

(2002) 01 BOM CK 0006

In the Bombay High Court

Case No : Civil Revision Application No. 1288 of 2001

Motilal Bharadiya

APPELLANT

Vs

Kedarmal Jainarayan Bharadiya and Others

RESPONDENT

Date of Decision : 23-01-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 7(1), 8, 8(1), 8(2)

Citation : (2002) 3 BOMLR 347 : (2003) 2 MhLj 751

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : R.F. Totla, for the Appellant; A.K. Gugale, holding for A.M. Gholap, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Dabholkar, J.—Judgment debtor (original defendant), by this revision petition, challenges order dated 5-12-2001 passed by Civil Judge, Senior Division, Jalgaon, at Exhibit 543 of Special Civil Suit No. 51/1964 on his file.

By this application - Exhibit 543 filed on 3-12-2001, a document dated 22-2-1993 was produced before the Court and it was pleaded that although titled as "General Mukhtyar Patra", it was in fact an arbitration agreement. It was, therefore, prayed that property dispute pending between the parties before the Court may be referred to the two surviving arbitrators viz. Gokuldas Bhutada and Nandkishor Bharadia for the settlement of the matter and final decree should be drawn only after a report from those arbitrators. Admittedly, third person named in the same document, namely Ishwardas Baldawa, is dead.

This application was rejected by learned Civil Judge, Senior Division, mainly on three grounds :

(1) That the document is not an arbitration agreement, but it is General Mukhtyar Patra;

(2) That original agreement or its certified copy is not filed on record, as required by Section 8(2) of the Arbitration and Conciliation Act, 1996 (henceforth referred to as the Arbitration Act, 1996 for the sake of brevity); and

(3) The application was moved at a very late stage and in order to protract the proceedings which had started in the year 1964.

The order is being impugned on the ground that the same is, illegal and contrary to law.

2. Learned Advocate Shri R.F. Totla for revision petitioner, while submitting that the document is arbitration agreement and, therefore, in view of provisions of the Arbitration Act, 1996, Court had no option but to refer the dispute to arbitrator; referred to relevant provisions of the Arbitration Act, 1996, as also some judicial pronouncements in support of his propositions.

According to Shri Totla, as per Section 2(1)(b) "arbitration agreement" means an agreement referred to in Section 7. Section 7(1) defines "arbitration agreement" as an agreement by the parties to submit to arbitration, all or certain disputes, which have arisen or which may arise between them, in respect of defined legal relationship, whether contractual or not. Sub-sections (2) to (4) of Section 7 of the Arbitration Act, 1996, lay down that an arbitration agreement can be in the form of an arbitration clause in a contract or in the form of separate agreement. The same is required to be in writing. It can be gathered from a document signed by parties or in the exchanged correspondence between the parties and even a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if the contract is in writing, making the arbitration clause part of the contract. According to Advocate Shri Totla, reading the contents in the document dated 22-2-1993, and more particularly contents at pages 3 and 5 indicate that it is an arbitration agreement. Referring to Sections 11 and 16 of the Arbitration Act, 1996, in the light of observations of the Apex Court in *Nimet Resources Inc. and Another Vs. Essar Steels Ltd.*, submitted that even the issue whether document is "arbitration agreement" can be considered by the arbitrators named.

Referring to Section 5, which has given overriding effect to the provision vis-a-vis any other legislation for the time being in force, he pointed out that by the said section, the Arbitration Act, 1996, limits the scope of intervention by any judicial authority where there is arbitration agreement between the parties, to intervention as provided by Sections 14, 34 and 37 only.

Thus, it was urged that the order of learned Civil Judge, Senior Division, may be set aside and matter may be referred to arbitrators.

3. Advocate Shri A.K. Gugale, while opposing the revision petition, has advanced two pronged argument. According to him, the document is not at all an arbitration agreement and in fact it has all the incidents and trappings of contract of agency. It is, therefore, a power of attorney as titled, which fact is also evident

from the duties assigned to the attorneys appointed by virtue of Clause 3 Sub-clauses (1) to (35) of the said document. Secondly, according to him, if the document is considered to be arbitration agreement, for the sake of arguments, then Section 8(1) of the Arbitration Act, 1996, debars any reference to arbitration, parties having acquiesced to the jurisdiction of the Court for a long span of 8 years from 1993 to 2001, without making a request of arbitration by any of them.

