

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Arb P. No.12/2022,
Arb P. No.13/2022,
Arb P. No.14/2022.

Reserved on:21.07.2023
Pronounced on:19.10.2023

Jaguar Overseas Ltd.

...Petitioner(s)/appellant(s)

Through: Mr. Pranav Kohli, Sr. Advocate with
Mr. Farhan Mirza, Advocate

Vs.

J&K State Power Development Corporation

...Respondent(s)

Through: Mr. M.A. Chashoo, AAG

CORAM:

HON'BLE THE CHIEF JUSTICE

JUDGMENT

N. Kotiswar Singh, C.J.

01. Arbitration Petition Nos.12, 13 and 14 of 2022 are taken up together and disposed of by this common order as common issues are involved in the above referred three petitions.
02. The petitioners in these petitions are one and the same, and so are the respondents.
03. By these applications, the petitioner is seeking appointment of an arbitrator for resolution of the dispute which has arisen between the

Arb P. No.12/2022
Arb P. No.13/2022
Arb P. No.14/2022

parties by invoking Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”).

04. The petitioner in each of these petitions is a company primarily engaged in the business of engineering, procurement and construction projects as well as supply projects in the fields like power, industrial plant, infrastructure etc.
05. The Respondent in every petition is the Jammu and Kashmir State Power Development Corporation Ltd. (herein after referred as “JKSPDC”) which is a company established by the Government of Jammu and Kashmir primarily responsible for execution, completion, operation and maintenance of all power stations and power projects of the State now Union Territory.
06. The Respondent invited bids for electrifying the habitations/villages and for creation of rural infrastructure and household electrification to BPL households in certain Blocks of Pulwama, Baramulla and Anantnag districts under the Rajiv Gandhi Gramin Vidhyutikaran Yojana (RGGVY).
07. The petitioner being declared as the lowest bidder in respect of the aforesaid three districts i.e., Pulwama, Baramulla and Anantnag, was awarded the contract for designing, engineering, manufacture, fabrication, testing along with testing at manufacture’s works site, supply of the material/equipment including transportation to site destination, insurance, storage at site, and activities comprising route survey/site selection, erection, testing and commissioning of works for

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

rural electrification infrastructure and household electrification under RGGVY Scheme for these three districts by separate work orders. Accordingly, in respect of Pulwama district, the petitioner was awarded the contract worth Rs.22,02,43,093/- (including applicable levies, taxes and duties and freight and insurance), out of which the arbitration proceeding under Arbitration Petition No.12 of 2022 has arisen. Similarly, the petitioner was awarded the contract in respect of Baramulla district worth Rs.18,15,35,123/- for execution of similar works, out of which arbitration proceeding under Arbitration Petition No.13 of 2022 has arisen. The petitioner also having found the lowest bidder was awarded the similar works in respect of Anantnag district worth Rs.51,22,25,482/- which included excise duty, CST and VAT, other applicable levies, taxes and duties and freight and insurance, and a second contract for the same district worth Rs.8,47,74,891/- (including WCT @ 8.4%) was also awarded to the petitioner, out of which arbitration proceeding under Arbitration Petition No.14 of 2022 has arisen.

08. According to the petitioner even though the petitioner was declared the lowest bidder for the aforesaid works in the three districts, in view of certain ambiguity regarding the applicability of work contract tax (WCT), agreements were not immediately signed. The petitioner contends that, however, after a series of deliberations and meetings, the petitioner was informed that the WCT in respect of contracts will be

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

paid by the JKSPDC. Accordingly, the contracts were finally executed for the aforesaid works in the three districts on 29.04.2010.

09. As per the petitioner, the Managing Director JKSPDC vide his letter No.PDC/P-226/CJ/5655 dated 25.02.2010 also clarified that WCT deductions will be made only to the extent of erection part in respect of the three RGGVY projects in the district of Pulwama, Baramulla and Anantnag and not for other works, and accordingly, the issue relating to WCT was settled and only after settlement of the said issue, the contract agreements in respect of the said works were executed on 29.04.2010.
10. It is the stand of the petitioner that the aforesaid clarification letter dated 25.02.2010 issued by the Managing Director JKSPDC clarifying that WCT deductions will be made only in respect of the erection part, after which the agreements were subsequently executed on 29.04.2010.
11. However, in spite of the aforesaid clarification made by the Managing Director, the authorities started deducting WCT from the running bills of the petitioner which were objected to by the petitioner.
12. The petitioner states that a meeting was conveyed on 29.06.2013 by the JKSPDC, in which it was conveyed that WCT was not in the account of JKSPDC and started recovering the same from the bills of the petitioner in July, 2013. Later on, because of the objections raised by the petitioner, the matter was referred to the Law Department of Government of Jammu and Kashmir which, however, gave an adverse opinion against the petitioner, because of which the petitioner submitted representations to the Managing Director JKSPDC for reviewing its

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

decision. The petitioner claims that he also approached the then Law Minister of the Jammu & Kashmir who also intervened directing the respondent authorities to reconsider the claim of the petitioner.

