

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO. 36 OF 2011

M/s. Amar Bharat Construction .Petitioner

Vs.

Sudhir Gangadhar Borgaonkar .Respondent

Mr. Atul Damle, Senior Counsel with Mr. R.D. Suryawanshi for the
Petitioner.

Mr. R.S. Apte, Senior Counsel with Mr. A.A. Garge for the
Respondent.

CORAM : A.A. SAYED, J.

DATE : 5 MARCH 2015

ORDER:

. This Arbitration Petition is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as '1996 Act') seeking a direction to appoint an Arbitrator to adjudicate the dispute in terms of Clause 34 of the Agreement dated 22.11.1997.

2. The Petitioner is a partnership firm carrying on business of Contractors, Builders and Developers in the city of Kalyan. The Respondent and his brother late Shri P.G. Borgaonkar owned several immovable properties situated in

Kalyan City. The case of the Petitioner is that the Respondent and his late brother entrusted civil work on contract to the Petitioner in respect of a property known as 'Sudhanshu Chambers' owned by the Respondent and his late brother. The Petitioner completed the construction and from time to time raised bills upon the Respondent and his late brother. However, they failed to pay the said bills aggregating to Rs.34,41,000/- in respect of the work carried out by the Petitioner. On 22 November 1997, an Agreement was executed between the parties for construction of a building another property viz. D.P.Site No.84, Borgaonkar Wadi Shopping Complex owned by the Respondent and his late brother. The building was to be constructed on 'items-rate-contract' basis by the Petitioner. Pursuant to the said Agreement, the parties appointed one Mr. M.S. Deshpande as Architect. Respondent No.1 and his late brother also appointed one M/s. Upama Consultants Pvt. Ltd. as Project Management Consultants, for the purpose of inspection of various works relating to the contract and for verifying the payments to be made to the Petitioner (Contractor) as per the Statement of running bills issued by the Petitioner from time to time and forward the Statement of running bills to the

Respondent on 16.12.2010. It is the further case of the Petitioner that they almost completed the work of the building (shopping complex) except the south west side portion of the Borgaonkar Wadi shopping complex Building due to some litigation which had between the Respondent and their tenant and there was a status-quo order with regard to the construction relating to the said portion which was suppressed by the Respondent. The Petitioner had raised a running bill No.18th/ABC/2010 upon the Respondent (and his late brother) aggregating Rs.68,96,100/-. By letter dated 5 January 2011, the Respondent refused to pay any amount to the Petitioner on the ground that the entire amount of the bills of the Petitioner had been paid by the Respondent (and his late brother) and there is nothing due and payable to the Petitioner. On 11 May 2011, the Petitioner invoked Arbitration clause 34 of the Agreement dated 22 November 1997 called upon the Respondent to give their consent to the appointment of Sole Arbitrator as suggested in the notice. On 19 May 2011, the Respondent through their Advocate sent a reply wherein it was contended that in view of the Agreement dated 6 April 2006 entered into between the parties, there was no amount due and payable to the Petitioner. Hence, the present Petition.

3. An Affidavit-in-reply has been filed on behalf of the Respondent. The case of the Respondent in the reply is that the claim of the Petitioner is time barred and the Petition is required to be dismissed. The Petition is not maintainable inter alia also for the reason that the Petitioner has given a go-bye to the procedure as stipulated under Clause 34 of the Agreement dated 22 November 1997. Under Clause 34 of the Agreement, all disputes and differences were required to be referred to and settled by the Architect. It is pointed out that the Architect Mr. M.S. Deshpande appointed by the parties expired on 19 January 2011. Under the Development Agreement dated 7 April 2006 which was executed later in point of time, it was agreed between the parties that there is no outstanding liability on the part of the Respondent towards the bills raised by the Petitioner in respect of construction work. The present Arbitration Petition is merely an afterthought and hit by the provisions of limitation. The services of the Architect, R.C.C. consultant as well as the Project Management Consultant (M/s. Upama Consultants Pvt. Ltd.) had come to an end/terminated in the year 2007 itself and there was no question of raising any bills or certification bills including the running bill dated 16.12.1990. It is pointed out that as a matter of

fact there was still another Development Agreement dated 6 December 2004 entered into between the parties for construction of the 3rd floor by utilizing TDR. It is averred that Development Agreement dated 22 November 1997 has come to an end in April 2006 as the work of construction was completed and the Petitioner has received entire amount towards his bill and this fact is conceded by the Petitioner in the Agreement dated 6 April 2006 and there is no dispute existing between the parties.

