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**(2016) 09 KAR CK 0064**

**In the Karnataka High Court**

**Case No :** Civil Miscellaneous Petition No. 168 of 2014

Srinivasa Construction

APPELLANT

Vs

Mysore and Chamarajanagara District School Teacher House  
Building Co-operative Society Ltd.

RESPONDENT

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**Date of Decision :** 20-09-2016

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11(5)

**Citation :** (2017) 1 AirKarR 196 : (2016) ILRKarnataka 4441

**Hon'ble Judges :** A.S. Bopanna, J.

**Bench :** Single Bench

**Advocate :** Sri. B.M. Arun, Advocate, for the Respondent Nos. 1 to 3; Sri. Dyan Chinnappa, Sr. Counsel, Sri. Showri and H.R., Advocates, for the Petitioners

**Final Decision :** Allowed

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## **Judgement**

A.S. Bopanna, J. - The petitioners are before this Court in this petition under Section 11 (5) of the Arbitration and Conciliation Act, 1996 ("A & C Act" for short) seeking that an Arbitrator be appointed as provided under clause 21 of the agreement dated 05.09.1988 so as to resolve the disputes arising under the said agreement and the subsequent supplementary agreements between the parties.

2. The respondents have filed detailed objection statement opposing the prayer made in the petition contending that dispute as claimed by the petitioner does not subsist. Reference is made to the proceedings under the Karnataka Co-operative Societies Act, 1959 ("the KCS Act" for short) wherein the petitioner has failed. The threshold objection is however with regard to the delay. In that regard it is contended that the agreement is dated 05.09.1988 and the notice issued is dated 22.06.1996, but the instant petition is filed only on 06.09.2014. As such the instant petition is liable to be rejected only on the ground of delay is the contention.

3. In the light of the above I have heard Sri. Dhyana Chinnappa, learned senior

counsel for the petitioner and Sri. B.M. Arun, learned counsel for the respondent quite exhaustively and perused the petition papers.

4. From the very nature of the contentions urged, the fact that the agreement dated 05.09.1988 was entered into between the parties herein and that the said agreement through clause-21 thereof provides for resolution of disputes by resorting to arbitration is not seriously in dispute. Even with regard to the differences having arisen between the parties relating to the agreement also, the same cannot be in dispute since the petitioners are demanding payment for the work carried out towards the development of the residential layout while the respondents are disputing the same and in fact they are also contending that due to the default of the petitioners and the prolonged litigation the formation of the layout has not been completed and the members of the respondent society have been denied the benefit of the housing sites and exposed to hardship. It is also the case of the respondents that the agreement has been terminated. In such situation, in a normal circumstance, the petition would not have required any other consideration except to appoint the Arbitrator and leave all issues for consideration therein. However, since the question of delay is very vehemently raised in the instant petition, that aspect of the matter requires consideration so as to place in its correct perspective by keeping in view the legal position referred by the learned senior counsel and the learned counsel representing the parties and thereafter arrive at the conclusion.

5. The learned senior counsel for the petitioner in that view on referring to the proceedings that had been initiated by the petitioners under Section 70 of the KCS Act and the order dated 02.08.2008 (Annexure-L) passed therein and also the order dated 29.08.2013 (Annexure-S) passed in appeal by the Karnataka Appellate Tribunal ("KAT for short) would contend that the petitioners were prosecuting the proceedings before a different forum and the need for resorting to the instant proceeding seeking arbitration arose only because the KAT held that the petitioners not being members of the respondent society cannot maintain a dispute under the KCS Act. Hence it is contended that Section 14 of the Limitation Act would come to the aid of the petitioners and in that regard the decision in the case of *Gulbarga University v. Mallikarjun S. Kodagali* and another (AIR 2009 SC (Supp) 1281 is relied on.

6. The learned counsel for the respondents would however contend that the proceedings under the KCS Act was not bona fide prosecuted nor was the petitioner - firm a party to the said proceedings and as such the petitioners cannot claim benefit of Section 14 of Limitation Act. The limitation will therefore be as provided under Articles 55 or 113 to the schedule of the Limitation Act. If that be so the petition is to be dismissed is the contention. The learned counsel has relied on the decisions in the case of *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others* [(2008) 7 SCC 169] and in the case of *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* [(1993) 4 SCC 338] on that aspect.

