

IN THE HIGH COURT OF BOMBAY AT GOA
APPLICATION FOR APPOINTMENT OF
ARBITRATOR NO.5/2014

M/s. Sharma Kalypso Private Limited,
(formerly M/s. Raus Infrass Limited &
M/s. Sharma Constructions) 16-C,
Community Centre, Basant Lok,
Vasant Vihar, New Delhi 110057.

..... Petitioner.

V/s.

M/s. Goan Real Estate and Construction
Limited. DB House, Yashodham,
Gen. A.K. Viidya Marg,
Goregaon (East), Mumbai 400 063.
And Also
Project Office at M/s. Goan Real
Estate and Construction Limited,
Grand Hyatt Hotel Resorts
Aldeia De Goa, Next to Goa University,
P.O. Goa University, Nauxim,
Bambolim, Goa 403 206.

..... Respondent.

Ms. Prachi Joshi Kabadi, Advocate for the petitioner.

Mr. J. Supekar and Mr. P. Sawant, Advocates for the respondent.

CORAM :- F.M. REIS, J.

Date :- 9th January, 2015.

ORAL ORDER :-

Heard Ms. Prachi Joshi Kabadi, learned Counsel appearing for the petitioner and Shri J. Supekar, learned Counsel appearing for the respondent.

2. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“the Act” for short), for appointment of an arbitrator.

3. Shri J. Supekar, learned Counsel appearing for the respondent has opposed the above application. The main ground raised by the respondent is that the application for appointment of arbitrator itself is barred by limitation as, according to him, as per the averments in the application the cause of action arose on 26.12.2009 and the application came to be filed on 15.12.2013. The learned Counsel further points out that on that basis itself the application is barred by limitation and the same deserves to be dismissed.

The other contention of Shri Supekar, learned Counsel appearing for the respondent is that the agreement relied upon by the petitioner for appointment of an arbitrator is on the basis of an

agreement between the respondent and M/s. Sharma Constructions. The learned Counsel further points out that the present application has been filed by M/s. Sharma Kalypso Private Limited and, as such, the question of there being any arbitration agreement between the petitioner and the respondent would not arise. The learned Counsel further points out that as there is no arbitration agreement, there is no ground for appointment of an arbitrator to adjudicate the disputes. Shri Supekar, however, does not dispute that in the said agreement sought to be invoked by the petitioner, there is an arbitration clause which would cover the alleged disputes raised by the petitioner.

4. Ms. Prachi Joshi Kabadi, learned Counsel appearing for the petitioner has disputed the contentions raised by the learned Counsel appearing for the respondent. The learned Counsel contends that the notice for appointment of an arbitrator was issued on 10.11.2012 (Exhibit J) which is the date of commencement of the proceedings. Learned Counsel, as such, points out that the contention of Shri Supekar, learned Counsel appearing for the respondent that the application is barred by limitation is untenable.

With regard to the next contention raised by the learned

Counsel appearing for the respondent, it is pointed out by the learned Counsel appearing for the petitioner that the petitioner has produced the Memorandum of Association of the petitioner/Company and has pointed out clause 1 of the said Memorandum of Association, which reads thus :

“1. To takeover the business of a proprietorship concern running under the name and style of M/s “SHARMA CONSTRUCTIONS” working at 16C, Basant Lok, Vasant Vihar, New Delhi-110057, with all the assets and liabilities on terms mutually agreed upon. The said firm shall cease to exist after such take over by the Company on incorporation.”

The learned Counsel further points out that the said clause itself shows that the petitioners are successors-in-interest of the said M/s Sharma Constructions Limited, a proprietorship concern, which has been taken over by the petitioner-Company.

The learned Counsel has, thereafter, taken me through the reply filed by the respondent to point out that the respondent never questioned the locus of the petitioner to serve such notice for appointment of an arbitrator and further in the said letter, the respondent made the following averments :

“Please be informed that we are keen to release your due amounts without any delay but before we do so you too have to comply with the agreed requirements as indicated above.”

The learned Counsel further points out that this conduct of the respondent itself discloses that the petitioners were accepted as successors of M/s. Sharma Constructions Limited by the respondent and, as such, it is not open for the respondent to now raise such a frivolous contention.

