

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO.5 OF 2022

Ranjana S. Kamthe and Another .. Applicants
Versus
Dileep Vasant Thatte and Others .. Respondents

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Mr. Girish K. Naik-Thigle, Advocate for the Applicants.
Mr. Amar D. Soman, Advocate for respondent Nos.1A, 1B, 1C & 2.
Mr. Amol N. Kakade, Advocate for respondent No.3.
Mr. Satyajit S. Bora, Advocate for respondent No.4.

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CORAM : SHARMILA U. DESHMUKH, J.
Reserved on : FEBRUARY 23, 2023.
Pronounced on : MARCH 03, 2023.

FINAL ORDER :

1. Arbitration Application is filed under Section 11 (1) of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) seeking appointment of sole-Arbitrator to adjudicate the dispute arising out of Memorandum of Understanding (MoU) dated 1st March, 2014.

2. The facts of the case are as under:

A Memorandum of Understanding (for short” MOU”) came to be executed on 1st March, 2014 between the respondents and the Applicant No.1. Respondent Nos.1 to 4 are the co-owners of agricultural land out of Gut No.7 of village Mauje Golwadi total admeasuring 5 H 84 R and the subject matter of MoU was an area

approximately 4 H 84 R. The MoU records that the land forming subject matter of MOU was ancestral property of respondents, and the property has been inherited by the owners in equal proportion. By this MoU, the respondents agreed to sell the land i.e. approximately 4 H 84 R to the Applicant No.1 for consideration of Rs.11 Crore and a sum of Rs.50 lakhs was paid as earnest money at the time of execution of MoU. The relevant clauses of the MoU are as under:

“2. The Owners further assure that they collectively own the said property as indicated on 7/12 extract and they have collectively agreed with mutual understanding that their respective shares in the property are as follows:

a.	Jayashree Suresh Bhat	19%
b.	Dileep Vasant Thatte	35%
c.	Anjali Vinay Thakur	25%
d.	Nilima Amit Maydeo	21%

The purchaser is and will be paying the amount of consideration to each owner as per the above division. The Owners hereby assure the Purchaser that neither of them will object for such mode of payment of consideration.

3. That the Purchaser shall pay to the owner the balance amount of Rs.10,50,00,000/- (Ten Crores Fifty Lacs Only) as follows:

(i) Amount of Rs.50,00,000/- (Fifty Lacs Only) to be paid on or before 15/06/2014.

(ii) That the final installment of the consideration i.e. the Amount of Rs.10,00,00,000/- (Ten Crores Only) is to be paid on or before 15/12/2015 at the time of execution of Sale Deed.

(iii) The abovementioned consideration is decided on the basis of area owned by the party of the first part/owners. The party of the first part/owners agrees for decrease in the said consideration, if there is decrease in area owned by them after title verification of the said entire land.

(iv) It is agreed between the parties that if Purchaser will pay Rs.10,00,00,000/- (Ten Crores Only) i.e. the Final consideration to the party of the first part before the time frame agreed above, in such case the Purchaser will be eligible for discount @10% P.A. on the total consideration agreed.

(v) It is further agreed between the parties that if the purchaser fails to pay final amount of consideration within the time frame as agreed above then the parties will suitably extend the period, provided that the Purchaser has paid additional Rs.3,00,00,000/-(Rs. Three Crores Only) by 15th December 2015 and further in case such extension is upto 3 months past December 15th 2015, then the purchaser will be liable to pay 13% interest p.a. on the balance amount of consideration and if such delay is more than 3 months but upto 6 months, i.e. Past March 15th 2016 upto June 2016, the purchaser will pay an interest of 16% p.a. on such balance consideration for the period beyond the first three months.

(vi) It is specifically agreed by the parties that the purchaser is not at all liable to pay any interest on the balance amount, if such delay is due to any defect in title of the party of the first part or the inability of the Owners to Convey title to the Purchaser for any reason including but not limited to Title defect, Ownership issues, any Litigation or Boundary dispute.

14. That it is specifically agreed by and between the parties herein that every stage of the payment mentioned herein is the essence of the contract subject to terms agreed hereinabove in clause no.3.”

3. The Arbitration clause contained in clause 22 of the MoU, reads as under:

“22. That it is agreed by and between the parties herein that in case of any dispute in respect of the present MOU then the parties herein shall mutually nominate one arbitrator each and such two arbitrators shall appoint the third arbitrator and the dispute shall be referred to them and the decision taken by the majority shall be binding on all.”

