

Ashwini

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION APPLICATION (L) NO.480 OF 2019**

C Shamsuddin	...Applicant
<i>Versus</i>	
Now Realty Ventures LLP & Ors	...Respondents

**Mr Vineet Naik, Senior Advocate, i/b S Anchan, for the Applicant.
Mr Tejas Dande, with Bharat Gadhavi, Vaibhav Kulkarni and Vishal
Navale i/b Tejesh Dande & Associates for the Respondents.**

**CORAM: G.S. PATEL, J.
DATED: 16th January 2020**

PC:-

1. This is a contested application under Section 11 of the Arbitration and Conciliation Act 1996. The relevant facts are these. The Applicant is an individual said to be engaged in the business of real estate development. The Respondent is a partnership firm constituted under the Limited Liability Partnership Act 2008. It was also earlier constituted under a different name. Respondents Nos. 2 and 3 are its partners.

2. Between 2009 and 2011, by a series of registered sale deeds, the Applicant acquired a tract of land of 36,224.5 sq mtr at Mouje Baner, Pune. The relevant records stand in the name of the Applicant. Given that this was a very large tract of land, the Applicant desired to identify a suitable entity for joint development. The Respondents expressed interest in this development. They owned the adjacent land. They desired to merge the two lands and jointly develop both. The 1st Respondent and the Applicant thus entered into a Joint Venture Agreement dated 18th April 2011. This is duly stamped and registered. The agreement provides that the Applicant is entitled to 48% of the revenue share from the development of the property. In consideration of doing the development work, the 1st Respondent was entitled to 52% of the revenue. It was for the 1st Respondent to obtain the necessary permissions and sanctions and to commence construction within the specified time. The 1st Respondent was to complete construction in 42 months from the date of commencement of the construction. A copy of agreement is at Annexure 'A' to the Petition.

3. Clause 14 of this agreement contains the Arbitration clause. It reads thus:

**“CLAUSE 14: ARBITRATION COURT
PROCEEDING:-**

If any dispute arises between the parties hereto due to the non-performance of any obligation by other party then in such circumstances the parties hereto at first instance may try to settle the dispute amicably between themselves and if dispute is not settled within 1 month then same shall be

referred to arbitration as per the provision of the Arbitration and Conciliation Act, 1996 and for such proceeding the parties hereto shall co-operation to the Arbitrator. No party, even the Arbitrator shall not be entitled to stop the development work and sales or work of the scheme/project in any manner. If both parties decide to submit any dispute for arbitration, then both parties shall appoint one Arbitrators each and in case of disagreement between the two Arbitrators, then both Arbitrators shall appoint a third Arbitrator, who shall be a judicial person and his decision shall be binding on both parties.”

4. The 1st Respondent gave the Petitioner a refundable interest-free deposit of Rs. 25 lakhs, adjustable against the Applicant’s share. The parties then modified their understanding by executing a Supplementary Memorandum of Understanding (“**MoU**”) dated 21st August 2012. The refundable security deposit was increased to Rs. 14 crores and was refundable upon termination of the agreement. The minimum sale price of the project would be Rs 6,000 per sq ft. According to the Applicant, the agreement said that the construction work would commence within nine months. The 1st Respondent did not adhere to this condition. The parties re-negotiated. They entered into a second Supplementary Memorandum of Understanding dated 12th November 2013. Now the minimum sale price was increased to Rs 7,500/- per sq ft for the first 25 flats and thereafter to Rs 8,000/- per sq ft for additional flats. On the same day, 12th November 2013, the parties also executed a Correction-cum-Deed of Modification modifying certain terms of the original agreement. The revenue-sharing ratio was changed to equal shares, i.e. 50:50. Also, the projected completion

period was now to be read as commencing from the date of execution of this Modification Deed.

5. According to the Applicant the Respondent has failed to do any construction work on the site at all. On 5th August 2014, the Applicant terminated the agreement, a contemporaneous power of attorney and all further documents. A copy of this notice is at Exhibit 'F' to the Petition. The 1st Respondent replied on 9th October 2014. It is said to have admitted that there was delay but said that work on two buildings on the southern portion would be commenced and that the RCC framework up to fourth slab would be completed within seven months. In view of this communication by the 1st Respondent firm, on 9th October 2014, the Applicant revoked the termination and permitted the 1st Respondent to commence construction.