4. The factual matrix of the matter, which is almost undisputed, is as under. For the sake of reference henceforth, the parties shall be referred as branch of Jainarayan and branch of Kanheyalal. This is because, as is evident, although there was only one plaintiff and 4 defendants when the suit was filed in the year 1964, from the revision petition, it can be seen that now as many as 17 persons are on record as litigating parties.

Kedarmal Jainarayan of the branch of Jainarayan (son) filed Special Civil Suit No. 51/1964 in the Court of Civil Judge, Senior Division on 3-10-1964. It was a suit praying for partition and separate possession of the family property between the branches of Jainarayan and Kanheyalal. It prayed for a declaration that each branch had 1/2 share in the property. It appears that although there was third brother Devkaran, it was contended that he had separated in 1940. The suit was decreed on 24-12-1968 on considering the matter on merits and a preliminary decree was drawn. First Appeal No. 276/1969 was preferred against this preliminary decree by the original defendant No. 1 - Kanheyalal (who is now dead). This appeal was disposed of on 1-4-1977 by the High Court in terms of compromise entered into by the parties. By virtue of order dated 24-7-1969 passed in Civil Application No. 1533/1969 in First Appeal No. 276/1969, further proceeding of the suit was stayed by this Court. Original plaintiff filed cross objection on 29-9-1971 and thereafter record was submitted to the High Court. In November, 1971, record was received back by the trial Court from the High Court for carrying out work of commission and, therefore, plaintiff Kedarmal filed application - Exhibit 368 for appointment of Court Commissioner. It must be mentioned here that this was part of work and progress in the suit towards preparation of final decree. Shri Bhusari Advocate, who was appointed Commissioner by order dated 2-2-1972, submitted his report at Exhibit 376 on 6-3-1972. Further report of the Commissioner Exhibit 381 was filed on 30-10-1972. On 6-12-1972, original defendant No. 1 Kanheyalal, father of revision petitioner, tendered his objection to the Commissioner's report vide Exhibit 389 and thereafter on 24-12-1972, entire record was again remitted to the High Court for the purpose of First Appeal No. 276/1969 along with the Commissioner's report.

After compromise decree in first appeal on 1-4-1977, record was received by trial Court on 6-3-1982. Court Commissioner was examined on 3-4-1982 and original defendant Nos. 2 to 4, paid Court fee stamp to the extent of their share (affixed) on 28-4-1982. In a partition suit, even the defendants, who are entitled to share

in the joint family property assume the character of decree holder, since they get a relief from the decree for partition and separate possession and, therefore, this was necessary. On 10-6-1982, trial Court by the order below Exhibit 1 accepted the partition proposed by Commissioner and directed the Commissioner to start the work of actual partition.

At this stage, second round of litigation reached the High Court in the form of Civil Revision Application No. 333/1982 by original defendant No. 6 -Hiralal, son of defendant No. 1. He challenged the order dated 28-4-1982 of the trial Court accepting proposed partition. The revision petition was dismissed on 30-7-1982.

According to plaintiff - respondent No. 1, the matter was adjourned on 10 occasions between July, 1993 to August, 1995. In July, 1995, Advocate of plaintiff intimated that matter was fixed for 5-8-1995, however, as mother of plaintiff expired on 24-7-1995, he could not contact the Advocate till 5-8-1995. On 5-8-1995, Advocate of the plaintiff retired by filing Purshis - Exhibit 505 and although plaintiff was personally present and sought adjournment by application - Exhibit 506, the application was rejected and an order dismissing the suit for want of prosecution was passed. (In fact, this was not a suit, at that stage, but a final decree proceeding). On 14-11-1995, plaintiff filed Civil Revision Application No. 1219/1995 before this Court against the said dismissal. The revision petition was allowed on 17-10-2000, the proceeding was restored and trial Court was directed to complete and finalize the same by 30-12-2001. During the pendency of this revision petition, defendant No. 6 - Hiralal died and his L.Rs. are brought on record.