4. A perusal of the above clause put forth the picture that the owners collectively owned the property and have collectively agreed with mutual understanding that their respective shares in the property will be as stated in Clause 2, which is reproduced hereinabove. The said clause is being emphasized, as subsequently as there has been debate interse between the respondents on the proportion of the respective shares which have been set out in Clause 2. The payment terms set out in Clause 3 of the MoU, set out that the final installment i.e. Rs.10 Crore is to be paid on or before 15th December, 2015, at the time of execution of the sale deed and if there is failure to pay the amount of consideration within the time frame as agreed above, then the period would be suitably extended provided that the applicant no.1 has paid additional Rs.3 Crore by 15th December, 2015 and in case such extension is upto 3 months past 15th December, 2015 then the applicant no.1 will be liable to pay 13% interest *per annum* on the balance amount and if delay is more than three months, upto 6 months i.e. past 15th March, 2016 upto 20th June, 2016, the applicant no.1 will pay interest of 16% p.a. on such balance consideration.

5. Pursuant to the execution of the MOU, there has been substantial correspondence between the Applicant No.2 and the Respondent No 1 and 2. On 26th December, 2015, the applicant no.2, who claims to hold power of attorney on behalf of the applicant no.1, received an email from Respondent No.1 forwarding the email received from Respondent No.4, wherein it was stated by

respondent No.1 that the division mentioned in the MoU was not acceptable to him.

6. By email dated 29th December, 2015 addressed by the Applicant No.2 to the Respondents, it was conveyed that the internal understanding of share holding needs to be converted into lease/share partition etc. *vide* a registered deed and that there is a need to register the lease/partition deed document amongst the respondents prior to registering the sale deed. The email also states that execution of the sale deed/conveyance deed on 15th January, 2016 was planned subject to getting the land owners 7/12 extracts rectified and NOC from CIDCO and since the 7/12 extract is an important title document, they cannot go ahead unless it is done.

7. By email dated 1st January, 2016 addressed by respondent no.4 to applicant no.2 and others respondents, Respondent No.4 stated that she is willing to execute the sale deed as per the MoU executed between the parties and that the respective shares are clearly mentioned in the said MoU. It was pointed out that the respective shares in the property of the owners are clearly mentioned in para 2 of the MOU dated 1st March, 2014. Under the circumstances the contents of the paragraph no.4 of the email is not in conformity with the MoU between the owners and the purchaser, and there is no need to execute the release/partition deed.

8. By email dated 3rd January, 2016 addressed to the applicant No.2, the respondent No.1 stated that in light of the

recent clarification of law regarding division of ancestral property, the respondents plan to adjust the division of shares in the property and may therefore need to delay the conveyance of the land, and it was requested to grant some time to fulfill the obligation and that the applicant no.2 will be informed once this issue is resolved from their side and a mutually convenient date will be set out for executing the conveyance deed.

9. On 18th March, 2016, a Deed of Partition was executed between the Respondents and it was agreed that in accordance with the aforesaid partition by metes and bounds, the respective parties herein have been mutually allotted, granted and delivered into their possession the concerned properties as their respective and absolute property by virtue of this partition.

10. On 25th August, 2016, the applicant no.2 forwarded the draft of agreement of sale to the respondent no.1. On 4th January, 2017 the husband of the respondent No.2 addressed an email to the applicant no.2 stating that the final draft is currently being reviewed by them and will be sent by end of the week and an inquiry was made as regards the status of NOC from CIDCO. There was further correspondence by email between the respondent No.2 and the applicant no.2 as regards the sale deed .

11. On 26th March, 2018, Adv.Ashok Bora representing the Respondent Nos.1 and 2 forwarded the drafts by way of email to the Advocate for the applicant no.2. On 5th April, 2018 the respondent No.3 forwarded the note prepared by the lawyer to the

applicant no.2. On 3rd December, 2018, the applicant no.2 emailed the final draft of sale deed to the respondent Nos.1 and 2, and also to their counsel. On 11th April, 2019, the applicant no.2 forwarded the drafts on email to respondent no.2 conveying that he had received two drafts from Advocate Bora and that the only remaining issue is regarding the PDC.

12. By email dated 2nd April, 2019, addressed to the applicant no.2, the Respondent No 2 stated that based on the conversation with respondent no.1, she has understood that the applicant no.2 is ready to proceed with the sale deed as per the procedure stated in the email. It was stated that the final sale deed may be forwarded to Adv. Bora, immediately so that he can courier it to her and once the same is signed it will be couriered back to Adv. Bora for safe custody, until the deposit of the amount in her bank account.