7. Having perused the decisions cited in the background of the contentions urged herein, I am of the considered opinion that the question relating to applicability of Section 14 of Limitation Act to exclude the time spent in an alternate proceedings or otherwise is required to be adverted in the proceedings when the merits of the rival contentions will arise for consideration wherein it is also to be decided whether the claim is barred by time, if ultimately a decision is taken in the instant case to appoint an Arbitrator. In such event, the contentions on that aspect as noticed above and the view taken by the Hon"ble Supreme Court will still be open for consideration by the Arbitrator to decide as to whether the claim is to be rejected on the ground as being barred by limitation or whether the alternate proceeding would save that situation. Hence leaving open that aspect, the issue which is to be considered herein is as to whether the petitioners had slept over their right; have they allowed the claim to be a stale and dead one even to the extent of seeking appointment of an Arbitrator and have they only woken up in the year 2014 relating to the claim raised in the year 1996 by issue of notice relating to the agreement of the year 1988 and in that circumstance whether a petition under Section 11 of the A & C Act could be entertained and an Arbitrator be appointed.

8. In order to appreciate the legal position in that regard, the decisions relied on by the learned counsel for the respondents will have to be noticed. In the case of SBP & Co. v. Patel Engineering Ltd. and another [(2005) 8 SCC 618] the position has been explained as hereunder;

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that, question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

(Emphasis supplied)

9. In the case of Indian Oil Corporation Limited v. SPS Engineering Limited [(2011)3 SCC 507], it is held as hereunder;

"14. To find out whether a claim is barred by res judicata, or whether a claim is "mala fide", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under section 11 of the Act is whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under section 11 of the Act. The Chief Justice or his Designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration : If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his Designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under section 11 of the Act.

15. An application under section 11 of the Act is expected to contain pleadings about the existence of a dispute and the existence of an arbitration agreement to decide such dispute. The applicant is not expected to justify the claim or plead exhaustively in regard to limitation or produce documents to demonstrate that the claim is within time in a proceedings under section 11 of the Act. That issue should normally be left to the Arbitral Tribunal. If the Chief Justice or his designate is of the view that in addition to examining whether there is an arbitration agreement between the parties, he should consider the issue whether the claim is a dead one (long time barred) or whether there has been satisfaction of mutual rights and obligation under the contract, he should record his intention to do so and give an opportunity to the parties to place their materials on such issue. Unless parties are put on notice that such an issue will be examined, they will be under the impression that only questions of jurisdiction and existence of

arbitration agreement between the parties will be considered in such proceedings."

(Emphasis supplied)

10. The position of law relating to the scope of consideration of a petition under Section 11 of A & C Act vis-a-vis the contention relating to a dead claim being barred by limitation is to be kept in view so as to find out in the facts arising in each case whether the claim was kept alive or is to be considered as having been abandoned by conduct, in the background of the elucidation made by the Hon'ble Supreme Court with an illustration. Hence, the present facts will have to be examined to come to a conclusion as to whether it can be considered as a dead one or a long barred claim which is sought to be resurrected through the instant petition, only because the notice was issued in 1996 and the present petition is filed at this stage.

11. In the above background, a perusal of the sequence of events in the instant case will disclose that in respect of the agreement and five supplementary agreements, certain issues had arisen between the parties, towards which the petitioner had issued the legal notice dated 22.06.1996 (Annexure-K) making the claim. In view of the existence of the arbitration clause in the agreement, it is no doubt true that on the demand not being complied, the natural course should have been to proceed in the direction of initiating arbitration proceedings under the law governing that aspect at that point in time. The petitioner Nos.2 and 3 herein instead of choosing the said course however raised a dispute under Section 70 of the KCS Act immediately thereafter since the respondent is a Co-operative Society governed under the said Act. The said proceedings was assigned the case No.862/1996-97 and the records would indicate that the initial proceedings was conducted on 29.01.1997 which means it was pursuant to the notice issued on 22.06.1996. The said proceedings concluded with the considered order being passed on merits, on 02.08.2008 (Annexure-L). It is around the same time, i.e., on 20.08.2008 (Annexure-R.2), the respondent society issued the notice of termination of all the above stated agreements. The petitioner Nos.2 and 3 herein not being fully satisfied with the order dated 02.08.2008 had filed an appeal before the KAT in Appeal No.594/2008. The said appeal was disposed of through the order dated 29.08.2013 (Annexure-S).

