

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF JUNE, 2022

BEFORE

THE HON'BLE MR. RITU RAJ AWASTHI, CHIEF JUSTICE

C.M.P. NO. 24 OF 2022

BETWEEN:

M/S SOBHA LIMITED
[FORMERLY SOBHA DEVELOPERS LIMITED]
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 1956
HAVING REGISTERED OFFICE AT
"SOBHA", SARJAPURA-MARATHALLI RING ROAD
BELLANDUR POST
BENGALURU - 560 103
REPRESENTED BY ITS AUTHORISED SIGNATORY
SRI RAJESH MARATHE

... PETITIONER

(BY SRI MADHUKAR M DESHPANDE, ADVOCATE)

AND:

1 . M/S NAVA VISHWA SHASHI VIJAYA
KRISHNA PROPERTIES PVT. LTD.,
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 1956,
HAVING REGISTERED OFFICE PRESENTLY AT
NO.25, 15TH MAIN ROAD, RMV EXTENSION
SADASHIVANAGAR, BENGALURU - 560 003.
REPRESENTED BY ITS DIRECTOR
E-MAIL: cs@necltd.com

2 . MR. SURYANARAYANA ARUMILLI
S/O NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
DIRECTOR
NVSVK PROPERTIES PVT. LTD.
PLOT NO.A33, FILM NAGAR
APOLLO HOSPITAL, JUBILEE HILLS
HYDERABAD - 500 096.

- 3 . MS. LAKSHMI PRIYADARSHINI CHINTA
D/O. NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
CEO AND DIRECTOR
NVSVK PROPERTIES PVT. LTD.,
PLOT NO.A33, SRI VISWANVITHA
ROAD NO.11, FILM NAGAR
JUBILEE HILLS
HYDERABAD – 500 033.
- 4 . MS. CHINTA SAISUDHA
D/O NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
DIRECTOR
NVSVK PROPERTIES PVT. LTD.,
PLOT NO.854/B, ROAD NO.44
JUBILLE HILLS
HYDERABAD – 500 033.
- 5 . MR. BHARATH REDDY GOPU
S/O NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
DIRECTOR
NVSVK PROPERTIES PVT. LTD.
11-1-44, KOTHURU ROAD
KOVURU
NELLORE – 524 137.
- 6 . MR. SASIDHAR CHINTA
S/O NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
DIRECTOR
NVSVK PROPERTIES PVT. LTD.
PLOT NO.32, 33 ROAD NO.11
NEXT TO M.P. RAJAGOPAL HOUSE,
FILM NAGAR, JUBILEE HILLS
HYDERABAD – 500 033.

ALSO AT:

PLOT NO.550, A/1 ROAD NO.92
JUBILEE HILLS - PHASE III
HYDERABAD – 560 032.

7 . MR. UDDARAJU BANGAR RAJU
S/O NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
2-7-8A, PENNUMATSAAVARI STREET
SIVA RAO PETA BHIMAVARAM
WEST GODAVARI – 534 202.

8 . MR. ZARNA BHARATH SHINGALA
S/O NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
H NO.1-8-472, PLOT NO.131
NEW MCH COLONY
DILSUKHNAGAR
HYDERABAD – 500 060.

9 . MR. G.M. VIJAYKUMAR
S/O NOT KNOWN TO THE PETITIONER
MAJOR BY AGE
EX-MANAGING DIRECTOR AND
AUTHORISED SIGNATORY
NVSVK PROPERTIES PVT. LTD.
NO.25, 15TH MAIN ROAD
RMV EXTENSION
SADASHIVANAGAR
BENGALURU – 560 003.

ALSO AT:

NO.22/5, B.R. HILLS ROAD
CHAMARAJ NAGAR
KARNATAKA – 571 313

ALSO AT

C/O. MR. CHINTA SASIDHAR
PLOT NO.32, 33, ROAD NO.11
NEXT TO M.P. RAJAGOPAL HOUSE
FILM NAGAR
JUBILLE HILLS
HYDERABAD – 500 033.

