

(2012) 06 BOM CK 0003

In the Bombay High Court

Case No : Application For Appointment of Arbitrator No. 1 of 2012

Shri Inacio C. Fernandes

APPELLANT

Vs

Gil Oswald Rebeiro

RESPONDENT

Date of Decision : 15-06-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6)

Citation : (2012) 06 BOM CK 0003

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : A.D. Bhobe, for the Appellant; P.A. Kamat, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Heard Mr. A. D. Bhobe, learned Advocate for the applicant and Mr. P. A. Kamat, learned Advocate for the respondent. By this application u/s 11(6) of the Arbitration and Conciliation Act, 1996, the applicant seeks appointment of an arbitrator in respect of the dispute arising under the agreement dated 7.3.1988.

2. The applicant and the respondent entered into an agreement by which the respondent inter alia agreed to construct six one bedroom ownership Holiday Homes on plot No. 16. Out of said six, Holiday Homes, the respondent agreed to sell one Holiday Home to the applicant for a consideration of Rs. 1,50,000/-. It is the case of the applicant that pursuant to the said agreement the respondent constructed six Holiday Homes and possession of one Holiday Home was given to the applicant on 7.8.1988.

3. On 26.9.2011 the applicant through his advocate called upon the respondent to appoint an arbitrator in respect of the disputes that had arisen between the parties and suggested the name of two arbitrators.

4. By reply dated 26.9.2011, the respondent through his advocate, inter alia, contended that the claim raised in the notice was barred by limitation since

agreement was executed in the year 1988.

5. Thereafter by another advocate's notice dated 28.10.2011, the respondent informed Advocate of the applicant that he had already sold entire property along with the structure to M/s Colonia Santa Maria Hotels Pvt. Ltd by sale deed dated 18.7.2006. The present application was filed on 17.11.2011.

6. The respondent filed reply opposing the application, inter alia, on the ground that the application was barred by limitation. Additionally, the respondent has contended that by sale deed executed in the year 2006 entire property has been transferred to third party and therefore, arbitration proceedings are not maintainable.

7. Mr. Bhobe, learned Counsel appearing for the applicant submitted that the respondent was bound to convey title in respect of Holiday Home of which possession was given to the applicant to a co-operative society which was to be formed by the respondent. Learned Counsel further submits that issue of limitation can also be referred to the arbitrator and considering the facts and circumstances it would be just and proper to refer the matter to the arbitrator by giving liberty to the respondent to raise the issue of limitation before Arbitrator. Mr. Bhobe placed reliance upon the judgment of Apex Court in the case of Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd., .

8. Per contra, Mr. Kamat reiterated the objections taken in the reply and placed reliance upon the Judgment of the Apex Court in the National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., .

9. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

10. Record discloses that pursuant to the agreement dated 7.3.1988 possession of the Holiday Home was given to the applicant on 7.8.1988. Perusal of the record further discloses that thereafter the applicant did not chose to have any written communication with the respondent in connection with the agreement dated 7.3.1988. In the case of National Insurance Company (supra) relied upon by Mr. Kamat, after referring to Constitutional Judgment of the Apex Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, in paragraphs 22, the Supreme Court has observed thus:-

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal u/s 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application u/s 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1 The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied u/s 11 of the Act, is a party to such an agreement.

22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

11. Therefore, the Chief Justice or his designate can decide whether the claim is dead claim or live claim.

12. In the present case the record discloses that after taking possession of the Holiday Homes on 7.8.1988 the applicant has not taken any steps by writing to the respondent to invoke his rights under the agreement dated 7.3.1988 and for the first time on 26.7.2011, the applicant sought appointment of an arbitrator in respect of the disputes he had with the respondent in connection with the agreement.

13. Therefore, it is evident that the applicant has not taken any action for a period of almost 23 years after taking possession of Holiday Home to enforce his right under the agreement dated 7.3.1988. Therefore, I have no hesitation to hold that the claim made by the applicant is dead claim. Applying the ratio of the Apex Court in the case of National Insurance company Limited (supra) the claim made by the applicant in the year 2011 has to be treated as dead claim and barred by limitation. Therefore, in my considered opinion this is not a fit case in which applicant is entitled to seek appointment of any arbitrator in the year 2011 u/s 11(6) of the Arbitration and Conciliation Act, 1996.

14. The ratio of the judgment in the case of Indian Oil Corporation Ltd (supra) does not advance the case of the applicant. In the present case the issue of limitation is not a mixed question of fact inasmuch as the material produced on record clearly discloses that from 1998 till 2011 the applicant did not choose to raise dispute in connection with the agreement dated 7.3.1988. Therefore, in my considered opinion no purpose would be served by leaving the issue of limitation

open to the Arbitral Tribunal to decide.

15. I, therefore find merit in the objection taken by Mr. Kamat, learned counsel appearing on behalf of the respondent that the claim being hopelessly time barred reference of the dispute ought not to be made to the arbitrator. In the result therefore, the application deserves to be dismissed and is accordingly dismissed with no order as to costs.