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

ARBITRATION APPLICATION NO.477 OF 2019

Jagruti Developers & Anr. .. Applicants
v/s.
Arun Bhoomi Corporation & Ors. .. Respondents

Mr. Shailesh Shah, Sr. Advocate, a/w Anchit Ojha, Ankit Ojha i/b. R.P. Ojha for the applicants.
Mr. Navroz Seervai, Sr.Advocate, a/w Ms. Lizum Wangdi & Anukul Seth for the respondents.

CORAM : A. K. MENON, J.
DATED : 25TH APRIL, 2022.

P.C. :

1. This is application under Section 11 of the Arbitration and Conciliation Act, 1996 seeks appointment of a Sole arbitrator of Agreement for Sub-Development dated 21st October, 2009 under an arbitration agreement to be found in clause 23.

2. The parties thereafter executed a Supplemental Sub-Development Agreement dated 4th August, 2011 under which terms of the

principal agreement were reiterated. There is no separate arbitration agreement incorporated in the supplemental agreement but clause 28 of the supplemental agreement records that the principal agreement and the supplemental agreement shall be co-extensive.

3. On the same date, the parties executed a Deed of Confirmation. However, it is agreed today that the Deed of Confirmation does not in any manner alter the terms of the arbitration agreement between the parties. The applicant has approached this court on the basis of a letter of invocation of the arbitration agreement which is dated 28th September, 2015. By that letter of invocation dated 13th July, 2019 addressed the partners of the respondent firm. By that letter, the applicant has invoked clause 23 of the second agreement calling upon the respondent to nominate a second arbitrator. The application was thereafter filed on 9th December, 2019. Admittedly, there is no response to the notice invoking arbitration and therefore Mr. Shah appearing in support submits that the arbitrator should be appointed for all the respondents in view of the fact that the arbitration agreement is not in dispute and the respondents have not contested the application by filing an affidavit in reply.

4. At this stage, I may note that initially this application was tagged along with Arbitration Application no.1576 of 2019 which are seen to be disposed. When the application was taken up for hearing on 28th February, 2022, the following order came to be passed which reads as follows;

> *"1. At the outset, on behalf of the applicants, Mr. Shah states that since an objection on the ground of limitation has been raised the applicant is desirous to file an additional affidavit in support. Faced with this, Ms. Wangdi will seek to file reply.*
>
> *2. Additional affidavit to be filed on or before 14th March, 2022.*
>
> *3. Reply to the additional affidavit to the main application by 28th March, 2022.*
>
> *4. Rejoinder, if any, to be filed on or before 4th April, 2022.*
>
> *5. S.O. to 11th April, 2022."*

5. I may observe that an additional affidavit of one Ramashish Gupta, applicant no.2 dated 14th March, 2022 has since been filed and it is on record. However, the respondent has not filed any affidavit despite having sought time to file a reply. On that date the principal opposition on behalf of the respondent is one of limitation. According to Mr. Seervai who has raised this preliminary objection, it is contended that the application is barred by law of limitation in view of the fact that the respondent

had recorded several breaches of the agreements between the parties and had called upon the applicants to rectify these breaches granting them 30 days notice and as contemplated by the agreement itself. The agreement though executed on 21st October, 2009 was registered on 4th August, 2011 and material breaches are said to have occasioned.

6. Mr. Seervai submitted that on 28th September, 2015 a notice was issued to the applicants calling upon them to rectify these breaches within 30 days failing which the agreements would stand automatically terminated. According to Mr. Seervai, the breaches were not so rectified and as a result the agreements stood terminated. Thereafter the respondent no.1 firm issued a public notice through its Advocate informing the public at large that the agreements stood terminated. The applicant is said to have responded only on 2nd December, 2015 denying the contents of the notice. The applicant thereafter is seen to have issued its own public notice on 24th April, 2016 refuting the termination / cancellation of the agreements. On 18th July, 2018 the applicants are said to have issued a letter calling upon the respondent to rectify the breaches. However, the applicants invoked arbitration under clause 23 only on 13th July, 2019.

7. The contention on behalf of the respondent is that the claim ex-facie barred by limitation in view of the fact that the notice intimating the applicant of material breaches was issued on 28th September, 2015 and the respondent had failed to comply with the requisites within the period for curing those breaches. Thereafter the invocation should have followed within a period of 3 years, however, it did not and therefore the claim of the applicant is ex-facie barred by limitation. In support of his contentions, Mr. Seervai sought to rely upon the following judgments ;

1) *Bharat Sanchat Nigam Limited and Anr. v/s. Nortel Networks India Private Limited*[1]

2) Secunderabad Cantonment Board v/s. B. Ramachandraiah and Sons[2]

3) V.M. Salgaocar and Bros. v/s. Board of Trustees of Port of Mormugao and another[3].

