

HIGH COURT FOR THE STATE OF TELANGANA

ARBITRATION APPLICATION No.169 OF 2022

Between:

Sri Athelli Mallikarjun
and others.

... Applicants

AND

S.S.B Constructions,
Registered Partnership Firm,
Secunderabad.
and another.

... Respondents

! Counsel for Applicants : Sri Prabhakar Sripada, Senior Counsel

^ Counsel for Respondents : Sri Vijay B. Paropakari

> HEAD NOTE:

? Cases referred:

1) (2021) 5 SCC 738

THE HONOURABLE SRI JUSTICE C.V. BHASKAR REDDY

ARBITRATION APPLICATION No.169 OF 2022

ORDER:

This application, under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 (for short “the Act”) read with Para (3)(i)(d) of Scheme of Appointment of Arbitrators, 1996, is filed by the applicants seeking to appoint sole Arbitrator to adjudicate the differences and disputes between the applicants and the respondent.

2. Heard the submissions of Sri Prabhakar Sripada, learned Senior Counsel appearing for the applicants, Sri Vijay B.Paropakari, learned counsel for the respondents and perused the record.

3. The case of the applicants, in brief is that, the respondents entered into a development agreement-cum-General Power of Attorney with the applicants on 07.12.2012 in respect of premises bearing Municipal No.4-2-80 admeasuring 271 Sq. Yards situated at Old Bhoiguda, Secunderabad (hereinafter referred as “Schedule A property”) and the same was registered vide document No.22/2013 in the office of Sub-Registrar, Doodhbowli. The respondents also entered into another Development Agreement-cum-General Power of Attorney with the applicants and some of their relatives on the same day i.e, 07.12.2012 in respect of premises bearing Municipal Nos.4-

2-75 to 77 admeasuring 585 Sq.yards situated at Old Bhoiguda, Secunderabad (hereinafter referred as “Schedule B property”) and the same was registered vide document No.23/2013 in the office of the Sub-Registrar, Doodhbowli. It is further case of the applicants that in terms of the development agreement-cum-General Power of Attorney, the respondents are supposed to complete the construction within a period of twelve (12) months subject to a grace period of six (6) months. It is the specific case of the applicants that respondents have delayed the construction of the apartment by 12 months and even after eight (8) years the respondents have not obtained the Occupancy certificate. It is further case of the applicants that the Respondents have jointly constructed both the properties and did not provide staircase and lift to the Schedule A property. Instead the respondents informed the Applicants to use the staircase provided for Schedule B property. It is further case of the applicants that the respondents used low grade tiles, local granite stone, unbranded sanitary ware, contrary to the Schedule-B specifications of the Development Agreement. Further, the Respondents failed to provide Telephone points in all bedrooms, living and drawing areas as specified and used low quality plumbing items. Therefore, in view of the deficiency in services on the part of the respondents, they have suffered financial loss and mental agony. Stating the said facts, the applicants have repeatedly

requested the respondents to make good the loss but the respondents dodged the same on one pretext or the other. It is stated that as per clause No.16 of the Development Agreement-cum-General Power of Attorney, all the disputes that arise out of the development agreement have to be resolved through an Arbitrator. The applicants were constrained to issue legal notice dated 19.05.2022 to the respondents suggesting the name of Smt. Shantha Kumari, Retired District Judge, as an Arbitrator but the respondents issued reply notice dated 19.06.2022 refusing to resolve the disputes through Arbitration, which necessitated the applicants to file the present arbitration application under Section 11(5) & (6) of the Act.

4. A counter affidavit has been filed by the respondents, wherein *inter alia* it is stated that the respondents after entering into Development Agreements-cum-General Power of Attorney with applicants on 07.12.2012, completed the construction in all respects in the year 2014-2015 by providing all amenities and facilities as per the agreed specifications of the development agreements which includes providing of two lifts, water connection, standby generator etc., It is further stated that as per the development agreement-cum-General Power of Attorney, 50% of the construction portion was already handed over to the applicants during the year 2015 in the form of shops and residential units and

the applicants have not raised any objection whatsoever till date and seven (7) years passed by peacefully. It is further stated that under Section 137 of Limitation Act, 1963, the period of limitation prescribed for filing an application is three years from the date when the right accrues and in the present application, the applicants were silent for seven years after occupying and peacefully enjoying all the amenities provided by the respondents and now they have come up with the present application alleging deficiency of service contrary to the terms of Development-cum-General Power of Attorney and therefore, the present application for appointment of arbitrator is belated and time barred and the claim has become stale. It is further stated that the applicants cannot sleep over their legal rights and wake up after seven years lie rip van wrinkle. It is further stated that once the Development Agreement-cum-General Power of Attorney concluded, the documents are extinguished and the arbitration clause in the said agreement also does not survive. Therefore, the present Arbitration Application is not maintainable and the application deserves to be dismissed.