4. The learned Counsel for the Petitioner reiterated the contentions in the Petition and relied upon the following judgments :

(i) S.B.P. & Company vs. Patel Engineering Ltd. & Anr., 2006 (1) Bom.C.R. 585 by a Bench of seven learned Judges of the Supreme Court

(ii) Schlumberger Asia Services Ltd. vs. Oil And Natural Gas Corporation Ltd., (2013) 7 SCC 562

(iii) Today Homes and Infrastructure Pvt. Ltd. vs. Ludhiana Improvement Trust & Anr., (2014) 5 SCC 68

(iv) Indian Oil Corporation Ltd. vs. SPS Engineering Ltd., (2011) 3 SCC 507

5. The learned Counsel on behalf of the Respondent reiterated the contentions in the Affidavit-in-Reply and relied upon the following judgments :

i) Dhu Bv vs. Tahal Consulting Engineers Ltd., 2007 Lawpage (SC) 333

ii) Adinath Sahakari Sakhar Karkhana vs. Triveni Engineering and Industries Ltd., 2007 Lawpage (Bom.) 27, of Single Judge of this Court

iii) Speech & Software Technologies (India) Pvt. Ltd. vs. Neos Interactive Ltd., 2008 Lawpage (SC) 1551 of Single Judge of Kerala High Court

iv) Union of India (Uoi) & Ors. vs. Onkar Nath Bhalla and Sons, 2009 Lawpage (SC) 1869

v) Anil Kumar vs. B.S. Neelkanta & Ors. , 2010 (5) SCC 407

vi) Bharat Rasiklal Ashra vs. Gautam Rasiklal Ashra & Anr., 2012 (2) SCC 144

6. I have considered the rival contentions of the learned Counsel and perused the material on record as also the judgments cited by the counsel. There is no dispute that the Agreement dated 22 November 1997 contained a clause for arbitration. The contention on behalf of the Respondent is essentially that the claim of the Petitioner is time barred and that the Agreement dated 22 November 1997 had already come to an end in April 2006 itself as the work of the construction under that

Agreement was completed and the Petitioner was paid the entire amount towards their bill and this fact is admitted in the Development Agreement dated 6 April 2006 and hence there was no dispute existing between the parties which requires to be referred to arbitration.

7. In the case of *S.B.P. & Co. vs. Patel Engineering Ltd.* (*Supra*), a Bench of 7 Learned Judges of the Supreme Court in para 46 has held as follows :

“46. We, therefore, sum up our conclusions as follows:

i)

ii)

iii)

iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of section 11(8) of the Act if the need

arises but the order appointing the arbitrator could only be that of the Chief Justice or the Judge designate.”

8. A plain reading of the aforesaid conclusion of the Supreme Court makes it clear that the Chief Justice or the designated Judge can decide the issue whether the claim was a dead one or alive claim. By order dated 16 January 2015, I had made it known to the Counsel for the parties that I am inclined to consider whether the dispute raised is a live one or not. As indicated earlier there is no dispute that there was an Arbitration clause in the Agreement dated 22 November 1997 between the parties. However, the parties had thereafter entered into another Development Agreement dated 7 April 2006. Clause 2 of the Development Agreement dated 7 April 2006 is relevant for our purposes. It reads as under:

“The party of the first part has transferred the right in favour of the party of the second part in respect of the construction as per sanctioned plan dated 18.2.2006 on the land described in the annexure to the said agreement and calculated price of the same comes to Rs.1,08,55,833/- (Rs. One crore eight lac fifty thousand and eight hundred thirty three) and the said amount has been paid and/or given by party of the first part to the second part towards the bill of construction cost. Therefore now party of the second part

has nothing to pay to the party of the first part towards the contract for construction as well as the party of the first part has nothing to receive any consideration from the party of the second part towards the right to construct given of west and south side of the plot of land. And now the party of the first part has no right to demand any amount from the party of the second part.”

9. A bare perusal of the aforesaid clause indicates that under the Development Agreement dated 7 April 2006 the Petitioner had agreed that there was no outstanding amount towards bills raised by the Petitioner in respect of construction work carried out by the Petitioner. Pertinently in para 12 of the Arbitration Petition, the Petitioner has averred as follows:

“12. The Petitioner states that thereafter the Petitioner and Respondents entered into Development Agreement dated 07.04.2006 as stated above, wherein the Petitioner allegedly agreed that there is no outstanding amount towards the bills raised by the Petitioner in respect of construction work carried out by the Petitioner in view of Agreement dated 22.11.1997. The Petitioner states that in fact the said clause in the Development Agreement dated 07.04.2006 is inserted by mistake and therefore the Petitioner through his Advocate wrote a letter and pointed out the said fact. However, till today the Respondents neither given any reply to the said letter nor corrected the said mistake.”

It is, thus, an admitted position that the Petitioner had agreed that there was no outstanding dues payable by the Respondent to the Petitioner as set out in the Development Agreement dated 7 April 2006. No steps were taken by the Petitioner to rectify the clause in the Development Agreement dated 7 April 2006 and the contention in para 12 of the Petition that the said clause in the Development Agreement dated 7 April 2006 is inserted by mistake cannot be countenanced and is rejected.

10. Apart from the above, it is required to be noted that the Arbitration Petition has been filed only sometime on 29 September 2011 in respect of the Agreement dated 22 November 1997 and the construction work was completed long back. It is noticed that the 17th running bill is dated 26 September 2005 whereas the 18th running bill is dated 16 December 2010 and the said 18th running bill appears have to be issued only as an afterthought after a period of more than five years. For the aforesaid reasons, I hold that there is no live dispute between the parties and the claim of the Petitioner is long time barred. I am not inclined to accede to this request made by Learned Senior Counsel for the Petitioner, that it may be left the Arbitrator to

determine the issue whether the dispute is a live one or not or that the claim is time barred.

11. The Petition is accordingly dismissed. No order as to costs.

(A.A. SAYED, J.)