

**THE HIGH COURT OF MADHYA PRADESH****AC No. 57/2018****(M/s SHAKTI TRADERS v. M.P. STATE MINING CORPORATION)****JABALPUR, DATED : 01.07.2019**

Shri Siddharth Gupta, Advocate and Shri Amit Garg, Advocate for the applicant.

Shri Aditya Khandekar, Advocate for the respondent.

This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short “the Act”) for appointment of an Arbitrator between the parties for settlement of their dispute.

2. The case of the applicant is that the applicant is in the business of sand quarrying and for this purpose they have entered into an agreement with the respondent – M.P. State Mining Corporation on 24.07.2013 (Annexure P-1) in relation to excavation and trading of sand quarries of Tehsil Palera, District Tikamgarh. Apparently, a dispute has arisen between the parties relating to the said agreement, which also provides for the resolution of the same through an Arbitrator as per Clause 8 of the agreement provided that such dispute is referred to the Managing Director of the Corporation within seven days from the date of cause of action.

3. Learned counsel for the applicant has submitted that the Clause 8 of the agreement dated 24.07.2013 (Annexure P-1) provides that the dispute has to be referred to the Managing Director of the respondent - Corporation within seven days of its cause of action. He submits that the first cause of action arose in the month of February, 2015 and subsequently, the contract was also terminated on 20<sup>th</sup> March, 2017,

however, letter for appointment of the Arbitrator was issued only on 13.02.2017 and subsequently, on 05.07.2017, which are filed as Annexure P-8 and P-12 respectively. Thus, the dispute was raised almost after three months from the date of termination of the contract and since no reply to the same was sent by the respondent, this application has been filed.

4. Learned counsel for the applicant has relied upon a three Judge Bench judgment passed by the Apex Court in the case of **Grasim Industries Limited v. State of Kerala (2018) 14 SCC 265** to submit that the contract which limits the rights of the parties to approach to the Court, would be void.

5. On the other hand, learned counsel for the respondent has opposed the prayer and has submitted that in the present case, even the notices which are alleged to have been issued by the applicant, were not served on the respondent, as even from the delivery reports submitted by the applicant which are annexed to the application at page 41 and 49, it is clear that the same were served on Shiksha Mandal and not on the respondent – M.P. State Mining Corporation and thus, the same would not be treated to be the compliance of Clause 8 of the agreement and since there is no invocation of arbitration clause by the applicant, there is no question of appointment of Arbitrator. Learned counsel has relied upon a judgment rendered by the coordinate Bench of this Court in the case of **Star Mineral Resources Pvt. Ltd. v. M.P. State Mining Corporation Ltd.** passed on 30.06.2016 in A.C. No.39/2016 in which also the same issue was involved that the arbitration clause was not invoked by the applicant within the time limit provided in the agreement and while scrutinizing the issue, it has been held that if the applicant has failed to follow the agreed procedure as mentioned in Clause 8 of the agreement then in such circumstances, the application for appointment of an Arbitrator cannot be entertained.

6. To rebut the aforesaid contention, learned counsel for the applicant has submitted that the notices were sent by the applicant on two occasions viz. on 13.02.2017 (Annexure P-8) and on 05.07.2017 (Annexure P-12), the delivery reports of the same are also filed on record at page nos. 41 and 49, which clearly demonstrate that these notices were served on 15.02.2017 and 10.07.2017 respectively, hence, it cannot be said that the notices were not served on the respondent. Learned counsel has further submitted that it is not the case of the respondent that the notices were sent on the wrong address and hence, even if the Postal Department in its delivery report has mentioned about service of the notice on Shiksha Mandal, it cannot be said that it was not delivered on the respondent. It is further submitted that even otherwise in the delivery report it is mentioned that it was delivered on Shiksha Mandal S.O. i.e. the Sub-Office of the Postal Department. Thus, it has to be presumed that the same was delivered on the respondent through the Shiksha Mandal Sub-Office of the Postal Department which is nearer to the office of the respondent. Learned counsel has also placed reliance upon Section 27 of the General Clauses Act 1897, which refers to the “meaning of service by post” and postulates that the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Thus, it is submitted that when the notices were properly addressed and were sent on the correct address through speed post, it cannot be said that they were not sent by the applicant.

