

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 52 OF 2021

Deccan Paper Mills Co. Limited through
Mr. Rahul Nainesh Mehta ...Petitioner
Vs.
M/s. Regency Mahavir Properties & Ors. ...Respondents

Ms. Meena H. Doshi, for the Petitioner.
Mr. Drupad Patil, for the Respondent No.1.
Mr. S. S. Patwardhan a/w. Ms. Mrinal Shelar, for the Respondent
No.3.

CORAM : MANISH PITALE, J.
DATE : 16 DECEMBER 2022

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. By this petition, filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the petitioner has approached this Court seeking appointment of a sole arbitrator for resolution of disputes between the parties.

2. The learned counsel for the petitioner has handed over an affidavit of service showing that the respondent No.2 was served by Courier as well as by email. In the order dated 7/12/2022, it was inadvertently recorded that the learned counsel representing the respondent No.1 was also representing respondent No.2, but

it is clarified by the learned counsel for respondent No.1 that he has no instructions to appear on behalf of respondent No.2. In any case, service is affected on the respondent No.2, but it has chosen not to appear before this Court. The respondent Nos.1 and 3 are duly represented by counsel.

3. The brief facts leading up to filing of this petition are that the parties entered into an agreement dated 27/4/2002, whereby development rights were granted to respondent No.2, to develop the property of the petitioner. The agreement was signed between the petitioner and the respondent No.2. The documents on record further show that by agreement dated 22/7/2004, again executed between the petitioner and the respondent No.2, the said respondent was granted development rights with certain additions and variations as compared to the aforesaid earlier agreement.

4. Thereafter, on 20/5/2006, an agreement was executed between the petitioner, respondent No.1 and respondent No.2, whereby development rights were granted to respondent No.1 and possession of the property also stood handed over to respondent No.1. On 13/7/2006, a deed of confirmation was executed between the parties and it was specifically stated therein that the aforementioned agreement dated 20/5/2006, stood confirmed and executed as if the same was executed between the

parties to the deed of confirmation and that the said earlier agreement was to be taken as full and complete evidence of its execution and that it would be acted upon.

5. For the purpose of this petition, Clause 14 of the agreement dated 20/5/2006, assumes significance, for the reason that it provides for arbitration, in case of any dispute between the parties.

6. It appears that disputes indeed arose between the parties and the petitioner filed Special Civil Suit No.1400/2010, before the Court of Civil Judge, Senior Division, Pune, for a decree of cancellation of the agreements, specifically pleading that the agreement containing the arbitration clause was procured by means of fraud. There were specific allegations made against the respondent No.3 regarding fraud and collusion. In the said suit, the respondent No.1 moved an application under Section 8 of the aforesaid Act, relying upon the arbitration clause and sought direction to refer the parties to arbitration. This application was resisted on the part of the petitioner. By order dated 19/7/2011, the aforesaid Court allowed the application and directed the petitioner to invoke the process of arbitration, in the light of Clause 14 in the agreement dated 20/5/2006.

7. Aggrieved by the said order, the petitioner filed Writ

Petition No.7838/2011, before this Court, which was dismissed by order dated 18/3/2015. Aggrieved by the same, the petitioner approached the Supreme Court. By a detailed judgment and order dated 19/8/2020, the Supreme Court dismissed the appeal and confirmed the orders passed by the Court below and this Court.

8. In this backdrop, the petitioner moved an application on 4/9/2020, under Section 9 of the aforesaid Act before the Court of District Judge, Pune, seeking certain directions against the respondents, as regards carrying out development activities and creation of third party rights in respect of the property in question. During the pendency of the said application, filed under Section 9 of the said Act, on 25/9/2020, the petitioner filed a *pursis* stating that it did not wish to prosecute the application against respondent Nos.2 and 3. Accordingly, the said respondents were deleted from the proceedings.

9. By judgment and order dated 25/9/2020, the Court of District Judge, Pune, partly allowed the application filed by the petitioner under Section 9 of the Act, thereby restraining the respondent No.1 from carrying out development activities and/or from creating third party interest in the property in question, until appointment of arbitrator or for a period of 90 days from the date of the order.

