

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.1260 OF 2019

Bhavik Bhimjiyani ... Petitioner
Vs.
Urban Infrastructure Real Estate Fund and others ... Respondents

AND

COMMERCIAL ARBITRATION PETITION NO.1312 OF 2019

Rashmi Bhimjiyani ... Petitioner
Vs.
Urban Infrastructure Real Estate Fund and others ... Respondents

AND

COMMERCIAL ARBITRATION PETITION NO.1278 OF 2019

Neelkanth Realty Private Limited ... Petitioner
Vs.
Urban Infrastructure Real Estate Fund and others ... Respondents

Mr. Ravi Kadam, Senior Advocate a/w. Mr. Prateek Seksaria, Mr. Saket Mone, Mr. Subit Chakraborti and Ms Kinjal Bhatt i/b. Vidhii Partners for Petitioner in CARBP No.1260 of 2019.

Mr. Prateek Seksaria a/w. Gulnar Mistry, S. Chakraborti, Kinjal Bhatt i/b. Vidhii Partners for Petitioner in CARBP No.1312 of 2019.

Mr. Mahendra Ghelani i/b. Law Charter for Petitioner in CARBP No.1278 of 2019.

Mr. Shyam Mehta, Senior Advocate a/w. Mr. Zal Andhyarujina, Mr. Aditya Bapat & Mumtaz B. i/b. Junnarkar & Asso. for Respondent No.1 in all the Petitions.

CORAM : UJJAL BHUYAN, J.
DATE : DECEMBER 04, 2019

ORDER :

This order will dispose of all the three commercial arbitration petitions.

2. Heard Mr. Kadam, learned Senior Counsel for the petitioner in Commercial Arbitration Petition No.1260 of 2019; Mr. Seksaria, learned

Counsel for the petitioner in Commercial Arbitration Petition No.1312 of 2019; Mr. Ghelani, learned counsel for the petitioner in Commercial Arbitration Petition No.1278 of 2019; and Mr. Mehta, learned Senior counsel for respondent No.1 in all the petitions.

3. Since all the three petitions assail the legality and correctness of the common impugned interim award dated 27.08.2019 passed by the learned Arbitrator, those were heard together on 03.12.2019 at the admission stage itself and are being disposed of by this common order.

4. The three arbitration petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration and Conciliation Act hereinafter) contending that the interim award passed by the learned Arbitrator is in conflict with the public policy of India inasmuch as it is in contravention with the fundamental policy of Indian Law.

5. Respondent No.1 as the claimant has instituted arbitration proceeding against the petitioner and others. Claimant, which has been arrayed as respondent No.1 in the present petitions, had entered into Share Subscription Agreement and Share-Holders Agreement, both dated 23.07.2008, with Neelkanth Reality Private Limited (Neelkanth Group hereinafter) for the purpose of investing in a development project proposed to be undertaken by the Neelkanth Group. The two agreements envisaged initial investment of Rs.25 crores by the claimant (respondent No.1 herein).

6. Claimant (respondent No.1 herein) alleged that the Neelkanth Group of which petitioners are Directors had failed to comply with the terms of the two agreements. Therefore, the claimant (respondent No.1 herein) issued letters dated 21.01.2009 and 14.02.2009 to the Neelkanth Group to refund the amount invested with interest.

7. On 19.02.2009, Neelkanth Group informed the claimant

(respondent No.1 herein) that there was no question of any amount due to the claimant by way of refund or otherwise.

8. This is the substance of the dispute which led to the related arbitration proceeding.

8.1. Petitioner has filed statement of defence in the arbitration proceeding.

8.2. Learned Arbitrator thereafter framed several issues out of which issue No.1 is relevant which is as follows:

“1. Whether all or any of the claims made by the claimant are barred by the law of limitation?”

9. Petitioner insisted before the learned Arbitrator that issue No.1 should be tried as a preliminary issue. Learned Arbitrator in the proceeding held on 27.08.2019 decided to deal with issue No.1 as a preliminary issue on the basis of demurrer. Thereafter, interim award was passed on the said date i.e. on 27.08.2019, whereby learned Arbitrator held the claims to be within time and answered issue No.1 in the negative.

