

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 3RD DAY OF MARCH 2015/12TH PHALGUNA, 1936

A.R.No.62 of 2013

PETITIONER(S):-

MFAR HOLDING PVT. LTD.,
NO.3 LAVELLE ROAD, BANGALORE - 560 001,
REPRESENTED BY ITS EXECUTIVE DIRECTOR
Y. MOIDEEN RIZWAN.

BY ADVS.SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI. SHARAN SHAKEER

RESPONDENT(S):-

* RADHA BALAKRISHNAN } Address amended.
VRINDHAVAN, ATHANI P.O., THRISSUR. }

* RADHA BALAKRISHNAN,
VRINDAVAN, ATHANI P.O., ALUVA - 683 585,
ERNAKULAM DISTRICT.

[THE ADDRESS OF SOLE RESPONDENT IS AMENDED AS PER ORDER
DATED 22.07.2014 IN I.A.NO.19 OF 2014].

BY ADVS. SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE
SMT.ACHU SUBHA ABRAHAM
SMT.K.R.MONISHA.

THIS ARBITRATION REQUEST HAVING BEEN FINALLY HEARD ON
30-01-2015, THE COURT ON 03.03.2015 PASSED THE FOLLOWING:-

APPENDIX

APPLICANT'S ANNEXURES:-

ANNEXURE-A	TRUE COPY OF THE MEMORANDUM OF UNDERSTANDING EXECUTED BETWEEN APPLICANT AND THE RESPONDENTS DATED 28.3.2007.
ANNEXURE-B	TRUE COPY OF LETTER DATED 12.6.2008 ISSUED BY THE RESPONDENTS TO THE APPLICANT.
ANNEXURE-C	TRUE COPY OF LAWYER NOTICE DATED 9.4.2010 ISSUED TO THE RESPONDENTS.
ANNEXURE-D	TRUE COPY OF REPLY NOTICE DATED 18.5.2010 ISSUED TO THE APPLICANT.
ANNEXURE-E	TRUE COPY OF LAWYER'S NOTICE DATED 16.6.2010 ISSUED TO THE RESPONDENTS.
ANNEXURE-F	TRUE COPY OF THE REPLY NOTICE DATED 21.7.2010 ISSUED TO THE APPLICANT.
ANNEXURE-G	TRUE COPY OF THE JUDGMENT IN AR.NO.55/2010 DATED 14.10.2011, DISMISSING THE ARBITRATION REQUEST.

RESPONDENT'S ANNEXURES:-

NIL.

Vku/-

[true copy]

P.S. TO JUDGE.

K.Vinod Chandran, J.

A.R.No.62 of 2013

Dated this the 03rd day of March, 2015

ORDER

The applicant herein seeks appointment of an Arbitrator to adjudicate the disputes and difference between the applicant and the respondent, which arise from the Memorandum of Understanding [for brevity MOU"], produced as Annexure-A. The MOU at Annexure-A is one executed between the applicant and the respondent, with the mother of the latter also joining her, who is deceased as of now. The MOU dated 28.03.2007; is one executed in Bangalore; however, relating to a property situated within the State of Kerala and includes an arbitration clause, which indicates that any arbitration is to be conducted in Cochin.

2. Admittedly no consideration passed in pursuance of the MOU; nor is any stated to have been passed, in the MOU. The applicant, who is the 2nd party in the MOU, contends that in preparedness of the further agreement to be executed and the work of development of land, which is the subject matter of the MOU, the applicant had spent considerable amounts, which the applicant has

lost, due to the failure of the respondent to comply with the conditions of the MOU. Hence, the present Arbitration Request.

3. The respondent, who, along with her mother, was the first party, besides asserting that there was no consideration, contends that the MOU was dependent upon a change in the zoning plan, which alone could permit commercial construction in the land, lying in a residential zone. Only on publication of the zoning plan, which at that point of time was to be published by July-August, 2007, the first party was obliged to perform their part of the contract; so as to facilitate construction of a multi-storeyed commercial complex in the said land. The MOU rested on the expectation that, the new zoning plan would enable conversion of the property, from residential land into a commercial land. Such expectation having not fructified till today, there is no basis for the request to appoint an arbitrator, since there is no dispute or claim which could be adjudicated under the MOU. The respondent also resists the application on the ground of unexplained long delay.

4. The applicant, per contra, would contend that the applicant had commenced the arbitration proceedings with the issuance of a notice within time and, hence, there is no question of

any delay. Jurisdiction having been established and the arbitration clause evident from Exhibit P1, this Court has to necessarily appoint an arbitrator who would deal with the other contentions, is the plea.

