

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMMERCIAL ARBITRATION APPLICATION NO.107 OF 2018
ALONG WITH
NOTICE OF MOTION NO.814 OF 2018
IN
COMMERCIAL ARBITRATION APPLICATION NO.107 OF 2018**

Deepdharshan Builders Pvt. Ltd.)
a Company registered under the)
Companies Act, 1956 and having its)
registered office at B-203, Goyal Shopping)
Centre, S.V. Road, Borivali (West),)
Mumbai – 400 092.) .. Applicant

Versus

1.Saroj, Widow of Satish Sunderrao Trasikar)
2. Sandeep Satish Trasikar)
3. Farida W/o Ravindra Satish Trasikar)
all of Mumbai Indian Inhabitants)
residing at 497, Ramdas Nivas,)
16th Road, Khar (W),)
Mumbai – 400 052.)
4. Suvarna Bhaskar Damankar)
also of Mumbai Indian Inhabitant)
residing at 5/86, Mahim Muktidham)
Cooperative Housing Society Ltd.)
F/5, S.L. Raheja Marg, Mahim,)
Mumbai - 400 016.) .. Respondents

Mr.G.R. Joshi, Senior Advocate a/w Mr.Deepak Shukla I/by Vinod Mistry & Co. for the applicant.

Mr.Anil Anturkar, Senior Advocate a/w Mr.Prathamesh Bhargude a/w Mr.Yatin Malvankar a/w Mr.Shubham Misar a/w Mr.Ranjit Shinde I/by Mr. Ajinkya Mohan Udane for the respondent nos.1, 2 and 4.

Mr.Bharat Rajnikant Zaveri for the respondent no.3. ---

CORAM : **R.D. DHANUKA, J.**
RESERVED ON : **1st November 2018**
PRONOUNCED ON : **22nd November 2018**

Judgment :-

1. By this application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”), the applicant seeks appointment of an arbitrator on behalf of the respondents (in addition to the arbitrator nominated by the applicant) as per clause 8 of the Memorandum of Agreed Terms (hereinafter referred to as “the said agreement”) dated 7th December 2006. The applicant has also filed a notice of motion inter alia praying for condonation of delay of 536 days in filing the present commercial arbitration application. Some of the relevant facts for the purpose of deciding this application are as under :-

2. By the said agreement dated 7th December 2006 entered into between the respondent no.1 and 2 and Mr.Ravindra Satish Trasikar, husband of the respondent no.3 who subsequently expired as vendors, the respondent no.4 as confirming party and the applicant as a purchaser, those vendors agreed to sell and transfer the suit property for a total consideration of Rs.14 crore in favour of the purchaser.

3. It is the case of the applicant that under the said agreement, the applicant paid certain amounts to the vendors. The said agreement contains arbitration clause 8 which is extracted as under :-

“8. In the event of any disputes and differences between the parties herein, the same shall be referred to the arbitration of the Arbitrators to be appointed by each parties and the decision of such Arbitrator/Umpire shall be final and binding and the same shall be governed as per the Indian Arbitration and Reconciliation Act, 1996 and the same shall take place in Mumbai.”

4. The dispute arose between the parties. It is the case of the applicant that on 24th June 2013, the respondent no.2 by his advocate's letter dated 24th June 2013 alleged that the applicant had failed to obtain the permissions as per clause 4 of the said agreement and thus the said agreement automatically stood terminated. On 23rd July 2013 and 5th August 2013, the applicant invoked the arbitration clause recorded under clause 8 of the said agreement and called upon the respondents to concur with the appointment of the arbitrator suggested by the applicant within a period of 30 days.

5. On 6th August 2013, the applicant through its advocates addressed a letter to the respondent nos.1 and 4 informing them about several correspondences exchanged between the applicant's advocate

and the advocates for the respondent nos.2 and 3 and also provided photocopies thereof. There was no response from the respondents to the said correspondence. The applicant had accordingly filed a petition under Section 9 of the Arbitration Act for seeking various interim measures.

6. On 31st August 2013, the respondent no.3 did not agree with the name of the arbitrator suggested by the applicant and suggested another name for appointment as an arbitrator.

7. On 16th September 2013, this Court dismissed the arbitration petition No.741 of 2013 filed by the applicant under Section 9 of the Arbitration Act on the ground that the said agreement was unregistered and insufficiently stamped. The said order dated 16th September 2013 however was subsequently clarified by this Court by an order dated 25th September 2013 that this Court had only refused the ad-interim relief in favour of the petitioner therein and not dismissed the petition. This Court however, passed an order that since the said agreement was inadequately stamped and was not registered, the same was required to be impounded and to be sent for stamping and registration to the stamp office. This Court directed the Prothonotary and

Senior Master of this Court to send the original Memorandum of Agreed Terms dated 7th December 2006 for stamping. It was however directed that the said agreement shall be kept in a sealed cover/envelope after the said agreement was stamped and adjourned the said petition to 23rd December 2013. There was a delay on the part of the office of the Prothonotary and Senior Master to send the said document to the Collector of Stamps, Bandra, MMRDA, Mumbai for adjudication and stamping.

8. On 3rd November 2014, the adjudicating authority under the Maharashtra Stamp Act i.e. the Collector of Stamps, Andheri, Mumbai directed the applicant to pay a sum of Rs.70,00,000/- as stamp duty and Rs.1,17,60,000/- as penalty thereon. The applicant preferred an appeal against the said order dated 3rd November 2014 before the appellate authority which appeal came to be rejected by an order dated 23rd October 2015. The applicant took some time to pay the said amount. On 18th January 2017, the said Arbitration Petition No.741 of 2013 filed by the applicant under Section 9 of the Arbitration Act came to be dismissed on account of non-payment of stamp duty.