13. The petitioner states that however, subsequently, the petitioner received a letter dated 26.07.2018 from the Chief Engineer, Generation Wing, Kashmir, JKSPDC, informing the petitioner that they had considered the same in the light of the opinion of the Law Department, by holding that the claim for release of WCT was not tenable. Thereafter, the petitioner again requested the Chief Engineer, Generation Wing, Kashmir, JKSPDC on 15.10.2018 to make payment of the WCT which was wrongly deducted from the petitioner. However, the petitioner has not received any response to the said request.
14. The petitioner also states that the respondent had released part of the final payment on 05.04.2018 after deducting WCT from the supply portion of the petitioner's bill in respect of the contract relating to Pulwama, and on 28.03.2018 relating to Baramulla, and on 11.08.2017 relating to Anantnag.
15. Being aggrieved by the aforesaid deduction of the WCT from the supply portion of the petitioner's bills, the petitioner vide letter dated 05.03.2021 invoked the arbitration clause as provided under Clauses 47 and Clause 48 of the General Conditions of Contract and in terms of aforesaid Clauses 47 and Clause 48, the petitioner also proceeded to nominate an arbitrator and the respondent was also expected to nominate its arbitrator. However, as there was no response, the petitioner filed the

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

petition before the High Court of Delhi under Section 11 (6) of the Arbitration and Conciliation Act, for appointment of an arbitrator, which however, was withdrawn due to lack of jurisdiction of the court with liberty to approach the competent Court of jurisdiction which was allowed by the Delhi High Court vide order dated 30.03.2022. Accordingly, these three petitions have been filed before this Court for appointment of arbitrator in respect of aforesaid three contracts relating to the districts of Pulwama, Baramulla and Anantnag, being aggrieved by the deduction of the WCT from the bills of the petitioner.

16. These three petitions have been contested by the respondent corporation. The common plea taken by the respondent in its objection is that the application for appointment of arbitrator is barred by limitation since, the cause of action arose more than three years before the filing of the applications.
17. As no objection has been raised by the respondent about the existence of dispute or about the arbitration clause, we will not dwell on these issues.
18. It has been submitted by Mr. M. A. Chashoo, learned counsel on behalf of the respondent that the dispute relates to deduction of WCT from the pending bills of the petitioner. The dispute arose after the respondent started deducting WCT and the petitioner was informed of the decision of the respondent to deduct WCT in terms of the letter dated 15.07.2013 issued by the Director, Finance to the Chief Engineer, JKSPDC and accordingly, deductions came to be made from the bills of the petitioner and as such, if the petitioner was aggrieved of the same i.e., recovering

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

from the bills of the petitioner as per the decision of the respondents taken on 29.06.2013, the cause of action would arise on 29.06.2013, in which event the limitation period for recovering WCT would lapse by 28.06.2016 and as such any claim made thereafter would be time barred.

19. It has been submitted that once the cause of action commences, the same cannot be postponed on account of alleged discussion between the parties and requests made by the petitioner for reconsideration of the claim for not deducting the WCT. Accordingly, it has been submitted that merely because the Chief Engineer, Generation Wing Kashmir (JKSPDC) wrote to the petitioner on 26.07.2018 that the claim for release of payment on account of WTC is not tenable and cannot be entertained, or that the deduction was made from the final payment of the bills of the petitioner on 05.04.2018, or 28.03.2018 or 11.08.2017, it cannot be said that the cause of action would start running from 26.07.2018 or from 05.04.2018, or 28.03.2018, or 11.08.2017. Further, merely by serving a notice for appointment of an arbitrator on 05.03.2021, it cannot be said that the cause of action would start running from that time.

20. It has been submitted that the issue relating to limitation has been settled by the Hon'ble Supreme Court in its latest decision in *M/s B AND T AG vs. Ministry of Defence, 2023 SCC Online SC 657* decided on 18.05.2023, in which it was held by the Hon'ble Supreme Court that the cause of action cannot be postponed by writing letters or sending

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

reminders by bilateral discussions without indicating the period and the cause of action would arise when the right to sue accrues.

21. It has been submitted by Mr. M.A. Chashoo, learned counsel that it has been held in the said judgment that the limitation applies both before the arbitrator as well as before the Court when considering application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 and it has been submitted that since the cause of action had arisen on 29.06.2013 when the respondent informed him of the decision of the respondent-corporation to deduct WCT from the bills, as the respondent started deducting WCT from July, 2013 onwards, the limitation period continued only up to 28.06.2016 and hence any letter or legal notice thereafter for appointment of arbitrator is clearly time barred. It has been submitted that since the claim itself is time barred, the application for appointment of arbitrator after the lapse of the limitation period will also be not maintainable.

