

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**ARBITRATION APPEAL NO.9 OF 2009
WITH
CIVIL APPLICATION NO.11 OF 2009**

Maharashtra Krushna Valley Development
Corporation, Pune.

..Appellant.

v/s.

M/s.M.V.Patel & Co. & Anr.

..Respondents.

Mr.Vijay D.Patil for appellants.

Mr.Nitin Thakkar a/w Manjiri Parasnis for Respondent No.1.

CORAM:- A.M.KHANWILKAR, J

DATED :- JULY 31, 2009.

P.C.

1. Heard Counsel for the parties.
2. The only contention pressed by the Counsel for the Appellant before this Court is that the arbitration remedy was barred in terms of the limitation provided in the agreement between the parties. This question has been answered by the Arbitrator in the following words:

“6.0 I have carefully examined the Arbitration agreement,

submissions of both the parties, and thereupon I decide that the Claimants are entitled to bring their claim to Arbitration and that I have jurisdiction to decide them as per the Arbitration agreement. The reasons of my ruling are as under:

(i) There exists disputes between the parties to contract. The Claimant has claimed for his various claims from time to time as per the voluminous documentary evidence filed by Claimant.

(ii) Though the Respondent contend that the Claimant has completed the work on 31.12.98, the Claimant has not in fact, actually completed whole of the work by 31.12.98 as per admission of the Respondents and correspondence originating from the Respondents subsequent to the date of 31.12.98 for example-

(A) The Respondent's Sub-divisional officer under his letter No.1003 dated 28.12.98 (Exhibit No.C-69) listed out detailed balance work in Km.No.8,9 and 10. He has also recorded that without any obstructions from the Department, the work is stand still since 15.12.1998. He has also notified to Claimant by stating that though the work is to be completed by 31.12.98, he shall start the work early and complete the balance work.

(B) The Respondent, have notified to the Claimant under their letter No.600 dated 27.1.99(Exhibit C-67) by recording the facts as -

(a) Even though the work was allowed to be completed by 31.12.98, the Claimant has not completed the same.

(b) No further extension will be given beyond 31.12.98 and that till the whole work is completed compensation will be levied with effect from 1.1.99.

(c) He has instructed to the Sub-Divisional Officer to submit proposal for Liquidated Damages since the

Claimant has not completed the work by 31.12.98.

(C) The Respondent has under his letter No.685 dated 30.1.1999 (Exhibit No.C-68) has notified the Claimants as -

(a) The Claimant has not completed the work in the extended period inspite of notices and has stopped the work since 8.12.98 without any reasons.

(b) He notified the Claimant to complete the balance work by 15.2.99 or else liquidated damages will be levied and balance work will be got done through another agency.

(iii)From the facts as above, it is apparent that work is not completed on date 31.12.98. Moreover the balance work as informed by Respondents under their notices exhibits C-69 (of 28.12.98), C-67 of 27.1.99 is of considerable magnitude, that it may not be possible to complete the same in between 28.12.98 and 31.12.98.

(iv)No completion certificate is issued by Respondents as per terms of contract under Clause 25 of the General Condition of Contract.

(v) Under Clause 18(e) of the G.C.C. The Contractor is liable to make good within such period as may be stipulated by the Engineer In Charge any defect which may develop or may be noticed before the expiry of six months from the certified date of completion and which is attributable to the Contractor. In this case, no such completion date has been certified by the Engineer in Charge. The period of one month u/c 53 of the G.C.C. therefore did not get over when I was appointed as an arbitrator. The Claimants were therefore entitled to bring their claim to Arbitration. I accordingly, hold that I have jurisdiction to enter into the claim of the Claimants and decide the disputes.”(emphasis supplied)

3. The question whether the view so taken is tenable has been answered in the affirmative by the District Court.

4. In this appeal the correctness of the view so taken on the question of limitation is in issue. To consider the same, it may be apposite to advert to clause 53 of the Arbitration agreement, which reads thus:

“53. **ARBITRATION :**

All disputes or differences in respect of which the decision is not final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows.

Within thirty days of receipt of the notice from the Contractor of his intention to refer the dispute to arbitration the Chief Engineer shall send to the Contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The Contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of the one officer from the list who shall then be appointed as the sole arbitrator. If the Contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within thirty days as stipulated, the Contractor shall send a similar list to the Chief Engineer, within fifteen days. The Chief Engineer shall then select one officer from the list and appoint him as a sole arbitrator within fifteen days.

If the Chief Engineer, fails to do so the Contractor shall communicate to the Chief Engineer, the name of one officer from the list, who shall then be the sole arbitrator.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the sole arbitrator shall be final and binding on the parties thereto. The Arbitrator shall determine the amount of cost of arbitration to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payment due to the Contractor by the Department shall not be withheld, unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and in case of awards amounting to Rs.1.00 Lakh and above, such awards shall state reasons for the amounts awarded.

Neither party is entitled to bring a claim to arbitration if the Arbitrator has not been appointed before the expiration of thirty days after defect liability period.” (emphasis supplied)

Since the last part of clause 53 refers to the defect liability period, it will be apposite to advert to clause 18(e) of the Agreement which reads thus:

“18(e) Defects Liability:

The Contractor shall be responsible to make good within such period as may be stipulated by the Engineer-in-charge any defects which may develop or may be noticed before the expiry of “six months from the certified date of completion” and which is attributable to the Contractor. All notices of such defects shall be given to the Contractor promptly. In case the Contractor fails to make good the defects, Engineer-in-charge

may employ other persons to make good such defects and all expenses consequent thereof and incidental there to shall be borne by the Contractor.

