



BOMBAY HIGH COURT WON'T ALLOW HIDING BEHIND ANCILLARY RELIEFS CLAIMED AGAINST NON-PARTIES TO ARBITRATION AGREEMENT, IN ORDER TO PREVENT THE DISPUTE BEING REFERRED TO ARBITRATION

Suman Baburao Thapa v. Jigar K. Mehta and Ors. (Bombay High Court, 13 March 2017)

BRIEF BACKGROUND

Respondent Nos. 1 and 2 (“**Respondents**”) filed a suit for specific performance (“**Suit**”) before the Trial Court against the Petitioner, pertaining to an agreement of sale dated 4 July 2010 (“**Agreement**”). Under the Agreement a particular plot of land – allotted by Respondent No. 3 (City and Industrial Development Corporation, “**CIDCO**”) to the Petitioner – was to be sold to the Respondents.

During the pendency of the Suit, the Petitioner moved an application under Section 8 (“**Application**”) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) before the Trial Court, for referring the dispute to arbitration in view of an arbitration clause contained in the Agreement (“**Arbitration Clause**”).

The Respondents contested referral of the dispute to arbitration as, according to them, the language of the Arbitration Clause limited itself to disputes concerning payment of the consideration amount, whereas in the present case, the entire consideration had been paid. The Trial Court accepted this contention of the Respondents and rejected the Application.

The Petitioner thus brought the present petition challenging the Trial Court’s order before the Bombay High Court (“**HC**”).

ISSUES AND FINDINGS

The first issue before the HC was regarding the scope of the Arbitration Clause. The Petitioner submitted that once it was established that the Agreement contained a valid arbitration clause, it is mandatory on the part of the HC to refer the dispute to arbitration and it was not open to the Respondents or the Trial Court to interpret which subject matter could be referred to arbitration under the Arbitration Clause. Such interpretation would have to be done by the arbitrator herself. To this, the Respondents’ contention was the same as before the Trial Court, that the scope of the Arbitration Clause was restricted to payment of consideration. The HC agreed fully with the submission of the Petitioner.

The second issue raised before the HC was that CIDCO was a party to the Suit, but not to the Agreement of Sale, hence the dispute in its entirety could not be referred to arbitration. On this point, the HC opined that while CIDCO was a necessary and proper party to the Suit, only a consequential and ancillary relief of injunction was claimed against it, making CIDCO a formal party who would abide by the decision of the Arbitrator and thereafter the Court. The main dispute was between the Petitioner and the Respondents, who were subject to the Arbitration Clause, and thus the dispute could be referred to arbitration.

The third, and final, contention raised before the HC was that in the case of *Krishan Radhu v. The Emmar MGF Construction Pvt. Ltd.*¹ (“**Krishan Radhu**”), the Delhi High Court had read Section 8 of the arbitration Act along with Order VIII Rule 1 of the Civil Procedure Code, 1908 (“**CPC**”) to conclude that an application for reference to arbitration must be made before expiry of the period to file a written statement, which was a maximum of 120 days from filing of the suit under Order VIII Rule 1. The Application in the present case had been filed beyond the period of 120 days, and thus could not be entertained. However, the HC found a very clear distinction in the two scenarios, as the suit in the *Krishan Radhu* case was a Commercial Suit, and the 120 days’ time limit, brought in by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was only applicable to commercial suits, whereas in the present case, the Suit was an ordinary suit for which the courts had the discretion to grant extension for filing of written statement for reasons deemed fit by them. Thus, the ratio of the *Krishan Radhu* case was not applicable to the facts at hand, and the Application could therefore be accepted at this stage.

Hence, the HC quashed the order of the Trial Court, and directed that the dispute be referred to arbitration. However, at the same time, a stay on the HC’s order was granted at the request of the Respondents to allow them to approach the Supreme Court against the same.

CONCLUSION

The findings of the HC on the second and third issues outlined above make for some interesting observations:

- i) It would not necessarily be a defence to say that a dispute cannot be referred to arbitration merely because a particular

¹ 2016 SCCOnline Del 4484. ELP has previously released an update on this judgment as well.

party to a Court proceeding is not party to the arbitration agreement. Depending on the nature of reliefs claimed by or against such a party, it would still be possible for the courts to make a reference to arbitration.

- ii) The HC, while distinguishing the timeline for filing written statement in an ordinary suit versus a commercial suit, appears to have implicitly accepted the position that 120 days is the strict outer limit for filing written statement in commercial suits – with no discretion to the court to extend the same – and that an application under Section 8 of the Arbitration Act must be made before expiry of such period. However, this can, at best, be considered an obiter from the Bombay High Court, although the position is very clear in the jurisprudence of the Delhi High Court.

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**ECONOMIC
LAWS
PRACTICE**
ADVOCATES & SOLICITORS

MUMBAI
mumbai@elp-in.com

AHMEDABAD
ahmedabad@elp-in.com

NEW DELHI
delhi@elp-in.com

PUNE
pune@elp-in.com

BENGALURU
bengaluru@elp-in.com

CHENNAI
chennai@elp-in.com

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