9. The applicant filed an appeal bearing (L) No.262 of 2017

before the Division Bench of this Court. The said appeal came to be disposed of finally on 15th December 2017 thereby setting aside the order dated 18th January 2017 passed by this Court dismissing the said Arbitration Petition No.741 of 2013 and restoring the said arbitration petition on file. This Court permitted the applicant to pay the stamp amount and penalty within a period of one week from the date of the said order dated 15th December 2017. The applicant deposited the said stamp duty and the said penalty on 21st December 2017. The applicant also deposited further sum of Rs.35,00,000/- as per the demand of Collector of Stamps on 12th January 2018. On 22nd January 2018, the stamping authority returned the said original agreement duly stamped to the applicant. On 2nd February 2018, the Arbitration Petition No.741 of 2013 was restored to file for hearing and final disposal. On 9th February 2018, the applicant filed this application under Section 11(6) of the Arbitration Act inter alia praying for appointment of arbitrator nominated by the applicant and also an arbitrator on behalf of the respondents.

10. Mr.Joshi, learned senior counsel for the applicant invited my attention to the agreement recorded in clause 8 of the said agreement and also to the notice dated 23rd July 2013 issued by the applicant

through its advocates invoking arbitration clause and appointing a counsel of this Court as the arbitrator on behalf of the applicant and called upon the respondents to appoint their arbitrator or to concur on the appointment of the arbitrator suggested by the applicant within a period of 30 days from the receipt of the said letter. He also invited my attention to the letter dated 31st August 2013 from the respondent no.3 through his advocates conveying that he did not agree with the name of the arbitrator suggested by the applicant and suggested the name of a retired Judge of the Hon'ble Supreme Court.

11. It is submitted by the learned senior counsel that the existence of the arbitration agreement is not in dispute. In so far as the issue of limitation raised by the respondents in filing this arbitration application under Section 11(6) of the Arbitration Act is concerned, it is submitted that a distinction has to be drawn between the period of limitation for filing an application seeking appointment of the arbitral tribunal vis-a-vis the period of limitation to file a claim. He submits that the Limitation Act does not apply to the application filed under Section 11(6) of the Arbitration Act.

12. It is submitted that in view of Section 21 of the Arbitration

Act, the arbitral proceedings have commenced on the date on which the respondents have received the notice dated 23rd July 2013 issued by the applicant invoking the arbitration agreement recorded under Clause 8 of the said agreement. He submits that admittedly the said notice was received by the respondents prior to 6th August 2013. It is submitted that the arbitral proceedings in this case had commenced prior to 23rd October 2015 i.e. the date on which Section 11(5) and various sub-section of Section 11 were amended by Act 3 of 2016 and the expression “the Chief Justice” was substituted by the expression “the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.”

13. It is submitted that since the arbitral proceedings had already commenced prior to 23rd October 2015, a right had vested in the applicant to the effect that these proceedings could not be filed before the Chief Justice of this Court as a *persona designata* and not before the Court and thus the provisions of the Limitation Act are not applicable to the proceedings under Section 11(6) of the Arbitration Act. He submits that merely because the arbitration application under Section 11(6) was filed after 23rd October 2015 in view of the said agreement having been impounded and referred to the Collector of

Stamps for adjudication of stamp duty by the orders passed by this Court in the proceedings filed under Section 9 of the Arbitration Act, the amended provision of Section 11(6) which mandated for filing of an application under Section 11(6) of the Arbitration Act before a Court and not before the Chief Justice of the Court cannot be extended to such arbitral proceedings which had already commenced prior to 23rd October 2015.

14. It is submitted that the present arbitration application though filed on 9th February 2018 would be governed by unamended Section 11 of the Arbitration Act. The amended Act only applies to invocations post 23rd October 2015. Reliance is placed on Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015.

15. Learned senior counsel for the applicant placed reliance on the following judgments in support of his submission :-

- (i) ***Bhagheeratha Engineering Ltd., Kochi Vs.Sesa Sterlite Ltd., 2016 (2) Mh.L.J.155 (para 13)***
- (ii) ***M/s.Vashi Builders Pvt. Ltd. vs. Green Blaze CHS Ltd. (Arbitration Application No.199 of 2007 - Para 5) and Arjandas Techchand Kashyap Vs.Smt. Pooja Jaiprakash Pamnani & Ors. (2014) 2 Bom CR 164 (Para 27).***
- (iii) ***Yogesh Kumar Gupta (2007) 2 Arb.LR 446 @ 457.***

- (iv) *National Insurance Company Vs. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267 (para 22) and Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra & Anr. (para 11).*
- (v) *M/s.Duro Felgeura, SA vs. M/s.Gangavaram Port Limited, 2017 (9) SCC 729.*
- (vi) *Hari Shankar Singhania & Ors. Vs.Gaur Hari Singhania & Ors., 2006 (2) Arb.LR 1.*

16. In his alternate submission, it is submitted by the learned senior counsel that if this Court comes to the conclusion that even in this case, though the arbitral proceedings had already commenced prior to 23rd October 2015, the amended provisions of Section 11(6) would apply and this arbitration application is treated as an application before the Court under the amended Section 11(6) of the Arbitration Act, the provisions of Section 5 of the Limitation Act, 1963 would be attracted to the application filed under Section 11(6) of the Arbitration Act.

17. Learned senior counsel for the applicant invited my attention to various orders passed by this Court in Arbitration Petition No.741 of 2013 from time to time, the order passed by the learned Collector of Stamps adjudicating upon the said document, proof of payment of stamp duty and penalty made by the applicant pursuant to the orders

passed by the learned Collector of Stamps. It is submitted by the learned senior counsel that the arbitral proceedings in this case had already commenced prior to 6th August 2013. The respondent no.3 has refused to agree to the name suggested by the applicant by letter dated 31st August 2013. By an order dated 16th September 2013 passed by this Court in arbitration petition filed by the applicant under Section 9 of the Arbitration Act, this Court had passed an order of impounding the said agreement. The said document was pending for adjudication before the learned Collector till 3rd November 2014.