In the event Government taking over portions of works as they are completed, the liability of the Contractor under this clause for those portions shall extend to a period of two years from the actual dates on which portions of the works are taken over.”

Since the Defect Liability Clause in turn refers to six months from the “certified date of completion”, it would be appropriate to refer to clause 25 of the Agreement which reads thus:

“25. CERTIFICATE OF COMPLETION OF WORKS :

As soon as the work is completed, the Contractor shall give notice of such completion to the Engineer-in-charge and within one month of receipt of such notice, the Engineer-in-charge shall furnish the Contractor with a certificate of completion or otherwise inform him in writing of the reason for not granting the certificate.”(emphasis supplied)

3. On conjoint reading of the abovesaid clauses, I am in agreement with the view taken by the Arbitrator and as confirmed by the District Court that the dispute brought by the Respondents before the Arbitrator was well within limitation. Inasmuch as, the period provided in the Arbitration clause is before expiration of thirty days after defect liability period. The

Defect Liability period would however, commence from the certified date of completion by the Engineer incharge and would enure till six months therefrom. The certified date of completion will have to be reckoned from the certificate of completion to be issued by the Engineer incharge in terms of clause 25. In the present case, the Arbitrator has found as of fact that no such certificate was ever furnished to the Respondents. If such certification has not been issued by the Engineer incharge, it necessarily follows that the limitation for institution of Arbitration proceedings had not commenced.

4. To get over this position, the argument of the Appellant before this Court is that the communication sent by the Executive Engineer dated 19th February, 1999 will have to be treated as certificate issued by the Engineer incharge, which refers to the fact that the defective work be completed by the Respondents before 30th December, 1998 and the work is treated as completed as on 31st December, 1998. Besides relying on this document, the Appellant would also rely on the communication sent by the Respondents addressed to the Executive Engineer, which categorically states that the Respondent has completed the work on 30th December, 1998, which fact is noted in letter dated 2nd January, 1999 at page 26 and dated 6th July, 1999 at page 34, as also letter dated 13th October, 1999 at page 39.

According to the Appellant, in this correspondence the Respondent has conceded the position that the work was completed as on 30th December, 1998 itself. For which reason, the liability period would commence from that date and would enure for a period of six months therefrom which period would expire in June, 1999. Whereas the arbitration dispute is raised in January, 2000, which was obviously beyond 30 days after expiration of the defect liability period. This argument will have to be stated to be rejected. In the first place, going by the stipulations in the Agreement, the period of limitation will be ignited only upon issuance of certificate of completion by the specified officer. No more and no less. That factum cannot be answered on the basis of stand taken by the Respondent about the status of the work. Nor is it possible to answer the same on the basis of communication exchanged by the Department with the Respondent. As a matter of fact the Arbitrator has found as of fact that the officer of the Appellant had sent letters dated 27.1.1999(C67) and 30.1.1999(C68) to the Respondent(Claimant) which state that the work was not complete as on 31.12.1998 and the balance work was of considerable magnitude. Considering these letters it is too late for the Appellant to contend that the work was completed on 31.12.1998. Besides, the Appellants themselves are relying on certificate issued by the Executive Engineer on 16th July,

1999, which is purportedly a certificate issued by the Engineer incharge in terms of clause 25 of the Agreement. There is dispute about issuance of such certificate. Assuming that such certificate was issued by the Appellant, it is the date of issuance of such certificate, which will have to be reckoned in the context of clause 25 of the Agreement. If this date is kept in mind, the defect liability period would expire on 15th February, 2000. The Respondent thereafter, would get 30 days period within which the arbitration dispute could be raised. The Respondents however, admittedly resorted to arbitration dispute in January, 2000 which obviously is within limitation. The Arbitrator has analysed all the relevant documents to conclude that no completion certificate was issued by the Appellants as per the contract under clause 25 of the general condition of contract. There is no reason to doubt the correctness of this position. Assuming that the claim of the Appellant that such certificate was duly furnished to the Respondent is to be accepted as it is, the date of said certificate is 16th July, 1999. That would not take the matter any further. For, on conjoint reading of clauses, 53, 18(e) and 25 of the Agreement, the position which emerges is that the date of issuance of such certificate i.e. 16th July, 1999 will have to be reckoned as the relevant date in the context of clause 25 of the agreement and as aforesaid the defect liability period would enure till six months

therefrom. The arbitration dispute having been resorted to within such time the arbitrator has justly concluded that the same was within limitation.

5. While parting it is placed on record that the Counsel for the Respondent in all fairness submits that if the Court were to uphold the opinion recorded by the arbitrator and as confirmed by the District Court, it may not be necessary to delve upon his argument that the limitation clause in the agreement is against public policy and hit by section 28 of the Contract Act as it would denude the Respondent of his remedy of arbitration.

6. Accordingly, there is no substance in the argument canvassed before this Court. Hence Appeal should fail. The same is dismissed. In view of the order passed in Appeal Civil Application also stands dismissed.

7. At this stage, Counsel for the Appellants submits that the Appellants are inclined to carry the matter in appeal for which reason operation of the award as confirmed by the District court as well as in terms of this order be stayed. This request can be accepted only if the Appellants were to deposit the decretal amount within specified time, that being a money decree. It is

therefore ordered that in the interest of justice, that the decree may not be executed on condition that the Appellants shall deposit the decretal amount in the Executing Court within one week from today. I am showing this indulgence notwithstanding the non-observation of the statement made by the Appellants before the Executing Court as back as on 27th February, 2009 that the decretal amount will be deposited within twelve weeks therefrom. If the amount is deposited within time, the decree shall not be executed for a period of six weeks.

(A.M.KHANWILKAR,J)