

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO. 21 OF 2020

Vijay Sharma ..Petitioner

vs.

1.Nagibai Dagadu Khandekar, since deceased

2. Leelabai Ambaji Patil ..Respondents

Mr.Jehaan Mehta i/b. Sarosh Dubey, for the Petitioner.

Mr.S.S.Patwardhan with Bhooshan Mandlik, for the Respondents.

CORAM : G.S. KULKARNI, J.

DATE : AUGUST 10, 2022.

P.C.:

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short “**the Act**”) whereby the petitioner has prayed for appointment of an arbitral tribunal for adjudication of the disputes and differences which have arisen between the parties under the Memorandum of Understanding dated 20 February 2007. The agreement pertains to sale of certain land under which the petitioner is the purchaser and the respondents are the owners-sellers. The arbitration agreement between the parties is contained in Clause 6 (page 24) in regard to which there is no dispute.

2. The facts in the present case are peculiar inasmuch as on 29 November 2011 the petitioner filed a suit inter alia for a decree of specific performance before the learned Civil Judge, Senior Division at Panvel. This despite an arbitration agreement between the parties. The respondents appeared in the said suit and filed an application under Section 8 of the Act praying that the plaint be rejected as there exists an arbitration agreement between the parties and the parties be referred to

arbitration. On 6 March 2013, the learned Civil Judge passed an order on such application of the respondents and returned the plaint to the petitioner. Such order passed by the learned Civil Judge was assailed by the petitioner by filing an Appeal From Order under Order 43 of the Code of Civil Procedure before this Court. By an order dated 17 February 2014, this Court held the appeal to be not maintainable. Thereafter, the petitioner resorted to a remedy of filing a Civil Revision Application which came to be filed alongwith the application for condonation of delay. By an order dated 14 November 2014, this Court rejected the petitioner's application for condonation of delay in filing Civil Revision Application and accordingly, the Civil Revision Application itself also stood rejected.

3. The petitioner, thereafter, on 1 December 2014 issued a notice to the respondents invoking the arbitration agreement and called upon the respondents to appoint an arbitral tribunal. The petitioner also suggested the name of a proposed arbitrator. The respondents by its letter dated 12 January 2015 replied to the petitioner's notice thereby objecting to arbitration by appointing the arbitrator as suggested by the petitioner and in turn suggested the name of a retired District Judge who could be appointed as an arbitrator. The petitioner did not accept such suggestion of the respondents. The petitioner in such circumstances, approached the Court of learned District Judge at Alibaug by filing an application under Section 11 of the Act which came to be filed on 22 January 2015. By an order dated 18 November 2015, the learned District Judge rejected the petitioner's application as filed under Section 11 of the Act, observing that the District Court has no jurisdiction to entertain such application. The petitioner, however, immediately after such rejection of the application by the learned

District Judge, did not approach this Court, by filing a Section 11 petition. After a lapse of about four years i.e. on 11 September 2019 the petitioner again issued a notice to the respondent invoking arbitration and called upon the respondents to appoint an arbitrator. As the respondents did not reply to such notice, the present petition came to be filed on 4 November 2019.

4. The respondents have appeared, a reply affidavit has also been filed opposing the reliefs and primarily on the ground that the petition itself is time barred.

5. Mr.Mehta, learned Counsel for the petitioner has drawn the Court's attention to the various documents on record to contend that the petitioner was bonafide pursuing not only the suit as filed by him but also the Section 11 application which wrongly came to be filed before the Court of learned District Judge, Alibaug. He, however, fairly submits that after the first invocation notice dated 1 December 2014, the second invocation itself was on 11 September 2019 which he agrees, was after about four years from the learned District Judge rejecting the Section 11 application filed by the petitioner for want of jurisdiction. He fairly submits that there is nothing on record, to show that in a manner known to law the limitation even to approach this Court by filing a petition under Section 11, would be saved. He, however, submits that the Court may consider such issue of limitation to be a mixed question of law and facts and which can be left to be decided by the arbitral tribunal on its own merits and by giving an opportunity to the parties to lead evidence on such issue. In support of his contentions that the issue on limitation is a mixed question of law and facts, Mr.Mehta has placed reliance on the decision of the Supreme Court in **"Uttarakhand Purv Sainik Kalyan**

Nigam Ltd. Vs. Northern Coal Field Ltd.” (2020)2 SCC 455.

6. On the other hand, Mr.Patwardhan, learned Counsel for the respondents in opposing the present petition, would submit that this is a case wherein *ex facie* the proceedings are barred by limitation. He submits that not only the Section 11 application is barred by limitation but also the main cause which the petitioner intends to pursue, is barred by limitation. Mr.Patwardhan would submit that in fact the first invocation notice itself was on 1 December 2014 and thereafter, the second invocation was on 11 September 2019. He submits that it is relevant that the first invocation notice dated 1 December 2014 would in fact be the commencement of the arbitral proceedings in accordance with Section 21 of the Act. It is his submission that, considering such clear material and the relevant dates, and more particularly, that the learned District Judge, Alibaug on 18 November 2015 rejected the petitioner’s application for want of jurisdiction, however, no steps having been taken by the petitioner for a period of almost four years, itself would go to show that the present proceedings are *ex facie* time barred. In support of his contention Mr.Patwardhan has placed reliance on the decision of the Supreme Court in “**Secunderabad Contonment Board Vs. B. Ramchandraiah & Sons, [(2021)5 SCC 705]**” and “**Bharat Sanchar Nigam Ltd. & Anr. Vs. Nortel Networks India Pvt.Ltd” (2021)5 SCC 738.**

7. I have heard learned Counsel for the parties and with their assistance I also perused the pleadings and documents on record.

