IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 150 OF 2021

Abdul Razak Abdul Gaffar Rajkotia … Applicant
Versus
Salma Fazlur Rahman Ansari and Ors. … Respondents

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Ms. Iram Memon i/by Mr. Shoaib Memon for the Applicant.
Ms. Shamina d/o Gulam Rassol Miyabhoy, Respondent No.4 in-person, present.

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CORAM: G. S. KULKARNI, J.
DATE : 4th APRIL, 2022

P.C. :-

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') whereby the applicant has prayed for appointment of an arbitral tribunal for adjudicating the disputes between the parties that have arisen under the Development Agreement dated 30th April, 2010 as executed between the respondents-owners and the applicant-developer.

2. Learned counsel for the applicant has pointed out that the arbitration agreement between the parties is contained in clause 35 of the said agreement. It appears that at the time of the execution of the said agreement, the applicant agreed in clause 2 that an amount of Rs.5,00,000 was to be paid to the respondents. It is the case of the applicant that thereafter, the respondents could not perfect their title and the appropriate mutation in favour of the respondents could not be obtained and hence the development could not proceed.

Correspondence as entered between the parties after the execution of the Development agreement is placed on record which are letters dated 27th June, 2011, 17th September, 2011 and 11th October, 2011, to contend that the applicant had an intention to perform and comply with the terms and conditions of the agreement.

3. It is also the case of the applicant that the possession of the subject premises, which was allegedly handed over to the applicant by the respondent, was forcibly taken over by the respondents. This was stated by the applicant in his letter dated 31st October, 2011 addressed to the respondents advocate. However, if such was to be the position on possession, after addressing such letter dated 31 October 2011 the applicant had not taken any steps whatsoever to assert anything in regard to either the Development Agreement dated 30 April 2010 or in regard to the alleged forcible possession of the subject land being taken over by the respondent, or even for recovery of the amounts of Rs. 5,00,000/- paid to the respondents.

4. Almost after about 10 years of the applicant's last letter dated 31 October 2011, the applicant apprehending that the respondent is in negotiations with the other developers for the redevelopment of the subject property, the applicant through his advocate addressed a notice dated 21st May, 2021 to the respondent invoking arbitration by calling upon the respondents to refer the disputes and differences to arbitration. Such notice of the applicant's advocate was responded by the respondents' advocate's letter dated 9th June, 2021 wherein the respondents denied acting in breach of the development agreement. A specific contention was raised that the applicant had no legal right to

assert anything or to raise or create any issue after a lapse of 10 years from the date of the Development Agreement The respondents in paragraph 10 of the said letter had specifically contended as under :-

> “Your client paid only a sum of Rs.5 lakhs and failed and neglected to pay the balance amount and also not taken any steps in furtherance of the said development agreement therefore the said development agreement is become invalid and expired by efflux of time and deemed to be terminated as your client has not taken any action for so many years in respect of and in furtherance of the development agreement.”

The applicant did not reply to the said letter dated 9 June, 2021 of the respondent’s advocate and filed this application under Section 11 of the Act on 8 July, 2021.

5. The above facts would clearly indicate that the applicant intends to prosecute a deadwood and/or an absolutely stale cause of action. The last letter addressed on behalf of the applicant to the respondent was dated 31st October 2011, wherein the applicant pointed out that forcible possession of the land was taken over by the respondent from the applicant. However, except for such letter no action whatsoever was taken by the applicant for a period of 10 years much less initiating any legal proceedings. It is only after a long lapse of 10 years, a notice dated 21st May 2021 invoking the arbitration agreement was addressed by the applicant to the respondent, purporting to raise a dispute. It is manifest that if at all any cause of action had accrued to the applicant it was in the year 2011, however no steps whatsoever were taken by the applicant to assert his rights and/or take recourse to any legal remedies, at such time when such cause of action had accrued. For the applicant to awake from a deep slumber after 10 years and on the sole basis of the, notice invoking

arbitration dated 21st May 2021, purporting to assert a claim against the respondent under the agreement would certainly amount to an abuse of the process of law to prosecute an *ex facie* time barred claim. The respondent cannot be foisted with an untenable arbitration. It is a settled principle of law, that mere issuance of invocation notice would not extend the period of limitation when the cause of action itself does not survive.

6. The Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. & Anr. Versus M/s. NORTEL Networks India Pvt. Ltd.***[1] while discussing the power of the Court to refer disputes to arbitration has held that the Court may decline to make the reference when the claim is ex-facie time barred. In the facts of the said case, the claim being made by the respondent Nortel Networks India Pvt.Ltd. Was held to be time barred, as the claims made by Nortel were rejected by the appellant – BSNL on 4 August 2014. Nortel had invoked the arbitration agreement by its notice dated 29 April 2020, which was after a period of five and half years after the rejection of its claim by the BSNL. In that regard, the Supreme Court has made the following categorical observations, which reads thus :-

> "47. 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.
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> 51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement

1 (2021) 5 SCC 738

> discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that : "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." **There must be a clear notice invoking arbitration setting out the "particular dispute" (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.**
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> 52. In the present case, the notice invoking arbitration was issued 5 ½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration is ex facie time barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case."
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> (emphasis supplied)

7. In a recent decision of this Court in ***Graceworks Realty & Leisure Pvt. Ltd. v/s. Mr. Zahid Hussain Khan*** (Arbitration Application (L) No.16813 of 2021, Order dt.2 March 2022), this Court considering the law as laid down by the Supreme Court in **Vidya Drolia & Ors. V/s. Durga Trading Corporation** ((2021) 2 SCC 1)**, Bharat Sanchar Nigam Ltd. & Anr. Versus M/s. NORTEL Networks India Pvt. Ltd.** [(2021) 5 SCC 738] and the decision in **Secunderabad vs. B. Ramachandriah & Ors.** (AIR 2021 SC 1391), in similar circumstances has held that the claim of the applicant in the said case, was *ex facie* time barred and was a deadwood and accordingly, has rejected the application for appointment of an arbitral tribunal.

8. The present case is no different. As a result of the above discussion, the application needs to fail. It is accordingly rejected. No costs.

[G. S. KULKARNI, J.]