7. So far as the judgment relied upon by the learned counsel for the respondent rendered in the case of **Star Mineral Resources** (supra) is concerned, learned counsel for the applicant has submitted that identical issue has already been decided by the Apex Court in the case of **Grasim Industries** (supra). He has submitted that since the aforesaid judgment is

rendered by the Apex Court subsequent to the order passed by a coordinate Bench of this Court in A.C. No.39/2016 (supra), the decision passed in A.C. No.39/2016 (supra) would not be binding on this Court and the law governing the field at present would be as has been declared by the Apex Court in **Grasim Industries** (supra).

8. Heard learned counsel for the parties and perused the record.

9. From the record, this Court finds that the arbitration clause in the agreement dated 24.07.2013 (Annexure P-1) reads as under:-

**“8. विवाद और उनका निपटारा**

निगम एवं ठेकेदार के मध्य निष्पादित अनुबंध से संबंधित किसी विवाद के निराकरण हेतु विवाद उत्पन्न होने के सात दिवसों के भीतर ठेकेदार द्वारा निगम के प्रबंध संचालक को औपचारिक रूप से लिखित में विवाद का सारभूत अधिसूचित किया जावेगा। अधिसूचित करने के तीस दिवस के भीतर निगम के प्रबंध संचालक संबंधित पक्षों की सुनवाई कर इसका निराकरण कर सकेंगे। यदि निगम के प्रबंध संचालक 30 दिवस में उन्हें संदर्भित किये गये विवाद का समाधान करने में असमर्थ रहते हैं तब ऐसी स्थिति में विवाद का निपटारा निगम के प्रबंध संचालक द्वारा नामांकित व्यक्ति के समक्ष आरबीट्रेशन एण्ड कन्सीलिएशन एक्ट 1996 के अंतर्गत संबंधित पक्षों द्वारा विवाद पंच निर्णय हेतु प्रस्तुत किया जावेगा एवं पंच द्वारा विधि सम्मत निर्णय दोनो पक्षों को मान्य होगा। किसी भी विवाद की स्थिति में किसी भी पक्ष द्वारा पंच के समक्ष रेफरेंस करने के पूर्व विवाद न्यायालय में दायर नहीं किया जा सकेगा जो कि उपरोक्त वर्णित आरबीट्रेशन एण्ड कन्सीलिएशन एक्ट 1996 के अंतर्गत नहीं आता। इसमें यदि न्यायालयीन वाद प्रस्तुत हुआ तो उस वाद के लिए केवल व्यवहार न्यायालय, भोपाल को ही श्रवणाधिकार होगा तथा अन्यत्र किसी स्थान में न्यायालयीन वाद प्रस्तुत नहीं किया जा सकेगा।”

(emphasis supplied)

10. It is the admitted fact that a dispute has arisen between the parties relating to excavation of sand and the payment to be paid to the applicant, however, the preliminary dispute before this Court is that the notices regarding reference of the dispute to the Arbitrator were not issued by the applicant within seven days time as prescribed in the

aforesaid clause. This Court finds that the notice was issued by the applicant on 13.02.2017 itself for the first time, which was served on the respondent on 15.02.2017 although in the service report it is mentioned that the place of delivery of notice is “Shiksha Mandal S.O. (Sub Office), however, this Court has no reason to disbelieve the contention raised by the learned counsel for the applicant that from the Shiksha Mandal S.O., the same were served on the respondent, as the address on the notices mentioned is M.P. State Mining Corporation Ltd. through General Manager, Paryavas Bhawan, Block No.1, Second Floor, Arera Hills, Bhopal. Otherwise also, Section 27 of the General Clauses Act would be applicable in the present case with full force. Thus, this Court has no hesitation to hold that notice for appointment of Arbitrator was served by the applicant on the correct address of the respondent and the same was properly served on the respondent.

11. Now coming to the contention regarding the invocation of arbitration clause after the prescribed period of limitation is concerned, this Court finds that so far as the judgment of the coordinate Bench of this Court in **Star Mineral Resources** (supra) is concerned, in which the same Clause 8 of the agreement has been considered by this Court and it is held that the applicant who has invoked the arbitration clause subsequent to the time limit provided in the aforesaid arbitration clause has no right to get the Arbitrator appointed, the same is distinguishable in the light of the decision rendered by the Apex Court in the case of **Grasim Industries** (supra). In **Grasim Industries** (supra), the Apex Court has also referred to Section 28 of the Contract Act and has held as under:-

“9. Having perused Clause 9 of the supplementary agreement dated 27.10.1988, we are of the view that the interpretation placed by the High Court on Clause 16, was wholly misconceived. The aforesaid clause, did not postulate the period within which a claim could have been raised by the parties to the contractual agreements. Even otherwise, we are of the view that in terms of Section 28 of the

Contract Act, 1872, such a stipulation in a contractual obligation would not be valid and binding.