13. On 18th October, 2019, the applicant no.2 by email conveyed to respondent No.3 that during his visit to US he had discussion with respondent Nos.1 and 2 and they have re-confirmed that the registration of sale deed will be done independently and need not be together as earlier requested and, as such they can go ahead with the registration of the sale deed for her share of the land. It was also conveyed that the final agreement for her share has been approved by both the parties and further logistics of travel will be discussed and requested for details of convenient day and time for registration of agreement and completion of all the related

formalities.

14. On 19th October, 2019, the applicant no.2 addressed email to respondent no.4 stating that the applicant no.1 had made payments as agreed in the MoU and eventually dispute arose between her and other legal heirs regarding to the share of individual ownership, which dispute was eventually settled with a revised agreement between the respondents *inter se* as related to the share of individual ownership in which the share holding of individual legal heirs was changed as compared to the earlier MoU. By email respondent No.4 was requested to deliver the registered partnership deed between the respondents *inter se*, and government demarcation of the individual share holding of land, and as such other legal heirs have provided all the necessary documents mentioned above and till date respondent no.4 has not provided it to the purchaser and called upon her to provide the necessary documents to complete the necessary procedure related to the registration of the sale deed of the land.

15. By email dated 10th January, 2020 addressed by the Applicant No.2 to the respondent no.1, the draft revision of the terms was forwarded and one of the terms of revision was the Court consent decree to be obtained for the settlement of terms between the seller and the purchaser. On 24th February, 2020, the applicant no.2 informed the respondent No.1 and 2 that the process of obtaining consent decree will take couple of months and once the same is received an update will be given.

16. Perusal of the documents annexed to the Affidavit in reply filed by the Respondent No.4 indicates that there was separate correspondence exchanged by the Applicant No.2 with Respondent No 4.

17. The following emails were exchanged between the Applicant No. 2 and the Respondent No.4 :

- (a) In response to the email dated 29th December, 2015 of Applicant No.2, the Respondent No.4 communicated by email dated 4th January, 2016 that any document of partition or release of individual shares in the collective title is unwarranted.
- (b) On 19th April, 2016 the Applicant No.2 addressed an email to the Respondents referring to minutes of meeting and stating that should he assume the drafts are fine as nothing was heard on the draft Agreement to Sale and Power of Attorney.
- (c) Email dated 21st April, 2016 by Respondent No.4 stating that it is not possible to execute any agreement to sale/development agreement during subsistence of the agreement or MOU dated 1st March, 2014. It was also stated that by virtue of the Partition Deed, she is capable of executing Sale Deed of her share independently and that she is now exclusive owner of her share of land and she has not authorized anybody to act or promise of her behalf and any such representation by any one to Applicant No.2 is void

and she will not be bound by any of them. The Applicant No.2 was requested to send all the communications to her directly and independently.

- (d) Email dated 3rd May, 2016 by the Applicant No.2 stating that the Applicant No 1 had never promised or agreed to purchase the said land in pieces or separate individual shares. It was stated that the Applicant No.2 has never requested any partition deed from the Respondents and considering the disagreement between the Respondents, the Applicant No.1 had rightfully requested a registered document from Respondents finalizing their individual shares.
- (e) Email dated 30th May, 2016 by the Respondent No.4 stating that she is ready and willing to perform her part of MOU dated 1st March, 2014 and that she is not party to any revised agreement and it is not binding upon her. It was stated that that she will hand over the revised 7/12 extract of her land as soon as the Draft Sale Deed is given to her. It was reiterated that she is ready to execute the Sale Deed of proportionate area of land owned by her at any time.
- (f) On 24th October, 2016 a communication was addressed by the Respondent No.4 to the Applicant No.1 stating that the as per the MOU the sale deed was to be executed on or before 15.06.2016. The terms and conditions of the MOU have become unenforceable because she has failed to perform her part of the

Agreement.

18. After all these exchange of correspondence between the parties on 25th June, 2021, the Advocate for the respondent Nos.1 and 2 i.e. Mr. Ashok Bora addressed a legal notice to the applicants, stating that the sale deed was to be executed on or before 15th June, 2016 and due to the reluctance of the Applicant to go ahead with the purchase of the land, the Respondent No.4 on behalf of the Respondents was constrained to terminate the MoU vide letter dated 24th October, 2016. By the legal notice the MoU was terminated and the Power of Attorney was revoked with immediate effect. The legal notice addressed on behalf of the respondent nos.1 and 2 was replied to by the Advocate for the applicants, wherein the contents of the legal notice were denied and it was denied that there was breach on behalf of the applicants. On 4th September, 2021, public notice was issued on behalf of the respondents informing the public that respondent no.4 by letter dated 24th October, 2016 had cancelled the MoU and respondent Nos.1 and 2 by communication dated 25th June, 2021 have cancelled the Power of Attorney executed in favour of the applicant no.2.