18. It is submitted that an appeal preferred by the applicant before the Appellate Authority i.e.the Chief Controlling Revenue Authority, Maharashtra State, Pune came to be dismissed only on 23rd October 2015. The arbitration petition filed by the applicant came to be dismissed for non-payment of stamp duty. The said order dated 18th January 2017 came to be set aside by the Division Bench of this Court on 15th December 2017. The stamp duty and penalty was paid by the applicant on 21st December 2017. The additional amount of Rs.35,00,000/- demanded by the Collector of Stamps was paid on 12th January 2018. The original document was returned to the applicant by the Collector of Stamps duly stamped on 22nd January 2018.

19. It is submitted that on 9th February 2018, the applicant filed this application under Section 11(6) for appointment of arbitrator. In view of the said agreement having been impounded and the said issue was pending before this Court till 15th December 2017 and the applicant having been granted time to pay the said amount to the authority, the applicant was returned the original agreement only on 22nd January 2018, time thus taken in this process has to be excluded while computing the period of limitation in filing the application under Section 11(6) of the Arbitration Act. It is submitted that the applicant has shown a good and sufficient cause for condonation of delay in filing the arbitration application under Section 11(6) of the Arbitration Act and thus the applicant prays for condonation of delay of 536 days in filing the present commercial arbitration application.

20. In so far as the issue of limitation in making a claim of the applicant in the notice of demand is concerned, the learned senior counsel for the applicant submits that the said question of limitation raised by the respondents is a mixed question of law and fact and can be left open to the arbitral tribunal to decide. He submits that even otherwise the issue as to whether the claims are barred by law of limitation cannot be decided by this Court in view of the limited powers

of this Court in view of Section 11(6-A) of the Arbitration Act. He strongly placed reliance on the judgment of the Hon'ble Supreme Court in the case of *M/s.Duro Felgeura, SA (supra)*. It is submitted that the issue as to whether this application is barred by law of limitation or not has to be decided by the arbitral tribunal.

21. Mr.Zaveri, learned counsel for the respondent no.3 opposes this arbitration application on the ground that the arbitration application is filed before the Commercial Division of this Court and is not maintainable. He submits that under Section 6 of the Commercial Courts Act, 2015, the Commercial Court has jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value. He placed reliance on the definition of 'commercial dispute' under Section 2(1)(c)(vii) of the Commercial Courts Act, 2015 and would submit that since the immovable property which is the subject matter of the said agreement is not used exclusively in the trade and commerce, the dispute between the parties being not a commercial dispute and thus this application filed under Section 11(6) of the Arbitration Act is not within the jurisdiction of the Commercial Court under Section 6 of the Commercial Courts Act, 2015.

22. The next submission of the learned counsel for the respondent no.3 is that the application filed by the applicant under Section 11(6) is barred by law of limitation prescribed under Article 137 to the Schedule of the Limitation Act, 1963. It is submitted that the applicant had invoked the arbitration clause 8 on 23rd July 2013 followed by a letter dated 5th August 2013 whereas this arbitration application has been filed on 11th February 2018 and thus the arbitration application is barred by law of limitation. He placed reliance on the judgment of the *Vasu Healthcare Private Limited Vs.Gujarat Akruti TCG Biotech Limited & Anr., AIR 2017 Gujrat 153* and in particular paragraphs 7.3, 7.4 and 7.6 in support of his submission.

23. Mr.Anturkar, learned senior counsel for the respondent nos.1, 2 and 4 opposes this arbitration application on the ground that this arbitral proceedings filed under Section 11(6) of the Arbitration Act are the proceedings before the Court in view of the amendment to various sub-sections of Section 11 of the Arbitration Act with effect from 23rd October 2015. He also strongly placed reliance on Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 and would submit that the first and second part of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 referring to the expression “arbitral

proceedings” would operate in two different fields. He submits that this arbitration application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 would fall in second part of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 and thus Article 137 of the Schedule of the Limitation Act, 1963 would apply to this application.

24. It is submitted by the learned senior counsel that the arbitration application under Section 11(6) has been admittedly filed by the applicant on 9th February 2018. The respondents did not agree to the names suggested by the applicant. The arbitration application thus filed on 9th February 2018 by the applicant is ex facie barred by law of limitation in view of the said application not having been filed within three years from the date when the right to apply accrues under Article 137 of the Schedule to the Limitation Act, 1963. In support of his submission, learned senior counsel strongly placed reliance on the judgment of the Supreme Court in the case of **Board of Control for Cricket in India Vs. Kochi Cricket Private Limited & Ors., (2018) 6 SCC 287** and in particular paragraphs 36 to 39, 75, 76 and 79 thereof. Learned senior counsel also placed reliance on the judgment of the

Supreme Court in the case of ***United India Insurance Co. Ltd. Vs. Hyundai Engineering and Construction Co. Ltd., 2018 SCC OnLine SC 1045*** and in particular paragraphs 12 and 14 thereof.

25. It is submitted that there is a clear distinction in period of limitation in respect of claim and filing an arbitration application under Section 11 of the Arbitration Act. He submits that cause of action had arisen when notice was given by the applicant to the learned advocate for the respondents on 23rd July 2013. The present application filed under Section 11(6) of the Arbitration Act on 9th February 2018 is barred by law of limitation under the provisions of the Limitation Act, 1963.

26. It is submitted by the learned senior counsel that in the judgment of ***Board of Control for Cricket in India (supra)***, the question raised before the Hon'ble Supreme Court was not only in respect of the petition under Section 34 but was also in respect of all the provisions of the Arbitration Act interpreting the provisions of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 which were brought into force on 23rd October 2015.

