

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.64/2015

M/s. Vishwajeet and Associates
through its proprietor
Shri Vaibhav R. Gambhir

... Petitioner

V/s.

Chandrakant M. Wavikar

... Respondent

Mr. Rahul Singh /b. Legal Catalyst for the Petitioner.
Mr. K. S. Dewal i/b. Roshan S. Tanna for the Respondent.

CORAM: K.K. TATED, J.
DATED : NOVEMBER 27, 2015

P.C. :

1. Heard the learned counsel for the parties. By this petition under section 11 of the Arbitration and Conciliation Act 1996 (the said Act), the Petitioner is seeking appointment of an arbitrator to resolve the dispute with Respondent as per the undated agreement.

2. The learned counsel for the Petitioner submits that they carried out the work of the Respondent hospital and raised their bills. He submits that as the Respondent failed and neglected to pay their outstanding, the Petitioner issued legal notice dated 10/11/2013 invoking arbitration clause as per undated agreement Exhibit-A to the petition. As the Respondent neither paid their outstanding nor stated any name of an arbitrator, the Petitioner filed the present petition.

3. The learned counsel for the Petitioner submits that on the date of issuing notice dated 10/11/2014, a sum of Rs.53,20,513.50 was due and payable by the Respondent. He submits that the Respondent has filed Affidavit-in-Reply and raised objection about the maintainability of petition under section 11 of the said Act. He submits that the first objection raised by the Respondent that the Petitioner has not made proper party in the present proceedings i.e. partnership firm. He submits that in any case, the Respondent is one of the partners of the partnership firm and hence, the petition is maintainable. The learned counsel for the Petitioner further submits that the Respondent raised objection about the limitation. He submits that the issue about the limitation is to be decided by the Arbitrator and not by the Court. In support of his contention, he relies on a judgment of the Andhra Pradesh High Court dated 12/07/2012 in the matter ***of R. P. Agrawal : Prop. Rajeev Traders Vs. General Manager, S.C.Railway and Ors.*** MANU/AP/1461/2002.

4. On the basis of the above mentioned submission, the learned counsel for the Petitioner submits that the petition as filed by the Petitioner under section 11 of the said Act is maintainable and hence this Hon'ble Court be pleased to appoint an Arbitrator to resolve the dispute between the parties.

5. On the other hand, the learned counsel for the Respondent vehemently opposed the petition. He submits that they filed Affidavit-in-Reply dated 24/07/2015 and also the additional compilation of documents. The learned counsel for the Respondent submits that the

Respondent is one of the partners of the partnership firm known as “Dr.Wavikar's Eye Hospital & Atharva Eye Clinic”. He submits that the said partnership is duly constituted and registered under the Indian Partnership Act, 1932. He submits that the Respondent Chandrakant M. Wavikar is one of the partners of the said firm. He submits that as the Petitioner failed and neglected to join the partnership firm as well as other partner in the present proceedings, the petition is not maintainable in law, for non-joinder of necessary party.

6. The learned counsel for the Respondent submits that the petition is barred by law of limitation. He submits that pursuant to the contract between the Petitioner and the Respondent, the Respondent handed over the site to the Petitioner for carrying out the work on 18/12/2009. He submits that the cut-off-date for completion of the work as per agreement was 18/02/2010. He submits that as per the agreement, the Petitioner handed over the site after completion of the work to the Respondent on 04/04/2010. Thereafter the Petitioner issued Advocate's notice dated 25/08/2010 calling upon the Respondent to pay sum of Rs.53,20,512.50. The said legal notice was replied by the Respondent through his Advocate on 21/10/2010. Thereafter the Petitioner filed complaint under section 406, 417 and 420 of the Indian Penal Code, 1860 against the Respondent which was dismissed by the learned Judicial Magistrate, First Class, Thane on 26/11/2013. Thereafter the Petitioner issued another legal notice dated 10/11/2014 as per the arbitration clause of an undated arbitration agreement. That notice was disputed by the Respondent on 12/11/2014 and thereafter the Petitioner filed present petition under