5. Objecting to the contention of the respondent that the MOU itself stood frustrated, due to the new zoning plan not being published, the applicant would place before me the decision reported in ***Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee* [(2014) 6 SCC 677]**. A learned Judge of the Hon'ble Supreme Court, the designate of the Chief Justice of India, had distinguished the terms “void” and “voidable” and deprecated the use of such words loosely and interchangeably with each other. To come to a conclusion that a contract is void, on the basis of the reasonable evidence at the stage of reference, was held to be difficult at the stage of Section 11(6) of the Arbitration and Conciliation Act, 1996 [for brevity “Arbitration Act”]. To shut out arbitration in cases where the defence taken would be that of the contract being voidable, was held to be not a possible exercise. This Court would not venture to undertake such an exercise in the confined jurisdiction exercised by this Court.

6. At the outset, one has to consider the aspect of delay. A Constitution Bench of the Hon'ble Supreme Court in ***SBP & Co. v. Patel Engineering Ltd.* [(2005) 8 SCC 618]** dealt with the question of function of the Chief Justice or his designate under Section 11 of the Arbitration Act. The question raised on the basis of earlier decisions of a three Judge Bench and another Constitution Bench was, whether the function is purely administrative and not at all judicial or quasi-judicial in nature, thus interdicting decision on the contentious issues between the parties. The Hon'ble Supreme Court, by a majority, found that:

"Once a statute creates an authority, confers on its power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the

section for the exercise of that power or the performance of that duty exist. Therefore, unaided by authorities and going by general principles, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final”.

7. A judicial authority before whom an action is initiated, faced with an objection of the existence of an arbitration agreement, between the parties under Section 8 of the Arbitration Act, is entitled to and bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11, where one of the parties seek for reference before the Chief Justice or his designate of the jurisdictional High Court, was found to cover another situation, where the other party does not co-operate and accede to the request for arbitration, as provided in

a valid agreement. The Hon'ble Supreme Court found that it is incongruous to hold that the highest judicial authority in the State, being the Chief Justice or the designate Judge, would be unable to decide on the question of the exercise of jurisdiction; while a judicial authority under Section 8 could decide such issue before making or declining reference.

8. The summing up of conclusions of the Constitution Bench decision was succinctly stated by a two-Judge Bench of the Hon'ble Supreme Court in ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 267]**, which has stated so in paragraph 22 of the aforesaid decision:

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

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".

The issue whether the claim is a live claim, hence, would be an aspect which could be decided under Section 11 of the Arbitration Act before making a reference. On the facts coming to fore in the above case this court is inclined to look into the issue of delay.

9. The MOU was entered into with respect to 1.35 acres of property in Thrissur District, which was in the sole and absolute ownership of the first parties and which was proclaimed to be, even as per the MOU; Clause 1(d), falling under the “residential zone”, wherein no commercial building could be put up. The first party had agreed to the development of the said land by the second party, by putting up a multi-storeyed commercial complex in the said land on the expectation that by July-August, 2007 the new zoning plan would come into existence. The specific dispute is with respect to Clause 3.1(ii), that the second party did not obtain the conversion of the scheduled property from agricultural/residential to commercial for such purposes as may be required by the second party. While the applicant asserts that this failure on the part of the first party resulted in there being no development of the property as intended in the MOU; the respondent maintains that for reason only of the new zoning plan

having not come into existence, the MOU stood frustrated.

10. The specific prescription in the agreement was that the Joint Development Agreement [for brevity "JDA"] would be signed only after the first party fulfils its obligation under Clause 3 within 30 days of the signing of the MOU and the JDA shall be signed within 240 days from the date of compliance by the first party. Hence, what was intended was that the first party comply its obligation under Clause-3 within 30 days and within 240 days from the date of compliance, and then execute a JDA.

11. The first party having not been able to comply with Clause 3 for reason only of the expectation, of both parties that there would be a new zoning plan in place by July-August, 2007, having not fructified; the fact was communicated to the second party by Annexure-D produced by the applicant itself. Though no specific date is mentioned therein, it is evident from Annexure-C, a lawyer notice issued by the applicant, that the said communication was received by the applicant on 12.06.2008 and was replied by a letter dated 18.6.2008. The MOU itself was dated 28.03.2007 and on 12.06.2008, within less than three months, the first party had communicated its inability to carry on with the development as

indicated in the MOU. While the first party asserts the impossibility of performance of the MOU on the basis of Annexure-B, the second party, the applicant herein, on the basis of Annexure-E dated 16.06.2010, asserts the commencement of arbitration proceedings, within time.

12. There is no dispute that the claim made is of money, the limitation of which runs for three years. The notice at Annexure-E appointing an Arbitrator invoking Clause-14 of the MOU; is three years after the execution of the MOU; but, however, within three years from the date on which the impossibility of performance was communicated by the first party to the second party, i.e., 12.06.2008, from which time; reasonably the cause of action for the applicant could be deemed to have arisen.