Parties appeared before the trial Court on 6-11-2000 as directed by the High Court, but then record was not traceable for about 8/9 months and, therefore, no effective steps could be taken in the matter. On 28-8-2001, plaintiff filed application - Exhibit 521 for appointment of new Commissioner to execute the work, in view of death of Commissioner already appointed. By application Exhibit 533 dated 10-9-2001, legal representatives of Hiralal objected to commission work and upon considering the reply filed by plaintiff at Exhibit 534, trial Court rejected the application on 6-11-2001. Consequently, a fresh Commissioner was appointed.

Parties approached this Court for the fourth time in the form of Civil Revision Application No. 1175/2001 filed by L.Rs. of defendant No. 6 - Hiralal against the order of rejection of objections and appointment of Commissioner. This revision petition was rejected on 27-11-2001.

On 3-12-2001, Motilal, present revision petitioner and one of the L.Rs. of original defendant No. 1 .- Kanheyalal filed application Exhibit 543 u/s 8 of the Arbitration Act, 1996. After considering the say filed by original plaintiff, learned Civil Judge, Senior Division, was pleased to reject this application on 5-12-2001 by the impugned order, against which present Civil Revision Application No. 1288/2001 is preferred, making the fifth trip to this Court.

Motilal has filed Miscellaneous Application No. 236/2001 before District Judge, Jalgaon, u/s 9 of the Arbitration Act, 1996, on 12-12-2001 for injunction against Court Commissioner and also an application u/s 11 of the Arbitration Act, 1996, numbered as 4/2001 before this Court u/s 11 of the Act praying to refer the dispute to the arbitrators. He had also filed First Appeal No. 699/2001 against the order dated 14-12-2001 passed in Miscellaneous Application No. 236/2001 directing notices to other side, but the same was withdrawn on 28-12-2001.

5. In view of admitted fact that preliminary decree was already drawn and the matter was in progress for drawing of final decree, which includes appointment of Court Commissioner, and Court Commissioner proposing partition in terms ordered by preliminary decree and thus rights of the parties already having been adjudicated by the trial Court and confirmed by the High Court in terms of compromise entered before the High Court on 1-4-1977, a query was posed to Advocate Shri Totla for the petitioner whether parties can enter into an arbitration agreement in the matter where dispute regarding legal rights is already resolved.

In order to reply the query, learned Advocate has placed reliance on the case P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, . Observations relied upon can usefully be reproduced hereinbelow :

"The phrase "which is the subject of an arbitration agreement" does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the Court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending."

In this matter, during the pendency of appeal before the Hon'ble the Apex Court, all the parties had entered into an arbitration agreement and had agreed to refer the disputes in the appeal and others to Justice S. Rangnathan, a retired Judge of the Apex Court, as sole arbitrator. From the observations of the Supreme Court, it can be said that Arbitration Act, 1996, does not prohibit the parties from entering into an arbitration agreement after the dispute has arisen. However, this does not answer the query completely. In the case at hands, the dispute between the parties was already resolved by adjudication of trial Court on 24-12-1968, which adjudication received the seal of this Court either in the same form or may be in modified form in terms of compromise filed on 1-4-1977. It must, therefore, be said that, which of the parties were entitled for share in the joint family property and to what extent was already defined and no more in dispute. Final decree proceeding mainly includes execution work, by Commissioner determining which portion of the immovable property should be given to which co-sharer and propose partition accordingly. In any case, at this stage, preliminary decree had already resolved the aspects of extent of shares and the sharers entitled to it. Thus, in fact it is difficult to say that any dispute was subsisting to be resolved. Viewed from this angle, there was nothing for the arbitrators to resolve in the year 1993 when the disputed document took birth. However, it cannot be denied that parties may agitate about the proposed

partition and raise issues such as not having been given the share in accordance with preliminary decree, or the shares proposed are inequitable etc. and, therefore, total absence of dispute also cannot be guaranteed. Therefore, in the light of observations of the Hon'ble the Apex Court, it may be said that it was open for the parties to enter into an arbitration agreement.

6. A decision in *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, is referred by the learned counsel in order to propound that 1996 Act is different from the Arbitration Act, 1940 and, therefore, provisions of the new Act are required to be interpreted and construed independently, as reference to 1940 Act may lead to misconstruction. Provisions of 1996 Act are, therefore, required to be construed, uninfluenced by principles underlying 1940 Act and at the most reference could be made to UNCITRAL Model Law. (United Nations Commission on International Trade Law).

