

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.10 of 2014

=====

Braj Kishore Pandey, S/o Late Shyamal Kishore Pandey, Permanent resident of Village Doohari Bath, P.O. and P.S. Bath, District Bhagalpur, Presently residing on the 11th Floor, Udaigiri Apartment (South Block), Budha Marg, Patna-800001

.... Petitioner

Versus

1. M/s Hem Developers Pvt. Ltd. a company incorporated under the Companies Act, 1956, having its registered office at Road No. 12, Rajendra Nagar, Patna P.S. Kadamkuan, Patna-800016 through its duly authorized Director namely Shri Prakash Kumar, S/o Shri Murli Prasad Sinha, resident of Road No. 12, Rajendra Nagar, P.S. Kadamkuan, Patna-800016.

2. Shri Prakash Kumar, S/o Shri Murli Prasad Sinha, Advocate, resident of Road No. 12, Rajendra Nagar, P.S. Kadamkuan, Town and District- Patna-800016

3. Shri Bhavesh Kumar, S/o Name not known to the petitioner, Managing Director of M/s Hem Developer (P) Ltd. Office situated in Shyam Centre, Exhibition Road, Patna, P.S. Gandhi Maidan, Patna-800001

.... Respondents

=====

Appearance :

For the Petitioner : Mr. Manish Chandra Gandhi,

Mr. Subodh Kumar Sinha, Advocates

For Respondent No. 3: Mr. Siddhartha Prasad, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 05-05-2016

Heard learned counsel for the petitioner and learned counsel for the respondent no.3.

2. The present request application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) for appointment of sole independent Arbitrator in view of Clause 64 of the General Conditions of Contract (for short, “the GCC”) for adjudication of contractual disputes in connection with collaboration

agreement dated 26.03.1995 entered into between the parties.

3. According to the petitioner, a collaboration agreement dated 26.03.1995 was entered into between the petitioner, the owner of a plot of land measuring 5103.75 Sq. ft. equivalent to 3.75 Katha bearing Holding No. 36(B) on the Fraser Road, Patna, and the respondent no. 1, the Developer-Company, through its Director, the respondent no. 3. Under the agreement, the developer was required to construct a residential complex on the aforesaid land in which 47% of the total built up area would fall to the share of the land owner and the remaining 53% to the developer. The construction of the complex was required to be completed within a period of two years with provision for a further six months' grace period. Failure to abide by the time limit for construction would entail consequences including a penalty on the developer.

4. Learned counsel for the petitioner submits that the developer (respondent no. 1) failed to adhere to the time schedule for construction, thereby violating the terms of the agreement. Accordingly, an advocate's notice dated 23.06.2009 was communicated to the respondents by registered post enumerating as many as 17 defects and failures on the part of the developer and calling for rectification, which notice, however, was not responded to. About three years thereafter, a second registered notice was sent on 31.05.2010, which was once again ignored. The petitioner then approached this Court in Request Case No. 1

of 2015 which, however, was rejected by order dated 28.03.2014 on the ground that neither of the two notices given by the petitioner had carried a demand for referring the disputes for arbitration.

5. The petitioner then sent an Advocate's notice dated 15.05.2014 by registered post, this time invoking the arbitration clause in terms of the Collaboration Agreement. It is, however, stated that such notice returned unserved with the endorsement that the addressee's office was locked all the time. It is submitted that in the facts and circumstances of the case, an arbitrable dispute exists between the parties in the backdrop of an agreement, Clause XV whereof contemplates the reference of disputes to arbitration.

6. Learned counsel for the respondent-developer raises a preliminary objection to the maintainability of the present request petition on the ground that the same is barred by limitation. He invites attention to the provisions of Section 43(1) of the Arbitration & Conciliation Act, (for short, 'the Arbitration Act') which provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Courts. He, therefore, submits that Article 137 of the Schedule to the Limitation Act, 1963 which provides a limitation period of three years from the time when the right to apply accrues, becomes applicable.

7. It is submitted by the respondents that the agreement



dated 26.03.1995 contemplated a period of two years and six months (including the grace period) for completion of the construction by the respondents and if the respondents failed to fulfill their obligations within such stipulated time, a cause of action arose to the petitioner at that stage itself for the purpose of limitation. It is further submitted, if only for argument's sake, that had the petitioner in his initial notice dated 23.06.2009 made a demand for arbitration, even then his right to apply under Section 11(6) of the Arbitration Act for appointment of an arbitrator would be barred on 23.06.2012 upon the expiry of three years thereof. The present request case has been filed on 25.08.2014, which is well beyond the expiry of the period of limitation and thus barred.

8. The respondent relies on the decision of the Supreme Court in *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta* [(1993) 4 SCC 338]. Reliance is also placed on the decision in *Union of India Vs. Momin Construction Company* [(1997) 9 SCC 97].

9. In reply, learned counsel for the petitioner submits that the request petition has not become barred by limitation and has been filed well within time. He relies on paragraph 46 of the decision of the Supreme Court in *SBP & Co. Vs. Patel Engineering Limited and another* [(2005) 8 SCC 618] as also on *M/s Gammon India Vs. Bihar State Electricity Board* [2013 (1) PLJR 633].

10. Having heard the parties at length and having regard



to the provisions of Section 43(1) of the Arbitration Act, it is evident that the provisions of the Limitation Act are applicable to arbitration matters as they apply to civil proceedings before the court. Accordingly, the time limit as laid down under Article 137 of the Schedule to the Limitation Act prescribing the limitation period of three years from the time when the right to apply accrues, is applicable and must be given effect to.

