

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
APPLICATION FOR APPOINTMENT OF ARBITRATOR
NO.2 OF 2018

Mr. Raghunath Madhukar Mandrekar	 Applicant
Versus	
Mr. Prabhakar Vernekar & Anr	 Respondents

WITH
APPLICATION FOR APPOINTMENT OF ARBITRATOR
NO.18 OF 2017

Mr. Gajanan Murari Gavandi	 Applicant
Versus	
Mr. Prabhakar Vernekar & Anr.	 Respondents

WITH
APPLICATION FOR APPOINTMENT OF ARBITRATOR
NO.24 OF 2017

Mr. Ganesh Ladu Chari (Dec)	
Through Lrs.	 Applicant
Versus	
Mr. Prabhakar Vernekar & Anr.	 Respondents

WITH
APPLICATION FOR APPOINTMENT OF ARBITRATOR
NO.25 OF 2017

Mr. Dilip Jaidev Parab	 Applicant
Versus	
Mr. Prabhakar Vernekar & Anr.	 Respondents

WITH
APPLICATION FOR APPOINTMENT OF ARBITRATOR

NO.26 OF 2017

Mr. Madhav Vishnu Joshi

..... Applicant

Versus

Mr. Prabhakar Vernekar & Anr.

..... Respondents

Mr. J. Mulgaonkar, Advocate for the Applicants.

Mr. Parikshit Sawant, Advocate for Respondent No.1.

Mr. Vishnuprasad Lawande, Advocate for Respondents No.2(b), 2(c), 2(d), 2(e), and 2(f).

Coram : M.S. Sonak, J.***Dated : 28th January, 2021.*****P.C.:-**

Heard Mr. J.J. Mulgaonkar for the Applicants, Mr. Parikshit Sawant for Respondent No.1 and Mr. V.A. Lawande for Respondents 2(b) to 2(f).

2. These are applications seeking appointment of an arbitrator since the disputes have arisen between the parties in connection with the agreements entered into between the parties which, admittedly, contain an arbitration clause.

3. On 22nd January, 2021, after hearing the parties, the following order was made :

“ *Heard Mr. J. Mulgaonkar for the Applicants, Mr.*

Parikshit Sawant for Respondent no.1, and Mr. Vishnuprasad Lawande for Respondents no.2(b), 2(c), 2(d), 2(e), and 2(f).

2. Mr. Mulgaonkar, learned counsel for the applicants submits that all the respondents have been duly served. Today, Mr. Sawant and Mr. Lawande appear on behalf of some of the respondents and oppose these applications seeking the appointment of an arbitrator.

3. Learned counsel for the parties submit that the facts involved in all these applications are similar and therefore, there will be no difficulty in disposing of all these applications by a common order. Application for appointment of arbitrator no.2/2018 made by Shri Raghunath Mandrekar is treated as the lead application for sake of convenience.

4. The applicants are purchasers of flats in a building named Prabhavati Apartments constructed by the respondents/predecessors in the title of the respondents. Therefore, for the sake of convenience, respondents will be collectively referred to as the 'builders'.

5. It is the case of the applicants that the builders have not complied with certain terms and conditions of the agreement for sale based on which they have been put in possession of the flats in Prabhavati Apartments (said building). One of the grievances relates to the non-execution of the sale deed/conveyance.

6. The applicants instituted proceedings before the Consumer Forum being Complaint No.103/2012. The builders took out an application under Section 8 of the Arbitration and Conciliation Act, 1996 (said Act) urging reference to arbitration since there was an arbitration clause

in the agreement between the parties and even the disputes had arisen under the said agreement itself. The Consumer Forum rejected the builders' application under Section 8 of the said Act by holding that the jurisdiction of the Forum was not excluded despite the existence of the arbitration clause in the agreement between the parties.

7. The builders instituted a revision petition before the Goa State Consumer Disputes Redressal Commission (Commission) questioning the orders of the Consumer Forum. By a common order dated 27.03.2014, the Commission, allowed builders' revisions and upheld the builders' objection in terms of Section 8 of the said Act. The applications of the builders were allowed and the parties were referred to arbitration by the named arbitrator Architect Shri Falari to decide the disputes raised by the applicants.

