

**Alfa Constructions Vs. Vinod Kumar Thareja**

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**Court :** Madhya Pradesh

**Decided On :** Apr-09-2014

**Judge :** Alok Aradhe

**Appeal No. :** Arbitration Case No. 108 of 2011

**Appellant :** Alfa Constructions

**Respondent :** Vinod Kumar Thareja

**Judgement :**

**Alok Aradhe, J.**

1. By means of this petition under section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the Act), the petitioner seeks appointment of an arbitrator.

2. The facts, giving rise to filing of the petition, briefly stated, are that the petitioner is a builder and developer, whereas the respondent is the owner of plot ad measuring 11000 square feet situate at Idgah Hills, Bhopal. The parties entered into a joint venture agreement on 2-7-2004 under which the petitioner agreed to construct duplexes on the land in question subject to the terms and conditions, enumerated in the aforesaid agreement. The sale proceeds were to be divided in the ratio of 55% and 45% respectively between the petitioner and the respondent. The Municipal Corporation Bhopal granted the permission for construction of duplexes on 16-6-2004 and thereafter the construction of the duplexes

commenced. The petitioner executed sale deeds on behalf of the respondent as his attorney. However, the Municipal Corporation demolished all the duplexes constructed by the petitioner on 25-6-2005. It is the case of the petitioner that he has paid a sum of Rs.16,85,000/- to the respondent. However, the respondent despite repeated requests did not refund the amount to the petitioner.

3. Clause 19 of the joint venture agreement provides that if any dispute arises between the parties, the same can be resolved by appointing one arbitrator each. The petitioner by a notice dated 27-4-2011 invoked the arbitration clause however, the respondent did not respond. In the aforesaid factual backdrop, the petitioner has approached this Court.

4. Learned counsel for the petitioner submitted that clause 19 of the joint venture agreement is in contravention of section 10 of the Act and, therefore, sole arbitrator should be appointed. It is further submitted that the Supreme Court vide order dated 8-2-2011 passed in Civil Appeal No. 1493/2011 has granted liberty to the petitioner to seek redressal of its grievance against the respondent and arbitrator has the authority to decide about the maintainability of the claim raised before him. On the other hand, learned counsel for the respondent submitted that the agreement in question is not duly stamped. In this connection reference has been made to Article 5(d) of Schedule I-A of the Indian Stamp Act, 1899 (hereinafter referred to as the 1899 Act) as well as the decision of the Supreme Court in the case of M/s SMS Tea Estates Pvt. Ltd. v. M/s Chandmari Tea Co. Pvt. Ltd., 2011 AIR SCW 4484. Therefore, the agreement should be impounded. It is also urged that the claim of the petitioner is a dead one and is barred by limitation and, therefore, the same cannot be referred to the arbitrator.

5. I have considered the respective submissions made by learned counsel for the parties. Before proceeding further I deem it appropriate to examine the question whether the agreement is duly stamped as required under Article 5(d) of Schedule I-A of the 1899 Act. Article 5(d) reads as under :

"5. Agreement or memorandum of an agreement:

(d) If relating to the construction of a building on a land by a person other than the owner or lessee of such land and having a stipulation that after construction, such building shall be held jointly or severally by that other person and the owner or the lessee, as the case may be, of such land, or that it shall be held jointly or severally by them and the remaining part thereof shall be sold jointly or severally by them"

6. In the instant case, from perusal of relevant clauses, namely, (ii), (iii), (vi), (viii), (x) and (xii) of the joint venture agreement dated 2-7-2004 it is evident that the agreement in question does not fall within the purview of Article 5(d) of Schedule I-A of the 1899 Act as there is no stipulation in the agreement that building shall be held jointly or severally by the person other than the owner and remaining part thereof shall be sold jointly or severally by them. Therefore, the same is not required to be stamped as per Article 5(d) of Schedule I-A of the 1899 Act.

7. In *Speech and Software Technologies (India) P. Ltd. v. NEOS Interactive Ltd.*, 2009(3) MPLJ (S.C.) 1 : (2009) 1 SCC 475 it has been held that the preliminary matters to be considered by the Court while dealing with the application under section 11(6) of the Act, are namely, (i) existence of an arbitration agreement; (ii) territorial jurisdiction; (iii) whether there are live issues to be referred to arbitrator; and (iv) whether the application is filed within the period of limitation prescribed by law.

8. In the case of *Anil Kumar v. B. S. Neelkanta and others*, 2010(3) MPU (S.C.) 514 : (2010) 5 SCC 407 it has been held by the Supreme Court that if it is not possible to decide whether the live claim is made, without recording evidence such question should be left for decision of the arbitral tribunal. In the case of *Indian Oil Corporation v. SPS Engineering Ltd.*, 2011(3) MPLJ (S.C.) 73 : (2011) 3 SCC 507 it has been held that in proceeding under section 11(6) of the Act, merits of the claim or maintainability or tenability of the claim either on the facts or law cannot be gone into. The scope of scrutiny is confined only to a claim which is evidently time barred and where there is no need of detailed consideration of evidence. It has further been held that the Court will not enter into disputed question whether the claim is barred by limitation or not and such issue should be left for decision of the arbitral tribunal.

9. In the backdrop of aforesaid legal position, the facts of the case may be seen. It is relevant to mention here that the petitioner in the petition under section 11(6) of the Act has not disclosed the date of payment of the amount to the respondent. The respondent has not filed any reply to the petition under section 11(6) of the Act. There is prima facie no material on record to hold that the claim made by the petitioner is patently a dead claim. Therefore, the question whether the claim made by the petitioner is a dead claim cannot be decided without recording evidence and, therefore, has to be left for decision of the arbitral tribunal.

10. Clause 19 of the joint venture agreement provides that if any dispute arises between the parties, they can resolve the dispute by appointing one arbitrator each. The aforesaid clause is in contravention of section 10(1) of the Act which provides that number of arbitrator shall not be an even number. It is pertinent to mention here that during course of argument, learned counsel for the parties submitted that they have no objection for appointment of Mr. Justice V. K. Agrawal, as arbitrator. Accordingly, Mr. Justice V. K. Agrawal is appointed sole arbitrator to arbitrate the dispute between the parties. The parties shall appear before him along with a copy of this order. The Office is also directed to send a copy of this order to Mr. Justice V. K. Agrawal.

11. In the result, the petition is allowed.

Petition allowed.

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