NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 874 OF 2022
(Arising out of SLP (Civil) No. 7635 of 2021)

MOHAMMED MASROOR SHAIKH … APPELLANT

v.

BHARAT BHUSHAN GUPTA & ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NO. 875 OF 2022
(Arising out of SLP (Civil) No. 7655 of 2021)

AND

CIVIL APPEAL NO. 875 OF 2022
(Arising out of SLP (Civil) No. 7714 of 2021)

JUDGMENT

ABHAY S. OKA, J.

Leave granted.

1. These three appeals take exception to the similar orders passed by a learned Single Judge of the Bombay High Court

on 6th March 2020 on the petitions under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"). The appellant, the respondent no.1 and the respondent nos.3 to 5 were the partners of three different partnership firms in the name and style of M/s M.M. Developers, Nisarga, M/s M.M. Developers, Shanti Nagar and M/s M.M. Developers, Shramjivi. The facts of these three cases are identical and therefore, for convenience, we are referring the facts of the case in Civil Appeal arising out of Special Leave Petition (Civil) No. 7635 of 2021. A deed of retirement-cum-continuation dated 12th September 2014 (for short "the retirement deed") in respect of the firm M/s M.M. Developers, Nisarga (the respondent no.2) was executed by and between the appellant, the respondent no.1 and the respondent nos.3 to 5. The retirement deed recorded that the respondent no.1 retired from the respondent no.2 - partnership firm on the terms and conditions mentioned therein and the business of partnership firm was continued by the appellant and the respondent nos.3 to 5.

2. The respondent no.1 by his advocate's notice dated 18th February 2019 invoked the arbitration clause (clause 19) in the retirement deed. According to the case of the respondent no.1, the appellant and the respondent nos.3 to 5 did not respond to the said notice. Therefore, a petition under Section 11 of the Arbitration Act was filed by the respondent no.1. By the impugned Order dated 6th March 2020, the learned Single Judge of the Bombay High Court allowed the petition and appointed a member of the Bar as the sole Arbitrator. Similar orders were passed in relation to the two other firms. The present appeals have been filed on 9th June 2021.

3. A counter affidavit has been filed by the respondent no.1 contending that though the appellant was served with the advocate's notice of the petition under Section 11 of the Arbitration Act, he did not appear in the petition. In the counter affidavit, it is pointed out that on 8th May 2021 in the preliminary meeting held by the learned Arbitrator, the appellant was represented by an advocate. It is pointed out that the respondent no.1 filed an application under Section 17

of the Arbitration Act before the learned Arbitrator claiming certain interim directions. The respondent no.3 filed an application under Section 16 of the Arbitration Act contending that there was no arbitration agreement in existence and that the claim made by the respondent no.1 before the Arbitrator was barred by limitation. By the order dated 25th May 2021, the learned Arbitrator rejected the objection raised under Section 16. The respondent no.1 has pointed out in the counter affidavit that before the learned Arbitrator, the appellant, the respondent no.2 and respondent nos.4 and 5 were represented by a common advocate who specifically supported the submissions of the learned counsel appearing for the respondent no.3 in support of the application under Section 16. It is also pointed out that the aforesaid material facts have been suppressed in the present appeals filed on 9th June 2021. It is also pointed out that by the order dated 24th June 2021, the learned Arbitrator allowed the application under Section 17 filed by the respondent no.1. By filing additional documents, the respondent no.1 has brought on

record a copy of an appeal filed by the appellant and the respondent no.2 for challenging the Order dated 24th June 2021 before the Bombay High Court.

4. During the course of submissions, Mr. Manish Vashisht, the learned Senior Counsel appearing for the appellant accepted that the appellant has filed a petition under Section

34 of the Arbitration Act for challenging the order dated 25th

May 2021 passed by the learned Arbitrator overruling the objections raised by the respondent no.3.

5. The learned Senior Counsel appearing for the appellant in support of the appeals firstly urged that the High Court did not issue and serve a notice of the petition filed under Section

11 of the Arbitration Act. His submission is that the appellant was admitted in intensive care unit of a hospital on 3rd May 2021 and was discharged on 3rd June 2021. He relied upon the documents placed on record to that effect in the rejoinder. He submitted that clause 19 of the retirement deed does not provide for referring a dispute between the respondent no.1, who was the retiring partner and the continuing partners to

arbitration. He submitted that this crucial fact has been ignored by the learned Single Judge of the Bombay High Court. Moreover, even the facts pleaded in the petition under Section 11 of the Arbitration Act show that the claim of the respondent no.1 was barred by limitation. He relied upon a

decision of this Court in the case of **State of Orissa and another** v. **Damodar Das**[1]. He submitted that as the appellant was not given a notice of the date fixed in the petition under Section 11, he could not urge before the learned Single Judge that the claim of the respondent no.1 was barred by limitation and that there was no arbitration clause. He submitted that the appellant caused appearance before the learned Arbitrator without prejudice to his rights and contentions. The learned counsel relied upon another decision of this Court in the case

of **Vidya Drolia & Others** v**. Durga Trading Corporation**[2] and in particular what is held in paragraphs 95 and 98 thereof. He submitted that the issues which are concluded by the impugned order cannot be reopened by the learned Arbitrator.