10. Section 28 of the Act is reproduced below:

**“28 Agreements in restraint of legal proceedings, void.**

— Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,  
is void to that extent.

*Exception 1 — Saving of contract to refer to arbitration dispute that may arise.* — This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

*Exception 2. - Saving of contract to refer questions that have already arisen.* — Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

*Exception 3. - Saving of a guarantee agreement of a bank or a financial institution* - This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.”

11. Section 28(b) unequivocally provides that an agreement which extinguishes the right of a party on the expiry of a specified period, would be void. Therefore, even if a restricted period for raising an

arbitral dispute had actually been provided for (as was determined in the impugned order), the same would have to be treated as void.

**12.** In view of the legal position expressed hereinabove, the limitation with reference to the claim raised by the appellant, would have to be determined only under Article 137 of the Limitation Act. Insofar as the instant aspect of the matter is concerned, the High Court found that the claim raised by the appellant was even beyond the period postulated under Article 137 of the Limitation Act. In this behalf, the High Court recorded the following observations (*Grasim Industries Ltd. v. State of Kerala, 2003 SCC OnLine Ker 630 para 12*):

“12. ....It is not actually a decision on the claim made under Annexure-X, but it is a decision of the arbitration clause in the Agreement. Apart from that, the claim put forward by the applicant in respect of the shortage of supply of raw materials from 1988-1989 onwards also is barred by limitation under Article 137 of the Limitation Act. The Supreme Court in *Steel Authority of India Limited v. J.C Budharaja [(1999) 8 SCC 122]* held that the provisions of Art.137 of the Limitation Act would apply and any action should be brought within three years from the date when the cause of action to recover the amount rose. Thus, the request for appointment of arbitrator will have only to be rejected.”

**13.** It is not possible for us to accept the aforesaid determination rendered by the High Court for the simple reason that in the claim raised by the appellant in the notice, dated 1.2.2002, it was inter alia asserted as under:

“While the matter was so pending before the Industrial Tribunal at the instance of the Labour Department of Government of Kerala, through the Labour Commissioner and the Additional Labour Commissioner, a settlement was eventually entered into with the Unions in the presence of the Hon'ble Minister for Labour on 7.7.2001, agreeing to the closure of the undertakings with effect from 1.7.2001. The fact that the Government was not in a position to supply raw material in required quantity and in the proportion agreed to on account of its not having taken enough steps to ensure continued availability of eucalyptus by planting the same is also clear from the orders of the Secretary to the Government, Labour department, in the applications for closure of the company's units at Mavoor. This has also been admitted by your department. The total amount that was paid to the employees inclusive of fixed overheads and idle wages during the period referred to above i.e June, 1999 to June

2001 came to Rs. 5999.43 lakhs is enclosed, marked as Annexure - 2 and the compensation paid to the employees as a result of the settlement came to Rs. 5559.72 lakhs is enclosed, marked as Annexure - 3.”

It is, therefore, apparent that the appellant raised a grievance with reference to issues, that emerged even upto June, 2001. Under Article 137 of the Limitation Act, the postulated period of limitation is 3 years. In the instant case, the period of limitation would be three years prior to the date of invocation of arbitration. After the appellant issued the notice dated 1.2.2002, it invoked the arbitral clause on 8.5.2002, and therefore, the period of limitation in terms of Article 137, would bar all claims prior to 9.5.1999.”

(emphasis supplied)

12. Thus, this Court, with due respect, is of the considered opinion that the judgment rendered by this Court in the case of **Star Mineral Resources** (supra) has already been superseded by the judgment of the Apex Court in **Grasim Industries** (supra) and hence, is not binding on this Court and the judgment rendered by the Apex Court in **Grasim Industries** (supra) would prevail.

13. Resultantly, the contentions raised by the respondent are hereby rejected and the application stands **allowed**.

14. As agreed between the parties, I deem it proper to provisionally appoint **Shri K.K. Trivedi, Former Judge, R/o Block No.3, Vasundhara Vihar, Near St. Thomas School, South Civil Lines, Jabalpur** (M.P.) as an Arbitrator to resolve the dispute between the parties. The Registry of this Court shall obtain consent/declaration from the said Arbitrator as per Sub-section (8) of Section 11 of the Act and place this matter before the Court on the next date of hearing.

List **after two weeks**.

**(Subodh Abhyankar)**  
**Judge**