5. Upon hearing the learned Counsel appearing for the respective parties and on perusal of the records, it becomes abundantly clear that the fact that there is an arbitration clause, which covers the dispute raised by the petitioner, in the said agreement dated 6.11.2007 as modified on 9/2/2008 has not been disputed. The only point to be examined is whether the filing of the application itself is beyond the period of limitation and whether the petitioners are entitled to file such an application.

6. Section 43 of the Arbitration and Conciliation Act, 1996

clearly provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to the proceedings in the Court. Sub-section (2) further provides that for the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in section 21. Section 21 of the Arbitration and Conciliation Act, 1996 provides thus :

“ 21. Commencement of arbitral proceedings.—
Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

On plain reading of the said section and taking note of the date of receipt of the notice for appointment of the arbitrator dated 10.11.2012 and the fact that the application for appointment of arbitrator was served by the petitioner on 15.12.2013, the contention of learned Counsel Shri Supekar, learned Counsel appearing for the respondent, cannot be accepted.

7. With regard to the next contention of the learned Counsel appearing for the respondent, the Memorandum of Association

produced by the petitioner clearly shows that the petitioner Company has taken over the business of the proprietorship concern of M/s. Sharma Constructions along with the assets and liabilities. Hence, the petitioners, as successor-in-interest of the said proprietorship, are entitled for the appointment of the arbitrator in terms of the contract. Even, Section 40 of the Arbitration and Conciliation Act, 1996 provides that even the legal representatives of a deceased person can invoke an arbitration clause where the deceased was a party.

8. In such circumstances, it is now well settled that even an assignee of a party to the arbitration clause is entitled to invoke the arbitration agreement. In this context, the judgment of the Apex Court reported in (2008) 13 SCC 667, in the case of ***Ravi Prakash Goel vs. Chandra Prakash Goel and another***, would be relevant. Observations at paras 20 and 23, read thus :

“ 20. The definition of “legal representative” became necessary because such representatives are bound by and also entitled to enforce an arbitration agreement. Section 40 clearly says that an arbitration agreement is not discharged by the death of a party. The agreement remains enforceable by or against the

legal representatives of the deceased. In our opinion, a person who has the right to represent the estate of the deceased person occupies the status of a legal person (*sic* representative). Section 35 of the 1996 Act which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the “*parties and persons claiming under them*”. Persons claiming under the rights of a deceased person are the personal representatives of the deceased party and they have the right to enforce the award and are also bound by it. The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives.

23. On the dissolution of the firm, the arbitration clause does not come to an end and so if a dispute had arisen during the lifetime of the deceased partner, his legal representatives would be entitled to take proceedings under Section 20 of the Arbitration Act, 1940.”

9. The Apex Court, in another judgment reported in (2008) 10 SCC 187, in the case of ***TATA Industries Limited and another vs. Grasim Industries Limited*** has, *inter alia*, held that though a person is not originally a party to an arbitration agreement, he can attain *locus*

standi to file an application under Section 11 (6) of the Arbitration and Conciliation Act, 1996. In a situation, *inter alia*, when such a person later acquiring some shareholding which was bought by the party objecting to its locus standi, or when such a party having acquired and becoming wholly owned subsidiary of one of the original parties to the contract and when he having been impliedly accepted as a party by the party which is disputing his locus standi. In the present case, as pointed out by the learned Counsel appearing for the petitioners, the petitioners have succeeded the original proprietorship M/s. Sharma Constructions Limited and as such, the petitioners have *locus standi* to file the above application under Section 11(6) of the Act. Apart from that, the reply referred to by the learned Counsel appearing for the petitioner to the notice for appointment of an arbitrator, clearly shows that the respondent did not dispute the *locus standi* of the petitioners to raise a dispute before the arbitrator and even went to the extent of claiming performance of some obligations in the agreement from the petitioner. The respondent also disclosed that the respondent was prepared to refund the retention amount to the petitioner after efflux of the defect period. This conduct itself suggests that the respondents themselves have accepted that the retention amount held by them was

on behalf of the petitioner herein. No doubt, whether the petitioners are entitled to recover the amounts or not would be a dispute which would have to be adjudicated by the arbitrator on its own merits. In such circumstances, both the objections raised by the respondent are unsustainable and, as such, the application under Section 11(6) of the Act deserves to be allowed.

10. Hence, the application is allowed. By consent, Shri R.M.S. Khandeparkar, Retired Judge of this Court is appointed as the sole arbitrator to adjudicate upon the disputes between the parties. All the contentions of both parties, on merits, are left open.

F.M. REIS, J.

ssm.