1 (1996) 2 SCC 216
2 (2021) 2 SCC 1

6. The learned counsel appearing for the respondent no.1 submitted that a notice of arbitration petition filed under Section 11 was served upon the appellant. He submitted that the appellant was represented before the Arbitral Tribunal by his advocate, Mr. Shreyans Baid, who supported the objections raised by the respondent no.3 under Section 16 of the Arbitration Act regarding the absence of arbitration agreement as well as the time barred claim. He submitted that the said objection was overruled by the learned Arbitrator by his order dated 25th May 2021. He pointed out that this material fact has been suppressed by the appellant while filing these appeals. He pointed out that the appellant has filed petitions under Section 34 of the Arbitration Act before the Bombay High Court on 2nd December 2021 for challenging the order dated 25th May 2021. He submitted that the appellant can always agitate the issues raised by him in these appeals in the arbitration petition under Section 34. He submitted that documents have been placed on record which show that Mr. Baid, the learned advocate was appearing on behalf of the

appellant before the learned Arbitrator and that the said advocate represented the appellant before the Arbitrator from 8th May 2021. The learned counsel appearing for the respondent no.1 submitted that what is held in paragraph 154

of the decision of this Court in the case of **Vidya** (supra) completely supports the case of the respondent no.1.

7. The learned Senior Counsel appearing for the appellant clarified that though the advocate's notice of filing the petition under Section 11 was served upon the appellant, the date fixed in the arbitration petition was not communicated to the appellant. Moreover, the Court did not issue any notice on the petition filed under Section 11.

8. We have given careful consideration to the submissions. It is not in dispute that along with advocate's notice dated 8th

November 2019, the appellant and the respondent nos.2 to 5 were served a copy of the petition filed under Section 11 of the Arbitration Act by the respondent no.1. In the impugned Order, the learned Single Judge of the Bombay High Court has referred to the affidavit of service of notice filed on behalf of

the respondent no.1. A judicial notice will have to be taken of a long standing and consistent practice followed on the Original Side of the Bombay High Court. The practice is that the advocates serve a notice of the proceedings filed in the Court even before it comes up before the Court. The Court acts upon such service effected by the advocate on proof thereof being produced in the form of an affidavit of service. Therefore, there is nothing illegal about the High Court acting upon the advocate's notice admittedly served to the appellant. According to the case of the appellant, he was admitted to a hospital on 3rd May 2021. However, the advocate's notice of the petition under Section 11 was served upon the appellant in November 2019. Therefore, the appellant could have always made arrangements to contest the said petition. Therefore, we reject the first submission made by the learned Senior Counsel appearing for the appellant regarding the failure to serve the notice of the petition under Section 11.

9. While filing the present appeals on 9th June 2021, the appellant ought to have disclosed that on 8th May 2021, his

advocate had appeared before the learned Arbitrator in the first preliminary meeting convened by the learned Arbitrator. The minutes of preliminary meeting recorded by the learned Arbitrator do not record that the appellant appeared in the meeting without prejudice to his right of challenging the order appointing the Arbitrator. In fact, Mr. Baid, the learned counsel who appeared for the appellant before the learned Arbitrator, by e-mail dated 29th May 2021 addressed to the learned Arbitrator, sought his permission to withdraw his appearance. In the said e-mail, the advocate stated that he was appointed on the instructions of the present appellant. Moreover, the order dated 25th May 2021 passed by the learned Arbitrator by which objections under Section 16 were overruled shows that the same advocate appeared for the appellant and supported the objections raised by the respondent no.3. As the objection was rejected by the learned Arbitrator, in view of sub-section (6) of Section 16, on 21st December 2021, the appellant has filed a petition under

Section 34 of the Arbitration Act, which is pending before the Bombay High Court for challenging the said Order.

10. The learned counsel appearing for the respondent no.1 has relied upon what has been held in paragraphs 95 and 98 of the decision of this Court in the case of **Vidya** (supra). The conclusions of this Court have been summarised in paragraph 154 of the said decision, which reads thus:

> **"154.** Discussion under the heading **"Who Decides arbitrability?"** can be crystallised as under:
>
> **154.1.** Ratio of the decision in *Patel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.
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> **154.2.** Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence- competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non- arbitrability. The court has been conferred power of "second look" on aspects of non- arbitrability post the award in terms of sub-clauses (*i*), (*ii*) or (*iv*) of Section 34(2)(*a*) or sub-clause (*i*) of Section 34(2)(*b*) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non- arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial

> or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."
>
> *(underlines supplied)*

11. Thus, this Court held that while dealing with petition under Section 11, the Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable. In such case, the issue of non-arbitrability is left open to be decided by the Arbitral Tribunal. On perusal of the impugned order, we find that the issues of non- arbitrability and the claim being time barred have not been concluded by the learned Single Judge of the Bombay High Court. In fact, in clause (vii) of the operative part of the impugned Order, the learned Single Judge has observed that the contentions of the parties have been kept open. The petitions filed by the appellant under Section 34 of the Arbitration Act, challenging the Order dated 25th May 2021 are pending before the High Court in which the appellant can raise all permissible contentions.

12. Therefore, in our considered view, no case for interference is made out. We, therefore, dismiss the appeals, while leaving open the contentions raised by the appellant in pending petitions under Section 34 of the Arbitration Act before the High Court of Bombay.

13. There will be no order as to costs. Pending applications, if any, shall stand disposed of.

.....J
(INDIRA BANERJEE)

.....J
(ABHAY S. OKA)

New Delhi;
February 02, 2022.