

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.19 OF 2014

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1. Shri Suraj Vithal Patil
 2. Shri Vithal Ananda Patil

...Petitioners

v/s.

M/s.Dattakripa Minerals

...Respondent

...

Mr.G.N.Salunke with Mr.Siddheshwar B. Katel for the Petitioners.
 Mr.P.C.Kansara for the Respondent.

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CORAM : A.A. SAYED, J.

DATED : 3 JULY 2015

P.C.:

This Arbitration Petition has been filed for appointment of an Arbitrator under section 11(6) of the Arbitration & Conciliation Act, 1996.

2. The District Collector, Sindhudurg had granted mining lease rights in the subject property to one M/s.Gadre Minerals vide Agreement dated 1 January 2010. M/s.Gadre Minerals assigned rights in the mines as contractor to the Respondent i.e. Dattakripa Minerals vide Agreement dated 31 December 2010. By Agreement dated 1 March 2011 (hereinafter referred to as "the said Agreement"), the Respondent assigned certain rights in respect of excavation to the Petitioners, under the terms & conditions more particularly mentioned in the said Agreement. The Petitioners claim to have paid a sum of Rs.11,40,000/- to the Respondent

by way of cheques and cash under the said Agreement. The period of the said Agreement was from 1 March 2011 to 31 December 2019.

3. According to the Petitioners, they started work and excavated Silica till the end of May 2011 and also excavated 2,400 dumpers goods, i.e. about 2 lacs tones Silica sand from the subject property and deposited the same in the nearby depot made available by the Respondent. The Petitioners claim that they spent an amount of Rs.13,50,000/- towards excavation of silica sand goods, for rent of Dumpers, rent of Pockland, rent of JCP, rent of Tractors, laboures and administrative charges, which amounts were in addition to the amount paid to the Respondent thus making aggregate of Rs.24,90,000/-. According to the Petitioners, the Respondent failed to obtain the royalty pass and in view of their default and conduct they stopped work of excavation by the end of May 2011. According to the Petitioners, on assurance of the Respondent, the Petitioners appointed one Mr.Shamrao Farakate on 20 September 2011 as the sub-contractor under the Petitioners to carry forward all the activities on the subject property for mining. However, the Respondent was not in a position to make available the royalty passes even for two months thereafter.

4. On 15 November 2011, the Petitioners issued a letter to the Respondent and its partners and demanded the royalty passes and to obtain consent of the owners and other compliances as per the said Agreement. The said letter was issued in the name of M/s.Suraj Mine Co.Infra Pvt.Ltd., a company formed by the Petitioners for the purpose of carrying on work on the subject property. On 6 December 2011, the Respondent replied to the said letter and denied receiving any payment and demanded balance amounts under the Agreement. According to the Petitioners, the Respondent by joining hands with the sub-contractor Mr.Farakate, who was appointed by the Petitioners, had started selling the deposited goods by committing theft behind the back of the Petitioners. The Petitioners on becoming aware of the same, made grievances to the partners of the Respondent, the original owner and the sub-contractor appointed by the Petitioners in writing. The owner of the subject property on receiving the Petitioners' complaint arranged for a meeting with the partners of the Respondent. According to the Petitioners, in the said meeting it was agreed that the Respondent would return goods of about Rs.18 lacs to the Petitioners and to settle the dispute and proceed with the work.

5. The Petitioners, thereafter, learnt on 26 May 2012 that Mr.Krishna Ananda Patil had executed a writing in favour of the Respondent

i.e. M/s.Dattakrupa Minerals and its partners Mr.Walave, Mr.Bhai Patade, Mr.Ravindra Patade as also Mr.Farkate. According to the Petitioners, the said Krishna Patil was not authorized to execute any writing in favour the Respondent, which writing was obtained on misrepresentation and the said writing was not binding on the Petitioners and informed the Respondent accordingly.

6. On 6 August 2012 and 19 November 2012, the Petitioners issued notices invoking Arbitration. Since the Respondent did not reply to the aforesaid letter, the Petitioners through their Advocate's notice dated 8 October 2013 appointed Advocate Mr.Arun Patil as an Arbitrator and called upon the Respondent to name its Arbitrator or to accept the Arbitrator appointed by the Petitioners.

7. An Affidavit-in-Reply has been filed on behalf of the Respondent. According to the Respondent, the Agreement dated 1 March 2011 is not valid and subsisting and has been revoked by the Petitioners themselves. The Petitioners have not paid the amount under the said Agreement and had committed breach of the said Agreement. According to the Respondent, the Petitioners had assigned their rights to Mr.Farkate, as sub-contractor, in breach of the said Agreement dated 1 March 2011 and