27. In so far as the delay of 536 days caused in filing the

arbitration application is concerned, learned senior counsel for the respondent no.3 invited my attention to clause 6 of the said agreement which provides that with regard to the payment of stamp duty and registration fees, the same shall be borne and paid by the purchaser alone. He submits that it was thus an obligation on the part of the applicant to pay the stamp duty and registration fees exclusively. He submits that it is not the case of the applicant that the applicant did not have sufficient amount of stamp duty or registration fees with it which caused delay in making payment of such stamp duty and registration fees.

28. It is submitted that Section 14 of the Limitation Act, 1963 thus cannot be come to the rescue of the applicant for seeking exclusion of time taken in process of adjudication of stamp duty and penalty before the learned Collector of Stamps, before the Appellate Authority and thereafter before this Court. He submits that no sufficient cause is made out by the applicant for seeking condonation of delay of 536 days in filing the arbitration application under Section 11(6) of the Arbitration Act.

29. Learned senior counsel for the respondent nos.1, 2 and 4

submits that the judgments delivered by the Hon'ble Supreme Court and this Court prior to 23rd October 2015 in the proceedings arising out of Section 11(6) of the Arbitration Act holding that the proceedings under Section 11(6) of the Arbitration Act were not before the Court and thus the provisions of the Limitation Act were not applicable to such proceedings would not apply to the facts of this case in view of the fact that the expression "Chief Justice or his designate" has been substituted by the expression "Court" with effect from 23rd October 2015. It is submitted that admittedly these proceedings filed under Section 11(6) of the Arbitration Act are filed after 23rd October 2015 and are admittedly filed before this Court and not before the Hon'ble Chief Justice of this Court.

30. It is lastly submitted by the learned senior counsel that the issue of limitation in filing of this arbitration application under Section 11(6) cannot kept open to be decided by the arbitral tribunal inspite of limited powers conferred on the Court under Section 11(6-A) of the Arbitration and Conciliation (Amendment) Act, 2015. The issue of limitation in filing the arbitration application has to be decided only by this Court and not by the arbitral tribunal.

31. Mr.Joshi, learned senior counsel for the applicant in rejoinder in so far as the objection of dispute of this arbitration application before the Commercial Division of this Court on the ground that the immovable property which is the subject matter of the said agreement being not used exclusively in trade or commerce and thus the dispute between the parties does not fall within the meaning of “commercial dispute” under Section 2(1)(c)(vii) of the Commercial Courts Act, 2015 is concerned, learned senior counsel invited my attention to some of the provisions of the said agreement and would submit that the said property has to be developed under the said agreement for commercial purposes and thus the dispute arising out of such agreement would be a “commercial dispute” within the meaning of Section 2(1)(c)(vii) of the Commercial Courts Act, 2015.

32. It is submitted that in any event, all arbitration applications filed under Section 11(6) of the Arbitration Act including the arbitration applications falling under the provisions of the Commercial Courts Act, 2015 are assigned to this Court. He submits that if this Court comes to the conclusion that the applicant has inadvertently filed the application before the Commercial Division of this Court, this Court has ample power to grant leave to amend to the applicant and to treat this

commercial arbitration application as an arbitration application under the provisions of the Arbitration and Conciliation Act, 1996.

33. In so far as the reliance placed by the learned senior counsel for the respondent nos.1, 2 and 4 on the judgment of the Hon'ble Supreme Court in the case of **Board of Control for Cricket in India (supra)** is concerned, learned senior counsel for the applicant invited my attention to paragraphs 2, 36 to 39 and 75 thereof. He submits that the said judgment of the Hon'ble Supreme Court was dealing with the issue is as to whether Section 36 which was substituted by the Amendment Act, would apply in its amended form or in its original form to the appeals in question. He submits that in the said judgment before the Hon'ble Supreme Court, the Supreme Court made it clear that the Hon'ble Supreme Court has not dealt with all the provisions of the Arbitration and Conciliation Act, 1996. He submits that the said judgment cannot be considered as a precedent under Article 141 of the Constitution of India in so far as this application under Section 11(6) of the Arbitration Act is concerned. He submits that the expression "arbitral proceedings" mentioned in Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 refers to the arbitral proceedings only before the arbitral tribunal and does not refer to two separate proceedings i.e.

one before the arbitral tribunal and another before the Court.

34. Learned senior counsel distinguishes the judgment of the Hon'ble Supreme Court in the case of ***United India Insurance Co. Ltd.*** (*supra*) relied upon by the learned senior counsel for the respondent nos.1, 2 and 4 and would submit that the arbitration clause dealt with by the Hon'ble Supreme Court in the said judgment is different than the arbitration clause which is the subject matter of this arbitration application.

35. It is submitted by the learned senior counsel that though the expression "Chief Justice or his designate" in Section 11(6) of the Arbitration Act prescribed prior to amendment of the said provision has been substituted by the expression "Court" by the Amendment Act, 2015 and though these proceedings can be considered as the proceedings filed before the Court, the Hon'ble Chief Justice has powers to delegate his powers to another Judge of this Court to appoint an arbitrator.

36. In so far as the issue of limitation raised by the respondents is concerned, it is submitted that the question of applicability of Article 137 to the Schedule of the Limitation Act, 1963 to this application does

not arise. In his alternate submission, he submits that even if this Court comes to the conclusion that Article 137 to the Schedule of the Limitation Act, 1963 is applicable to this application filed under Section 11(6) of the Arbitration Act, the applicant has made out sufficient cause for condonation of delay of 536 days in filing this arbitration application and thus be condoned under Section 5 of the Limitation Act, 1963 and the notice of motion filed by the applicant be made absolute.