7. Following observations from *Nimet Resources Inc. and Another Vs. Essar Steels Ltd.*, were relied upon by the learned counsel for the petitioner:

"It is no doubt permissible u/s 11 to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange of documents between the parties are not clear as to existence or non-existence of arbitration agreement, in terms of Section 7, the appropriate course would be that the arbitrator should decide such a question u/s 16 rather than the Chief Justice of India or his nominee u/s 11."

Relying upon these observations, Advocate Shri Totla faintly proposed that even issue whether the document is or is not arbitration agreement can be and should be considered by the named arbitrators.

The reason why the Hon'ble the Apex Court was inclined to refer such an issue also to the arbitrators when there were two for a available, one u/s 16 i.e. arbitrators themselves and one u/s 11 i.e. nominee of the Chief Justice, is available in the same judgment. It is observed by the Supreme Court that the power that is exercised by the nominee of Chief Justice u/s 11 is in the nature of administrative order and, therefore, unless the nominee can be absolutely sure regarding existence of arbitration agreement, it would be difficult for him to say that there should be no reference to arbitration. In the same judgment, the Supreme Court has referred to its observations in earlier judicial pronouncement in the matter of *Wellington Associates Ltd. Vs. Mr. Kirit Mehta*, wherein it is observed that the jurisdiction of the nominee of the Chief Justice to decide the question is not excluded by Section 16 of the Act and such a power can be exercised in a suitable case. In the matter at hands, the issue whether the document is an arbitration agreement or only a power of attorney was not pending before an authority for the purpose of passing administrative order. It was pending before the Court which was moved u/s 8. Judicial authority was moved for a reference to arbitration. Section 2(1)(e) of the Arbitration Act, 1996 defines "Court" as principal Civil Court of Original Jurisdiction in a District and

includes the High Court in exercise of its Ordinary Original Civil Jurisdiction. In spite of this, the Act uses the phrase "judicial authority" in quite a considerable number of provisions. The "judicial authority" certainly has a wider import than "Court". Whenever an application is moved before a judicial authority for reference to arbitration u/s 8, it is difficult to contemplate a blind reference without considering existence of an arbitration agreement. The argument of learned Advocate Shri Totla that even dispute regarding existence or non-existence of arbitration agreement also should be referred to named persons is, therefore, not tenable. The judicial authority u/s 8 is not divested of the powers to determine existence/ non-existence of arbitration agreement before directing a reference to arbitrators under the said section.

If at all factually a finding of the so called arbitrators is necessary, Advocate Shri Totla has filed on record Exhibit I, a reply from Shri Gokuldas Bhutada in response to notice dated 3-12-2001 by present petitioner. The reply dated 13-12-2001 reads thus :

^^rk- 22&2&1993 pk nLrvSot gk tuju eq[kR;kj i= vlkp nLrvSot vkgs- r;kyk rqEgh vkfcZV?s"ku vWxzehesaV Eg.kwu ts uko fnysys vkgs rs pqdhps vkgs- Inj nLrvSotkps f"k"kZd vkf.k R;krrhy laiw.kZ etdqj ;kpk fopkj dsyk vlrk Injpk nLrvSot gk tuju eq[kR;kj i=kpk nLrvSot vkgs ;k ckcr dks.krhgh lafnX/krk jkgkr ukgha-**

Although in the remaining part of the letter, he has shown willingness to work as sole arbitrator, he has referred himself as arbitrator as also power of attorney. But the interpretation about the nature of document is in clear terms, available in the opening para of the letter. If this opening para is taken into account, there is no arbitration agreement and a request for reference to arbitrator would, therefore, fail.

8. Learned trial Judge has rejected the prayer for reference on three grounds and one of the grounds is that the original arbitration agreement or its certified copy is not filed. Advocate Shri Totla has successfully met this challenge by relying upon ITC Classic Finance Ltd. Vs. Grapco Mining and Co. Ltd. and another, . In this matter, lease agreements were relied upon by both the plaintiff as well as the petitioner, and it was not in dispute that the said xerox copies were in fact the copies of the same document. It was observed by learned Single Judge of Calcutta High Court that xerox copies of the lease agreement containing the arbitration clause having been annexed to the application u/s 8 was sufficient compliance with the requirement of Section 8(2) of the Act. In the present matter also the application was accompanied by the xerox copy of the document in question. In the notice dated 3-12-2001, petitioner had sounded to Shri Gokuldas Bhutada that original document is in his custody which is not denied by Shri Bhutada in his reply and, therefore, it must be said that the application for reference to arbitrator could not have been rejected on the sole ground of non-compliance of Section 8(2) of the Act.

