

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.06.2021

PRONOUNCED ON : 01.07.2021

CORAM

THE HONOURABLE MR. JUSTICE **V. PARTHIBAN**

O.P.No.245 of 2021

Mrs. Rajalaxmi Mckenna,
Rep.by her Power Agent Mr.M.Amarnath,
Director, Paterson & Co.Pvt.Ltd.,
“Vanguard House, No.48, Second Line Beach,
Chennai – 600 001.

...Petitioner

Vs.

1.Mr.Sankaran Raghunathan
2.Mrs.Pushpa M.Krishnaswamy

...Respondents

PRAYER: Original Petition filed under Section 11 (6) of Arbitration and Conciliation Act 1996, praying to appoint a Sole Arbitrator to resolve the dispute between the petitioner and the respondents with regard to the Put Option Agreement dated 10.10.2011.

For petitioner : Mr.A.Uma Shankar

For Respondents : Mr.S.Kumar for
M/s.Rank Associates

ORDER

This petition has been filed to appoint a Sole Arbitrator to resolve the

dispute between the petitioner and the respondents with regard to the Put Option Agreement dated 10.10.2011.

2. The claim of the petitioner herein is that she has invested in National Schools of Business and Management Private Limited (hereinafter referred to as 'Company') on 07.10.2011, wherein, the first respondent herein is the promoter of the Company. As a consequences of the investment of the petitioner, she was allotted five units, each unit consists of 2,500 Equity shares of Rs.10/- each and 4,750, 15% compulsorily convertible cumulative preference share of Rs.100/- each. The company runs the National Management School, Chennai.

3. In pursuance of the investment, the petitioner entered into a “Put Option Agreement” with the first respondent on 10.10.2011 and as per the agreement, the option was to be exercised by the petitioner through prior written notice not later than 01.11.2015 and 01.01.2016 was fixed as the Put Option Date.

4. According to the petitioner, the first respondent apart from the agreement with the petitioner, has entered into similar Put Option Agreement with two other share holders namely one Mr. V.Ramachandran and other Mrs.

Mythili Venkataraman (herein after referred to as 'investors'). In order to secure the investment of the petitioner in terms of the Put Option Agreement, the claimant entered into a memorandum of second charge dated 19.08.2011 in favour of M/s. Paterson & Company Private Limited, the Power Agent of the petitioner which is the duly constituted power agent of the other two investors (herein after referred to as 'mortgagee'), with regard to the property owned by the first respondent situated in Red Hills.

5. The first respondent, subsequent to the above agreements, requested the mortgagee to accept the substitution of security on 29.04.2014, as originally mortgaged land described in the memorandum of second charge was to be sold. Thereafter, the mortgagee accepted the substitution of the property as security *vide* letter dated 25.03.2015 and in furtherance of which, a memorandum of deposit of title deeds dated 06.04.2015 was executed by the respondents in favour of the mortgagee as security to the Put Option Agreement to secure the interest of the investors.

6. While matters stood thus, the petitioner herein had exercised the Put Option by issuing prior notice dated 28.10.2015 in terms of Clause 9 of the agreement through duly constituted Power Agent to the address of the first respondent as provided in the agreement. However, according to the petitioner

the notice was returned with an endorsement “party not available”. However, in the meanwhile, the first respondent on 03.02.2016, sent an email addressed to the mortgagee seeking to return the original title and release the charge on the property, for which, a reply was sent on 15.02.2016 by the mortgagee to the first respondent, refuting the claims of the first respondent and the first respondent was informed that the petitioner had exercised her Put Option Agreement in accordance with the relevant clauses of the Put Option Agreement dated 10.10.2011. The petitioner has categorically informed the first respondent that the land which was sought to be released was held as a security by the Power Agent on behalf of the investors and the first respondent herein was liable to honour his commitment and repay Rs.1.48 Crores to the investors, including the petitioner.

7. The first respondent thereafter started making baseless allegations by the letter dated 26.03.2016 against the petitioner and subsequently, in May 2020, the first respondent has sent a legal notice invoking Arbitration Clause to one of the Investors Mr.V.Ramachandran and a copy was marked to the common power agent of the petitioner herein. Thereafter, O.P.No.412 of 2020 was filed by the respondents for appointment of sole arbitrator for resolving the dispute with reference to the release of the property given as common security

to the investors which included the petitioner herein.