6. A year passed. The promised construction on the southern portion did not commence. Therefore, by a letter of 22nd September 2015, the Applicant terminated the agreement again and all other mutual understandings between the parties. It expressly revoked the power of attorney. A copy of this second termination is at Exhibit 'H' to the Petition. There was a reply of 7th October 2015 which I will quickly pass over.

7. The Application then says that because of the delay caused, the Applicant was required to incur additional liabilities towards tax and legal proceedings. Consequently, by a letter of 4th January 2019 the Applicant demanded an amount of over Rs 190 crores within

eight days. A copy of this demand is 4th January 2019. Attempts at settlement failed and it is thereafter that, by a letter dated 2nd April 2019, the Applicant issued a notice of invocation and in terms of clause 14 of the principle agreement (set out above) nominated an Arbitrator. The Applicants also called upon the Respondents to nominate their Arbitrator. Their reply of 6th May 2019 from the Respondents was to deny non-performance and to contend that there were no disputes. The Respondents declined or refused to nominate any Arbitrator.

8. Hence, this petition.

9. The existence of the arbitration clause is not disputed. This should satisfy the requirements of Section 11 (6-A) of the Arbitration and Conciliation Act 1996 which reads thus:

(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4), or sub-section (5) or sub-section (6), shall notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

10. The opposition from Mr Dande who has filed an Affidavit in Reply is chiefly on law. I am not addressing any of the contentions on the merits of the dispute, i.e. the development itself. I do not believe I can. This is in view of the express wording of Section 11(6-A) of the Act.

11. What Mr Dande argues is that the arbitration application itself, i.e. the claim to be entitled to seek an order of reference to arbitration is itself barred by limitation. He bases this submission on two grounds. The first is that the Section 11(6-A) has been taken off the statute book by the 2019 Amending Act, i.e. the Arbitration and Conciliation (Amendment) Act 2019.

12. Factually, this is incorrect. That Amendment Act No. 33 of 2019 was notified on 9th August 2019. That was the date of its publication in the Official Gazette. Section 1(2) said that except as otherwise provided in the Amendment Act, it would come into force on such date as the Central Government may notify in the Official Gazette, and, further, that different dates could be appointed for different provisions of the Act. Now the deletion of Section 11 (6-A) was contained in Section 3 of the 2019 Amending Act.

13. What the argument overlooks is the subsequent Notification of 30th August 2019 published by the Ministry of Law and Justice, Department of Legal Affairs in the Official Gazette. This Notification has 30th August 2019 as the date on which certain specified — but not all — provisions of the 2019 Amending Act would come into force. The Sections notified to become operational on that date are Section 1, Sections 4 to 9, Sections 11 to 13 and Section 15. Notably, Section 3, which contains the proposed deletion of Section 11 (6-A) was never so date-notified. It never came into force.

14. But this might in itself be somewhat academic in view of the decision of the Supreme Court in *Mayavati Trading Private Limited v Pradyut Deb Burman*.¹ There, considering precisely the effect of an omission of Section 11(6-A), the Supreme Court held that the deletion by the 2019 amendment of this Section would not operate to resuscitate the law prevailing prior to that amendment. The omission of Section 11(6-A) would not alter the position that the power of the Section 11 Court is confined to an examination of the existence of the arbitration agreement, nothing more, nothing less. All other preliminary issues are to be decided by the arbitrator.

15. Read on its own, this would mean that if there is a case that a claim in arbitration is time-barred, this must be taken before the arbitrator and not before the Section 11 Court.

16. The second limb to Mr Dande's argument is that the case is fully governed by the three-Judge Bench decision of the Supreme Court rendered on 3rd September 2019 in *Geo Miller And Co Pvt Ltd v Rajasthan Vidyut Utpadan Nigam Ltd*.² The facts in that case were somewhat peculiar. There were three arbitration applications, all of 2003, i.e. prior to the 2015 amendment that introduced Section 11(6-A). Work orders were even earlier of the years 1979 to 1985. Claims were made between 1997 and 1999. A demand was made as late as October 2002, and it is in this context that the question arose of limitation. The entire decision in *Geo Miller* makes no reference whatsoever to Section 11(6-A) and this is undoubtedly because that

1 (2019) 8 SCC 714.