9. This bring us to consider whether the trial Court was justified in arriving at a

conclusion that the document was not an arbitration agreement and, therefore, reject the prayer for reference. Considering Sections 2(b) read with 7(1) of the Arbitration Act, 1996.

"Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

In the old Act, Section 2(a) defined,

"Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

On comparison of two provisions, it can be seen that although the words used are not identical, the spirit is the same. The agreement must be an agreement by the parties to submit to arbitration, disputes/differences. Although learned counsel has cautioned against reference to provisions of 1940 Act for the purpose of construing interpretation of 1996 Act, in view of the definition of arbitration agreement in the two Acts and especially the underlined portion in the definitions reproduced above, it must be said that arbitration agreement is practically defined in the same manner in both the Acts.

10. A reference to the contents of the document is, therefore, necessary in order to find out the intentions of the parties, if they intended to refer the dispute/differences, to third persons as arbitrators, for the resolution.

If learned counsel for the petitioner can rely upon the fact that document is signed by conflicting parties for the purpose of suggesting that it is an arbitration agreement, the counsel for the respondent can rely upon the title, to claim that it is only power of attorney. Both the Advocates agreed to the proposition that the title or number and character of signatories is not sufficient to determine the nature of the agreement but intentions of the parties ought to be gathered by considering the contents of the document in their totality.

Advocate Shri Totla has led emphasis on contents at pages 3 and 5 and urged that those clearly indicate that parties intended to appoint the named three persons as arbitrators.

^^mHk;i{kkae/khy okn dk;eps lksMfo.;kps n`"Vhus dk; mik;;kstuk djrk ;sbZy ;kpk fopkj dsyk- ijarq ;kckcr dks.krkgh Bksl vkl fu.kZ; gks? "kdyk ukgh- "ksoVh mHk;i{kkauh R;kaps ukrsokbZd Jh bZ"ojnkl iq:"kks?ke cynok] xksdwynkl txUukFk HkwrMk o Jh uanfd"kksj fgjkyky Hkjkm;k ;kauk e;/LFkh dj.;klkBh ikpkj.k dsys- ?;kiq<s R;kapk mYys[k ^^tujy eq[kR;kj** vklk dsyk vkgs? gs fg?ksgh Hkqlkoy ;sFks vkys] R;kauh mHk; i{k kps Eg.k.ks ,sdwu ?ksrys- R;krwu dk; dk; ekxZ dk<rk ;srhy ls loZ ekxZ lqpflys-**

^^;k ppsZe;/s "ksoVh mHk;i{kkauh vkl fu.kZ; ?ksryk dh] mHk;i{kkae/khy okn feVfo.;kps loZ vf/kdkj mHk;rkaP;k laerhus tujy eq[kR;kj ;kauk n;kos- gs okn feVfo.;kP;k n`"Vhus tujy eq[kR;kj ;kauk tks ;ksX; okVsy rks fu.kZ; R;kauh /;kok

vls vf/kdkj ns.;kr vkys-**

In the first quotation above, if the portion not underlined makes some suggestion towards desire to appoint arbitrators by the use of words ^{^^}e?;LFkh dj.;klkBh ikpkj.k dsys** the underlined portion indicates that the said process was already completed by the named persons visiting the parties, hearing them and suggesting the solution. In the second part quoted above, there is nothing to indicate that the persons nominated were to hear the parties and then take some decision. In fact, the nominated persons were empowered to take any appropriate decision they felt to be just and proper.

