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

ARBITRATION PETITION NO.93 OF 2017

Mallikarjun Gurlingappa Valikhindi	...	Petitioner
V/s.		
Shrikant Panachand Shah (decd)		
through legal heirs	...	Respondents

Mr. Abhijit M. Adagule, for the Petitioner.
Mr. Saurabh Butala, i/by Harshad a. Sathe, for respondent
Nos.1(b)

CORAM : G. S. KULKARNI, J.

DATE : 12th June 2019.

P.C. :

- 1] Heard learned counsel for the petitioner and learned counsel for the respondents.
- 2] This petition is filed under section 11 of the Arbitration and Conciliation Act, 1996 (for short, "ACA"); whereby the petitioner has prayed for appointment of arbitral tribunal to adjudicate the disputes and differences between the parties, which are stated to have arisen under the agreement dated 21st May, 1995.
- 3] Respondent have appeared and reply affidavit is placed on record. Rejoinder affidavit is placed on record by the petitioner.
- 4] It is not in dispute that the petitioner had approached Civil Court, by

filing Regular Civil suit No.1244 of 2001, before the Civil Judge Senior Division, Kolhapur against the respondent seeking specific performance of the agreement dated 21.5.1995, executed between the petitioner and respondent. Respondent had appeared in the said suit and had also filed written statement. Thereafter the Civil Court framed issues. Affidavit of evidence was also filed. In the year 2011, the suit was dismissed for non prosecution.

5] Learned counsel for the respondent has raised preliminary objection to the maintainability of this petition, mainly on two grounds. Firstly, once the petitioner had chosen to file a civil suit, it was not open for the petitioner thereafter to espouse a cause seeking appointment of an arbitral tribunal. The second contention is that even after the suit was dismissed for non prosecution in the year 2011, no invocation notice is issued on behalf of the petitioner invoking the arbitration agreement. Learned counsel for the respondent would submit that in fact there is also a prayer made in the suit alongwith prayer for specific performance, that an arbitral tribunal be appointed. It is submitted that even assuming that the suit itself is to be taken as a notice of invocation of the arbitration agreement, which although it may not, however, by considering such prayers as made in the suit, it is submitted that in such event considering the provisions of section 137 of the Limitation Act, the present petition is time barred and cannot be

entertained.

6] The contention raised on behalf of the respondent, on the factual matrix is not disputed by the petitioner that the suit was filed in the year 2001 and the suit was dismissed for want of prosecution in the year 2011. It is also not in dispute that the suit had proceeded upto the stage of evidence.

7] The petitioner by filing of the suit in the year 2001, had categorically waived his rights to espouse arbitration. Further it is also required to be held that this petition is time barred, as it is not filed within the prescribed limit as stipulated period under Article 137 of the Limitation Act. The petition is filed after about 7 years from the dismissal of the suit and if the suit itself is required to be taken as an invocation notice, it is stated that after 16 years from the date of the suit. The petition is, thus, barred by limitation.

8] For all these reasons the petition is required to be rejected. It is accordingly rejected. No costs.

9] At this stage, learned counsel for the petitioner submits that if the petitioner intends to seek appropriate reliefs for restoration of the suit, the rights of the petitioner be kept open. None of such contentions can be closed by this order. All contentions of the parties in this regard are expressly kept open.

[G. S. KULKARNI, J]