10. Thereafter, on 2/1/2021, the petitioner invoked the arbitration clause contained in the aforementioned agreement dated 20/5/2006, read with confirmation deed dated 13/7/2006. The notice was addressed to all the three respondents. On 7/1/2021, the respondent No.3 sent a reply notice, stating that the petitioner ought to unconditionally withdraw the notice invoking arbitration, primarily on the ground that the said respondent No.3 was deleted by the petitioner in the proceedings initiated under Section 9 of the aforesaid Act. On 11/2/2021, the petitioner sent a further reply, more in the nature of a rejoinder, to the respondent No.3, refuting the claims made on behalf of the said respondent. It is relevant that the petitioner also prepared an undated agreement of the year 2020, showing itself and all the three respondents as parties, styled as an arbitration agreement. It reiterated clause 14 of the aforesaid agreement dated 20/05/2006, providing for arbitration and further added to the same. It is an admitted position that other than respondent no.1, none of the respondents signed the said agreement. The learned counsel appearing for respondent no.3 has raised certain submissions in that regard, which shall be dealt with separately.

11. In this backdrop, the petitioner filed the present petition under Section 11(6) of the aforesaid Act, seeking appointment of a sole arbitrator, specifically referring to Clause 14 of the

agreement dated 20/5/2006.

12. Ms. Meena Doshi, the learned counsel appearing for the petitioner submitted that the present petition deserves to be allowed. The learned counsel referred to Clause 14 of the agreement dated 20/5/2006 and submitted that by notice dated 2/1/2021, the petitioner had invoked the said clause by issuing notice to all the three respondents and since the procedure contemplated under the said arbitration clause did not result in appointment of arbitrator, the present petition was filed, which deserves to be allowed.

13. The learned counsel for the petitioner submitted that when the respondent No.1 itself had filed an application under Section 8 of the said Act before the Court in the aforementioned suit, which stood allowed, the said respondent was not entitled to oppose the present petition. It was submitted that the stand taken on behalf of respondent No.3, in response to the invocation of notice was also without any substance, for the reason that mere deletion of respondent Nos.2 and 3 from the array of parties in the application filed under Section 9 of the said Act cannot accrue to the benefit of the said respondents. It was obvious that the said application was concerned only with interim measures and that it did not amount to admission on the part of the petitioner that there was no dispute between the petitioner and

respondent Nos.2 and 3. The learned counsel for the petitioner further submitted that the petitioner was perhaps ill-advised to call upon the respondents to sign further agreement at the time of issuing the invocation notice, when the respondents were parties to the procedure of arbitration already specified in Clause 14 of the agreement dated 20/5/2006.

14. It was submitted that respondent Nos.2 and 3 did not sign the said document while respondent No.1 appeared to have agreed to the same. It was submitted that the existence of the said document would be of no consequence, for the reason that invocation notice dated 2/1/2021 was specifically based on the arbitration Clause contained in the agreement dated 20/5/2006. On this basis, the learned counsel for the petitioner submitted that the present petition may be allowed and the arbitrator proposed in the said notice may be appointed as the sole arbitrator for resolution of disputes between the parties.

15. Mr. Drupad Patil, learned counsel for respondent No.1 submitted that since the said respondent had filed the application under Section 8 of the said Act, which stood allowed and confirmed up to Supreme Court, thereby relegating the parties to arbitration, the said respondent could not dispute the existence of the arbitration agreement between the parties.

16. The learned counsel had instructions to state that there was no objection on the part of the said respondent for the name of the arbitrator proposed on behalf of the petitioner.

17. The Respondent No.2, despite service, chose not to appear before this Court.

18. Mr. S. S. Patwardhan, learned counsel appearing for respondent No.3 submitted that in the peculiar facts and circumstances of the present case, the said respondent could not be sent for arbitration in pursuance of the prayers made in the present petition. It was submitted that in the present case, admittedly, the petitioner on its own deleted respondent No.3 from the array of parties in the application filed under Section 9 of the said Act, and while doing so, the petitioner specifically stated that the said respondent had no concern with development activities of the said property. On this basis, it was submitted that when there was no grievance against respondent No.3, there could not be any dispute with the said respondent. Therefore, there was no question of the petitioner invoking Clause 14 of the agreement dated 20/5/2006 i.e. the arbitration clause, as against the said respondent. It was submitted that such a specific objection was taken on behalf of respondent No.3 in the reply notice to the notice of invocation issued on behalf of the petitioner.