REASONS AND CONCLUSIONS :-

37. There is no dispute that clause 8 of the said agreement i.e. “Memorandum of Agreed Terms” dated 7th December 2006 entered into between the parties records an arbitration agreement.

38. The following questions that arise for consideration of this Court in this arbitration application are :

(i) Whether unamended provisions of Section 11 of the Arbitration Act prior to 23rd October 2015 would apply to the facts of this case or the amended provision of Section 11 after 23rd October 2015 would apply though the notice invoking arbitration agreement was issued by the applicant on 23rd July 2013 read with notice dated 5th August 2013 under clause 8 of the said agreement and the

arbitration application was filed in the year 2018 ?

- (ii) Whether Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application filed under Section 11(6) of the Arbitration Act and if applies whether Section 5 of the Limitation Act, 1963 would be applicable to this arbitration application and if Section 5 applies to this arbitration application, whether the applicant has made out a sufficient cause for condonation of delay in filing this arbitration application ?
- (iii) Whether the immovable property which is the subject matter of the said agreement dated 7th December 2006 is not exclusively used in trade or commerce and if so, the dispute between the parties is not a commercial dispute within the meaning of Section 2(1)(c) (vii) and thus this arbitration application is not within the jurisdiction of the Commercial Courts under Section 6 of the Commercial Courts Act, 2015.

39. It is not in dispute that prior to 23rd October 2015, in the event of the parties failing to appoint an arbitrator within 30 days from the receipt of a request from the other party, the appointment was made, upon request of a party, by filing an application before “the Chief Justice of the High Court or the Hon'ble Supreme Court or, as the case may be,

the High Court or any person or institution designated by him.” With effect from 23rd October 2015, in view of the amendment to Section 11(4)(b), 11(5) and 11(6) which are relevant for the purpose of deciding this application, the words “the Chief Justice or any person or institution designated by him” is substituted by the words “the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.” As a result of the said amendment, the proceedings under Sections 11(6) and 11(9) are now required to be filed before the High Court or the Supreme Court respectively and not before the Chief Justice of that Court.

40. It is thus clear that with effect from 23rd October 2015, the Hon'ble Chief Justice of the High Court or the Hon'ble Chief Justice of India does not remain to be *persona designata* respectively to hear and entertain the application under Section 11(6) or under Section 11(9) of the Arbitration Act respectively. Such applications are required to be filed before the High Court or the Supreme Court, as the case may be. I am thus not inclined to accept the submission of Mr.Joshi, learned senior counsel for the applicant that though the notices invoking arbitration agreement in this case were issued on 23rd July 2013 and 5th August 2013 i.e.prior to Amendment Act 2015, the applicant could have

filed the application under Section 11(6) of the Arbitration Act before the Hon'ble Chief Justice of this Court and thus the Hon'ble Chief Justice or any person or institution designated by him would still appoint an arbitrator in this application though filed after 23rd October 2015.

41. By virtue of the amendment as on 23rd October 2015, there was no *persona designata* available for hearing the applications under Section 11(6) of the Arbitration Act even in respect of the arbitration proceedings having commenced prior to 23rd October 2015 by virtue of notice invoking the arbitration agreement issued prior to the date of the amendment.

42. In my view, since the proceedings under Section 11(6) of the Arbitration Act are required to be filed before the High Court, Article 137 of the Schedule to the Limitation Act, 1963 would apply to such application filed under Section 11 (6) of the Arbitration Act. In my view, since Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application under Section 11(6) of the Arbitration Act, Section 5 of the Limitation Act, 1963 would also apply to the arbitration application filed under Section 11(6) of Arbitration Act.

43. In so far as the judgment of this Court in the case of ***Bhagheeratha Engineering Ltd., Kochi (supra)*** and unreported judgment of this Court in the case of ***M/s.Vashi Builders Pvt. Ltd. (supra)*** are concerned, both these judgments are delivered by this Court considering unamended Section 11 in force prior to 23rd October 2015 when an arbitration application for seeking appointment of an arbitrator was required to be filed before the Hon'ble Chief Justice of the High Court and not before the Court. This Court thus in those judgments held that the proceedings under Section 11(6) of the Arbitration Act not being the proceedings before the Court, Article 137 of the Schedule to the Limitation Act, 1963 was not applicable. In my view, those judgments thus would not apply to the facts of this case. Admittedly, this arbitration application has been filed by the applicant before this Court and not before the Hon'ble Chief Justice of the High Court.

44. Delhi High Court in the case of ***Yogesh Kumar Gupta (supra)*** has held that since the Limitation Act, 1963 specifically applies to the arbitrations, Section 5 of the Limitation Act would also apply to an application/petition under Section 11(5) of the Arbitration Act. Delhi High Court has also considered the provisions of Section

14(1) and 14(2) of the Limitation Act, 1963 and held that it would be open to the applicant to file a fresh application under Section 11(5) of the Arbitration Act. In my view, the principles of law laid down by the Delhi High Court in the case of **Yogesh Kumar Gupta (supra)** would apply to the facts of this case. I am in respectful agreement with the views expressed by the Delhi High Court in the said judgment.

45. The Hon'ble Supreme Court in the case of **Hari Shankar Singhania & Ors. (supra)** while dealing with the proceedings arising out of Section 20 of the Arbitration Act, 1940 held that Article 137 of the Limitation Act, 1963 applies to the said application. It is held that the right to file the said application accrues when differences or disputes arise between the parties to the arbitration agreement. The Hon'ble Supreme Court held that when parties are in dialogue and are corresponding to negotiate the matter, the right to apply under Section 20 accrues when the dispute in fact arises between them i.e. when they fail to resolve that matter themselves.