22. Mr. Pranav Kohli, learned Senior Counsel appearing for the petitioner, on the other hand, has submitted that the issue of limitation is a mixed question of law and fact which can best be ascertained only after leading evidence and appreciation of the same which can be appropriately done by the arbitral tribunal and as such, this petition may not be rejected at the threshold at the referral stage, for which the learned counsel for the petitioner has relied on the decision in *BSNL and Anr. vs. Nortel Networks India Pvt. Limited*, (2021) 5 SCC 738. It has been further submitted relying on the aforesaid decision that if there is the slightest

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

doubt about any such claim being time barred, the proper course of action is to refer the dispute to arbitration and allow the arbitral tribunal to decide the matter as otherwise, it would encroach upon what is essentially a matter to be decided by the tribunal.

23. In order to appreciate the rival contentions, we may briefly refer to the relevant law governing the field in this regard.
24. The scope of the power of the High Court pertaining to appointment of arbitrator under the Arbitration and Conciliation Act, 1996 before its amendment in 2015 was considered in extenso by a Constitution Bench of the Hon'ble Supreme Court in *SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618*. This Court, is not however, concerned with various aspects considered in the said judgement, except for the issue of limitation. The Hon'ble Supreme Court in the aforesaid case observed that the scope of examination by the Chief Justice while exercising the power under Section 11 of the Act is a limited one though it includes deciding whether the claim was a dead one, or a long-barred claim that was sought to be resurrected. It was observed that it may not be possible at that refusal stage, to decide whether a claim made is live one which comes within the purview of the arbitration clause. In such a situation, it will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. It was thus, held in the aforesaid case as follows:

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

“39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.”
(emphasis added)

25. After the amendment of the Act in 2015 by the Arbitration and Conciliation (Amendment) Act, 2015, certain significant changes were brought in the Act. The Hon’ble Supreme Court had the occasion to deal with many aspects including arbitrability of disputes and requirement to weed out stale claims in *Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1*. In the present case, we are not so much concerned with arbitrability of dispute, as the respondent corporation is not contesting these petitions on the existence of dispute or its arbitrability, but on the sole ground that the claim is time barred and hence no arbitrator can be

appointed. We will therefore, confine ourselves with this issue and examine this aspect from various perspectives highlighted in numerous decisions. As regards the issue relating to time barred claim and how the Court has to deal with such issue while considering appointment of arbitrator, under Section 11 of the Act, it was observed in ***Vidya Drolia*** (supra), as follows:

“**148.** Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in *Premium Nafta Products Ltd.*⁶⁴, it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

64: *Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.*, 2007 UKHL 40 : 2007 Bus LR 1719 (HL)

(emphasis added)

26. What we can thus, understand is that “*The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits*”.
27. The aforesaid observation is an echo of the observations made in ***SBP & Co. v. Patel Engg. Ltd.*** (supra) wherein it was held that “*It may not be*

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration.”

28. What is discernible from the aforesaid observations is that unless the claim is *ex-facie* time barred, or “hopelessly time barred” to quote the expression used in *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons*, (2021) 5 SCC 705. the Court at the time exercising power under Section 11 of the Act for appointment of arbitrator should desist from rejecting any application for appointment of an arbitrator at the threshold unless
29. What is an *ex-facie* time barred claim or hopelessly time barred claim?
30. The word *ex-facie* has been defined in Black’s Law Dictionary (Seventh Edition) as “apparently, evidently, facially” and in legal parlance it means “on the face of it”. This means any matter which appears to be true or valid outwardly on its surface which understanding, or appreciation may not involve undertaking any detail analysis of the subject. A hopeless time barred claim is obviously a claim which is barred due to prolonged delay.
31. The inference that can be drawn from the aforesaid decisions in *SBP & Co. v. Patel Engg. Ltd.*(supra) and *Vidya Drolia* (supra) is that if the claim cannot be determined as *ex-facie* time barred, and if such conclusion of the claim being time barred is to be arrived at after a detail

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

discussion and appreciation of evidence, it cannot be said to be *ex-facie* time barred, in which event, it should be left to the arbitral tribunal to consider such an aspect. Further, if there is the slightest doubt about the issue of arbitrability on account of the claim being time barred, it should be left to the arbitrator to decide.

32. In this regard, it may be appropriate to reproduce the following observations in *BSNL v. Nortel Networks (India)* (supra) as follows:

“45. In a recent judgment delivered by a three-Judge Bench in *Vidya Drolia v. Durga Trading Corpn.*, on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out “manifestly *ex facie* non-existent and invalid arbitration agreements, or non-arbitrable disputes”. The *prima facie* review at the reference stage is to cut the deadwood, where dismissal is barefaced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject-matter is not arbitrable, that reference may be refused.