19. On 8th January, 2022, Advocate for the applicants addressed a legal notice to the respondents invoking the arbitration clause of the MoU and proposed the name of Mr.J.S. Kapre, retired District and Sessions Judge as one of the Arbitrator and called upon the respondents to appoint other arbitrator within a statutory period so as to enable the arbitrator to appoint third arbitrator.

Along with the legal notice a cheque of Rs.10 Crore was also enclosed.

20. By the reply dated 2nd February, 2022 addressed by Advocate on behalf of the Respondent no.4, it was stated that by communication of 24th October, 2016 the applicants were already informed about non-enforceability of the MoU and as such, MoU stood rescinded on that date itself and as such, the notice invoking arbitration is hopelessly barred by limitation. In the said reply after stating fact of non enforceability of MoU, an arbitrator was appointed. as stated in paragraph no.9, which reads as under:

“9. Your client has invoked the arbitration clause under the memorandum of understanding dated 01.03.2014 and has proposed the name of Mr. J.S.Kapre the retired District And Sessions Judge and called upon my client to Appoint the other arbitrator. In your notice you have not disclosed the particulars of the Arbitrator proposed by your client, Therefore, the notice issued by you is bad. Without prejudice to the same, my client is appointing Shri Sanjivkumar Somdutta Sharma, Retired District and Sessions Judge resident of B.902, Aishwarya Residency A, Near Ambience Hotel, Kaspate Wasti, Wakad, Pune-57, email-judge62@gmail.com, as the second arbitrator.”

21. By reply dated 3rd February, 2022, the Advocate for the respondent No.3 submitted that in view of the failure to adhere to the terms of the MoU, respondent no.4-Mrs.Anjali Thakur by letter dated 24th October, 2016 had informed the applicants that the said MoU had become unenforceable and post termination of the MoU, neither the respondent no.3 exchanged any correspondence with the applicants nor the applicants had approached the respondent no.3 for execution of the sale deed of her share of the property. It

was stated that as the MoU was terminated on 24th October, 2016 and there are subsisting rights and obligations under the MoU that requires adjudication and therefore, the purported nomination of the arbitrator does not stand.

22. A common affidavit-in-reply have been filed by the Respondent Nos.1A to 1C and the Respondent No.2 and by respondent Nos.3 and 4. As far as the reply filed by the Respondent Nos.1A to 1C and the Respondent No.2 is concerned, it is stated that the present respondents have issued the notice of termination of MoU through Respondent No.4 on 24th October, 2016, and the Power of Attorney executed by the Respondents in favour of the Applicant No.2 was terminated by notice dated 25th June, 2021.

23. It was stated that the notice issued by the present applicants for appointment of Arbitrator is time barred as per Article 137 of the Limitation Act, 1963, as three years limitation is provided and as such, notice has not been issued within three years and is beyond limitation.

24. The Respondent No.3 in her affidavit-in-reply has raised various contentions as regards non-payment of the stamp duty under the provisions of the Maharashtra Stamps Act, 1957, and about the MoU not being a registered document. As far as these two contentions are concerned, no submissions have been advanced at the time of arguments and the issue has been limited as to whether the application seeking appointment of Arbitrator is barred by limitation.

25. It is stated by the Respondent no.1 in her affidavit-in-reply that the right to sue accrued on 24th October, 2016 when the communication dated 24th October, 2016 was addressed to the applicants and as such, the dispute had to be filed within a period of three years. The Respondent No.4 in her affidavit-in-reply has stated that as the brothers and sisters of the deponents expressed the desire to get the land partitioned, the deponents also agreed and accordingly on 18th March, 2016 partition deed was executed amongst the partners thereby partitioning partitioned the land gut no.7 into separate pieces. She has further stated that on 24th October, 2016, she forwarded a letter to the Applicant no.1 informing her that the sale deed could not be executed as per the agreed timeline due to failure on part of the purchaser to pay the balance amount of compensation and perform her part of contract and, as such, terms and conditions of the MoU have become non-enforceable. She has further stated that as per the Limitation Act, the limitation for filing a suit for specific performance of contract is only three years from the date of refusal and the starting point of the limitation is 24th October, 2016. She has further deposed that even if Article 137 of the Limitation Act is applied to the application under Section 11, still substantial claim of the applicants herein is time barred and therefore, the arbitration application deserves to be dismissed.