He submits that the Supreme Court in unequivocal terms clarifies that if the claim is dead as on date when it was sought to be urged, then the reference to arbitration ought not to be made. He

1 (2021) 5 SCC 738
2 (2021) 5 SCC 705
3 (2005) 4 SCC 613

therefore submits that the application is liable to be dismissed.

8. On behalf of the applicant, Mr. Shah has submitted that the principal development agreement and the supplemental development agreement, no doubt cast duties on both sides and has issued notice on 28th September, 2015. However it is his case that there is a waiver of the so called termination. He submits that there is no confirmation of the termination subsequently since they were operating from the same office and the respondents had informed the applicants to ignore the notice dated 28th September, 2015. It is according to the applicants, this notice was issued only to appease the flat purchasers that was subject matter of the development agreement between the parties. In an attempt to demonstrate, the fact of waiver urged by Mr. Shah, he invites my attention to the letter / notice dated 6th October, 2015 i.e. a few days after the respondents public notice, the parties executed an agreement for sale in respect of a flat in the project in question and got the same registered. Thereafter between 5th October, 2015 and 4th November, 2015 as many as 11 other cheques were signed by both the parties. This was a clear indication of the fact that the respondent had waived the termination of the agreement.

9. According to Mr. Shah if the agreement stood terminated upon expiry of 30 days, there was no question of signing cheques and all that of 11 of these cheques of executing agreements on behalf of the venture in respect of the project. Mr. Shah therefore submits that this is clear evidence of waiver of the so called termination. The respondent had thereafter issued a public notice on 15th November, 2015 which seeks to confirm that the agreement stood terminated by way of notice dated 28th September, 2015. The fact that the notice is issued in November, 2015 after the date of the execution of the last cheque is sought to be explained away by Mr. Shah by contending that the public notice merely reiterates the issuance of the notice of breaches dated 28th September, 2015 and that the conduct of the parties after the notice was issued has clear evidence of waiver.

10. On a query from the court as to why a second notice had been issued by the respondent after signing the list of these cheques, Mr. Shah submits that the parties conduct should be taken into consideration. Both parties proceeded under the agreement and on the basis that the public notice was not final and binding on the issue of limitation since the cause of action has arisen much later. According to Mr. Shah, even after the public

notice was issued, the applicants' Advocate had issued notice on 2nd December, 2015 refuting the allegations in the public notice. However, there is no response to the said letter of 2nd December, 2015. From the aforesaid letter it is contended that once again the case where the parties have created an impression to the flat purchasers of performance of their obligations were in fact the parties had serious disputes amongst them.

11. The public notice issued subsequently by the applicants on 24th April, 2016 is being projected as a clear denial of the respondents version that the agreements stood terminated. Mr. Shah therefore submits that on one hand, the parties had created an impression, for the purposes of the flat purchasers, that all was well with the project and that is clearly indicative of the fact that the termination was not being seriously pursued. Mr. Shah submits that the respondents had approached the applicants thereafter contending that they were not keen on litigating and had informed the applicants that they may ignore the notice dated 28th September, 2015 and public notice dated 15th November, 2015.

12. Normally one would expect that in such a situation notice would be withdrawn. In the present case both sides have issued

notices and taken up contrary positions. The issue before me today is whether the claim is ex-facie time barred. In this respect, Mr. Shah has invited me to hold that in view of the disputes between the parties, this is clear indication of the fact that the respondents have not acted upon the notice of termination that if the agreements had in fact been terminated, there was no question of once again coming together signing cheques, signing an agreement for sale and registering the same. Mr. Shah submits that the cause of action really arose in May 2017 when the respondents attempted to dispossess the applicants from the site being shared as stated above. Upon the attempt at dispossession, the applicants are believed to have filed a complaint with the local police station on 4th May, 2017. The respondents also filed complaint against the applicants on 6th May, 2017. Mr. Shah has also submitted that the project was then got registered under RERA by the respondent unilaterally, without disclosing the applicants as a co-developer. It is only upon that dismissal that the applicants after invoked arbitration on 13th July, 2019 and filed a petition in this court under Section 9.

13. Mr. Shah therefore submits that there is no question of the claim being ex-facie barred. He has invited me to hold that the

judgments that have been cited in support do not in fact justify the rejection of the claim at the very outset. He submits that limitation is a mixed question of fact and law and in the case at hand, the respondents have not filed a reply despite having time to deal with the contents of the application and the additional affidavit that is sought to be filed. The learned counsel on behalf of the applicant has also placed reliance on the judgment of the Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Limited v/s. Northem Coal Field Limited*[4] and sought to differentiate the rulings in the case of BSNL (supra) and Secunderabad Cantonment Board (supra) which have been pressed into service by Mr. Seervai.