8. Although there appears to be no dispute in regard to existence of the arbitration agreement between the parties, however, it is clear from the facts on record that the petitioner was not diligent in pursuing the present proceedings, and hence, the case of the respondents that the

proceedings are barred by limitation and/or a deadwood, would be required to be accepted. The reason being that although the civil suit was filed by the petitioner on 29 November 2011 praying for decree of specific performance, it was on 6 March 2013 an objection was raised by the respondents to the maintainability of such suit by pointing out the existence of the arbitration agreement between the parties in the proceedings filed by the respondents under Section 8 of the Act. Such an application was adjudicated and the plaint was returned to the petitioner. It is clear from the facts as noted above that thereafter the petitioner filed an appeal from order against the said order passed by the Civil Court returning the plaint, which also came to be rejected as not maintainable, by an order dated 17 February 2014 passed by this Court. The petitioner thereafter filed in this Court a civil revision application alongwith an application for condonation of delay. The application for condonation of delay was rejected by this Court on 14 November 2014. All this clearly goes to show that the petitioner from inception had sufficient notice that there existed an arbitration agreement between the parties and the petitioner needs to pursue the arbitration.

9. Be that as it may, the petitioner did not stop at this, the petitioner next issued a notice to the respondents invoking arbitration agreement dated 1 December 2014 which was replied by the respondent. The petitioner also filed proceedings under Section 11 of the Act wrongly before the learned District Court at Alibaug, which application was rejected by the learned District Judge for want of jurisdiction by an order passed on 18 November 2015. However, what is glaring is after rejection of such application by the District Judge on 18 November 2015, for about four years that is upto 11 September 2019, the

petitioner did not pursue the arbitral proceedings, which in fact had commenced on 1 December 2014 namely by the notice of the petitioner invoking the arbitration agreement which was received by the respondents and replied. It appears that to overcome such delay the petitioner in such circumstances issued a second notice dated 11 September 2019 again invoking arbitration, when already the arbitration was invoked by the petitioner's first notice dated 1 December 2014. Thus, although a second notice dated 11 September 2019 invoking arbitration was issued by the petitioner, which was after a lapse of four years, the same could not have, in any manner, revived the limitation for the petitioner to pursue the Section 11 proceedings. It is clear that the cause of action for the petitioner had accrued to the petitioner when the petitioner issued a notice dated 1 December 2014 to the respondents invoking arbitration as such notice in terms of Section 21 of the Act would commence the arbitral proceedings and as in response to such notice within the period as specified under sub-section (5) of Section 11 of the Act an arbitral tribunal could not be constituted. This petition came to be filed on 4 November 2019.

10. The position in law in regard to the limitation to approach this Court in the proceedings under Section 11 of the Act, is well settled. The proceedings ought to have been filed as per the provisions of Article 137 of the Limitation Act within a period of three years from the date when the right to apply accrues that from the period of 30 days as contained in the invocation notice would lapse i.e. an inaction of the respondent to agree in appointing an arbitral tribunal within 30 days of the receipt of the notice invoking arbitration. **(See: Deepdharshan Builders Pvt. Ltd. vs. 1.Saroj, Widow of Satish Sunderrao Trasikar & Ors., Commercial Arbitration Application No.107 of 2018, decided on 22 November**

2018.) As noted above, the relevant invocation in the present proceedings is required to be held to be by the petitioner's notice dated 1 December 2014, and the present application was filed on 4 November 2019. Thus, applying the law in such decision, it would be required to be held that the petition is *ex facie* time barred.

11. Although in certain circumstances, the Court would hold the issue of limitation to be mixed question of law and facts and as has been canvassed by the learned Counsel for the petitioner relying on the decision in **Uttarakhand Purv Sainik Kalyan Nigam Ltd.** (supra), in my opinion, such decision would not be applicable in the facts of the present case.

12. In a recent decision of the Supreme Court in **Secunderabad Contonment Board** (supra), the Supreme Court taking a review of the law in the context in hand and referring to an earlier decision in the case **Bharat Sanchar Nigam Ltd.** (supra) it was held that while exercising jurisdiction under Section 11 as the judicial forum, the Court may apply the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. It was held that limited jurisdiction of the Courts would be to ensure expeditious and efficient disposal at the referral stage, and at the referral stage, the Court can interfere "only" when it is "manifest" that the claims are not *ex facie* time barred and dead, or there is no subsisting dispute. The Court also referred to the decision of three Judges Bench of the Supreme Court in **Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1**. It would be appropriate to note the relevant observations of the Supreme Court as contained in paragraphs 18 and 19 which read thus:-

18. While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex

facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time barred and dead, or there is no subsisting dispute. Paragraph 148 of the judgment reads as follows : (Vidya Drolia Case SCC p.119)

“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 the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in *Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.*, [2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , 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.”

19. Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 07.11.2006. This demand was reiterated by a letter dated 13.01.2007, which letter itself informed the Appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12.02.2007. The Appellant’s laconic letter dated 23.01.2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12.02.2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the Respondent and time began running from that day. Obviously, once time has started running, any final rejection by the Appellant by its letter dated 10.11.2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 06.11.2013, they were within the limitation period of three years starting from 10.11.2010. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time barred, no arbitrator could have been appointed by the High Court.”

(emphasis supplied)

13. In my opinion, the facts as in the present case are not too different from the facts which had fall for consideration of the Supreme Court in the case of **Secunderabad Contonment Board** (supra) as clearly seen from paragraph 19 of the said decision. As noted above, the Supreme Court in such facts had held that the claim made by the respondent therein was ex facie time barred.

14. In view of the above discussion, in my opinion, no case is made out for this Court to exercise jurisdiction under Section 11(6) of the Act. The petition is accordingly, rejected. No costs.

[G.S. KULKARNI, J.]