8. At the outset, the learned counsel appearing for the respondents resisted the petition by raising a preliminary objection on the ground that the invocation of the arbitration clause is barred by limitation. According to the counter affidavit filed and the oral submissions made on behalf of the respondents in terms of the Put Option Agreement, the petitioner should have exercised her option by issuing notice not later than 01.11.2015 and by 01.01.2016, the Put Option Agreement itself stood expired. The so called prior notice issued on 28.10.2015 was not received by the respondents. But, the said notice was only to inform that they intend to exercise the Option, but not the actual notice as contemplated in the Put Option Agreement dated 10.10.2011. The petitioner has chosen to invoke the Arbitration Clause only on 30.12.2020, which is clearly beyond the period of limitation i.e., after three years. Therefore, petition is clearly time barred and liable to be dismissed.

9. In regard to the above preliminary objection, the learned counsel for the petitioner Mr.A.Uma Shankar, submitted that the limitation aspect is a mixed question of fact and law. The learned counsel for the petitioner referred to the statements contained in the petition filed by the respondents in

O.P.No.412 of 2020 under Section 11 (6) of the Arbitration and Conciliation Act, 1996, for appointment of Arbitrator in respect of the same Put Option Agreement dated 10.10.2011, for the release of the title documents in respect of one other investor namely V.Ramachandran. This Court has ordered the petition on 30.12.2020 and one Mr.A.K.Sriram, learned counsel of this Court was appointed as Arbitrator and in fact, he has also completed the Arbitration Proceedings and reserved the passing of the Award in the matter.

10. The learned counsel therefore submitted that it does not lie in the mouth of the respondents to resist the appointment of Arbitrator only in respect of the other two investors. The petitioner herein, who is covered under the same Put Option Agreement dated 10.10.2011, is also identically placed. The learned counsel also referred to Memorandum of Deposit of Title Deeds dated 06.04.2015 as entered into between the respondents herein and the mortgagee, the power agent of the petitioner and referred to clauses which are extracted hereunder:

“MEMORANDUM OF DEPOSIT OF TITLE DEEDS:

Whereas the parties of the first part are the absolute owners of the property bearing Plot No.1, 3 and 5 (Part), as per Patta 2289 with Survey No.21/2B1, (Old Patta 1919 with Survey No.21/2B), Srinivasa Nagar Farm Grove, Padur

*Village & Panchayat, Thiruporur Panchayat Union,
Chengalpattu Taluk, Kanchipuram District, more fully
described in the Schedule A hererunder*

*Whereas the parties of the first part have created equitable
mortgage in and over the Schedule 'A' mentioned property in
favour of the party of the second part by way of depositing
the title documents on April 4, 2015, more fully particularly
described in Schedule 'B' hereunder with the party of the
second part at the office of the party of the second part,
within the corporation limits of Chennai towards security
upto a limit of Rs.1,48,00,000/- (Rupees One Crore and
Forty Eight Lakhs only) arising out of a Buy-Back
arrangement that Mr.Sankaran Raghunathan has entered
into.*

*Whereas at the request of the party of the second part, the
parties of the first part have agreed to register this
Memorandum of Deposit of Title Deeds before the Office of
the SRO, Thiruporur.”*

11. The learned counsel submitted that which provision of the limitation Act would apply in this case, is a matter of adjudication and if it is an issue of mortgage, then the period of limitation is 12 years, since it is a secured transaction. Therefore, this Court cannot reject the petition by simply accepting the objection of limitation raised by the respondents, without giving any clear

finding or conclusion.

12. In support of his contentions, the learned counsel relied on a recent decision of the Hon'ble Supreme Court of India reported in **2021 (2) SCC 1**. He has specifically drawn references to Paragraph No.240 to 244, which are extracted hereunder:

“240. Courts, while analysing a case under Section 8, may choose to identify the issues which require adjudication pertaining to the validity of the arbitration agreement. If the Court cannot rule on the invalidity of the arbitration agreement on a prima facie basis, then the court should stop any further analysis and simply refer all the issues to arbitration to be settled.

241. Coming to the scope of judicial interference under Section 11, the 246th Law Commission Report noted that:

“31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of Section 11, should also apply to Sections 8 and 45 of the Act – since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an

arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.”

242. We are cognizant of the fact that the statutory language of Sections 8 and 11 are different, however materially they do not vary and both sections provide for limited judicial interference at reference stage, as enunciated above.

243. In line with our holding on Question 1, generally it would not have been appropriate for us to delve into the second question. However, considering that a question of law has been referred to us, we agree with the conclusions reached by our learned Brother.

244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject -matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima

facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding

244.4. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e., “when in doubt, do refer”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? Or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?”