... RESPONDENTS

THIS CMP IS FILED UNDER SECTION 11(6) OF THE ARBITRATION AND CONCILIATION ACT 1996, PRAYING TO APPOINT AN ARBITRATOR TO ADJUDICATE THE DISPUTES THAT HAVE ARISEN BETWEEN THE PETITIONER AND THE RESPONDENTS AS PER CLAUSE 11 OF THE WORK ORDER DATED 15.01.2014 (ANNEXURE-'A') AND ETC.

THIS PETITION, HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

Heard counsel for the petitioner and perused the record.

2. The Civil Miscellaneus Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the dispute that has arisen between the petitioner and respondents as per clause 11 of the Work Order dated 15.01.2014 (Annexure-'A').

3. The facts of the case in brevity are that the 1st respondent approached the petitioner and informed that it is interested in entrusting design and construction of residential building work at No.25, 15th Main Road, 10th Cross, RMV Extension, Bangalore, on a plot. Accordingly 1st respondent issued Work Order dated 15.01.2014 in favour of the petitioner. It is alleged that the respondents also entrusted to the petitioner

the work of carrying out residential building construction work at their Plot No.32-33, Road No.11, Next to M.P. Rajagopal House, Film Nagar, Jubilee Hills, Hyderabad and the petitioner agreed for the same.

4. It is submitted that the petitioner had completed construction works of both the residential buildings during the period 2014 to 2018. The possession of the buildings situated at Bangalore and Hyderabad were handed over to respondents and the same has been accepted by the respondents without any demur. The respondents are in complete occupation and enjoyment of the same. However, they have not paid the balance amount for construction work done by the petitioner. The respondents have made part payment and have paid only Rs.3,53,57,520/-. The respondents are required to pay a sum of Rs.18,44,30,380/- along with interest as balance amount which is due to the petitioner. The petitioner has repeatedly requested the respondents to make the payment of the balance amount, however, the respondents did not bother to reply to the letters of the petitioner or make the payment of the balance amount with interest. The petitioner has sent several letters to the

respondents. The petitioner has invoked clause 11 of the Work Order by sending a notice dated 14.07.2020 to respondents and nominated Sri. S.S.Nagarale, retired District Judge as Sole Arbitrator. The said notice has been served on respondent No.1 on 27.07.2020. However, he has not sent any reply. The petitioner has received the reply only from respondent Nos.2 to 9 and they have baldly denied the lawful claim made by the petitioner. The respondent Nos.2 to 9 are the Directors / officials of respondent No.1. The petitioner is therefore left with no other option but to file the instant petition under Section 11(6) for appointment of Arbitrator. The petitioner has also filed Commercial A.A. No. 9/2021 before the City Civil and Sessions Judge, Bengaluru, under Section 9 of the Arbitration and Conciliation Act.

5. Learned counsel for the petitioner has placed reliance on the Hon'ble Supreme Court's decisions in *MTNL v. Canara Bank*¹, and *Punjab State v. Dina Nath*², to submit and establish that there is a valid arbitration agreement in existence between the petitioner and the Respondents.

¹ (2020) 12 SCC 767

² (2007) 5 SCC 28

6. Reliance is also placed upon decisions of the Hon'ble Supreme Court in *Mohd. Masroor Shaikh v. Bharat Bhushan Gupta*³ and *Sanjiv Prakash v. Seema Kukreja*⁴ to submit that this Court has a limited scope of interference at this referral stage under Section 11 of the Act of 1996 for appointment of arbitrator, particularly after the introduction of Section 6A post the 2015 Amendment to the Act of 1996. Hence, the power of a court under Section 11 should be limited to viewing whether an arbitration agreement exists between the parties and any elaborate review of facts and law which appears to be arguable would be non-determinable at the stage of reference.

7. The respondents have remained unrepresented in view of the office objection raised to seek clarification as to how Respondents No. 2 to 9 have been made parties in this petition, when those are not parties in the work order vide Annexure-'A'. However, office objection stands overruled.