8. The operative portion of the Commission's common judgment and order dated 27.03.2014 is to be found in paragraph 28 and the same reads as follows:

“In view of the above discussion, and following the ratio of Prasad K. Amonkar, supra, we allow these revision petitions, and set aside the impugned orders of the Lr. District Forum. Consequently, we allow the applications for reference filed by the OPs and refer the parties to the named arbitrator Architect Shri. Falari to decide the dispute raised by the complainants. We hope that Shri. Falari will now initiate arbitration proceedings in terms of the request made by both the parties as expeditiously as possible, and, in any event within a period of two months and conclude the same within the next 3 months or so, and thus save time, money, and energy of both the parties.”

9. The applicants, did not carry the matter any further but rather, submitted to the directions in the Commission's order dated 27.03.2014. This is evident from the fact that the applicants through their advocate addressed notices dated 04.06.2014 and 27.09.2014 to the named arbitrator Architect Shri Falari to enter upon arbitration and to proceed to adjudicate upon the disputes which the applicants had raised.

10. It is the case of the applicants that the arbitrator despite the Commission's order dated 27.03.2014 and despite the request made by the applicants on 04.06.2014 and 27.09.2014 declined to enter upon arbitration or to take any steps whatsoever to enter upon arbitration.

11. The applicants, were left with no other alternative than to institute these applications on 15.07.2016 urging the appointment of an arbitrator by this Court.

12. After these applications were filed the respondent no.2 i.e. Mrs. Prabhavati Prabhakar Vernekar expired and considerable time was spent in bringing and serving the legal representatives. That is the reason why these applications could not be disposed of earlier.

13. Today, Mr. Sawant and Mr. Lawande opposed the grant of any reliefs in these applications urging that these applications were ex facie barred by the law of limitation as prescribed under Article 137 of the Schedule to the Limitation Act, 1963. At the outset, they point out that after the 2015 amendment the applications for appointment of an arbitrator are to be made to the High Court, and therefore, the provisions of the Limitation Act will apply in case of such applications. They submit that since there is no particular article prescribing any period of limitation for such applications, the residuary Article 137

will apply. They rely on the decision of this Court in **Deepdharshan Builders Pvt. Ltd v. Saroj and others – Commercial Arbitration Application No.107 of 2018 decided on 22.11.2018** to submit that this Court has already held that Article 137 of the Limitation Act will apply to applications seeking appointment of an arbitrator made to the High Court.

14. Mr. Sawant and Mr. Lawande then pointed out that the cause of action for making applications for appointment of arbitrator arose to the applicants sometime in the year 2012 or in any case on service of notice dated 19.04.2013 upon the arbitrator requiring the arbitrator to enter upon the reference. They point out that once the period of limitation commences running, the same, cannot be halted by any acts of the parties. They rely on certain observations in **Vishindas Bhagchand v. Chairman, Maharashtra State Electricity Board and others – (2001) 4 ALL MR 763** in support of this contention. They submit that since the cause of action for seeking appointment of arbitrator arose in April 2013, these applications which are filed only on 15.07.2016 are *ex facie* barred by the law of limitation. They point out that in these matters there are no applications under Section 5 or 14 of the Limitation Act seeking either condonation or exclusion and therefore, this Court ought to dismiss these applications as barred by limitation.

15. Having considered the objections raised by and on behalf of the respondents, according to me, the same are neither bonafide nor have any merit.

16. The record bears out that the applicants are clamouring to seek redressal of their grievances against the builder in the matter of flats that were agreed to be sold to them. One of the grievances relates to the non-execution of

a sale deed or a conveyance by the builder.

17. The institution of proceedings before the Consumer Forum can hardly be regarded as malafide or lacking any good faith. In the said proceedings the builders themselves relied upon the arbitration clause and urged reference to arbitration. This was after some of the applicants had even written to the named arbitrator Architect Falari to enter upon arbitration and resolve the disputes which had arisen between the parties. Mr. Lawande points out to the communication dated 19.04.2013 in this regard. According to me, the address of such communication is not significant for determining whether the cause of action arose for the appointment of the arbitrator. The communication is only indicative of all the steps taken by the applicants to attempt to resolve or redress their grievances.

18. The builders' application under Section 8 of the said Act was dismissed by the Consumer Forum holding that the provisions of the Consumer Protection Act have an overriding effect. However, the Commission reversed the Forum and held that the parties will have to proceed to resolve their disputes to arbitration and not any other mode. This is evident from the above-referred operative portion of the Commission's order dated 27.03.2014.

