

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.109 OF 2019

Mr.Satyanarayan Rajaram Chinta & Ors. ...Petitioners

Versus

Marvel Realtors & Developers Ltd. & Ors. ...Respondents

Mr.Telesh Dande with Bharat Gadani i/b. Telesh Dande & Associates, for
the Petitioners.

Mr.Amit Gharte, for the Respondents.

CORAM: G.S.KULKARNI, J.

DATED: 18 September 2019

ORAL ORDER:

1. Heard the learned Counsel for the petitioners and the learned
Counsel for the respondents.

2. This is a petition filed under Section 11 of the Arbitration and
Conciliation Act,1996 (for short 'the Act') whereby the petitioners are
before this Court praying for appointment of an arbitral tribunal to
adjudicate the disputes and differences between the parties which have
arisen between the parties under the Articles of Agreement dated 24 April

2008. There is no dispute in regard to the arbitration agreement which is contained in Clause 24 of the agreement which reads thus:-

“24 All disputes or differences which may arise by and between the parties hereto arising out of the terms hereof or the interpretation of the terms and conditions of these presents or the performance by either of the parties hereto of its/ their obligations vis-a-vis the other party hereto, shall be referred to Arbitration under the provisions of the Arbitration and Conciliation Act,1996 and the decision of the said Arbitrator/s shall be final and binding on the parties hereto.”

3. Earlier the petitioners had filed against the respondents a civil suit being Special Civil Suit no.219 of 2018 before the Court of Civil Judge Senior Division, Pune. The respondents appeared in the said suit and objected to the suit by filing application under Section 8 of the Act contending that as there exists an arbitration agreement between the parties, the suit ought to be dismissed and the parties be referred to arbitration.

4. The record shows that the learned Civil Judge, Senior Division, Pune, allowed the said application filed by the respondent under Section 8 of the Act, by a detailed order referring the parties to arbitration. The operative order reads as under:-

- “1. The application is allowed.
2. The matter be referred to the arbitration.
3. The Superintendent, Civil Court Senior Division, Pune is hereby directed to arrange the arbitrator to refer the matter to arbitration.

4. Both parties to bear the costs of arbitrators equally.
5. The suit be stayed till further order.”

5. In pursuance of the orders passed by the learned Civil Judge, Senior Division, Pune, the petitioners issued notice dated 20 June 2019 to the respondents invoking the arbitration agreement and requested that an arbitrator be appointed suggesting the names of the proposed arbitrator to be appointed. As the respondents neither replied to the said notice nor agreed to the appointment of arbitrator, the present petition came to be filed.

6. Learned Counsel for the respondents has opposed this petition principally on the ground that the arbitration agreement is of the year 2008 and thus the claim of the petitioner itself is time barred and this should non-suit the petitioner in pursuing the remedy under Section 11(6) of the Act, in seeking appointment of an arbitral tribunal. In support of this submissions, learned Counsel for the respondents has relied on the decision of the Supreme Court in ***Geo Miller & Co.Pvt.Ltd. V. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.***¹.

1 AIR Online 2019 SC 981

7. Learned Counsel for the petitioners contesting the submissions as urged on behalf of the respondents would submit that the contention as urged on behalf of the respondents is misconceived. It is his submission that the petitioners had filed a civil suit before the Court of Civil Judge, Senior Division, Pune, and it is the respondents who had objected to the suit on the ground that there was an arbitration between the parties as provided in Clause 24 of the Agreement, and hence the suit ought not to proceed. It is submitted that now when the petitioner is complying the Civil Court's order and accordingly has invoked the arbitration, in these circumstances, it does not lie in the mouth of the respondents to contend that the remedy under Section 11 is not available. Learned Counsel for the petitioners submits that in the facts of the case, the decision of the Supreme Court in *Geo Miller & Co.Pvt.Ltd. (supra)* as relied on behalf of the respondents also would not be applicable.

8. Having heard the learned Counsel for the parties and having perused the record, I am not persuaded to accept the submissions as made on behalf of the respondents. This for two reasons, firstly, admittedly the

respondents non-suited the petitioner before the civil court on the ground of existence of an arbitration agreement between the parties and hence, the parties be referred to arbitration. Accepting the orders passed by the Civil Court when the petitioner invoked the arbitration, now the respondents are contending that the arbitration itself is not available as the claim is time barred.

