since no application is made under section 8 of the Arbitration and Conciliation Act, 1996, the jurisdiction of a civil court which exist even though

arbitration agreement is recorded by and between the parties and is not ousted. I am in respectful agreement with the views expressed by the Gujarat High Court in case of Marwadi Shares & Finance Pvt. Ltd. Company (supra).

19. Similar is the view expressed by the Madras High Court in case of M/s.Manoharamma Hotels and Investments Pvt.Ltd. (supra). Madras High Court has adverted to the judgment of the Supreme Court in case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, and held that jurisdiction of a civil court to decide a dispute is not ousted. Supreme Court in case of Sukanya Holdings (P) Ltd. (supra) has held that the Arbitration Act does not oust jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sections 8(1) and (2). I am respectfully bound by the judgment of the Supreme Court. I am also in agreement with the views of Madras High Court in case of M/s.Manoharamma Hotels and Investments Pvt.Ltd. (supra).

20. In so far as judgment of Delhi High Court relied upon by the learned counsel appearing for the applicant in case of The Handicrafts & Handlooms Exports Corporation of India Limited (supra) is concerned, a perusal of the said judgment indicates that the plaintiff had prayed for a declaration that the request of defendant no.1 for arbitration before the learned arbitrator was illegal and invalid. Delhi High Court considered such prayers before it and held that an issue whether arbitration agreement is void or not can be placed before the learned arbitrator under section 16 of the Arbitration and Conciliation Act, 1996 and a civil suit is not maintainable on that ground for seeking such declaration before a civil court. The facts of this case are however totally different. A perusal of the prayers in the plaint clearly indicates that the plaintiff has prayed for a declaration that the development agreement executed by and between the plaintiffs and defendant no.1 is valid, binding and subsisting. The judgment of the Delhi High Court thus in my view is clearly distinguishable with the facts of this case.

21. In so far as judgment of the Supreme Court in case of Chatterjee Petrochem Co. and another (supra) relied upon by the learned counsel appearing for the applicant is concerned, a perusal of the said judgment clearly indicates that a civil suit was filed by the plaintiff who was party to the arbitration agreement for a declaration. The plaintiff had also alleged that there was no arbitration agreement. The Supreme Court after construing the agreement entered into between the parties rendered a finding that the arbitration agreement was valid and accordingly held that a suit for a declaration and permanent injunction was unsustainable in law and accordingly dismissed the suit. The said judgment of the Supreme Court also thus does not assist the applicant but in my view assist the case of the plaintiff.

22. A perusal of the record indicates that the applicant who has already disputed the development agreement itself cannot be even otherwise allowed to raise a plea that an arbitration agreement exist and thus this court has no jurisdiction to

entertain a civil suit.

23. Perusal of the record indicates that except the plaintiff and the defendant no.1 society, none of the parties to this proceedings are party to development agreement. In my view since applicant and other defendants except the society are not parties to the arbitration agreement, even if application under section 8 would have been filed by the applicant to this Notice of Motion or other defendants except the society, same would not have been maintainable. Application under section 8 can be filed only by a party to the arbitration agreement. Section 8 has to be read with section 2(1) (h) of the Arbitration and Conciliation Act, 1996.

24. This court in case of Vardhaman Developers Ltd. vs. Andheri Krupa Prasad Co-op.Hsg.Soc.Ltd. & Ors. in Notice of Motion (L) No. 248 of 2014 in Suit No.94 of 2014 in a judgment rendered on 20th February, 2014 has taken a view that the member of the society who was not party to the arbitration agreement cannot mention an application under section 8 of the Arbitration and Conciliation Act, 1996. I am therefore of the view that even such application under section 8 of the Arbitration and Conciliation Act if would have been filed by a member claiming through the society which society is party to the arbitration agreement, such application would not be maintainable.

25. I am of the prima facie view that since the plaintiff has already filed a notice of motion inter alia praying for appointment of the court receiver and injunction, the applicant has chosen to file this frivolous Notice of Motion with an intention to stall and/or delay the outcome of the notice of motion filed by the plaintiff.

26. For the reasons rendered aforesaid, I am of the view that this court has jurisdiction to entertain, try and dispose of the suit and jurisdiction of this court is not ousted. Suit is maintainable against all the defendants. Issue is accordingly answered in affirmative.

27. Notice of Motion is disposed of in the aforesaid terms. No order as to costs.