had taken huge amount from the said Farkate and permitted the said Farkate to lift the minerals and sell the same. According to the Respondent, the Respondent entered into the said Agreement dated 1 March 2011 with the Petitioners for the use of machinery for removal of the minerals from the subject property from 1 March 2011 to 31 December 2019 and the conditions incorporated in the Lease Agreement dated 28 October 1996 and the Agreement dated 31 December 2010 formed part of the said Agreement dated 1 March 2011. It is averred in the Reply that the Petitioners are directly or indirectly claiming lease right without joining the original lessee as party-Respondent. It is further averred in the Affidavit-in-Reply that Mr.Farkate was not permitted by the Government to remove the material without any valid royalty pass as the main lease executed by the Government in the year 1995 was revoked on account of certain default committed by M/s.Gadre Minerals. The Petitioners had made written representation and requested the Respondent and M/s.Gadre Minerals to resolve the said dispute and to see that the minerals removed and sold to Mr.Farakate be properly delivered. The Petitioners had executed a writing to the effect that the matter was amicably resolved and the material was delivered to Mr.Farkate and the Petitioners waived their rights in the said Agreement dated 1 March 2011 and had cancelled the said Agreement. The Respondent has relied upon the Agreement dated 3 March 2012,

wherein it is stated by the Petitioners that the Agreement dated 1 March 2011 is cancelled and the Petitioners will not claim any amount or enforce the said Agreement dated 1 March 2011. The Petitioners had deliberately suppressed this Agreement in the Petition and they are not entitled to any relief. The said Agreement dated 1 March 2011 is not properly stamped nor is the same registered and therefore is not admissible in evidence. It is alleged that because of the inaction on the part of the Petitioners, who did not excavate the minerals as agreed, the Respondent has incurred huge loss. The Petitioners had excavated the minerals only for one or two months and thereafter failed to remove the minerals from the subject property and the Respondent had incurred loss of Rs.50 lacs because of the non-compliance of their obligations.

8. A Rejoinder has been filed by Mr.Suraj Vithal Patil, Petitioner No.1, on behalf of the Petitioners, wherein the Petitioners have stated that the claim of the Respondent that the said Agreement dated 1 March 2011 is revoked is without any basis. It is stated that the Petitioners learnt on 26 May 2012 that Mr.Krishna Ananda Patil had executed a writing in favour of the Respondent- M/s.Dattakripa Minerals, its partners Mr.Walve, Mr.Bhai Patade, Mr.Ravindra Patade as also Mr.Farkate under misrepresentation. Immediately, thereafter, the Petitioners informed the Respondent that they

did not agree with the said writing executed by Mr.Krishna Patil, as Mr.Krishna Patil had never been authorized to execute a writing in favour of the Respondent, which writing was obtained under misrepresentation and is not binding on the Petitioners. In the said Agreement dated 1 March 2011, the said Krishna Ananda Patil has been referred to as power of attorney holder, however, no such power of attorney was executed nor was Mr.Krishna Ananda Patil a signatory to the original Agreement, and therefore, the writing executed by said Krishna Patil would not be binding upon the Petitioners. It is contended that the issue whether the said Agreement is cancelled or otherwise is also required to be adjudicated before the Arbitrator.

9. I have heard the learned Counsel for the parties. It is not in dispute that the said Agreement dated 1 March 2011 was executed between the parties. It is further not in dispute that clause (9) of the Agreement contains an Arbitration Clause. What the Respondent was essentially contended that the said Agreement dated 1 March 2011 has already been cancelled and revoked by Agreement dated 3 March 2012 and there is no dispute as such, in view of the settlement arrived at. The Petitioners , on the other hand, contend that the Agreement dated 3 March 2012 has been executed by one Mr.Krishna Ananda Patil, who was not

authorized to execute the Agreement and the same was obtained under misrepresentation and is not binding on them.

10. Having considered the rival contentions, I am not inclined to go into aspect whether the original Agreement dated 01 March 2011 is validly revoked or otherwise by Agreement dated 03 March 2012. In my view, this issue can be adjudicated by the Arbitrator. In any event, this is not a claim which can be said to be evidently and patently long time barred claim. In **Indian Oil Corporation Ltd. v/s. S.P.S. Engineering Ltd., (2011) 3 SCC 507**, the Supreme Court in para 13 has held as follows:

13. *This Court, in [National Insurance Co. Ltd. vs. Boghara Polyfab. Private Limited](#) [2009 (1) SCC 267] following the decision in *SBP & Co. v. Patel Engineering Ltd.* [2005 (8) SCC 618], identified and segregated the issues that may be raised in an application under [section 11](#) of the Act into three categories, as under :*

"22.1. The issues (first category) which the Chief Justice/his designate will have to decide are :

- (a) Whether the party making the application has approached the appropriate High Court?*
- (b) Whether there is an arbitration agreement and whether the party who has applied under [Section 11](#) of the Act, is a party to such an agreement?*

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

- (a) Whether the claim is a dead (long-barred) claim or a live claim?*

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

(ii) Merits or any claim involved in the arbitration."

11. In the circumstances, the Petition is disposed of by passing the following order:

(i) Mr.Atul Damle, Sr.Counsel, of this Court is appointed as an Arbitrator under Arbitration & Conciliation Act, 1996 to adjudicate the disputes and differences between the parties.

(ii) Registry to communicate this order to the Arbitrator Mr.Atul Damle, Sr.Counsel together with a memorandum of address of parties.

(A.A. SAYED, J.)