section 11 of the said Act on 04/02/2015. He submits that when the Petitioner handed over the site after completion of the entire work on 04/04/2010, the cause of action started. Hence, the petition as filed by the Petitioner in the year 2015 is barred by law of limitation. He further submits that in a complaint under section 406, 417 and 420 of the Indian Penal Code, 1860, in paragraph 12, it was specifically stated by the Petitioner that the cause of action arose between the parties on 19/06/2010. He submits that bare reading of the petition shows that the petition filed by the Petitioner in the year 2015 was barred by law of limitation. He submits that as per the provision of section 43 of the said Act, Limitation Act is applicable to the arbitration proceedings. In support of his contention, he relies on the judgment of the Apex Court in the matter of ***Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd. (2007) 4 SCC 599***. Paragraph 27 of the said judgment reads thus:

*“27. We shall take up the last contention raised by the appellant regarding the scope of the order passed by the Chief Justice or his Designate Judge. It was contended that since the Designate Judge has already given findings regarding the existence of live claim as also the limitation, it would be for this Court to test the correctness of the findings. As against this it was argued by the respondent that such issues regarding the live claim as also the limitation are decided by the Chief Justice or his Designate not finally but for the purpose of making appointment of the Arbitrators under Section 11(6) of the Act. In our opinion what the Chief Justice or his Designate does is to put the arbitration proceedings in motion by appointing an Arbitrator and it is **for that purpose** that the finding is given in respect of the existence of the arbitration clause, the territorial jurisdiction, live issue and the limitation. It cannot be disputed that unless there is a finding given on these issues, there would be no question of proceeding with the arbitration. Shri Salve as well as Shri Venugopal invited our attention to the observations made in para 39 in ***SBP & CO. v. Patel Engineering****

Ltd. 2(2005) 8 SCC 618 which are as under:

“39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11(6) of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long- barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.”

A glance on this para would suggest the scope of order under Section 11 to be passed by the Chief Justice or his Designate. In so far as the issues regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his Designate has to decide those issues because otherwise the arbitration can never proceed. Thus the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the Arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the

transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.”

7. On the basis of this submission, the learned counsel for the Respondent submits that the petition as filed by the Petitioner is not maintainable and same to be dismissed with costs.

8. Heard the learned counsel for the parties at length. Admittedly, in the present proceedings, the Petitioner has filed this petition under

section 11 of the said Act on the basis of legal notice dated 10/11/2014. Prayer clause (a) of the petition reads thus:

(a) this Hon'ble Court may be pleased to appoint Sole Arbitrator for adjudication of dispute raised by the Petitioners in its letter dated 10/11/2014, annexed at Exhibit-B to the present petition.

9. It is to be noted that the petition under section 11 of the said Act required to be filed on the basis of agreement and not on the basis of a legal notice. On this ground, the petition is required to be dismissed.

10. Even admittedly, the Petitioner, in his complaint filed before the Judicial Magistrate, First Class, Thane in O.M.A.No.324/2011 in paragraph 18 stated that the cause of action first arose on 19/06/2010 when a meeting was conducted. Paragraph 18 of the said complaint reads thus :

“18. The cause of action firstly arose on 19/06/2010 when the meeting was conducted. The accused had admitted his liability to pay the complainant a sum of Rs.31,06,889 as full and final settlement of the complainant's dues. It further arose on 29/07/2010 when the accused sent an email admitting that he is liable to pay the complainant a sum of Rs.28,00,000/- plus taxes. It further arose on 25/08/2010 when the accused through his reply to the legal notice admitted his liability to the extent of Rs.11,46,319/- (Rupees Eleven Lacs Forty Six Thousand Three Hundred Nineteen only) but has not paid even the above mentioned amounts to the complainant. It finally arose on 26/02/2011 when the complainant had filed a police complaint with Kapurbawdi Police Station. Thus, this complaint is filed within limitation.”

11. This itself shows that the present petition has been filed by the Petitioner after more than 5 years, which is barred by law of limitation. The Apex Court, in the matter of Shree Ram Mills Ltd. (Supra)

specifically stated that at the time of deciding the Application under section 11 of the said Act, the court can consider whether the claim was within limitation or not.

12. In view of these facts, I do not find any substance in the petition. Same stands rejected.

(K.K. TATED, J.)