46. It is not in dispute that under Section 20 of the Arbitration Act, 1940, an application was required for taking the arbitration agreement on record and for appointment of an arbitrator in accordance

with the arbitration agreement before a Court. Since the said proceedings under Section 20 were required to be filed before an appropriate Court, the provisions of Article 137 of the Limitation Act, 1963 were applicable to such proceedings filed before such appropriate Court. In my view, since the proceedings under Section 11(6) or Section 11(9) of the Arbitration Act for seeking appointment of arbitral tribunal are also now required to be filed before the High Court or the Hon'ble Supreme Court, as the case may be. Article 137 of the Schedule to the Limitation Act, 1963 would apply. It is not in dispute that no other Article of Schedule to the Limitation Act, 1963 provides for any other period of limitation for filing an arbitration application filed under Section 11(6) or Section 11(9) of the Arbitration Act respectively.

47. It is not in dispute that Article 137 of the Schedule to the Limitation Act, 1963, such application has to be filed within three years from the date when the right to apply accrues. In my view, under Article 137 of the Limitation Act, 1963, application for appointment of an arbitrator under Section 11(6) or Section 11(9) of the Arbitration Act before the High Court or the Hon'ble Supreme Court would apply from the date when a notice invoking an arbitration agreement is received by other side and other side refuses to the name suggested by the opponent

or refusing to suggest any other name in accordance with the provisions of Section 11 or the agreed procedure prescribed in the arbitration agreement within the time contemplated therein or specifically refuses to appoint any arbitrator in the event of such other party being an appointing authority.

48. In my view, the limitation prescribed under Article 137 of the Schedule to the Limitation Act, 1963 which applies to an application under Section 11(6) or Section 11(9) of the Arbitration Act filed before the High Court or before the Hon'ble Supreme Court cannot be mixed up with the period of limitation applicable to the claims prescribed in various other Articles of the Schedule to the Limitation Act, 1963. Both these periods of limitation i.e. one applicable to the claims being made and another being applicable to the application under Section 11(6) or Section 11(9) of the Arbitration Act to which Article 137 of the Schedule to the Limitation Act, 1963 applies, are two different periods of limitation and cannot be made applicable to each other.

49. A question then arises for consideration is whether the applicant has made out a sufficient cause for condonation of delay of 536 days in filing this arbitration application without prejudice to the

rights and contention of the applicant that there was no delay in filing this application under Section 11(6) of the Arbitration Act.

50. It is not in dispute that the applicant had issued a notice on 23rd July 2013 invoking arbitration agreement which was received by the learned advocate for the respondent nos.1, 2 and 4 on 23rd July 2013 itself. The applicant issued another notice on 6th August 2013 upon the respondent nos.1 and 4 calling upon those respondents to comply with the notice dated 23rd July 2013. The respondent no.3 filed her advocate's reply dated 31st August 2013 and did not agree with the name suggested by the applicant's advocate and suggested the name of a former Judge of the Hon'ble Supreme Court. The other respondents did not give response to the notice invoking arbitration agreement issued by the applicant. The arbitral proceedings thus commenced in so far as the respondent nos.1, 2 and 4 are concerned, after expiry of 30 days from the date of receipt of notice invoking arbitration agreement. In so far as the respondent no.3 is concerned, the arbitral proceedings commenced after expiry of 30 days from the date of receipt of notice invoking arbitration agreement and in any event with effect from 31st August 2013 when the respondent no.3 refused to accept the name suggested by the applicant and suggested another name. The applicant,

however, lodged this commercial arbitration application on 9th February 2018. The applicant has admittedly filed this arbitration application after expiry of three years from the date of receipt of notice issued by the applicant invoking arbitration agreement by the respondents.

51. It is not in dispute that the applicant herein had filed an arbitration petition under Section 9 of the Arbitration and Conciliation Act, 1996 on 7th August 2013 intere alia praying for various interim measures. In view of the objection raised by the respondents, this Court passed an order dated 16th September 2013 for impounding the suit agreement and directed the Prothonotary and Senior Master of this Court to send the said document for stamping and adjudication before the Collector of Stamps. On 3rd November 2014, the Collector of Stamps adjudicated the payment of stamp duty and penalty and directed the applicant to pay a sum of Rs.70,00,000/- towards additional stamp duty and Rs.1,17,60,000/- as penalty thereon.

52. The applicant impugned the said order dated 3rd November 2014 before the Appellate Authority. On 23rd October 2015, the Appellate Authority rejected the said appeal filed by the applicant. The said order was received by the applicant in the last week of January,

2016. On 24th November 2015, the applicant took time in Arbitration Petition No.741 of 2013 to pay the amount of stamp duty and penalty as determined by the Collector of Stamps. On 18th January 2017, the Arbitration Petition No.741 of 2013 was dismissed on account of non-payment of stamp duty. The applicant preferred an appeal being Appeal (L) No.262 of 2017 before the Division Bench of this Court impugning the said order dated 18th January 2017. On 15th December 2017, the Division Bench of this Court disposed of the said appeal filed by the applicant and permitted the applicant to deposit the stamp duty and penalty on the said agreement.

53. Pursuant to the said order dated 15th December 2017, on 21st December 2017, the applicant deposited the said sum of Rs.70,00,000/- and Rs.1,51,20,000/- and also further sum of Rs.35,00,000/-. On 12th January 2018, the applicant also paid costs imposed by this Court. On 22nd January 2018, the Collector of Stamps returned the said original agreement duly stamped to the applicant. On 9th February 2018, the applicant filed this arbitration application.

54. At this stage, this Court will have to thus consider whether the applicant would be entitled to the benefit of exclusion of time taken

by the applicant in prosecuting the application under Section 9 of the Arbitration Act for interim relief before this Court or not and whether such proceedings can be considered to have been prosecuted by the applicant in good faith and due diligence.

