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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.782 OF 2014

M/s.Shirdi Country Inns Pvt. Ltd.	...Petitioner
V/s.	
M/s.Suvidha Enginners India Pvt. Ltd.	...Respondent

Mr.Rajiv Singh with Mr.Sayeed Mulani i/b Mulani & Co. for the
Petitioner.

Mr.L.B. Rai for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 13TH JANUARY, 2015.

P.C. :-

1. This is a petition filed under section 34 of the Arbitration and Conciliation Act, 1996. The petitioner has impugned the arbitral award dated 18.01.2014 rendered by the arbitrator, allowing the claims made by the respondent. Some of the relevant facts for deciding the arbitration petition are as under.

2. On 18.03.2006, the petitioner invited tender for supply, installation, testing and commissioning of Air-Conditioning systems for business hotel project of M/s.Kariya Hotel Limited at Pune, through its consultant. The respondent had submitted its tender documents on 18.03.2006 at a value of Rs.69.00 lakhs. The

petitioner issued the work order on 18.03.2006 in favour of the respondent. It is the case of the petitioner that the respondent completed the said work amounting to Rs.69.00 lakhs and the said amount has already been paid by the petitioner to the respondent.

3. It is the case of the petitioner that after completion of the said work, pursuant to the work order dated 18.03.2006, the respondent carried out further work, which was extra work on various dates commencing from 30.04.2007. The respondent raised various invoices from time to time for the said work carried out by the respondent upon the petitioner.

4. Disputes arose between the parties. The respondent filed an Arbitration Application No.30 of 2011 in this Court under section 11 of the Arbitration & Conciliation Act, 1996, *inter-alia* prayed for the appointment of the arbitrator. The learned Designate of the Hon'ble Chief Justice, disposed of the said arbitration application by an order dated 18.02.2011. In paragraph 2 of the said order, the learned Designate of the Hon'ble Chief Justice has referred to the agreement dated 18.03.2006 entered into between the parties. The learned Designate of the Hon'ble Chief Justice recorded the statement made by the petitioner herein, who was the respondent to the said arbitration application that the petitioner did not have any objection to the Court appointing any arbitrator from the Indian Council of

Arbitrators despite the fact that the petitioner was entitled to enter the arbitration clause forming part of the agreement dated 18.03.2006. By the said order, the learned Designate of the Hon'ble Chief Justice appointed Mr.Ashok Kumar Agarwal, a Legal Consultant, as a sole arbitrator. It was however, made it clear that all the contentions, including as to maintainability were kept open.

5. Pursuant to the said order dated 18.02.2011, the learned arbitrator made an award granting the same in favour of the respondent herein. The said award came to be impugned by the petitioner herein by filing Arbitration Petition No.642 of 2012. By an order dated 29.10.2012, by consent of both the parties, the said award dated 10.02.2012 rendered by the learned arbitrator came to be set aside. By the consent of the parties, this Court appointed Mr.K.R. Budhavant, a former Civil Judge (Senior Judge) as the sole arbitrator, to adjudicate upon the disputes which was the subject matter of an earlier arbitration between the petitioner and the respondent. This Court issued various other directions regarding filing of the pleadings and amendment of the plaint. In paragraph 4 of the said order, it was recorded that all the contentions are kept open. Pursuant to the said order dated 29.10.2012, the learned arbitrator rendered a fresh award on 18.01.2014, allowing the claims made by the respondent directing the petitioner herein to pay a sum of

Rs.10,72,891/- with interest at the rate of 10% p.a. from the date of the legal notice i.e. 09.09.2010 till payment and also costs of Rs.4.00 lakhs to the respondent within one month from the date of the said order. The said award has been impugned by the petitioner in this petition.