13. However, after the arbitration proceedings having been deemed to have commenced by Annexure-E, dated 16.06.2010, the second party rested contend. An Arbitration Request was raised, by A.R.No.55 of 2010, filed on 01.11.2010. The same was pending before this Court till 14.10.2011, on which date Annexure-G order was passed permitting the applicant to withdraw the Arbitration Request without prejudice. The reason

stated by the applicant for such a request was the death of the 1st respondent, one of the two among the first parties in the MOU. The present Arbitration Request has been filed in the year 2013, specifically on 13.11.2013, after more than two years of the withdrawal of the earlier Arbitration Request. True, there was a liberty reserved to file a fresh Arbitration Request by Annexure-G. The present application is also moved with the sole respondent, on the admitted ground that there are no other legal heirs. On commencement of the arbitration proceedings, by virtue of the appointment of an Arbitrator by one of the parties, it cannot be said that the parties could then initiate appropriate proceedings under Section 11 at their sweet will at any distant point of time.

14. The applicant's contention is that for the purpose of determining the limitation, arbitration is deemed to be commenced on the date, referred to in Section 21; as per sub-section (2) of Section 43. Section 21 refers to the date on which a request for reference of a dispute for arbitration is received by the respondent. The request for reference to arbitration having been issued as per Annexure-E dated 16.06.2010, the commencement of arbitration is said to be within time. Hence, the date of filing of the arbitration

petition is not relevant, is the contention.

15. In examining such contention, useful reference can be made to the decision of the Hon'ble Supreme Court in ***J.C.Budhraja v. Orissa Mining Corpn. Ltd. [(2008) 2 SCC 444]***. The question of limitation for the purpose of commencement of arbitration proceedings and for approaching the Court for appointment of an Arbitrator were considered in the context of the Arbitration Act of 1940. It was held so in paragraph 26 of the said decision:

“26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4.6.1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4.6.1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking

arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in *Major (Retd.) Inder Singh Rekhi v. DDA* [(1988) 2 SCC 338], *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* [(1993) 4 SCC 338] and *Utkal Commercial Corpn. v. Central Coal Fields Ltd.* [(1999) 2 SCC 571] also make this position clear”.

Hence, going by the Arbitration Act of 1940, a limitation with respect to filing a petition under Section 8(2) seeking appointment of an Arbitrator cannot be confused with the period of limitation for making any claim. The claim has to be made within three years from the date on which the cause of action for the claim arises and a petition under Section 8(2) has to be moved within the limitation period from the date on which the cause of action for filing such petition arise.

16. With respect to an application to be filed for appointment of an Arbitrator, the cause of action is to be determined as the date on which the request was received by the respondent. Under the Arbitration Act of 1996 also, the above principle would be applicable. The Arbitration Act of 1996 also

speaks of the deemed commencement of arbitration, as indicated in Section 21, to be on the date of receipt of the request for reference by the respondent. This has to be within the limitation provided under the Limitation Act, 1963; as per Section 43. Herein the agreement was dated 28.03.2007 and on 12.06.2008, the respondent/first-party had communicated their inability to carry on the development as indicated in the MOU. Hence, the cause of action for raising the claim arises on 12.06.2008. The arbitration had to be commenced within three years from that date. Annexure-E, going by Section 21, is the request made for commencement of arbitration, which is dated 16.06.2010. The said commencement is within the limitation period as provided under Section 43, being within three years.

17. With respect to the limitation for approaching the Court under Section 11, more specifically sub-section (5) of Section 11, the cause of action arises, when the parties failed to agree on the arbitrator, within thirty days from receipt of a request by one party from the other party. Annexure-E dated 16.06.2010 would have definitely been received by the other party, in June, 2010 itself. The cause of action hence arises by the end of July,

2010. The first arbitration case, A.R.No.55 of 2010, was filed on 01.11.2010, within the period of limitation of three years. The same was pending before this Court till 14.10.2011 when the petitioner voluntarily sought for withdrawal of the request, on the ground of death of one of the respondents, without prejudice to the right to approach the Court after impleading the legal heirs. The subsequent arbitration case, the present A.R.No.62 of 2013, was filed on 13.11.2013, beyond the limitation period of three years, since the cause of action arose in August, 2010. Definitely, liberty was reserved to the petitioner to approach this Court with a further Arbitration Request, impleading all the legal heirs. But, that does not extend the period of limitation. A subsequent request made also would have to be within the period of three years itself. That having not been done, the Arbitration Request made, is delayed.

18. The question of whether there was any consideration passed or whether there could be any valid contentions raised on the basis of the agreement need not be gone into; nor would it be proper that this Court go into such issues which, even going by the afore-cited decisions, would be aptly left to the decision of the Arbitral Tribunal or Arbitrator if a

reference is made. However, this Court having looked into the issue of whether there is a live claim and found the issue against the applicant, there can be no reference made in the instant Arbitration Request. This Court has to find that the Arbitration Request is long delayed.

The Arbitration Request would stand rejected, on the ground of delay, leaving the parties to suffer their respective costs.

Sd/-
K.Vinod Chandran,
Judge

vku.

[true copy]