Why this document was executed is evident from further portion at page 3 which reads :

^{^^}gh loZ dkes dj.;klkBh vkEgka yksdkaph okjaokj vko";drk iMsy o loZt.k ,dkp osysl miyC/k gks.kkj ukgha gh vMp.k y{kkk ?k?u mHk;i{kkauh tuju eq[kR;kj ;kaps ykHkkar izLrqr eq[kR;kj= fygwu fnsys vkgs-**

This clause is clear indicator of the fact that the nominated persons were not obliged to invite the parties to put up their say and adjudicate thereupon. In fact, the nominated persons were put into the shoes of the conflicting parties and effect the partition. This is also evident from the portion at page 5 of the document which was also, relied upon by the learned counsel Shri Totla. The portion begins from the last line of page 4 and runs as follows :

^{^^};klkBh ok R;kckcrps loZ vf/kdkj tuju eq[kR;kj ;kauk fnsys vkgs- T;k feydrhps okVi dj.ks ;ksX; vko";d o O:ogkFkZ vkgs vls tuju eq[kR;kj ;kauk okVsy R;k feydrhps izR;{k dCtkr n;ko;kpk vkgs- ek= vls okVi djrkauk dkVsdksji.ks nksu leku Hkkx djko;kps vls ca/ku Bso.k;kr vkysys ukgh dkj.k okVj jrkau brj ekxkZuh mHk;i{kkaph HkjibZ d:u nsrk ;sr vLY;kl dkgh feydrhZP;k ckcr tuju eq[kR;kj ;kauk ;ksX; okVsy R;kizek.ks djko;kps vkgs- oj uewn dsysY;k loZ feydrhps okVi dsys ikfgts glsgh ca/ku tuju eq[kR;kj ;kapsoj Vkd.;kr vkysys ukgh- okVi dj.ks gs O;ogk;Z ukgh vls tuju eq[kR;kj ;kaps er vLY;kl R;kauh Inj feydrhckcr brj ;ksX; rs fu.kZ; /;ko;kps vkgsa-**

The portion not only fails to indicate any possibility of parties being allowed to agitate their cause before the nominated persons, but same indicates total surrender, by both the parties, to the judgment of nominated persons, as to how the partition is to be effected. In brief, it can be said that the contents are capable of substituting the nominated persons, in place of Court Commissioner appointed during the final decree proceeding. In fact, this portion at page 5 is contained in sub-clause (1) of Clause 3 of the document which enlists the powers of the nominated persons in 35 clauses. Clause 3 says.

^{^^}----- ;k eq[kR;kj i=kr uewn dsysyh loZ dkes dj.;klkBh dk;eps tuju eq[kR;kj Eg.kwu useys vkgs- oj o.kZu dsysY;k feydrhckcr o mHk;i{kkah/khy okn lksMfo.;ckcr tuju eq[kR;kj ;kauh [kkyh o.kZu dsysyh loZ dkes] d`R;s o xks"Vh djko;kP;k vkgsr-**

Part of first sub-clause relied upon by learned counsel Shri Totla is already discussed above, which is a total surrender to the judgment of nominated persons and not a process of dispute resolution by conflicting parties submitting their contentions before the nominated persons. The remaining Clauses 2 to 35 running into as many as 7 pages need not be verbatim reproduced. But it can be said that those clauses have all the incidents and trappings of a contract of agency. For example, Clause 2 empowers the nominated persons to advertise in case the property is decided to be sold, fix the valuation, deal with the proposed purchaser, execute the documents for the purpose of effecting sale, accept the amount and issue receipts. Clause 4 asks them to pay all the taxes of the property. Clause 5 empowers them to take all steps to ensure that properties are without encumbrance. They are authorized to develop the property by virtue of Clause 6. Suffice it to say, that none of these sub-clauses states that the nominated persons are to sit down to hear the parties as to how the partition should be effected amongst them, in accordance with the shares defined by a compromise decree before High Court and for the purpose which property should be given to whom, which property should be disposed of and sale proceeds should be shared and so on. And therefore, as discussed earlier, even if it can be said that there can be existence of dispute during final decree proceedings which are tantamount to effecting partition, on the points such as, which property should be divided, which portion should go to whom, which property cannot be partitioned and hence is required to be dealt with otherwise than actual partition, etc., the document in question does not contemplate adjudication upon such issues by the nominated persons. It is a total surrender to the judgment of nominated persons and they are empowered to take all necessary and suitable steps.

Thus, it must be said that the document does not answer to the requirement of Section 7(1) "agreement by the parties to submit to the arbitration all or certain disputes which have arisen". In fact, parties have agreed that they will not raise any dispute before the nominated persons and submit to their judgment and suggestions. The document, therefore, is not an arbitration agreement.