13. According to the learned counsel, the Hon'ble Supreme Court has held that “when in doubt, do refer”. The subject matter of arbitrability cannot be decided unless, it is a clear case of deadwood. In the face of such clear ruling of the Hon'ble Supreme Court, in cases of doubt as to whether what is the limitation period and whether there was a valid exercise of put option by the petitioner herein in terms of Put Option Agreement dated 10.10.2011, the same

is to be decided by the learned Arbitrator to be appointed by this Court. Therefore, the learned counsel requested this Court to order the Original Petition as prayed for.

14. Per contra, the learned counsel appearing for the respondents submitted that when there is a clear case of claim hit by limitation, this Court can always take a call and dismiss the petition. The learned counsel also referred to the same decision of the Hon'ble Supreme Court relied on by the petitioner, reported in **2021 (2) SCC 1** in Paragraph No.148, which is extracted hereunder:

“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The Court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be position in case of disputed “no-claim certificate” or defence on the plea

of novation and “accord and satisfaction”. As observed in Premium Nafta Products Ltd., it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the Court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”

15. According to the learned counsel, it is legally valid for this Court to interfere when the claims are *ex-facie* time barred and dead and no subsisting issues qua parties. In this case, the facts demonstrate that three year limitation period was over in 2019 itself as Put Option Agreement stood expired on 01.01.2016. The petitioner has sent a legal notice for invoking the arbitration clause only on 30.12.2020 and therefore, the claim is clearly hit by limitation and this Court can always dismiss the petition by accepting the preliminary objection of maintainability of Original Petition.

16. The learned counsel also submitted that with reference to the O.P.No.412 of 2020, in that case, the arbitration clause was invoked by the respondents well within the three year period and the invocation of arbitration clause was on a different set of circumstances and the petitioner herein cannot

be allowed to draw parallel to the pending Arbitration proceedings before this Court. As regards the mortgage aspect is concerned, the learned counsel submitted that the mortgagee is not a party to the arbitration agreement and further, the petitioner is not a party to the mortgagee agreement either. Therefore, the law of limitation in respect of the mortgage cannot be pressed into service by the petitioner herein.

17. The learned counsel further added that no relief for extension of limitation could be claimed due to Covid – 19 situation as the period of limitation was well over in 2019 itself.

18. The learned counsel further relied on yet another decision of the Hon'ble Supreme Court reported in **2021 SCC Online SC 207**, he has drawn reference to Paragraph No.39, which is extracted hereunder:

“39. The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading, which continue to hold the filed. It must be understood clearly that Vidya Droia has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engineering (Supra).

It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to

make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.”

wherein, the Hon'ble Supreme Court has held that when there is no vestige of doubt that the claim is *ex facie* time barred, the Courts could interfere in that and reject the petition for appointment of Arbitrator. Therefore, the learned counsel submitted that in this case when the claim is *ex facie* time barred, there is no reason that the respondents should be compelled to face the ordeal of arbitration proceedings.

19. The learned counsel for the petitioner by way of reply, submitted with reference to the contention regarding O.P.No.412 of 2020 that the petitioner was not a party to the mortgage, in the said Original Petition, both the respondents herein are the petitioners, who are the parties to the memorandum of title deeds dated 06.04.2015.

20. This Court considered the submissions of the respective counsels appearing for the parties and perused the pleadings and materials placed on record.

21. The preliminary objection raised as to the arbitrability of the subject matter on the ground of limitation is to be considered with reference to the legal principle laid down by the Hon'ble Supreme Court of India relied on by both the counsels for the petitioner as well as the respondents in the decision reported in **2021 (2) SCC 1** in the case of **Vidya Drolia and others Vs. Durga Trading Corporation**. The Hon'ble Supreme Court of India has clearly held that as a matter of rule, that is to be followed by the Courts is “when in doubt do refer” and additionally held that when the claim is *ex-facie* time barred and there is no vestige of doubt on that factual aspect, interference by the Courts is valid.

22. In line with the legal principle laid down by the Apex Court, with reference to the factual narrative as above, whether the preliminary objection as raised by the respondent is legally sustainable or not, is what calls for consideration of this Court.

23. On behalf of the petitioner, it was pleaded that a notice was issued initially on 28.10.2015 in accordance with the Put Option Agreement. However, it was refuted by the respondents that it was not received. However, the notice was only to inform that intention to exercise and not to exercise the

Option *per se*. Therefore, the contention is that the notice regardless of its receipt, was not valid at all. Further, there is also a contention regarding the aspect of limitation whether it is 3 years or 12 years, one emanating from the Put Option Agreement dated 10.10.2011, and the other from the memorandum of deposit of title deeds dated 06.04.2015.

24. Although the contention was also refuted by the learned counsel for the respondents, but, in the light of such competing contentions, this Court cannot embark upon a detailed legal enquiry as to which aspect of limitation would apply in the claim of the petitioner vis-a-vis, the resistance put up by the respondents.