26. Heard Mr. Naik-Thigle, learned counsel appearing for the Applicants, Mr. Soman, learned counsel appearing for respondent Nos.1A, 1B, 1C & 2, Mr. Kakade, learned counsel

appearing for respondent No.3, and Mr.Bora, learned counsel appearing for respondent No.4.

27. Mr. Naik-Thigale learned counsel appearing for the petitioner contends that it is clear from the correspondence between the parties that till 25th June, 2021 when the legal notice was issued by Advocate Ashok Bora to the applicants, there was no dispute between the parties. He has invited the attention of this Court to the reply dated 2nd February, 2022 addressed by the Advocate for the respondent no.4 appointing an Arbitrator. He would further submit that as there is breach of contract by the respondents, dispute has arisen and in view of the execution of the arbitration agreement, which execution is not disputed, the dispute is required to be referred to the Arbitrator. He would further submit that as the parties have failed to arrive at consensus, the dispute is required to be referred to Sole-Arbitrator. In support of his contentions, he relied upon the following decisions of the Apex Court :

- (i) **Mayavati Trading Private Limited versus Pradyut Deb Burman**, reported in (2019) 8 SCC 714;
- (ii) **Sanjiv Kumar s/o. Harakchand Kankariya Vs. The State of Maharashtra and others**, in Writ Petition No.7211 of 2011, decided on 26th September, 2011 by this Court.
- (iii) **Intercontinental Hotels Group (India) Pvt. Ltd. and Ors. Vs. Waterline Hotels Pvt. Ltd.**, reported in (2022) 7 SCC 662;

28. Per contra, learned counsel appearing for the respondent no.1 submits that as per Clause 3 of the MoU, the payments were to be made on or before 15th December, 2015 and as there was a breach by the applicants, the contract came to be terminated by communication dated 24th October, 2016. He would submit that dispute arose in the year 2016 itself, the application seeking appointment of an Arbitrator is barred by limitation. He would further submit that pursuant to the termination, the public notice was also issued on 20th October, 2021. He would contend that as per Clause 14 of the MoU, time of payment was made essence of the contract. He would further submit that in the alternative upon termination of the agreement, the arbitration clause does not survive. The alternative argument as regards non-survival of arbitration clause upon termination of agreement was not pressed.

29. Learned counsel appearing for the respondent No.3 has adopted the submissions of the learned counsel for the Respondent no.1. He has invited the attention of this Court to the communication addressed by the Applicant Nos.2 to 4 that the Applicant no.1 has never promised or agreed to purchase the said land in pieces or in separate individual shares. He would further contend that the MoU had been terminated on 24th October, 2016. In support of his submissions, he relied on the following decisions of the Apex Court:

- (i) **Secunderabad Cantonment Board versus B.Ramachandraiah and Sons**, reported in (2021) 5 SCC

705;

- (ii) **Bharat Sanchar Nigam Limited and Another Versus Nortel Networks India Private Limited**, reported in (2021) 5 SCC 738;

30. Mr. Satyajit Bora, learned counsel appearing for the Respondent No.4 has adopted the submissions of the counsel appearing for the Respondent No.1. He would further submit that it is clear from the emails exchanged between the parties in the year 2015 that the Applicants were seeking individual shares to be carved out for completing the obligations under the MoU. He would further submit that the dispute arose on 24th October, 2016 and as such, the present application is barred by limitation. He would further submit that respondent No.4 has nominated an arbitrator without prejudice to her contention that application is time barred. In support of his submissions, he relied on the following decisions of the Apex Court:

- (i) **Secunderabad Cantonment Board versus B.Ramachandraiah and Sons**, reported in (2021) 5 SCC 705;
- (ii) **Bharat Sanchar Nigam Limited and Another Versus Nortel Networks India Private Limited**, reported in (2021) 5 SCC 738
- (iii) **Shriram EPC Ltd. and Ors. Vs. Gaja Trustee Co. Pvt. Ltd.**, reported in MANU/MH/4038/2022;
- (iv) **Ravindra vs. Devendra and Ors.**, reported in MANU/MH/1360/2022;

31. In rejoinder, the learned counsel appearing for the applicants submits that on 24th October, 2016 the performance was not due which is evident from the correspondence which was exchanged between the parties and in particular the applications which were made to CIDCO on 11th January, 2017 for NOC would show that as the NOC were not obtained as on 24th October, 2016. He would further submit that the time therefore stood extended. He has pointed out the applications which are annexed at page nos.34 to 40 of the petition.