55. A perusal of the record referred to aforesaid clearly indicates that the petition filed by the applicant under Section 9 of the Arbitration Act inter alia praying for interim measures was pending before this Court from 7th August 2013 till 18th January 2017 and thereafter the Appeal (L) No.262 of 2017 filed by the applicant arising out of the said order dated 18th January 2017 was pending till 15th December 2017. Division bench of this Court had granted time to the applicant to pay stamp duty and penalty within one week from the date of the said order dated 15th December 2017 with costs quantified at Rs.50,000/-. The applicant was returned with the original document duly stamped by the office of the Collector of Stamps only after payment of stamp duty and penalty was made by the applicant pursuant to the extension of time granted by the Division Bench of this Court. The order passed by the Division Bench has not been impugned by the respondents.

56. A perusal of the order dated 16th September 2013 passed by

this Court in the said Arbitration Petition No.741 of 2013 clearly indicates that this Court while refusing to grant ad-interim relief had applied the principles of law laid down by the Hon'ble Supreme Court in the case of ***SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited, (2011) 14 SCC 66*** and held that the said document being unregistered and insufficiently stamped and was thus required to be impounded and dealt with under Section 38 of the Bombay Stamp Act, 1956. It is held that the Court could not act upon the said agreement and the agreement could not be seen and the rights claimed by the petitioner thereunder could not be granted. This Court held that the petitioner shall have agreement sufficiently and adequately stamped and then apply for relief.

57. In my view, the said arbitration petition remained pending in view of the objection raised by the respondents about the said document being insufficiently stamped and unregistered. The applicant thus could not rely upon the said agreement in view of the said agreement insufficiently stamped and unregistered even for the purpose of filing of the application under Section 11 of the Arbitration Act. In my view, the applicant was thus prosecuting the application under Section 9 relying upon the said agreement which is relied upon in this

arbitration application for the purpose of appointment of an arbitrator in good faith and due diligence. The applicant is thus entitled to take the benefit of the principles of Section 14 of the Limitation Act, 1963 for the purpose of computing the limitation under Article 137 of the Schedule to the Limitation Act, 1963 in filing this arbitration application under Section 11(6) of the Arbitration Act. In my view, there is thus no delay in filing this arbitration application. This Court thus need not consider a separate relief in the notice of motion filed by the applicant.

58. The judgment of the Delhi High Court in the case of **Yogesh Kumar Gupta (supra)** on this issue would squarely apply to the facts of this case. I am in respectful agreement with the views expressed by the Delhi High Court in the said judgment.

59. In so far as the submission of Mr. Anturkar, learned senior counsel for the respondent nos. 1, 2 and 4 that under the said agreement, obligation, if any, to pay stamp duty and registration fees and more particularly under clause 6 thereof was on the applicant alone and thus the applicant cannot be allowed to exclude the time taken in prosecuting the proceedings under Section 9 of the Arbitration Act under Section 14 of the Schedule to the Limitation Act, 1963 is concerned, in my view,

there is no merit in this submission of the learned senior counsel. There was serious dispute raised by the applicant whether any payment of stamp duty and registration fees was attracted to the said agreement or not. This Court passed an order of impounding the said document only on 16th September 2013 and directing the Prothonotary and Senior Master to send the said document for stamping and adjudication before the Collector of Stamps thereafter. The payment of stamp duty and penalty was paid after adjudication of stamp pursuant to the extension of time granted by the Division bench of this Court.

60. In so far as the judgment of the Hon'ble Supreme Court in the case of *M/s.Duro Felgeura, SA (supra)* relied upon by the learned senior counsel for the applicant in support of the submission that in view of Section 11 (6-A) of the Arbitration Act, the jurisdiction of this Court is confined only to the examination of existence of an arbitration agreement and thus issue as to whether this arbitration application is barred by law of limitation or not, cannot be decided by this Court is concerned, in my view, this submission is totally devoid of merit. The issue of existence of arbitration agreement which Court has to consider before appointing any arbitrator in an arbitration application filed under Section 11(6) itself is totally different than the issue as to whether

the arbitration application filed under Section 11(6) is filed within the period of limitation or not. Though the powers of Court under Section 11(6) in view of Section 11(6-A) are confined to the examination of existence of the arbitration agreement, the issue as to whether the arbitration application filed under Section 11(6) is filed within the time prescribed under Article 137 of the Schedule to the Limitation Act, 1963 or not has to be decided by the Court itself while considering such application under Section 11(6) of the Arbitration Act and such issue cannot be left open to be decided by the arbitral tribunal.

61. There is no dispute about the proposition of law laid down by the Hon'ble Supreme Court in the case of *M/s.Duro Felgeura, SA (supra)* relied upon by the learned senior counsel for the applicant. The said judgment however would not assist the case of the applicant. There was no issue before the Hon'ble Supreme Court in the said judgment whether the application under Section 11(6) of the Arbitration Act itself was barred by law of limitation and whether such issue of limitation in filing such application under Section 11(6) also could be kept open to be adjudicated upon by the arbitral tribunal. Similarly the judgment of the Hon'ble Supreme Court in the case of *National Insurance Company (supra)* and *Bharat Rasiklal Ashra (supra)* relied

upon by Mr.Joshi, learned senior counsel for the applicant also would not apply to the facts of this case at all. There was no issue of limitation in filing the application under Section 11(6) of the Arbitration Act before the Hon'ble Supreme Court in the said judgments also.

62. In so far as the judgment of the Hon'ble Supreme Court in the case of ***United India Insurance Co. Ltd. (supra)*** relied upon by Mr.Anturkar, learned senior counsel for the respondent nos.1, 2 and 4 in support of the submission that the earlier judgment of the Hon'ble Supreme Court in the case of ***M/s.Duro Felgeura, SA (supra)*** has been distinguished by the Hon'ble Supreme Court in the later judgment is concerned, in my view, reliance placed by the learned senior counsel on the said judgment in the case of ***United India Insurance Co. Ltd. (supra)*** is misplaced. There is no dispute between the parties in this case that the arbitration agreement exists.