2 (2019) SCC 1137.

Section had not been introduced at the time relevant to the dispute before the Supreme Court.

17. It is Mr Dande's case that this is the decision that is binding because it holds that a Section 11 Court is bound to assess the question of limitation before making any order of reference to arbitration.

18. But there is a later decision of the Supreme Court of 27th November 2019 in *Uttarakhand Purv Sainik Kalyan Nigam Limited v Northern Coal Field Limited*.³ This was squarely after the 2015 amendment to the Arbitration Act and it considers the impact of Section 11 (6-A). This amendment is referenced in paragraph 24 of *Uttarakhand Purv Sainik Kalyan Nigam Limited* and this decision references the earlier decision of the Supreme Court in *Duro Felguera SA v Gangavaram Port Limited*.⁴ The *Uttarakhand Purv Sainik* Court specifically held that a question of limitation is really a question of jurisdiction,⁵ and, therefore, has to be decided not by Section 11 Court but by the arbitrator under Section 16.

19. Mr Dande's submission is that I should hold that the Supreme Court decision in *Uttarakhand Purv Sainik*, although apparently on point, is a decision rendered per incuriam because it does not reference the previous three-Judge Bench decision of the Supreme Court in *Geo Miller*. He submits that the *Uttarakhand Purv*

³ 2019 SCC Online SC 1518.

⁴ (2017) 9 SCC 729.

⁵ *Indian Farmers Fertilizers Cooperative Ltd v Bhadra Products*, (2018) 2 SCC 534.

Sainik Court could not have taken a view contrary to that of *Geo Miller*. It was bound by the view taken by a larger Bench. If at all, the two judges in *Uttarakhand Purv Sainik* could have referred the question to the Hon'ble the Chief Justice of India for being placed before an even larger Bench, if they felt that *Geo Miller* was incorrectly decided. To the extent that it does not even notice the decision of the three-judge Bench in *Geo Miller*, Mr Dande submits, *Uttarakhand Purv Sainik* must be held to be per incuriam.

20. He further submits that this course of action, holding a Supreme Court decision to be one rendered per incuriam, is not a special privilege confined to the Supreme Court. Any Court at any level is entitled to so hold.

21. Mr Dande may be correct in the second part of the submission, but I do not think he is correct on the first.

22. As I have noted, *Geo Miller* and *Uttarakhand Purv Sainik* dealt with entirely different factual scenarios and, more importantly dealt with an entirely different statutory landscape. *Geo Miller* was clearly a case prior to the 2015 amendment that introduced Section 11(6-A). *Uttarakhand Purv Sainik* looked at the Act as amended, and dramatically, by the 2015 amendment introducing Section 11 (6-A).⁶

⁶ I will leave aside Mr Nayak's submission on behalf of the Applicant urging me to hold that *Geo Miller* itself was wrongly decided because it misconstrued or misunderstood previous decisions of the Supreme Court. That certainly is an argument best left for another Court, and not for this one.

23. I am unable to accept Mr Dande's submissions that the claim for reference to arbitration can be held to be barred by limitation. To hold so would be directly against the decision of the Supreme Court in *Uttarakhand Purv Sainik*. There is no inconsistency between *Geo Miller* and *Uttarakhand Purv Sainik*. They dealt with entirely different situations. The one in *Uttarakhand Purv Sainik* is the one closer to the case at hand. There is no question of saying that *Uttarakhand Purv Sainik* is a decision rendered per incuriam. It is not.

24. While I am on this, I believe I can profitably reproduce the relevant portions of *Uttarakhand Purv Sainik*.

1. The issue which has arisen for consideration is whether the High Court was justified in rejecting the application filed under Section 11 for reference to arbitration, on the ground that it was barred by limitation.

16. The invocation took place after Section 11 was amended by the 2015 Amendment Act, which came into force on 23.10.2015, the amended provision would be applicable to the present case.