32. Learned counsel appearing for the respondents submits that those applications have been filed on behalf of the partners of M/s.Rejiyas Properties LLP i.e. Vaibhavi Sunil Patil and the MoU is not executed with the LLP. It was further pointed out that the present arbitration application which has been filed at the instance of the applicant Nos.1 and 2, is not maintainable *quo* Applicant no.2 i.e. Sunil Patil. Learned counsel appearing for the applicants submits that the Applicant no.2 was the Power of Attorney holder and all the correspondence has been exchanged with the Applicant no.2. He would further submit that the notice dated 25th June, 2021 was the last communication in the exchange of correspondence, which raised the dispute and as such the dispute arose on 25th June, 2021.

33. Considered the rival submissions of the parties.

34. The application invokes the provisions of Section 11 of the Act seeking appointment of Arbitrator. According to the

Petitioner, the dispute arose upon the issuance of legal notice dated 25th June, 2021 and the application under Section 11 of the Act being filed within period of three years is within limitation. On the other hand the Respondents contend that the dispute arose upon issuance of communication dated 24th October, 2016 by the Respondent No 4 and the present application being filed in the year 2022 is barred by limitation.

35. I have minutely considered the documents produced on record. The MOU was executed on 1st day of March, 2014 between the Applicant No.1 and the Respondents for purchase of the land admeasuring 4 H 84 Aars of Gat No.7 of Village Mauje Golwadi for total consideration of Rs 11,00,00,000/- (Rupees Eleven Crores only). This land was stated to be owned collectively by the Respondents and the share holding of each of the Respondents was set out in Clause 2 of the MOU. From the email dated 26th December, 2016 sent by Respondent No.1 , it appears that there was some dispute about the division as mentioned in the MOU, which led to the Deed of Partition being executed between the Respondents on 18th March, 2016. In this Deed of Partition, there was change in the share holding of the Respondent No.1 and Respondent No 4. Pertinently, there was no revised MOU executed between the parties. The exchange of correspondence between the Applicant No.2 with the Respondent Nos.1 to 3 indicates that even after the communication dated 24th October, 2016 addressed by the Respondent No.4 to the Applicant No.2, the drafts of the agreements were being exchanged between the Applicant No.2 and

the Respondent Nos.1 to 3 till the year 2020. On 25th June, 2021, the Advocate for Respondent Nos.1 and 2 addressed a legal notice to the Applicants wherein the MOU was terminated and Power of Attorney was revoked.

36. The question which falls for consideration in the present case is the date of accrual of right of apply under Section 11 of the Act. At this stage it would be apposite to refer to the decision in the case of **Bharat Sanchar Nigam Limited and Another (supra)**, wherein the Apex Court while dealing with the issue of limitation has held as under:

“16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budh Raja v. Orissa Mining Corpn. Ltd. wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows: (SCC p. 460).

"26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims

were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in *Inder Singh Rekhi v. DDA*⁷, *Panchu Gopal Bose v. Port of Calcuttas and Utkal Commercial Corpn. v. Central Coal Fields Ltd.*⁹ also make this position clear.”

37. The Apex Court has highlighted the distinction between the period of limitation for filing a petition seeking appointment of an arbitrator and the period of limitation applicable to the substantive claims made in the underlying commercial contract.

38. In the present case, under Article 54 of the Schedule to the Limitation Act, 1963, the period of limitation for filing suit for specific performance is three years from the date fixed for performance or if no such date is fixed when the Plaintiff has notice that performance is refused. Article 54 of Schedule to the Limitation Act, 1963 will apply to the substantive claim.

39. As far as the limitation to file an application under Section 11 of Arbitration Act is concerned, the period of limitation to file an application under Section 11 of the Act is three years from date when right to apply accrues. The Apex Court in the case of **Bharat Sanchar Nigam Limited and Another (supra)** has referred to

paragraph 46 and 48 of the decision of this Court in the case of *Deepdarshan Builders (P) Ltd vs Saroj*, 2018 SCC Online 4885, which reads as under:

“46. It is not in dispute that under Section 20 of the Arbitration Act, 1940, an application was required for taking the arbitration agreement on record and for appointment of an arbitrator in accordance with the arbitration agreement before a court. Since the said proceedings under Section 20 were required to be filed before an appropriate court, the provisions of Article 137 of the Limitation Act, 1963 were applicable to such proceedings filed before such appropriate court. In my view, since the proceedings under Section 11(6) or Section 11(9) of the Arbitration Act for seeking appointment of Arbitral Tribunal are also now required to be filed before the High Court or the Hon'ble Supreme Court, as the case may be. Article 137 of the Schedule to the Limitation Act, 1963 would apply. It is not in dispute that no other Article of Schedule to the Limitation Act, 1963 provides for any other period of limitation for filing an arbitration application filed under Section 11(6) or Section 11(9) of the Arbitration Act respectively.