6. The learned counsel for the petitioner has made the following submissions :-

i). The entire arbitration proceedings filed by the respondent were without jurisdiction. The learned arbitrator had no jurisdiction to entertain the claims made by the respondents.

ii). The claims made by the respondent were arising out of the extra work carried out by the respondent, which were outside the purview of the work order dated 18.03.2006.

iii). It is submitted that thus there was no arbitration clause insofar as the claims arising out of the extra work carried out by the respondent was concerned. It is submitted by the learned counsel that though this Court while remanding the matter back, it made it clear that all the contentions were kept open, the learned arbitrator has rejected the plea of the non-existence of the arbitration agreement on the ground that since the High Court appointed him as a sole arbitrator, the arbitration agreement exists. It is submitted that the impugned award is contrary to the order passed by this Court.

iv). The next submission of the learned counsel is that in the impugned award, the learned arbitrator has allowed the time barred claims. In support of this plea, the learned counsel invited my attention to the findings rendered by the learned arbitrator on issue No.5, at page 11 of the impugned award. It is submitted that the learned arbitrator has considered the date of the application made by the respondent for adjudication as the date of the commencement of the arbitration proceedings, which is totally perverse under section 21 of the Arbitration & Conciliation Act, 1996. The learned counsel however, does not dispute that the notice invoking arbitration agreement was issued by the respondent on 09.09.2010.

7. The learned counsel for the respondent on the other hand invited my attention to the order passed by the learned Designate of the Hon'ble Chief Justice on 18.02.2011 and would submit that the petitioner having made the submission before this Court that they had no objection to the Court appointing any arbitrator from the Indian Council of the Arbitrators, despite the fact that the petitioner was entitled to appoint the arbitrator, has raised frivolous issues before the learned arbitrator. It is submitted that even the order remanding the arbitration proceedings before the learned arbitrator by this Court in the earlier petition filed under section 34 of the Arbitration & Conciliation Act, 1996, this Court had set-aside the earlier impugned

award and has appointed the new arbitrator by the consent of the parties. It is submitted that thus question of keeping the issue of existence of the arbitration agreement open did not arise.

8. Insofar as the issue of limitation is concerned, the learned counsel submits that admittedly the notice invoking the arbitration agreement was issued on 09.09.2010. The learned counsel invited my attention to paragraphs 7 and 8 of the impugned award and would submit that the present dispute was in respect of the arrears of the payment to the tune of Rs.10,72,898/-. The last payment made by the petitioner to the respondent was in the month of October, 2007. It is submitted that in view of the part payment made by the petitioner in the month of October, 2007, right to sue was postponed by another three years from the date of the last payment made by the petitioner. The notice thus issued under section 21 on 09.09.2010 was within time and no part of the claim was barred by limitation. It is submitted that the learned arbitrator has recorded this finding in the impugned award.

9. My attention has been also invited to the finding recorded by the learned arbitrator that the consultant of the petitioner had recommended to release the pending amount of Rs.17.00 lakhs vide its e-mail dated 28.09.2007 and as against the said recommendation, the petitioner had released the amount of Rs.5,26,880/-. The learned

counsel submits that thus no case is made out for interference with the impugned award under section 34 of the Arbitration & Conciliation Act, 1996. The learned arbitrator has rendered a finding of fact. Even the payment recommended by the consultant of the petitioner was not fully made by the petitioner to the respondent. Though the petitioner had an opportunity to examine the consultant, who had certified the pending bill amount of Rs.17.00 lakhs and which was partly implemented by the petitioner, the petitioner blatantly did not avail of the opportunity to examine such consultant.

10. Insofar as the issue of the existence of the arbitration agreement raised by the learned counsel for the petitioner is concerned, a perusal of the order passed by the learned Designate of the Hon'ble Chief Justice, clearly indicates that in the arbitration application filed by the respondent under section 11 of the Arbitration & Conciliation Act, 1996 for the appointment of the arbitrator, the petitioner itself made a statement before the learned Designate of the Hon'ble Chief Justice that though under the arbitration agreement, the petitioner was entitled to appoint an arbitrator, the petitioner had no objection to the Court appointing any arbitrator from the Indian Council of the Arbitrators. The learned Designate of the Hon'ble Chief Justice recorded the said statement in the order dated 18.02.2011 and in view of the consent rendered by the petitioner, procedure for

appointment of the arbitrator by the petitioner was given a go-bye and independent arbitrator came to be appointed by the said order.