11. In *S. Rajan Vs. State of Kerala and another* [(1992) 3 SCC 608] it was held as follows :

“Reading Article 137 and sub-section (1) of Section 20 together, it must be said that the right to apply accrues when the difference arises or differences arise, as the case may be, between the parties. It is thus a question of fact to be determined in each case having regard to the facts of that case. The question in the present case is when should the difference between the parties be said to have arisen. According to the High Court the date on which notice of demand under the Revenue Recovery Act was served upon the appellant namely May 30, 1974 is the date on which difference must be held to have arisen between the parties, if not earlier. Sri Poti, however, says that it is not so and that it must be held to have arisen only when the appellant applied to the Government to refer the disputes between them to the arbitrator in terms of the agreement and the Government refused to do so. We find it difficult to agree with the learned counsel. The agreement was entered into in 1966. It was terminated on December 19, 1968. The work was re-tendered and it was completed through another contractor. The State then worked out the loss suffered by it on account of the appellant’s failure to carry out the work in accordance with the agreement and called upon the appellant to pay the same through the demand notice dated May 30, 1974. It is relevant to notice that this demand notice was questioned by the appellant by way of writ petition in the High Court of Kerala which was dismissed on November 25, 1978. Thus, the dispute had arisen in 1974 with the service of the demand notice. Only in the year 1983, did the appellant choose to request the Government to refer the dispute to the arbitrator in terms of the agreement which was



rejected in the following year. Neither the arbitration clause nor a copy of the agreement is placed before us. Therefore, we cannot say whether the arbitration clause contemplates that a reference to arbitration can be made only by the Government and not by the appellant. Assuming that such was the requirement of the arbitration clause, even so it must be held that the very request in 1983 was very much belated and cannot, in any event, be treated as the date on which the right to apply accrued. The differences had already arisen between the parties following the service of the demand notice. The challenge to the said demand notice made by the appellant by filing a writ petition in the Kerala High Court is the demonstrable proof of the dispute. Accordingly, we agree with the High Court that May 30, 1974 is the date on which the right to apply accrued in terms of Article 137 read with section 20(1) and that therefore the application filed in the year 1985 was clearly barred by limitation.”

In *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta* [(1993) 4 SCC 338], it has been held as follows:

“11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

XXX

XXX

XXX

13. *The Law of Arbitration* by Justice Bachawat in Chapter 37 at p. 549 it is stated that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, so also in the case of arbitrations, the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) ‘action’ and ‘cause of action’ in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require

arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.”

In *Union of India Vs. Momin Construction Company* [(1997) 9 SCC 97), it was held that the right to apply for appointment of an arbitrator (under Section 20 of the Arbitration Act, 1940) arose to the contractor before 11th August, 1965, that being the date when it issued the no claim certificate and thus, the application under Section 20 of the Arbitration Act, 1940 having been made beyond the expiry of three years therefrom, was barred by time.

In *Hari Shankar Singhania Vs. Gaur Hari Singhania* [(2006) 4 SCC 658], it was held as follows :

“10. It is now well settled that Article 137 of the Limitation Act, 1963 applies to an application under Section 20 of the Arbitration Act, 1940. Accordingly, an application under Section 20 of the Act for filing the arbitration agreement in the court and for reference of disputes to arbitration in accordance therewith is required to be filed within a period of three years when the right to apply accrues. The right to apply accrues when difference or dispute arises between the parties to the arbitration agreement. In the facts of the case, it is therefore necessary to find out as to when the right to apply accrued”.

12. Relying on the conclusions of the Court summarized in paragraph 46 of the judgment in *SBP & Co. Vs. Patel Engineering Limited and another* [(2005) 8 SCC 618], it is submitted by the Petitioner that complex questions may not be decided by the Court in matters involving appointment of arbitrators. As far as the decision in *M/s Gammon India Vs. Bihar State Electricity Board* [2013 (1) PLJR

633/ is concerned, it does not support the petitioner's contention, rather it reiterates the aforesaid principles in paragraph 21 thereof as follows :

“21. So far the question of delay is concerned, Section 43 of the Arbitration & Conciliation Act provides that Limitation Act, 1963 shall apply to arbitrations as it applied to proceedings in court, whereas under the Limitation Act the period of limitation prescribed for such step is three years from the date when the limitation starts running i.e. from the cause of action”.

13. In the undisputed facts of the case, the agreement dated 26.03.1995 between the parties contemplated a maximum period of two years and six months including grace period for completion of the construction. The Developer failed to complete the construction within time which expired at the end of September, 1997, and, clearly therefore, the cause of action arose to the petitioner on such failure and the petitioner could have well invoked the arbitration clause in the agreement soon thereafter but he chose not to do so. It is only after more than a decade that the petitioner sent a Advocate's notice dated 23.06.2009, followed by a second notice dated 31.05.2012, pointing out numerous defects which, according to him, were required to be rectified by the developer. This Court is of the view that the limitation for the purpose of appointment of an Arbitrator under the Act started running from September, 1997 itself when the cause of action first arose to the petitioner. Considering that the petitioner took no action for appointment of an arbitrator at the relevant time by making a demand

for appointment of an arbitrator, the present application filed as late as in August, 2014 is, therefore, hopelessly barred by limitation in view of the Article 137 of the Scheduled to the Limitation Act and having regard to the judicial pronouncements referred to above. Accordingly, no relief accordingly can be granted to the petitioner.

14. The request case accordingly stands dismissed.

(Vikash Jain, J)

B.T/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	06.05.2016
Transmission Date	N/A