12. By the above said order, the KAT arrived at the conclusion that the initiation of the proceedings under Section 70 of the KCS Act was without jurisdiction since the petitioners not being members of the respondent society could not have raised the dispute under the said provision. In that view, the order dated 02.08.2008 was set aside. Immediately on such order dated 29.08.2013 being passed by KAT the petitioner got issued the notice dated 28.09.2013 raising the claim against the respondent and the instant petition was filed before this Court on 06.09.2014 seeking appointment of an Arbitrator. In addition the petitioner had also filed a suit in O.S.No.27/2006 which was disposed on 02.01.2013 though to the said suit the respondent was not a party, the same related to the

property which was to be a part of the layout to be formed. The events as noticed from 22.06.1996 till the date of filing the instant petition on 06.09.2014 would disclose that the matter was not abandoned, but was being agitated before a different forum.

13. The learned counsel for the respondent would however contend that the said proceedings under the KCS Act was not initiated by the partnership firm with whom the agreement was entered and even in the said proceedings there is no pleading with regard to the arbitration being available and the bona fide reasons for which the said proceedings under KCS Act was continued. However, what cannot be disputed is that the applicants in the proceedings under Section 70 of the KCS Act are the partners of the first petitioner herein and they have joined the instant petition as petitioner Nos.2 and 3. That apart as rightly pointed out by the learned senior counsel for the petitioners the proceedings under the KCS Act also makes reference to petitioner No. 1 firm and the nature of the transaction entered into between the parties. The issue that arose for consideration in the said proceedings is the same as the dispute that is being presently raised. Insofar as the contention that there is no pleading or material to indicate that the said proceedings had been bona fide prosecuted is not an issue which is required to be considered in the scope of this petition since that is an aspect which would arise in the Arbitration proceedings wherein a contention is urged in that regard to save the claim from being barred by time by referring to Section 14 of the Limitation Act. That apart the applicability of the time frame under Articles 55 and 113 of the Limitation Act will also arise in that context, but insofar as the instant petition, even if the time stipulated therein is taken note, the appeal No.594/2008 was disposed of by the KAT on 29.08.2013 holding that the said proceedings lacked jurisdiction and the instant petition was filed 06.09.2014 which is within the said period. Therefore, if those aspects of the matter are also adverted to in detail it would amount to deciding the validity of the claim itself which exercise is not to be undertaken in the proceedings of the present nature as is held by the Hon''ble Supreme Court in the decisions noticed supra. Being guided by the said decisions, the events as has unfolded herein would disclose that the petitioners had not abandoned or slept over the matter without taking any steps after issue of the notice dated 22.06.1996 to assert their right and pursue the claim. On the other hand it was being agitated in a different forum. Hence, the dispute cannot be considered as a dead one. However, all contentions on merits including limitation aspect with regard to the claim will have to be left open to be adjudicated by the Arbitrator.

14. For all the afore stated reasons, the following:

#### ORDER

(i) The petition is allowed, leaving open all contentions on merits including question of limitation to be urged before the learned Arbitrator.

(ii) In that view, Justice Sri. A.V. Chandrashekhara, Former Judge of this Court is

appointed as the Sole Arbitrator to enter upon reference and resolve the dispute between the parties, in terms of law and the Rules governing the Arbitration Centre, Bangalore.

(iii) Registry is directed to dispatch a copy of this order to the Arbitration Centre for further action in the matter.

(iv) The original documents, if any sought by the parties shall be returned to them by the Registry.