48. In my view, the limitation prescribed under Article 137 of the Schedule to the Limitation Act, 1963 which applies to an application under Section 11(6) or Section 11(9) of the Arbitration Act filed before the High Court or before the Hon'ble Supreme Court cannot be mixed up with the period of limitation applicable to the claims prescribed in various other Articles of the Schedule to the Limitation Act, 1963. Both these periods of limitation i.e. one applicable to the claims being made and another being applicable to the application under Section 11(6) or Section 11(9) of the Arbitration Act to which Article 137 of the Schedule to the Limitation Act, 1963 applies, are two different periods of limitation and cannot be made applicable to each other.” (emphasis supplied).”

40. In the case of **Secunderabad Cantonment Board (supra)**, the Respondents therein had issued a letter dated 7th November,

2006 to the Appellant therein requesting appointment of an arbitrator and inspite of non compliance by the Appellant, the Respondent kept on writing letters at long intervals between the year 2007-2009 and finally a legal notice came to be issued on 30th January, 2010. Subsequently after a long three year hiatus, the application under Section 11 was filed on 6th November, 2013. In the facts of that case, the Apex Court held as demand was arbitration was made by letter dated 7th November, 2006 and on and from 12th February, 2007 when no arbitrator was appointed, the cause of action for appointment of arbitrator accrued to the Respondent and time began running from that day.

41. Applying the aforesaid law to the facts of the present case, in my opinion, the application under Section 11 is filed within a period of three years of rejection of the request for appointment of arbitrator by Respondent Nos.1 to 3. As far as Respondent No 4 is concerned, by her reply dated 2nd February, 2022, an arbitrator came to be appointed. However, it needs to be noted that as per the arbitration clause the parties had to mutually nominate one arbitrator each. The appointment of arbitrator by respondent no.4 cannot be said to be the appointment on behalf of all the respondents.

42. The other issue which will have to be considered is whether the exercise of jurisdiction under Section 11 is warranted in cases where submissions are raised that the claims are *ex facie* time barred. The Apex Court in the decision of **Bharat Sanchar**

Nigam Limited and Another (supra) has held as under:

“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.

48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions.

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement 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"³⁴ (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.”

43. In the present case, the Respondents claim that by notice dated 24th October, 2016, the MoU came to be terminated and the dispute arose on that day. The communication dated 24th October, 2016 was issued by the respondent no.4 wherein it was stated that the sale deed was to be executed on or before 15th June, 2016 and as the petitioners have failed to perform the part of the agreement, the conditions of the MoU have become unenforceable. This communication nowhere states that it has been issued on behalf of all the Respondents. On the contrary, I find from the email dated 21st April, 2016 addressed by the Respondent No.4 to applicant no.2 that she being the exclusive owner of her share of land, she has not authorized anybody to act or promise on her behalf and any such representation is void and not binding on her. As such it appears that after the execution of the Deed of Partition on 18th March, 2016, the Respondents became entitled to their respective portions and Respondent No.4 had distanced herself from any promises made by anyone else. The communication dated 24th October, 2016 appears to be addressed on behalf of Respondent No.4 herself. It would be useful to reproduce the communication dated 24th October, 2016 which reads as under:

“Anjali Thakur,

14, West Road. Thakur Bungalow,
Dhantoli, Nagpur 440012 M.S.
24th October, 2016

To,
Mrs. Ranjana Kamathe,
H-8, Ganatra Complex,
Market Yard, Pune-411037
Maharashtra State

Dear Mrs. Ranjana Kamathe,

You had entered into MOU.21 dated 01-03-2014 for purchase of agricultural Land bearing Gat no. 7, village Golwadi, Taluka Aurangabad, Dist.Aurangabad; with the owners, Mr. Dileep Thatte, Mrs. Jayashree Bhat, Mrs. Anjali Thakur and Mrs. Nilima Maydeo.

As per the MOU the sale deed was to be executed on or before 15-06-2016 The terms and conditions of the MOU have become non enforceable because you have failed to perform your part of the agreement.

Mr. Sunil Patil, who claims to be your Power of Attorney, was accordingly informed. Yet he makes correspondence on your behalf. I request you to advise your Power of Attorney not to make any correspondence in respect of the Golwadi agricultural land which was the subject matter of the MOU dated 01-03-2014.