63. In so far as the judgment of the Hon'ble Supreme Court in the case of ***Board of Control for Cricket in India (supra)*** relied upon by Mr.Anturkar, learned senior counsel for the respondent nos.1, 2 and 4 in support of his submission that the amended provisions of Section 11 would apply also to the arbitral proceedings commenced prior to the date

of the amendment and that these proceedings filed under Section 11(6) of the Arbitration Act or that the proceedings before the Court are within the expression “arbitral proceedings” referred in Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 is concerned, a perusal of the said judgment of the Hon'ble Supreme Court clearly indicates that the issue before the Hon'ble Supreme Court in that judgment was whether Section 36 of the Arbitration Act which was substituted by the amendment Act would apply in its amended form or in its original form to the appeals in question before the Hon'ble Supreme Court in those matters. Paragraph 2 of the said judgment would clearly indicate the limited issue for consideration before the Hon'ble Supreme Court in those matters.

64. The Hon'ble Supreme Court in the said judgment clarified that the Supreme Court did not express any opinion on the contention whether amendment made in Section 34 by the Amendment Act was retrospective or prospective in nature and while clarifying the said issue, it was made clear that the Supreme Court did not express any opinion on the said contention since the amendment made to Section 34 was not directly before the Hon'ble Supreme Court.

65. In my view, there is no merit in the submission of Mr. Anturkar, learned senior counsel for the respondent nos. 1, 2 and 4. The Hon'ble Supreme Court in the case of **Board of Control for Cricket in India (supra)** has also held that the arbitral proceedings under Section 11 (6) of the Arbitration Act would also fall under the expression "arbitral proceedings." In my view, the judgment of the Hon'ble Supreme Court in the case of **Board of Control for Cricket in India (supra)** is not a precedent on the proposition that the expression "arbitral proceedings" prescribed in second part of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 would include the arbitral proceedings filed under Section 11(6) of the Arbitration Act before this Court.

66. In so far as the submission of the learned senior counsel for the respondent no. 3 that this commercial arbitration application filed before the Commercial Court Division is not maintainable in view of the fact that the property in question was not used for commercial purpose is concerned, Mr. Joshi, learned senior counsel for the applicant invited my attention to various provisions of the said agreement and would submit that under the said agreement, the suit property was to be developed and was used for commercial purposes. He submits that in

any event, the applicant has not filed any statement of claim till date before the learned arbitrator proposed to be appointed by this Court. In his alternate submission, he submits that even if this Court comes to the conclusion that the present commercial arbitration application has been wrongly placed before the commercial Court, it is submitted that this Court has been specifically assigned the petitions under Section 11(6) of the Arbitration and Conciliation Act, 1996 and also the Commercial Arbitration Application. If this Court comes to the conclusion that the commercial arbitration application is not maintainable in view of the objection raised by the respondent no.3 before the Commercial Court, this Court has ample power to grant leave to amend to the applicant to convert the said commercial arbitration application into the arbitration application under Section 11(6) of the Arbitration and Conciliation Act, 1996.

67. A perusal of the 'Memorandum of Agreed Terms' annexed to the arbitration application clearly indicates that the property in question was to be developed and thereafter to be sold under the said agreement. The property was to be dealt with according to the commercial terms agreed by and between the parties in the Memorandum of Agreed Terms for commercial purposes. I am thus not inclined to

accept the submission of the learned senior counsel for the respondent no.3 that the property in question was not to be used for commercial purposes and thus the dispute arising out of Memorandum of Agreed Terms would not be a commercial dispute within the meaning of Section 2(1)(c)(vii) of the Commercial Courts Act, 2015.

68. Be that as it may, it is not in dispute that this Court has been assigned the matters under Section 11(6) of the Arbitration and Conciliation Act, 1996 and also the arbitration applications under the provisions of the Commercial Courts Act, 2015. However, since this Court is of the view that the terms and conditions of the agreement and the pleadings and documents clearly reflects the commercial dispute between the parties and also reflects that the property in question was used for commercial purposes, this application filed before the commercial division of this Court is maintainable. There is thus no need to grant leave to amend to convert the said commercial arbitration application into the arbitration application under Section 11(6) of the Arbitration and Conciliation Act, 1996.

69. In my view, since there is no dispute about the existence of arbitration agreement and since the respondents did not appoint any

arbitrator inspite of receipt of notices invoking arbitration agreement by the applicant, this commercial arbitration application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 is maintainable.

70. The applicant has already nominated Mr.Snehal K.Shah as its nominee arbitrator. The respondents however, has not nominated any arbitrator.

71. I therefore pass the following order : -

- (i) Mr.Snehal K. Shah, a counsel of this Court is proposed to be appointed as an arbitrator on behalf of the applicant.
- (ii) I propose to appoint Smt.Justice Vasanti A. Naik, a former Judge of this Court having her office address at 322, Varma Chambers, 11, Homji Street, Horniman Circle, Fort, Mumbai - 400 001 as nominee arbitrator on behalf of the respondents.
- (iii) The prospective arbitrators proposed in this order are requested to file a statement of disclosure in terms of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996 on or before the next date.
- (iv) If the prospective arbitrators are appointed by this Court as arbitrators, they are directed to appoint a Presiding Arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996.
- (v) The applicant is permitted to obtain statement of disclosure from the

the learned prospective arbitrators nominated by the applicant and from the learned prospective arbitrator proposed by this Court and to tender the same before this Court on the next date. If the arbitrators are appointed, their fees and expenses shall be borne by the applicant and the respondents equally at the first instance.

(vi) Notice of motion No.814 of 2018 is disposed of.

R.D. DHANUKA, J.