11. A perusal of the order passed by this Court on 29.10.2012 in the Arbitration Petition No.642 of 2012, also makes it abundantly clear that the earlier award dated 10.02.2012 passed by the learned arbitrator came to be set-aside with the consent of both the parties. The appointment of Mr.K.R. Budhavant, Civil Judge (Senior Division) came to be made by the consent of both the parties. It is also recorded in the said order that the said arbitrator had been appointed to adjudicate upon the disputes which was the subject matter of the earlier arbitration agreement between the petitioner and the respondent. In my view, the petitioner is trying to take undue advantage of the clarification issued by this Court that "all the contentions including as to limitation are kept open". There was no question of keeping the issue of non-existence of the arbitration agreement open. The said issue was already decided by the learned Designate of the Hon'ble Chief Justice while passing the order of appointing of an arbitrator on 18.02.2011 by recording the statement made by the learned counsel for the petitioner. In my view, since the issue of existence of the arbitration agreement was already concluded by an order dated 18.02.2011, the petitioner could not have agitated this issue before the learned arbitrator under section 16

of the Arbitration & Conciliation Act, 1996. There is, thus no merit in this submission of the learned counsel. In my view, the learned arbitrator has rightly held that he had jurisdiction to entertain and dispose of the claims made by the respondent.

12. Insofar as the issue of limitation raised by the learned counsel for the petitioner is concerned, it is not in dispute that the respondent had carried out various works for the petitioner. The petitioner had also made payment to the respondent for part of the work carried out. The petitioner had engaged the consultant for scrutinizing the bills submitted by the respondent contractor. The consultants appointed by the petitioner have recommended last payment of Rs.17.00 lakhs. Out of the said amount of Rs.17.00 lakhs, the petitioner released only an amount of Rs.5,26,880/- keeping the balance of Rs.10,72,899/- in arrears. The learned counsel for the respondent rightly placed reliance on an e-mail addressed by the respondent to the petitioner placing on record that the petitioner had made part payment in the month of October, 2007. The curious submission of the learned counsel for the petitioner is that the said e-mail, including the receipt of the payment in the month of October, 2007 would not indicate that the petitioner had admitted that the said payment was made by the petitioner to the respondent. Upon making query, the learned counsel for the petitioner could not

point out any other e-mail pointing out that no such payment was made to the respondent by the petitioner. Since part payment was made by the petitioner to the respondent in the month of October, 2007, notice invoking the arbitration agreement issued on 09.09.2010 was within time and not barred by limitation. Under section 21 of the Arbitration & Conciliation Act, 1996, when the notice invoking the arbitration agreement is received by the opponent, the arbitration proceedings commences and the limitation would stop. Such notice was admittedly issued on 09.09.2010, which was admittedly within three years from the date of the part payment made by the petitioner in the month of October, 2007. In my view, the learned arbitrator has rightly rejected the plea of limitation raised by the petitioner before the learned arbitrator. Considering all these facts, including part payment made by the petitioner to the respondent, I do not find any infirmity in any part of the award of the learned arbitrator.

13. In my view, the learned arbitrator has rendered various findings of fact which are not perverse and thus no interference with such finding of fact is warranted under section 34 of the Arbitration & Conciliation Act, 1996. The petition is devoid of merits and is accordingly, dismissed.

There shall be no order as to costs.

14. The learned counsel for the petitioner at this stage prays

that the respondent shall not be permitted to withdraw the amount of Rs.12.00 lakhs already deposited by the petitioner in this Court, which application is vehemently opposed by the learned counsel for the respondent. In my view, since the petition filed by the petitioner is thoroughly frivolous and does not fall under any of the grounds set out in section 34 of the Arbitration & Conciliation Act, 1996, I am not inclined to accept this request of the learned counsel for the petitioner. The application is accordingly rejected.

The Prothonotary & Senior Master to act on an authenticated copy of this order.

(R.D. DHANUKA, J.)