14. Mr. Seervai has further submitted that the question of waiver of the termination does not arise in view of the fact that actions of the respondent in order to constitute waiver should be read from the view of the applicants conduct vis a vis the Respondents actions and not that of the Applicants in relation to third parties. He submits that will not be an appropriate method to ascertain whether or not there was a waiver of the termination.

15. I have heard the parties at length and with their assistance

4 2019 DGLS (SC) 1526

examined the documents, I find that the agreements are not in dispute, the existence of an arbitration agreement is also not in dispute. The only issue is whether the claim can be said to be ex-facie barred by limitation and it from that point of view, in this behalf I have heard and examined the record. According to the respondents, the question of waiver will not arise since that has to be knowledge of the opposite party and by an action which would indicate that the notice of breach and the requirement of clearing the breach had been made and that in the instant case this has not occasioned and therefore mere inaction on the part of the respondents does not constitute waiver.

16. The respondent had filed an affidavit dated 5th January, 2020 of one Vijay K. Joshi in reply to the Arbitration Petition under Section 9, however there is no reply in the present Application. The additional affidavit filed by the applicant reiterates the fact that the parties have continued to occupy the same office premises and the respondents informed the applicant that they did not want to litigate apparently there was an issue of TDR and that the applicants have agreed to pay the amounts to the respondent by blocking the rate of TDR. It is contended on oath by the deponent that they waived notice dated 28th

September, 2015 and the public notice and they confirm that the agreement was valid and subsisting. In paragraph 9 of this additional affidavit, it is stated that the respondent tried to dispossess the applicant from the site and the office leading the applicant to adopt suitable proceedings and set criminal law into motion. Thus the version of the applicant that parties agreed to proceed, albeit with certain hiccups is evident from the exchange of correspondence and the contents of the additional affidavit.

17. The contentions in the additional affidavit have not been controverted. Reliance placed by the respondents on the legal position obtaining from the three judgments cited are cases wherein the court found that if a money claim was found ex-facie barred by limitation, there was no question of making a reference to arbitration. In BSNL (supra) reliance was placed by Mr. Seervai on the observations of the court in paragraph 2 and again in paragraph 42 reiterating the fact that the intention was to cut out the deadwood as contemplated in the case of Vidya Drolia. At the relevant stage, if a prima facie review revealed that the dispute was ex-facie barred by limitation or if there is no valid arbitration agreement, reference can be refused.

18. In the present case, however, we are concerned with the aspect of whether or not the claim is ex-facie barred and is a dead claim. We are not concerned with validity of the arbitration agreement or the arbitrability of the subject matter. The existence of the arbitration agreement has not been disputed. It appears that there was a dispute raised on the preliminary issue of the documents being insufficiently stamped and I am told that is now cured. The question is whether the court should make a reference if the instant claim is ex-facie barred by limitation and is a dead claim. I am not able to agree with Mr. Seervai that the claim is a dead claim and therefore no reference is required to be made. Considering the course of events that have transpired after the notice setting out time to cure the so called breaches under the agreement, matters have progressed. Parties have met. They have also been securing the interests of the purchasers of the flats in the project. In paragraph 47 of the BSNL (supra), the court was very clear in observing that where there is not even a "vestige of doubt" that the claim is ex-facie barred by limitation, 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.

19. Subsequent conduct at hand viz. Post Public Notices would

indicate that if not a waiver, the parties were *ad-idem* on several aspects of the business that they were conducting. Nothing has been shown to me to record that these acts were without prejudice to the termination which has been propounded by the respondents. Thus, I am unable to agree that the claim is dead claim and would therefore qualify for rejection of this application under Section 11. An Arbitrator is required to be appointed for the respondent pursuant to failure of the respondent to nominate one after service of notice invoking arbitration dated 13th July, 2019.

20. Since I was inclined to appoint an Arbitrator and after dictating the order, both sides have agreed that the applicant will now make a fresh nomination and the respondent has withdrawn all objections to this application.

21. By consent therefore the following order is passed;

(i) The applicant nominates Mr. Justice Mohit S. Shah, Former Chief Justice of Bombay High Court as Arbitrator.

(ii) The respondent nominates Justice R.Y. Ganoo, Former Judge of this Court as Arbitrator.

(iii) In view of this fresh nomination, the two nominee

Arbitrators shall now appoint the third and Presiding Arbitrator.

(iv) All issues including that of limitation are kept open.

(v) Application is disposed in the above terms.

(vi) No costs.

(A. K. MENON, J.)