Thanking you,

Sd/-

Anjali V Thakur”

44. Pertinently, even after the communication dated 24th October, 2016 addressed by the Respondent No 4, the Respondent Nos.1 to 3 continued with their correspondence and exchange of drafts of Agreement without any mention of the communication dated 24th October, 2016 till the year 2021, when legal notice of termination came to be issued. As regards the communication dated 24th October, 2016, the Respondent No.4 states that the terms and conditions of MOU have become “unenforceable” because the Applicant No.1 has failed to perform her part of the agreement. From the communication, it is doubtful whether there was termination of the MOU or whether the MOU had been rendered unenforceable due to breach.

45. In the decision of **Bharat Sanchar Nigam Limited and Another (supra)**, the issue which fell for consideration of the Apex Court was as to whether the claim made by the Respondent-Nortel was time barred and inasmuch as the claim made by the Nortel were rejected by an appellant - BSNL on 4th August, 2014 and Nortel had invoked the arbitration agreement by its notice dated 29th April, 2020, which was after the period of 5 ½ years and after rejection of its claim by BSNL. In that context, the Apex Court held that in very limited category of cases, where there is no vestige of doubt that the claim of is *ex facie* time barred, or the dispute is non-arbitrable, that the Court may decline to make the reference to the arbitration. However, if there is even the slightest doubt, the rule is to refer the dispute to arbitration, other wise it would encroach upon what is essentially a matter to be determined by the tribunal.

46. In light of facts of the present case, it is doubtful as to whether the communication dated 24th October, 2016 amounts to termination and as to whether the communication was addressed on behalf of all the Respondents. The MOU has been executed by all the Respondents for sale of subject land which at the time of execution of MOU was owned collectively and subsequently a Deed of Partition was executed on 18th March, 2016 delineating the shares of each of the Respondents, without any amendment to the MOU.

47. In the background of judicial pronouncements of the Apex Court, in the facts of the present case, it cannot be said that

the case can be categorised as deadwood and is ex facie barred by limitation. In my view, it will be a matter of interpretation as to whether the communication dated 24th October, 2016 amounts to termination of the MoU and on behalf of all the Respondents, particularly, when the other respondents, who were the parties to the MoU continued with the correspondence and exchanged drafts of the agreement for sale. It is only on 25th June, 2021 that a legal notice was issued terminating the MoU and revoking the power of attorney. Subsequent to the issue of the communication on 24th October, 2016, there was no correspondence between the respondent no.4 and the applicants, however, the power of attorney in favour of the Applicant no.2 was subsisting and on the basis of power of attorney, further action was taken by the applicants and follow up action for NOC was made to CIDCO.

48. Considering the above, leaving open the question of limitation as well as all objections on merits as well as procedural aspects, the appointment of sole Arbitrator is made to adjudicate the dispute. Accordingly, the arbitration application is disposed of with following order :-

ORDER

- (i) Both parties agree that, Justice Shri S.P. Deshmukh, former Judge of this Court be appointed as an Arbitrator to decide the disputes arising between them.

a) **Appointment of Arbitrator :-**

By consent, Hon'ble Justice Shri S.P. Deshmukh, former Judge of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Partnership Deed.

(b) **Communication to Arbitrator of this order :-**

- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.
- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses :-

Arbitrator : Hon'ble Justice Shri S.P. Deshmukh,
former Judge of this Court.

Address : Neel Prabha, Bhagyanagar,
Near Hotel Green Olive,
Near Baba Petrol Pump,
Aurangabad.

Phone : 9545028282.

(c) **Disclosure :-**

The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Registrar of this Court, referencing this arbitration application, as soon as possible, and in any case

sufficiently before entering upon the reference to arbitration. That statement will be retained by the Registrar on the file of this application. Copies will be given to both sides.

(d) **Appearance before the Arbitrator :-**

Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

(e) **Contact/communication information of the parties :-**

Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.

(f) **Section 16 application :-**

The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) **Interim Application/s :-**

(i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator.

(ii) Any such application will be decided in such manner and within such time as the learned Sole

Arbitrator deems fit.

(h) **Fees :-**

The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(i) **Sharing of costs and fees :-**

Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) **Consent to an extension, if thought necessary :-**

Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) **Venue and seat of arbitration :-**

Parties agree that the venue and seat of the arbitration will be in Aurangabad.

49. The arbitration application is disposed of in these terms. No costs.

(SHARMILA U. DESHMUKH, J.)

Later on

50. At this stage, after the pronouncement, learned counsel for Respondent No.1 seeks stay of the order for a period of four weeks.

51. The order is stayed for a period of four weeks.

(SHARMILA U. DESHMUKH, J.)

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