5. There is no dispute that respondents entered into two Development Agreement-cum-General Power of Attorney, with the applicants on 07.12.2012 for construction of Schedule A and B properties and the said Development Agreements-cum-GPAs were registered vide document bearing Nos.22/2013 and 23/2013. As

per Clause 7 of the said Development Agreements-cum-GPAs, the respondents shall complete the building within 12 months from the date of execution of the document, with a grace period of 6 months. According to the respondents, they have completed the construction and handed over the building in all respects in terms of the contract during the year 2014-2015. It is the case of respondents that applicants having taken over possession of the property in the year 2014-2015, filed the present application belatedly after lapse of seven years. It is further case of the respondents that the claim made by the applicants and disputes sought to be resolved before the Arbitral Tribunal is hopelessly barred by limitation.

6. The applicants entered into two Development Agreements-cum-General Power of Attorney dated 07.12.2012 with the respondents and as per the terms of the contract, the building has to be completed within 12 months from the date of execution of the document, with a grace period of 6 months. It is also stated in the Development Agreements-cum-GPAs that time is the essence of the contract. If the respondents had not completed the contract in terms of the Development Agreements-cum-GPAs, the applicants would have initiated appropriate legal action at earlier point of time. But the applicants having waited for more than Seven (07) years after completion of the project, got issued legal notice dated 19.05.2022 to the respondents invoking arbitration clause.

7. In *Bharat Sanchar Nigam Limited and another v. Nortel Networks (India) Private Limited*¹, the Hon'ble Supreme Court while dealing with the similar issue, observed as follows:

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.*

50. *In the notice invoking arbitration dated 29-4-2020, it has been averred that:*

“Various communications have been exchanged between the petitioner and the respondents ever since and a dispute has arisen between the petitioner and the respondents, regarding non-payment of the amounts due under the tender document.”

51. *The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] 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” [Section 21 of the Arbitration and Conciliation Act, 1996.] (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.*

52. *In the present case, the notice invoking arbitration was issued 5½ years after rejection of the claims on 4-8-2014. Consequently,*

¹ (2021) 5 SCC 738

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.

Conclusion

53. Accordingly, we hold that:

53.1. *The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator. It has been suggested that Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings.*

53.2. *In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.*

54. *In view of the aforesaid, the present civil appeals are allowed, and the impugned orders dated 13-10-2020 [Nortel Networks (India) (P) Ltd. v. BSNL, 2020 SCC OnLine Ker 18662] and 14-1-2021 [BSNL v. Nortel Networks (India) (P) Ltd., 2021 SCC OnLine Ker 2375] passed by the High Court are set aside. The application filed under Section 11 by the respondent before the High Court is consequently dismissed.*

8. In the instant case, the applicants entered into Development Agreements-cum-General Power of Attorney with the respondents on 07.12.2012 for construction of Schedule A and B properties and according to the respondents, they have completed the construction during 2014-2015. After a period of over 7 years, the applicants vide legal notice dated 19.05.2022 invoked the arbitration clause, and requested for appointment of a sole arbitrator. The respondents vide reply notice dated 19.06.2022 refused to resolve the dispute through Arbitration as the issue involved is time barred and not maintainable. Therefore, the applicants filed the present Arbitration Application under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 on the file of this Court.

9. It is settled law that mere negotiations will not postpone the cause of action for the purpose of limitation. Since there is no provision in the Arbitration and Conciliation Act, 1996 specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Limitation Act, 1963. Section 43 of the Arbitration and Conciliation Act, 1996 provides that the Limitation Act shall apply to arbitrators, as it applies to proceedings in Court. Since none of the Articles in Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of arbitrator under Section 11, it would be covered by the residual provision under Article 137 of the Limitation Act which provides that the period of limitation is three years for any other application for which no period of limitation is provided elsewhere in the division. The time limit starts from the period when the right to apply accrues. In the instant case, the applicants except stating that they have repeatedly requested the respondents to make good the loss and pointing out the deficiencies in the construction, have not raised any dispute to resolve the disputes by the Arbitrator. As per the Development Agreement, construction has to be completed within twelve months and the grace period was allowed for a further period of six months. Thus the total time granted in the development agreement for completion of work is 18 months from the date of entering into the Development Agreement. If the

respondents failed to comply with the terms and conditions of the Development Agreement, the applicants ought to have issued notice to resolve the dispute by invoking arbitration clause at earlier point of time. Having taken over possession and enjoying the property since more than 7 years, the applicants are not entitled to invoke the arbitration clause saying that limitation has to be calculated from the date of issuance of legal notice dated 19.05.2022. 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. In view of the above circumstances, as the present Arbitration Application is not filed within the period of limitation as prescribed under Article 137 of Limitation Act, the same is liable to be dismissed.

10. Accordingly, this Arbitration Application is dismissed.

Miscellaneous Applications, if any, pending in the Arbitration Application shall stand closed.

C.V. BHASKAR REDDY, J

Date: 08.01.2024

Note: L.R Copy to be marked: **YES/ NO**

(b/o)

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