11. In *Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd.*, Kanpur, relied upon by learned counsel for the respondents, the Hon"ble the Apex Court observed as follows:

"In the present case the Managing Director is more in the category of an expert who will decide claims, rights or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In paragraph 18.067 of Volume 2 of Hudson on Building and Engineering Contracts, Illustration (8) deals with the case where, by the terms of a contract, it was provided that the engineer "shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or

otherwise arising out of or in connection with the contract....."

It was held that this clause was not an arbitration clause and that the duties of engineer were administrative and not judicial. The document in question, as already discussed above, in total submission to the judgment of the nominated person, confers a character of agent/administrator and not that of an adjudicator upon them. Arbitration is an alternate dispute resolution system of quasi judicial nature and if no judicial functions are attributed to the nominated persons, the document executed cannot be said to be arbitration agreement. In view of similarity in definition of the arbitration agreement, as contained in old as well as present Act, the observations of the Supreme Court although in relation to arbitration agreement under 1940 Act can be relied upon.

12. Section 8(1) of the Act reads thus :

"8(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, so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration."

In this context, observations in para 5 of the judgment of Apex Court reported at P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, are required to be referred and followed.

"The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are : (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. This last provision creates a right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence,

Under the new law, the party is at liberty to seek a reference to arbitrator but certainly not at a belated stage. The party desiring a reference has to approach the Court for such a reference before it submits first statement on the substance of the dispute. In the present matter, so called arbitration agreement is entered into on 22-2-1993 during the pendency of the action which had commenced with application dated 4-11-1971 for appointment of Commissioner. It was alleged that all the while petitioner or his predecessor in title had participated in the commission work. The matter was adjourned 10 times between July, 1993 to August, 1995. After dismissal on 5-8-1995, the matter was restored on 17-10-2000. During this span of 5 years, parties were before this High Court in Civil Revision Application No. 1219/1995 for restoration. Plaintiff successfully sought appointment of new Commissioner in place of deceased Commissioner by order dated 28-8-2001. L. Rs. of defendant No. 6 - Hiralal had objected to the appointment of new Commissioner and also approached this Court in Civil

Revision Application No. 1175/2001 on 26-11-2001. Taking into consideration all these events, it is impossible to say that after execution of the document on 22-2-1993, application for reference to arbitration is preferred before filing first say in the matter since the execution of the document. The application for reference to arbitrator, therefore, is also hit by Section 8(1) of the Arbitration Act, 1996.

13. To sum up, in fact no dispute between the parties remains to be resolved, taking into consideration the present stage of the matter which is in progress towards drawing of final decree of partition and even if it is presumed that a dispute exists, the document in question has not put the nominated persons in the shoes of a quasi judicial adjudication authority. Thus, there is no arbitration agreement and if there be one for the sake of arguments, the application of petitioner was hit by Section 6(1) of the Arbitration Act, 1996. In fact, the time lapse clearly indicates that parties to the document in question had acquiesced to the jurisdiction of Court of law. A judicial authority is not divested of the powers to determine existence or non-existence of arbitration agreement before directing a reference. The trial Court was not justified in relying upon non-compliance of Section 8(2) of the Arbitration Act, but there being no arbitration agreement and there being breach of requirement of Section 8(1) of Arbitration Act, 1996, the trial Court was justified in rejecting prayer for reference to arbitrator.

14. Arbitration is an alternate dispute resolution system of quasi judicial nature aimed at providing speedy justice to the parties at lesser expenditure. When the so called arbitration agreement was not acted upon for as many as 8 years, petitioner having moved the trial Court for an arbitration reference and challenging the rejection before this Court, is lengthening the life and making the litigation costlier to one and for all involved in the same. The application before the trial Court and present revision is, thus, nothing but abuse of process of law.

15. The revision petition is, therefore, dismissed. Rule discharged.

At this stage, Advocate Shri A.H. Mandhane holding for Shri R.F. Totla, prayed that the order may be stayed for certain period in order to enable the petitioner to approach the Hon"ble the Apex Court, Taking into consideration the age of the proceedings and the merits, as discussed in the order, the prayer is rejected.