25. From the facts as demonstrated by the parties concerned, this is not the claim that could be declared as a complete deadwood nor it could be concluded that the claim is *ex-facie* time barred. As rightly contended by the learned counsel for the petitioner, the limitation aspect is a mixed question of fact and law and in such legal context, this Court cannot undertake any detailed adjudication and give any definite finding in order to non-suit the claimant at the very threshold.

26. The Hon'ble Supreme Court of India has clearly held in the relevant legal context that no conclusion could be arrived at by the Courts on *prima-facie* consideration. Therefore, this Court cannot accept the case of the respondents with reference to their preliminary objection on a *prima-facie* consideration and negate the right of the petitioner to have her claim referred to Arbitrator in terms of the relevant agreement. When this Court cannot come to any clear conclusion as to the sustainability of the preliminary objection raised by the respondents, the best course open to the Court in such scenario is to reject the objections and refer the case for arbitration. Moreover, this Court also finds the contention of the respondents in regard to O.P.No.412 of 2020, having force for the simple reason that all the three investors are identically placed. The respondents cannot treat them differently, as the rights and obligations of all the investors arise from the identical ground. The reasons putforth as to the maintainability of O.P.No.412 of 2020 by the respondents that it is different from the claim of the petitioner herein, do not cut much ice with this Court. On the whole, this Court is not convinced of the preliminary objection raised on behalf of the respondents and therefore, the same is rejected.

27. Accordingly, this original petition is allowed. In view of the

appointment of learned counsel Mr.A.K.Sriram in respect of the other O.P.No.412 of 2020 and presumably, he being conversant with the issues on hand, the Original petition is allowed.

28. Accordingly, Mr.A.K.Sriram, learned Advocate, residing at No.81, CP.Ramasamy Road, Alwarpet, Chennai-18, is appointed as Arbitrator to arbitrate the dispute between the parties.

29. This Original Petition is ordered accordingly. No costs.

pns/gsk

01.07.2021

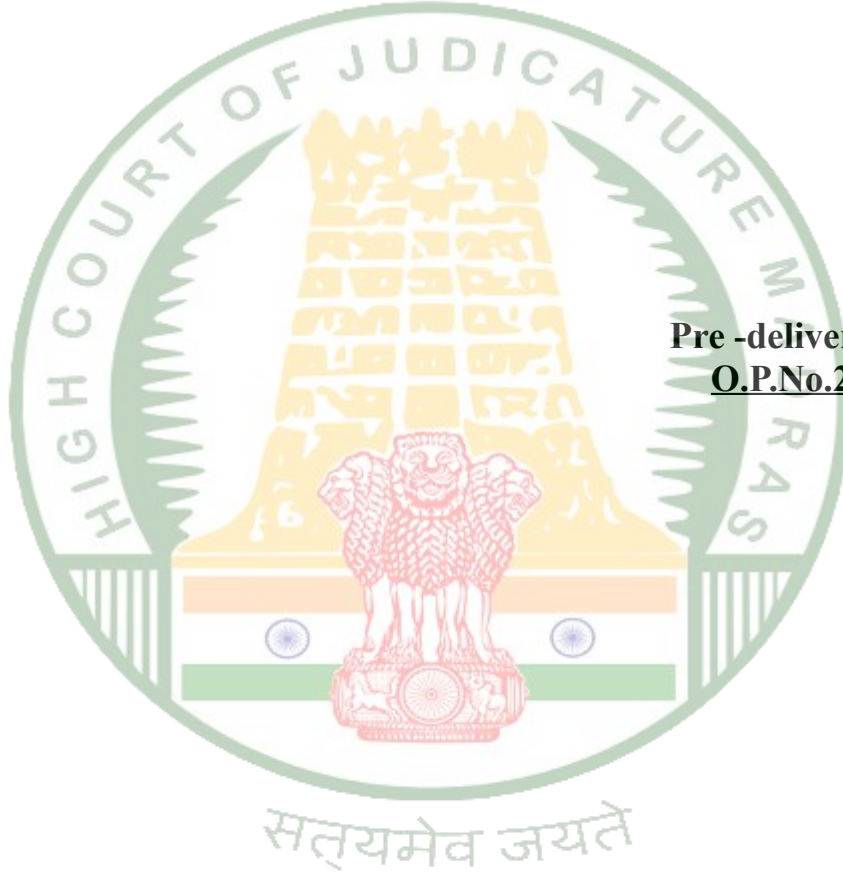
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V.PARTHIBAN, J.

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**Pre -delivery order in
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