8. The issue before this Court is required to determine in the present petition as to whether the prayer of the petitioner

³ (2022) 4 SCC 156

⁴ (2021) 9 SCC 732

seeking appointment of an Arbitrator under the provisions of Section 11 of the Act of 1996 is maintainable in view of Clause 11 of the work order dated 15.01.2014, which stipulates that in the event of failure of parties to resolve their dispute through conciliation, they shall refer their dispute to the sole arbitrator under the Act of 1996, which has not been resorted to by the petitioner.

9. The work order dated 15.01.2014 at Annexure-'A' contains an arbitration clause for adjudication of the dispute, which is as under:

"Clause 11- In the event of any dispute arises out of this work order, which could not be settled through conciliation between the parties concerned, shall be referred to the sole arbitrator appointed by awarder in accordance with the Arbitration and Reconciliation Act and the arbitration award shall be binding on all the parties concerned and final. Place of arbitration is Bangalore."

10. It is clear from the materials on record that the dispute, particularly concerning the Bengaluru property, has arisen between the parties in relation to the aforesaid work

order. A bare perusal of the aforesaid Clause makes it manifestly clear that parties have mutually made an arrangement to initiate conciliation to resolve the dispute and if differences were still left unresolved after the stage of conciliation, then the dispute was agreed to be referred to arbitration.

11. Part III of the Act of 1996 deals with conciliation.

Section 61 provides:

61. Application and scope.—(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto.

(2) This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

Section 62 speaks of commencement of conciliation proceedings, which provides that a party initiating conciliation shall send to the other party a written invitation to conciliate under Part III, briefly identifying the subject of the dispute and the conciliation proceedings shall commence when the other

party accepts in writing the invitation of conciliation. If the other party rejects the invitation, there will be no conciliation proceedings. The conciliator provides guidance as provided for under Section 67 of the Act of 1996, which is to only assist the parties in an independent and impartial manner to reach a conciliatory settlement of their dispute. Under Section 73, the conciliator formulates the terms of a possible settlement when it appears to him or her that there exist elements of a settlement which is acceptable to the parties. Nonetheless, it is the parties who are required to reach an agreement on a settlement of dispute whereby the conciliator merely authenticates the settlement agreement.

12. The language in Clause 11 of the work order dated 15.01.2014 where an initial step of conciliation had been agreed for between the petitioner and respondent, clearly shows the confidence which the parties had in each other to resolve the dispute and hence, provides to refer the dispute to arbitration in case such conciliation fails; thereby, making it a precondition before further referring the dispute for arbitration.

13. In the instant case, from the correspondence exchanged between the parties at Annexures-B to F2, it is clearly seen that no steps have been taken nor any attempt was made by the petitioner to initiate conciliation proceedings with the Respondents before issuing the notice dated 14.07.2020 that invoked the arbitration clause for resolving the dispute by referring it to arbitration, which happens to be a condition precedent as seen from the set-up of Clause 11 of the work order dated 15.01.2014 for triggering the process of arbitration. However, by approaching this Court for seeking appointment of an Arbitrator, it appears the petitioner is trying to bypass or skip this preceding condition of taking recourse to conciliation, thereby making an attempt to render the substance of Clause 11 of the work order as ineffectual.

14. Hence, a question also arises at this point as to whether the petitioner has satisfied the conditions for appointment of an arbitrator under Section 11(6) of the Act of 1996 and if this Court is justified to consider this question at this

stage. At this juncture, I may refer to Paras 39 and 47(iv) of *SBP & Co. v. Patel Engg. Ltd.*,⁵ which are as follows:

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

⁵ (2005) 8 SCC 618

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.

47. We, therefore, sum up our conclusions as follows:

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an

institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

15. In the aforesaid decision of the Constitution Bench, the Hon'ble Supreme Court has emphasized in paras 39 and 47(iv) whether the petitioner has satisfied the condition for appointing the Arbitrator under Section 11(6) of the Act of 1996. The opening words of Section 11(6) read along with clause (a) of the sub-section are "where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure". Here, the petitioner has failed to act as required under the appointment procedure of initiating conciliation proceedings with the Respondents before referring the dispute for arbitration by invoking Clause 11 of the work order which carries the arbitration clause. This also falls foul of the principle recognized by the Hon'ble Apex Court in *M.K. Shah Engineers & Contractors v. State of M.P.*,⁶ that the steps preceding the coming into operation of the arbitration clause are

⁶ (1999) 2 SCC 594

essential in nature and parties cannot bypass or skip the prerequisites to invoke arbitration directly.