17. The 2015 Amendment Act brought about a significant change in the appointment process under Section 11: first, the default power of appointment shifted from the Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; **second, the scope of jurisdiction under sub-section (6A) of Section 11 was confined to the examination of the existence of the arbitration agreement at the pre-reference stage.**

18. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11.

23. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the *kompetenz-kompetenz* principle enshrined in Section 16 of the 1996 Act.

24. The 2015 Amendment Act inserted sub-section (6A) to Section 11 which provides that:

“The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or subsection (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

(emphasis supplied)

25. By virtue of the non obstante clause incorporated in Section 11(6A), previous judgments rendered in *Patel Engineering (supra)* and *Boghara Polyfab (supra)*, were legislatively over-ruled. **The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.**

26. Reliance is placed on the judgment in *Duro Felguera S.A. v. Gangavaram Port Limited*, wherein this Court held that:

“From a reading of Section 11(6A), the intention of the legislature is crystal clear i.e.

the Court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a Clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”

(emphasis supplied)

27. In view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the *Kompetenz-Kompetenz* principle.

28. The doctrine of “*Kompetenz-Kompetenz*”, also referred to as “*Compétence-Compétence*”, or “*Compétence de la reconnue*”, implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

29. The doctrine of *kompetenz-kompetenz* is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final

contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified⁶. If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

32. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator.

33. Sub-section (1) of Section 16 provides that the arbitral tribunal may rule on its own jurisdiction, “including any objections” with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

34. In the present case, the issue of limitation was raised by the Respondent-Company to oppose the appointment of the arbitrator under Section 11 before the High Court.

35. Limitation is a mixed question of fact and law. In *ITW Signode India Ltd. v. Collector of Central Excise* a three

judge bench of this Court held that the question of limitation involves a question of jurisdiction. **The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.**

37. In *Indian Farmers Fertilizers Cooperative Ltd. v. Bhadra Products* this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the UNCITRAL Model Law which enshrines the *Kompetenze* principle.

38. In view of the aforesaid discussion, we set aside the impugned judgment and order dated 11.01.2018 passed by the High Court, and direct that the issue of limitation be decided by the arbitral tribunal.

(Emphasis added)

25. I note that it is not Mr Dande's case that the arbitration clause falls within any of the exceptions noted in paragraph 29 of *Uttarakhand Purv Sainik* as having been procured by fraud or deception.

26. The opposition to the application fails.

27. The question of limitation will be kept open for decision before the arbitral tribunal under Section 16.

28. Although the Arbitration Clause 14 requires a reference to the two Arbitrators, on taking instructions in Court, Mr Dande says that on a without prejudice basis i.e. without prejudice to his rights to

challenge this order, his client is willing to agree to the reference being to a sole Arbitrator. He cannot consent to the name and leaves that to the Court. His client does not accept the nomination made by the Applicant.

29. In these circumstances, I will request Mr Justice SR Sathe, former Judge of this Court, to accept the appointment as a sole Arbitrator to decide the disputes and differences between the parties arising from Joint Venture Agreement dated 18th April 2011, Supplementary Memorandum of Understanding dated 21st August 2012, Supplementary Memorandum of Understanding dated 12th November 2013 and Correction cum Deed of Modification dated 12th November 2013.

(a) **Appointment of Arbitrator:** Mr Justice SR Sathe, former Judge of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Joint Venture Agreement dated 18th April 2011, Supplementary Memorandum of Understanding dated 21st August 2012, Supplementary Memorandum of Understanding dated 12th November 2013 and Correction cum Deed of Modification dated 12th November 2013.

(b) Communication to Arbitrator of this order:

- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.
- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator **Mr Justice SR Sathe, former Judge of this Court.**

Address A-802, Ruturang Apartment,
Behind Paranjape School,
Kothrud,
Pune 411 038

Contact No. 020 2539 6407

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.

- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Section 16 application:** The Respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act, including limitation. All contentions are left open.
- (g) **Interim Application/s:**
 - (i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

- (ii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.
 - (h) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
 - (i) **Sharing of costs and fees:** All arbitral costs and the fees of the Arbitrator will be borne by the two sides in equal shares in the first instance.
 - (j) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Pune.
30. The application is disposed of in these terms. No costs.

(G. S. PATEL, J)