10. Learned Senior Counsel for the petitioner has argued that while arbitrating on issue No.1, learned Arbitrator decided the same on the basis of demurrer but at the same time foreclosed the issue for further consideration during the trial.

10.1. He submits that claim of the claimant (respondent No.1 herein) is clearly barred under the Indian Limitation Act, 1963 and Section 3(1) of the Limitation Act casts a duty upon the Court / Tribunal to dismiss an application if made after the prescribed period although limitation is not set up as a defence. Therefore, the finding recorded by the learned Arbitrator while answering issue No.1 in the negative on the basis of demurrer foreclosing the said issue is in contravention with the fundamental policy of Indian Law, thereby in conflict with the public

policy of India.

10.2. In this connection, learned Senior Counsel has placed reliance on a decision of the Calcutta High Court in *Angelo Brothers Limited (In Liquidation) Vs. Bennett, Coleman and Co. Ltd. and another*, [2017] 203 **Company Case 180 (Cal.)**. He, therefore, submits that impugned interim award is liable to be set aside by this Court under Section 34 of the Arbitration and Conciliation Act.

11. On the other hand, learned Senior Counsel representing the claimant (respondent No.1 herein) vehemently opposed the submissions of learned Senior Counsel for the petitioner. He has referred to the interim award dated 27.08.2019 and contends that parties were told by the learned Arbitrator in clear terms that if issue No.1 was to be taken up on that day as a preliminary issue then it had to be decided on the basis of demurrer. Respondents i.e. present petitioners were clearly told that they would then not be able to contest any statement of fact stated by the claimant in the statement of claim or in their evidence or any document annexed to the statement of claim or to attempt to prove the contrary. It was made clear by learned Arbitrator that if issue No.1 was decided on the basis of demurrer then it would not be open to re-agitate the issue subsequently. Petitioner having gone ahead thereafter insisting on treating issue No.1 as a preliminary issue cannot now turn around and contend that learned Arbitrator cannot foreclose this issue during the trial. He submits that if the Court is inclined to examine the issue, he will make detailed submissions but no stay should be granted as the Arbitration and Conciliation Act, more particularly Section 6 thereof, does not contemplate interference by any judicial authority.

12. Submissions made by learned counsel for the parties have been considered.

13. Having heard learned counsel for the parties and on due consideration, Court is of the view that keeping the matter pending for

further hearing on the issue may not subserve the cause of justice. Accordingly at the admission stage itself, the three petitions are being disposed of.

14. As already noted above, question for consideration is whether learned Arbitrator was justified in holding that decision given on issue No.1 by treating it as a preliminary issue on the basis of demurrer would foreclose the said issue for further consideration during the arbitral proceeding.

15. Issue No.1 has already been extracted above and for the sake of convenience, it is reproduced again as under:

“1. Whether all or any of the claims made by the claimant are barred by the law of limitation?”

16. Paragraph 1 of the interim award dated 27.08.2019 indicates that proceeding held on 27.08.2019 was devoted to deciding whether issue No.1 should be tried as a preliminary issue. Learned Arbitrator informed the parties that if on that day issue No.1 was to be decided as a preliminary issue then it would have to be decided on the basis of demurrer in which event, respondents (petitioners herein) would not be able to contest any statement of fact stated by the claimant in the statement of claim or in their evidence or on documents annexed to the statement of claim or to attempt to prove the contrary. It was clarified by the learned Arbitrator that if issue No.1 was decided as a preliminary issue then it would not be open to re-agitate the issue subsequently.

17. Learned Arbitrator also offered the option to the respondents (petitioners herein) to lead evidence if that was required on this issue. But if the said issue was to be heard on 27.08.2019 then it had to be on the basis of a demurrer. Respondents (petitioners herein) contended that no evidence was required to decide issue No.1. Accordingly, issue No.1 was heard on the basis of demurrer as a preliminary issue. Ultimately after hearing the matter, learned Arbitrator has held as follows:

“37. Heard the parties. As stated above, at this stage, the Tribunal is proceeding on the basis of demurrer. Had this issue been answered after all evidence had been recorded, then this Tribunal may have been inclined to accept some of the submissions of the Respondents. But at this stage as this Issue is being decided on the basis of demurrer, the averments in the Statement of Claim have to be taken as correct. It is clear that Clause 5.2.1 and 5.3 give to the Claimant a right to extend the time for performance of the Conditions Precedent. Thus even though a notice may have been given it is still open to Claimant to extend time for performance of Condition Precedents. Once time is so extended then a fresh cause of action arises if again there is a breach. It is not possible to accept submission that in paragraph 21 the Claimant has only averred that it had extended time for payment. Such a submission is against the wording of the paragraph. In paragraph 21 Claimant have averred “The Respondents requested the Claimant to consider a settlement of the disputes between the parties and in the meantime extend time for fulfilling various commitments and desist from taking legal action. The Claimant agreed to extend time for compliance of the terms of SSA in accordance with Clause 5.3 and desist from exercising its remedies under the SSA while parties were exploring a settlement” (Emphasis supplied). The words “fulfilling various commitments” can by no stretch of imagination refer to right of Claimant to receive refund. The words “Agreed to extend time for compliance of the terms of SSA” cannot be read in isolation and have to be read in the context of the sentence stating that Respondents had requested for extension of time. Read as whole paragraph 21 makes it clear that Claimant is claiming that at the request of Respondents, Claimant extended time to perform the Condition Precedents. Thus even though a notice had been given under Clause 5.3, it was possible for the Claimant to thereafter extend time for performance of the Condition Precedent. Mr. Seksaria is right the right to take any legal action on the notice dated 14th February 2009 would expire in 2012 and Clause 15.3 would not enable Claimant to extend Limitation once it had expired. However within the tenure of the SSA Claimant could extend time for compliance and if Claimant has extended time for compliance then a fresh cause of action would arise and the Claimant could again exercise its right under Clause 5.3 when there is again a breach of the Condition Precedents. The Claimant has averred that it had extended time. At this stage this averment has to be accepted. As at this stage the proceeding are proceeding on the basis of demurrer. The statement of Claimant that it had extended time has to be accepted. It will therefore have to be held that now time only started running once the negotiations failed and there was again a breach of the SSA by the Respondents. This was, at the earlier in 2016.

38. As this issue is being decided on the basis of demurrer,

in view of a plain reading of the Statement of Claim it is not possible to accept Mr. Geelani's submission that time had, in fact, been extended only to consider how the payment / refund was to be made. Such a contention may have been possible if Claimants' witness had first been cross-examined in this regard and if there was some evidence, to this effect on respondents' behalf."

18. On going through the order of learned Arbitrator, as extracted above, it is seen that he had proceeded on the basis that as at that stage the proceeding proceeded on the basis of demurrer, averments in the claim would have to be accepted. On a plain reading of the statement of claim, it was not possible to accept the contention that the claim was barred by limitation. However, learned Arbitrator observed that such a contention could have been possible if the claimant's witness had first been cross-examined in this regard and if there was some evidence to this effect on behalf of the respondents. In fact, at the beginning of paragraph 37 of the interim award, as extracted above, learned Arbitrator observed that had this issue been answered after all evidence had been recorded, then the Tribunal might have been inclined to accept some of the submissions of the respondents (petitioners herein). Having observed so, in the circumstances, it was held that the claims were within time.

19. Grievance of the petitioners has been noted. Grievance is that while deciding the question of limitation as a preliminary issue on the basis of demurrer, learned Arbitrator could not have foreclosed the issue of limitation altogether.

20. Learned Senior Counsel for the petitioners has drawn an analogy of deciding an issue on the basis of demurrer with an application under Order VII Rule 11(d) of the Civil Procedure Code and contends that even if an application for rejection of plaint is rejected at the threshold, the same would not come in the way of the Court to decide whether the suit was barred by any law at the stage of trial when evidence would be available on record.

21. To appreciate the contention, it is necessary to examine the meaning of the expression “demurrer”.

22. In Concise Oxford English Dictionary, Indian Edition, the word “demur” has been defined to mean raise doubts or objections; show reluctance; the action of demurring would mean to accept without demur. In so far the word “demurrer” is concerned, it has been defined to mean an objection granting the factual basis of an opponent’s point but dismissing it as irrelevant or invalid; an objection.