16. In view of the aforesaid discussion, I am of the view that where an agreed procedure of dispute resolution has been made a condition precedent for invoking the arbitration clause, the same is required to be followed.

17. The learned counsel for the petitioner has stressed on the limited scope of interference of this Court under Section 11 of the Act of 1996 for the appointment of an arbitrator by relying on *Mohd. Masroor Shaikh v. Bharat Bhushan Gupta* (supra) and *Sanjiv Prakash v. Seema Kukreja* (supra) whereby this Court should not indulge in a mini-trial at this referral stage. It is made clear that nowhere in the instant matter is this Court pertained to delving into an elaborate review of facts and law, which is subject to the jurisdiction of the arbitrator. As stated supra, this Court is concerned with the satisfaction of the petitioner's making out a prima facie arbitrable case at this referral stage under Section 11 and particularly, sub-section (6) of the said provision.

18. Similar view has also been reiterated by the Hon'ble Supreme Court in *DLF Home Developers Limited v. Rajapura Homes (P) Ltd.*,⁷ but it has also clearly stated that even within its limited jurisdiction under Section 11, "[this] Court is not denuded of its judicial function to look beyond the bare existence of an arbitration clause to cut the dead wood." This decision had also followed the eloquent clarification by the Hon'ble Apex Court in *Vidya Drolia v. Durga Trading Corpn.*,⁸ where it had observed that "the court may for legitimate reasons, to prevent wastage of public resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal."

19. Taking further recourse to these views of the Hon'ble Supreme Court and without causing any prejudice to the proceedings before the Arbitral Tribunal, I would like to make two cursory observations as *obiter dicta* in the capacity of my judicial discretion that had appeared to me during the prima facie review. First, the instant petition sought for an appointment

⁷ 2021 SCC Online SC 781

⁸ (2021) 2 SCC 1, para 139

of an arbitrator as per the work order dated 15.01.2014 pertaining to the dispute between the parties related to the Hyderabad property as well, in addition to the Bengaluru property. It is interesting to note that the work order forms the existence of an arbitration agreement concerning only the Bengaluru property. There is no written agreement between the parties concerning the Hyderabad property that may refer to a contract formation and hence, does not establish the existence of an arbitration agreement in that regard. Second, the claim also appears to be a dead one, albeit not patently, in light of a technical distinction made to the elucidating illustration for what is a dead or time-barred claim in the Hon'ble Supreme Court's decision in *Indian Oil Corpn. Ltd. v. SPS Engg. Ltd.*⁹ The Hon'ble Apex Court, speaking through Raveendran, J., observed that:

14. [...] 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

⁹ (2011) 3 SCC 507

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.

Applying this illustration on the facts of the instant case, there is no doubt that the claim for payment has been made by the petitioner beyond three years of completing the work i.e., in 2018 but within five years of completion of work. However, as per the cheque placed on record by the petitioner dated 14.08.2018, which was the last payment received by the petitioner, this does not fall within the three year timeline with respect to the concerned claim made through this instant petition filed on 03.01.2022, which had expired on 14.08.2021 and hence, may warrant this Court to enter into the question whether the claim is barred by limitation or not.

20. In view of the above, it is better to leave the question of limitation at this stage for final determination by the

Tribunal as it requires detail examination which may also require the parties to place the evidence on record in this regard.

21. In the end, I am of the considered view that the petitioner having not fulfilled the precondition of conciliation before invoking arbitration clause under the work order dated 15.01.2014, has no right to invoke the arbitration clause at this stage. Petition under Section 11(6) of the Arbitration and Conciliation Act is premature and liable to be dismissed. It is hereby dismissed.

Before parting with the judgment, this Court places on record its deep appreciation for the research and assistance rendered by Mr. Sourabh Roy, Law-Clerk-cum-Research Assistant.

**Sd/-
CHIEF JUSTICE**