19. The learned counsel for respondent N.o3 relied upon Section 9 of the aforesaid Act and submitted that the said provision, read with Section 4 of the Act indicated that by filing application under Section 9 of the Act, the petitioner had initiated the arbitration proceedings and having voluntarily given them up by deleting respondent No.3 from the said proceedings, the invocation of the arbitration clause itself was bad as against respondent No.3. The learned counsel placed reliance on judgment of the Supreme Court in the case of *Sundaram Finance Ltd. Vs. NEPC India Ltd.*¹. It was further submitted by the learned counsel for respondent No.3 that when the petitioner chose to execute the fresh agreement in the year 2020, which had the effect of departing from or modifying Clause 14 of the agreement dated 20/5/2006, pertaining to arbitration, it resulted in novation and an incongruous situation where the arbitration proceedings would now be relatable to two arbitration clauses / agreements, which cannot be countenanced. The learned counsel relied upon the judgment of the Supreme Court in the case of *Larsen and Toubro Limited Vs. Mohan Lal Harbans Lal Bhayana*² to contend that the invocation of arbitration was rendered ineffective in the present case as against respondent No.3 and that the petitioner was, in the peculiar facts and circumstances, constrained to add prayer clause (b) to the present petition

1(1999) 2 SCC 479

2(2015) 2 SCC 461

seeking direction from this Court to add the respondent Nos.2 and 3 as parties to the arbitration proceedings, upon appointment of the arbitrator. It was submitted that such a procedure could never be contemplated under the provisions of the said Act and for this reason also, the present petition deserved to be dismissed.

20. This Court has heard the learned counsel for the rival parties, perused the record and also referred to the provisions of the aforesaid Act.

21. The objections raised on behalf of respondent No.3 are two fold, firstly that having deleted respondent No.3 from the array of parties in the proceeding under Section 9 of the said Act, the petitioner could never invoke Clause 14 of the agreement dated 20/5/2006 i.e. arbitration clause, as against respondent No.3. Secondly, having proposed subsequent agreement in the year 2020, pertaining to arbitration, which had the effect of departing from or modifying the earlier arbitration clause, the invocation itself was rendered bad and the present petition accordingly deserved to be dismissed, at least as against respondent No.3.

22. In order to deal with the first objection raised on behalf of respondent No.3, it would be necessary to refer to Section 9 of the said Act. It pertains to interim measures that can be granted by the Court. The learned counsel for respondent No.3 has

placed reliance on Section 9(1)(ii)(a) and sub-section (2) thereof, to contend that once an application is filed under Section 9 of the said Act, the procedure as contemplated under Part I kicks in. It is also emphasized on behalf of respondent No.3 that under Section 4 of the said Act, the party has a right to object and that in the present matter, at the first available opportunity, while sending reply notice to the petitioner, the respondent No.3 had clearly stated that its deletion from the proceedings under Section 9 of the said Act, had led to a situation where the petitioner could not turn around and invoke the arbitration clause as against respondent No.3. A perusal of the relevant portion of the judgment of the Supreme Court in the case of *Sundaram Finance Ltd. Vs. NEPC India Ltd. (supra)*, upon which the learned counsel for the respondent No.3 has placed reliance, would show that the Supreme Court has recognized the position of law that in a given situation, a party may choose to apply under Section 9 of the said Act for interim measures, even before issuing notice invoking arbitration under Section 21 of the said Act. The Supreme Court also commented upon the extent of power available with the Court to pass appropriate orders towards interim measures in order to preserve the subject matter of the property or any such measures that would be warranted in the facts and circumstances of a particular case.

23. There cannot be any quarrel with the said proposition, but

it does not take the case of the respondent No.3 any further on the claim that once an application is preferred under Section 9 of the aforesaid Act, during the course of which the applicant chooses to delete one of the parties, the arbitration proceedings could never be invoked against such party.

24. This Court is of the opinion that the purpose of Section 9 of the said Act is to provide appropriate power to the competent Court to pass orders that are in the nature of interim measures, which can be issued before, during or any time after culmination of the arbitration proceedings. In a given situation, the party applying under Section 9 of the said Act to the competent Court, may wish to delete certain parties, if it finds that the interim measures sought in the facts and circumstances of the case are to be limited only to a few of the parties to the proceedings. In another case, the Court may grant interim measures only against some of the parties and not against others. If the contention raised on behalf of the respondent No.3 is to be accepted, that merely because the applicant/petitioner chooses to delete a party from a proceeding initiated under Section 9 of the said Act, such an applicant/petitioner gives up its right to invoke arbitration proceedings against such deleted party, it would lead to incongruous results. This would lead to a situation where, despite existence of an arbitration agreement between the parties, the applicant/petitioner would not be able to invoke arbitration

against one or more parties, merely because such party/parties to the agreement stood deleted from the proceeding under section 9 of the Act for grant of interim measures. Such an interpretation runs contrary to the objects and purpose of the Act. Therefore, the first objection raised on behalf of respondent No.3 is rejected.