19. Soon thereafter, the applicants, vide communications dated 04.06.2014 and 27.09.2014 once again wrote to the named Arbitrator Architect Falari and requested him to enter upon the reference. There is no dispute that such letters were received by Architect Falari, the named arbitrator. It was expected that the arbitrator enters upon reference particularly since he was the named arbitrator in terms of the agreement and further, there were directions to

him to enter upon arbitration in the Commission's order dated 27.03.2014. Therefore, the cause of action for the applicants to file the present applications arose within some reasonable period from the date on which the named/appointed arbitrator refused to enter upon arbitration. The cause of action, therefore, can be said to have arisen in October 2014 or thereabouts since 29.10.2014 could be regarded as a reasonable period during which the arbitrator ought to have entered upon the reference and proceeded with the arbitration. It is not possible to agree with the contentions of the respondents that the cause of action arose sometime in the year 2013 or thereabouts to seek the appointment of an arbitrator.

20. Therefore, even by accepting the principles laid down by this Court in the case of Deepdharshan Builders Pvt. Ltd (supra) and Vishindas Bhagchand (supra) it cannot be said that the institution of these applications is barred by limitation. Accordingly, there is no merit in the objection raised on behalf of the respondents. The objection, to say the least, is not bonafide. It was the builders' case that there is an arbitration agreement and the parties should attempt to resolve their disputes through arbitration. Now that the applicants applied for resolution of their disputes through arbitration, it was not expected from the builders to raise an objection of this nature and to stall every legitimate attempt on the part of the applicants to seek redressal of their grievances.

*21. Mr. Sawant and Mr. Lawande point out that even the claims of the applicants will by now be barred by limitation. As held by the Hon'ble Court in **M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited – (2020) 2 SCC 455**, the issue as to whether the claims before the arbitrator are barred by the law of limitation or not is an issue that will*

have to be decided by the arbitrator. Based on such a plea, however, an application seeking an appointment of an arbitrator cannot be defeated. Accordingly, this issue is kept open for examination and decision by the arbitrator.

22. Since, no other objection was raised, there can be no further hurdles to the appointment of an arbitrator to adjudicate upon the disputes and differences which have arisen between the parties.

23. The learned counsel for the parties without prejudice to their respective contentions propose the appointment of Advocate Vishwesh Kamat as Arbitrator. Mr. Sawant and Mr. Lawande clarify that this proposal is without prejudice to the rights of the builders to challenge the present order. This is accordingly recorded and even made clear.

24. Mr. Vishwesh Kamat, the advocate of this Court is proposed to be appointed as arbitrator in this matter. Such appointment can be made once Mr. Kamat files a Statement of Disclosure in terms of Section 11(8) of the said Act. To enable Mr. Kamat to file such a statement, this matter is now posted on 28.01.2021.

25. Learned counsel for the parties state that they will inform Mr. Kamat about the making of this order at the earliest.

26. Stand over to 28.01.2021.

27. All concerned to act based on an authenticated copy of this Order.”

4. Today, the learned Counsel for the parties, on the basis of

instructions, state that they will accept the appointment of Mr. Vishwesh Kamat, as an arbitrator and proceed with arbitration on merits.

5. Mr. Vishwesh Kamat is also present in the Court and has tendered his Statement of Disclosure in terms of Section 12(1)(b) of the Arbitration and Conciliation Act, 1996 (said Act). Such statement is taken on record.

6. Mr. Vishwesh Kamat is now appointed as an arbitrator to arbitrate between the disputes which have arisen between the applicants and the respondents. The learned Counsel for the parties agree that it will be only appropriate that a single arbitrator is appointed to arbitrate between the disputes which have arisen between the parties.

7. The appointment, as well as the fees of the arbitrator, will be governed by the provisions of the said Act.

8. It is made clear that this Court has not gone into the rival contentions on merits of the disputes and, therefore, such disputes will have to be adjudicated upon by the arbitrator in accordance with law and on its own merits. Further, it is clarified that observations, if any in the order dated 22/1/2021, were only in the context of considering the objections raised to the appointment of an arbitrator

and such observations need not influence the arbitrator in deciding the disputes between the parties on its own merits and in accordance with law.

9. The applications for appointment of an arbitrator are disposed of in the aforesaid terms. There shall be no order as to costs.

13. All concerned to act on the basis of an authenticated copy of this order.

M.S. Sonak, J.

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MHAMAL

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