9. In my opinion, in view of the clear stand taken by the respondents before the Civil Judge, the respondents ought not be permitted to take a contrary position that the arbitration itself is not available for the reason that the claim of the petitioner is time barred. In these circumstances the respondents are estopped from doing so.

10. The question is whether in the facts and circumstances of the case, it is required to be held that this Section 11 application is barred by limitation, considering the provisions of Article 137 of the Limitation Act. In my opinion, when the respondents opposed the maintainability of the suit and consented that the parties be referred to arbitration by moving an application under Section 8 of the Act on 12 November 2018, it is nothing

but the respondents invoking the arbitration agreement. Immediately thereafter as seen from the dates as noted above, the petitioners invoked the arbitration agreement on 20 June 2019 and as within the thirty days period as prescribed by Section 11(4) of the Act, the respondents did not concur in the appointment of an arbitral tribunal, the present petition was filed. Thus, by no stretch of imagination it can be said that applying article 137, the petitioners' application can be said to be time barred, being filed beyond three years.

11. The respondents cannot confuse the petitioners' claim on merits being time barred from that of a Section 11 application being barred by limitation. Both are distinct and different. A claim being time barred would be a mixed question of facts and law to be considered by the arbitral tribunal.

12. In my opinion, in the facts of the case, the reliance on behalf of the petitioner on the decision of the Supreme Court in ***Geo Miller & Co.Pvt.Ltd. (supra)***, is not well founded. This was a case where the Supreme Court dealt with the appellant who was sleeping over his right

for 14 years after having submitted final bills for payment to the respondent. The disputes between the parties concerned work orders dated 7 October 1979, 4 April 1980 and 3 May 1985 when the provisions of Arbitration Act, 1940 were applicable. The appellant however had served a notice to the respondent in the year 2002 (under the present Act) invoking arbitration. It is in these circumstances, applying the provisions of Article 137, the High Court rejected the application of the appellant filed under Section 11 of the Act. The Supreme Court in the facts of the case and also referring to the prior decisions in ***Hari Shankar Singhania & Ors. vs. Gaur Hari Singhania & Ors.***² and ***Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd.***³, held that in gross facts of the case, these decisions would not be applicable. In ***Shree Ram Mills Ltd.*** (supra) the Supreme Court had held a Section 11 application not being barred by limitation, considering the complete history of negotiations between the parties and observed that there was a continuing cause of action between the parties. It would be appropriate to note the observations of Their Lordships in paragraph (8) of the decision of the Supreme Court in ***Geo Miller & Co.Pvt.Ltd. (supra)*** which would demonstrate that the facts are uncomparable to the facts of the present case. The Supreme Court

2 (2006)4 SCC 658

3 (2007)4 SCC 599

referring to the facts of the case, observed thus:-

8. Undoubtedly, a different scheme has been evolved under the 1996 Act. However we find that the same principles continue to apply with respect to the applicability of the law of limitation to an application under Section 11(6) of the 1996 Act as laid down in the decisions dealing with judicial appointment of an arbitrator under Sections 8 and 20 of the 1940 Act.

Our finding is supported by the decision of a three Judge Bench of this Court in *Grasim Industries* (supra). In *Grasim Industries*, similar to the present case, the arbitration agreement provided for reference to be made under the 1940 Act. However the appellant raised their claim in 2002, attracting the application of the 1996 Act. This Court was therefore faced with the issue of whether an application for appointment of an arbitrator under the 1996 Act would be barred by limitation in respect of the appellant's claim. This Court found that, in view of Section 28 of the Indian Contract Act, 1872, the parties in the arbitration agreement could not stipulate a restricted period for raising a claim. However, the limitation period for invocation of arbitration would be three years from the date of the cause of action under Article 137 of the Limitation Act, 1963. However in the facts of that case, this Court found that certain claims had arisen within the three year limitation period and hence, could be allowed.

Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7.10.1979 and 4.4.1980 arose on 8.2.1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8.2.1986. Similarly, with respect to Arbitration Application Nos. 28/2003 relating to the work order dated 3.5.1985, the respondent has stated that final bill was handed over and became due on 10.8.1989. This has not been disputed by the appellant. Hence the limitation period ended on 10.8.1992.

Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a Court only by the end of 2003, his claim is clearly barred by

limitation.”

13. In my opinion, there cannot be a straight jacket formula as being suggested on behalf of the respondents to apply article 137 of the Limitation Act. The obligation of the Court would be to consider the facts of each case in considering any objection on limitation. (See: ***Hari Shankar Singhania & Ors. vs. Gaur Hari Singhania & Ors.*** (supra) and ***Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd.*** (supra)). It is also clear that the parties have not concluded their claims.

14. Even the decision of the Supreme Court in ***Speech and Software Technologies (India) Pvt.Ltd. Vs. Neos Interactive Ltd.***⁴ which is a decision rendered prior to the coming into force of the 2015 Amendment Act (w.e.f. 23.10.2015), would not be applicable in view of the amendment to Section 11 by insertion of sub-section (6-A) by Act no.3 of 2016 (w.e.f. 23.10.2015) which provides that notwithstanding any judgment, decree or order of any Court, the High Court required to confine the adjudication under Section 11 application to the examination of “existence of an arbitration agreement.” Law in this regard is now well

4 2009(3) Mh.L.J. SC 525

settled. (See to *Duro Felguera, S.A. vs. Gangavaram Port Limited*⁵, *A. Ayyasamy vs. A. Paramasivam and others*⁶, *Ameet Lalchand Shah and others vs. Rishabh Enterprises*⁷).

15. This is not a case where simplicitor a money claim has been made and the petitioner has forgotten to pursue the claim. The agreement concerned a development. There is no material to indicate that the respondents terminated the agreement. As pointed out on behalf of the petitioners, as the respondent could not comply with its obligation under the first agreement within a period of 25 months, a supplementary agreement dated 5 January 2010 came to be entered, wherein the respondents again agreed that they would complete the project within 23 months which came to an end 5 December 2012. Thereafter, there were negotiations between the parties as pointed out by the learned Counsel for the petitioners from the plaint as filed before the Civil Court. All this continued upto 2017 when in 2017 for the first time the respondents orally communicated that the respondents are in financial difficulties and would not be able to complete its obligation. However, it appears that

5 (2017) 9 SCC 729

6 2016 (10) SCC 386.

7 2018 SCC Online SC 487

there was no formal termination of the contract. The petitioners accordingly instituted a civil suit before the Court of Civil Judge, Senior Division, Pune inter-alia praying that the Articles of Agreement, Power-of-Attorney and the Supplemental Agreement be declared as null and void and for damages and injunction. The respondent objected to the suit on the ground of arbitration agreement between the parties. The suit came to be disposed of directing the parties to initiate the arbitration proceedings.

16. The petitioners accordingly issued a notice dated 20 June 2019 requesting the respondents to appoint an arbitrator. As the notice invoking the arbitration was not responded, the petitioner has filed this petition under Section 11 of the Act. These are the clear facts. These facts in the present case are totally distinct from the facts which fell for consideration of the Supreme Court in *Geo Miller & Co.Pvt.Ltd. (supra)*.

17. As a result of the above discussion, I am certain that the application is required to be allowed. It is accordingly allowed by the following order:-

ORDER

(i) Mr.Justice S.R.Sathe, Former Judge of this Court, is appointed as a sole Arbitrator to arbitrate the disputes and difference between the parties under the Articles of agreement dated 29 April 2008 and Articles of Supplementary Agreement dated 5 January 2010.

(ii) The learned prospective sole Arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act,1996, to the Registrar (Judicial-I), to be placed on record of this petition with a copy to be forwarded to both the parties.

(iii) The fees payable to the arbitral tribunal shall be governed in accordance with the fees prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.

(iv) At the first instance, the parties shall appear before the prospective arbitrator within three weeks from today on a date which may be mutually fixed by the prospective sole arbitrator;

(v) All contentions of the parties are expressly kept open;

(vi) The application is disposed of in the above terms. No costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:-

Mr.Justice S.R.Sathe
A-802, Ruturang Apartments,
Behind Paranjape School,
Kothrud, Pune 411038.
Tel: 020-25396407
Mobile: 9702502181
E-mail: shrikantsathe802@gmail.com

18. At this stage, learned Counsel for the respondents seeks stay of this order. The order shall take effect after fifteen days from being available.

(G.S.Kulkarni, J.)