25. In so far as the second objection is concerned, reliance placed on the judgment of the Supreme Court in the case of *Larsen and Toubro Limited Vs. Mohan Lal Harbans Lal Bhayana (supra)* is misplaced, simply for the reason that in the facts of the said case, the Supreme Court proceeded on the basis that the parties entered into a series of agreements i.e. an original agreement, a first supplementary agreement and then a second supplementary agreement. It appears that in the facts and circumstances of the said case all parties had indeed signed and were parties to the subsequent agreements.

26. In contrast, in the present case, even if the purported subsequent agreement of the year 2020 is taken into consideration, a copy of which is placed on record, it shows that although the petitioner and all the three respondents are shown as parties, there is no specific date shown on the same and it is an admitted position that neither respondent No.2 nor respondent No.3 signed the said document. Apart from this, invocation notice dated 2/1/2021, sent by the petitioner to all the three

respondents, does not refer to the said purported agreement of 2020. The aforesaid notice specifically refers to the agreements dated 22/7/2004 and 20/5/2006, as well as deed of confirmation dated 13/7/2006, in order to invoke the arbitration clause contained in the agreement dated 20/5/2006 and then proposes the name of the arbitrator.

27. The learned counsel for respondent No.3 placed emphasis on a specific ground raised in the petition and prayer clause (b) thereof, to contend that the present petition was based on the said purported agreement of the year 2020. On facts, this Court is of the opinion that the material on record does not support the said contention. If at all, the notice invoking arbitration dated 2/1/2021, had referred to the purported agreement of the year 2020, there would have been some substance in the contention raised on behalf of respondent No.3. It is crucial that prayer clause (a) of the present petition specifically invokes clause 14 of the agreement dated 20/5/2006, while seeking appointment of a sole arbitrator for the resolution of the disputes between the parties.

28. This Court has appreciated the rival contentions of the parties in the light of the stand of the petitioner in the aforementioned suit filed before the concerned Court, wherein specific allegations were made against respondent No.3 as regards

fraud, collusion etc. This indicates that when the petitioner first raised its grievance in the year 2010, it pertained to the agreements in question, particularly the agreement dated 20/5/2006, which admittedly contains the arbitration clause and that therefore, there do exist disputes between the parties, including respondent No.3, for the petitioner to invoke the arbitration clause for appointment of arbitrator. Hence, the second objection raised on behalf of respondent no.3 is also rejected.

29. At this stage, the learned counsel appearing for respondent Nos.1 and 3, on instructions, submit that the said respondents have no objection to appointing the arbitrator proposed on behalf of the petitioner in the invocation notice dated 2/1/2021. Therefore, this Court has no hesitation in proceeding to appoint the said proposed arbitrator as the sole arbitrator in the present case. Accordingly, Mrs. Justice Shalini Phansalkar- Joshi, former Judge of this Court, is appointed as the sole arbitrator for resolution of the disputes between the parties. The details of the learned arbitrator are as follows:

The Hon'ble Smt. Justice Shalini Phansalkar-Joshi

Address at Mumbai :

C/o. Mridula Bhatkar,

501, Saket, M. B. Raut Marg,

Near Balmohan Vidya Mandir,

Shivaji Park, Dadar (West),
Mumbai – 400 025. Maharashtra

Address at Pune :

Bungalow No.12,
Bhagya Chintamani Nagar,
Poul Road, Kothrud,
Pune – 411 038.

Mobile No. 9657188676

Email : phansalkarjoshi@gmail.com

30. The parties undertake to inform the learned arbitrator about the order passed today.

31. The learned arbitrator is requested to send her consent and disclosure statement as per Section 11(8) and 12(1) of the aforesaid Act, within four weeks to the Registrar (Judicial) of this Court. The fees of the learned arbitrator shall be as per schedule IV to the said Act.

32. All contentions of the parties are kept open. The petition is disposed of.

MANISH PITALE, J.