23. In Black’s Law Dictionary, Eighth Edition, the word “demur” has been defined to mean the following:

1. to file a demurrer;
2. to object to the legal sufficiency of a claim alleged in a pleading without admitting or denying the truth of the facts stated;
3. to object to the legal sufficiency of a claim alleged in a pleading while admitting the truth of the facts stated.

23.1. Insofar the word “demurrer” is concerned, the French derivative ‘*demorer*’ means to wait or stay. It has been defined to mean a pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer. It is further explained that in most jurisdictions, such a pleading is now termed as a *motion to dismiss*.

24. In **Angelo Brothers Limited** (*supra*), Calcutta High Court examined various judicial pronouncements on the point of demurrer *vis-a-vis* Order VII Rule 11 of the Code of Civil Procedure and came to the conclusion that it is not the law in India that a motion for dismissal of a plaint or petition on a preliminary point forfeits the right of the applicant to contest the case later or such a procedure results in admission of facts pleaded in such plaint or petition whose dismissal is sought for. It was held that the term “demurrer” in the Indian context has been construed to have a connotation wider than the dictionary meaning and a motion for

dismissal of a proceeding on a preliminary point has been commonly referred to as an application “in demurrer”. Accordingly, it was held that the expression “demurrer” when used in connection with an application seeking dismissal of a petition on a preliminary or maintainability point would not imply automatic admission of facts contained in the plaint or petition whose dismissal is sought for by the opposing party. Principles of Order VII Rule 11 would apply in relation to such a petition and if it is found that adjudication of such motion involves mixed question of fact and law, then adjudication of that question would stand deferred, and those points would be left to be determined on trial.

25. This Court is in respectful agreement with the above proposition of law as propounded by the Calcutta High Court.

26. Proceeding further, let us take a hypothetical case. It is trite that an application under Order VII Rule 11 can be filed at any stage of the suit. For examining whether the suit is barred by any law, the averments made in the plaint alone would be germane. However, examination of the plaint alone under Order VII Rule 11 would not permit the Court to examine or declare upon the correctness of the contents or otherwise of the plaint. If there is any doubt at this stage, the benefit of doubt has to go to the plaintiff. If the Court comes to the conclusion that on the basis of the averments pleaded in the plaint, it cannot be said that the suit appears to be barred by any law, can it be said that it would preclude the Court from finally looking into the question as to whether the suit is barred by any law when all the evidence and other materials are before the Court.

27. In the considered opinion of the Court, the answer has to be in the negative.

28. The same principle can be applied in the present case as well. Issue No.1 was heard as a preliminary issue on the basis of the statement of claim, and on that basis, finding has been recorded by the learned

Arbitrator that the claims are within time. Being a preliminary issue decided on demurrer, this finding of the learned Arbitrator would remain a preliminary finding subject to the evidence that may be tendered. As a matter of fact, learned Arbitrator himself stated that the contention of the respondents (petitioners herein) might have been possible if the claimant's witness was first cross-examined in this regard and if there was some evidence to this effect on the respondents' behalf. In fact, learned Arbitrator went on to observe that had this issue been answered after all the evidence had been recorded, then the Arbitral Tribunal might have been inclined to accept some of the submissions of the respondents (petitioners herein).

29. Considering Section 3(1) of the Indian Limitation Act, 1963, it is quite clear that objection as to limitation is quite fundamental. It is a substantive objection which goes to the root of the claim. Limitation being a mixed question of fact and law, a preliminary finding of maintainability on the point of limitation decided on demurrer would not preclude a final determination of the question based on facts which may come on record through adducing of evidence, because application of law is on facts and not in a vacuum. A decision on the basis of demurrer cannot foreclose a final decision on merit.

30. Therefore, in the light of the discussions made above, Court is of the view that the interim award dated 27.08.2019 is liable to be modified to the extent that the preliminary finding on issue No.1 on the basis of demurrer would not foreclose the issue and would not preclude the Tribunal from examining this issue on the basis of evidence and other materials on record, if tendered and if so warranted. However, no opinion is expressed by the Court.

31. With the above modification, the three Commercial Arbitration Petitions are disposed of.

(UJJAL BHUYAN, J.)