46.

47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.”

33. In my view the rationale behind such a view is simple, that is, if the Court while exercising jurisdiction under Section 11 of the Act has to embark upon a task of ascertaining limitation period by undertaking an elaborate exercise of involving production of evidence and appreciating evidence, the Court will be usurping the role of the arbitral tribunal as also observed by the Hon’ble Supreme Court in the above referred case of *BSNL v. Nortel Networks (India)* (supra).

34. The irresistible conclusion is that only when the claim appears on the face of the record appears to be hopelessly time barred without the Court requiring to undertake an exhaustive and elaborate exercise, the Court can refuse to exercise jurisdiction under Section 11 of the Act, to weed out such dead wood claims.
35. There is yet another related issue. Section 43 (1) of the Arbitration and Conciliation Act, 1996 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. If that is so, provisions of Section 5 of the Limitation Act will also certainly apply to proceedings before the Court while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996, just as provisions of Section 137 of the Limitation Act applies, as held in the above referred cases. If provisions of Section 5 of the Limitation Act apply, nothing prevents the Court to condone delay in certain cases while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act. But is the Court at the refusal stage expected to exercise this power under Section 5 of the Limitation Act to condone the delay in respect of any belated claim if there are sufficient causes for condoning the same? In my view, the said course of action is not desirable in view of the decisions of the larger Bench of the Hon'ble Supreme Court in ***SBP & Co. v. Patel Engg. Ltd.***(supra) and ***Vidya Drolia*** (supra), that it would be more appropriate to leave that question to be decided by the arbitral tribunal on taking evidence.

36. The upshot of this discussion is that the Court at the referral stage can reject the claim only when it is manifestly, *ex-facie* and hopelessly time barred and not otherwise. There can be situations where a belated claim could be entertained if the claimant is able to show sufficient causes for not making the application within the limitation period as provided under Section 5 of the Limitation Act, which should be examined by the arbitral tribunal and not by the Court at the referral stage.
37. As we proceed to examine the matter further, it may be relevant to consider certain other aspects of the issue relating to limitation in filing application for appointment of arbitrator under Section 11 of the Act.
38. It is now well settled that there are two facets to the issue of limitation involved in an application under Section 11 of the Act. One relates to the limitation period for appointment of arbitrator under the Act, and other relates to the limitation period pertaining to the substantive relief claimed. This has been clarified in *BSNL v. Nortel Networks (India) (P) Ltd.* (supra) in the following words:

“15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the

underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator.....”

39. The effect is that while the application for appointment of arbitrator must be within 30 days as provided under Section 11 (5) of the Act, the limitation period for reference of a dispute to arbitration is 3 (three) years from the date on which the cause of action arises or when the claim which is sought to be arbitrated first arises. In *Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, (2020) 14 SCC 643, it was held as under:

“13. Section 43 of the 1996 Act (relevant part) provides as follows:

“43. **Limitations.**—(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.”

14. Sections 43(1) and (3) of the 1996 Act are in perimetria with Sections 37(1) and (4) of the 1940 Act. It is well-settled that by virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a court under the 1940 Act (see *State of Orissa v. Damodar Das* 9) as well as the 1996 Act (see *Grasim Industries Ltd. v. State of Kerala* 10) is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.”

9: (1996) 2 SCC 216

10: (2018) 14 SCC 265

40. As to when the cause of action arises or the claim sought to be arbitrated can be made in the matter relating to the appointment of arbitrator is also now well settled, which is, when the dispute arises. A dispute arises when a claim is made on one side, and is specifically denied or contested by the other side.
41. In the present case, it would, therefore, be required to ascertain when the dispute arose.
42. In order to understand this, it will be apposite to refer to certain relevant facts as follows.
- (i) 07.01.2010: The works in respect of three district were awarded to the petitioner being the lowest bidder, but there was certain disagreement about the payment of WCT.
 - (ii) 25.02.2010: The Managing Director of JKSPDC wrote to the petitioner that WCT deduction can be made only to the extent of erection part of the projects.
 - (iii) 29.04.2010: The contract agreements for electrification and other related works under RGGVY scheme were executed after the issue relating to payment of WCT was settled as per the letter dated 25.02.2010 from the Managing Director, JKSDPC to the petitioner.
 - (iv) There is no dispute about the existence of the arbitration clause, nor about the existence of the dispute.
 - (v) The dispute centers round the liability of the parties regarding payment of the work contract tax (WCT). While the petitioner contends that the petitioner is not liable to pay WCT for any part of the contract, according to the respondent, the petitioner is liable to pay WCT, and hence the same was deducted from his bills.
 - (vi) 29.06.2013: The respondent authorities informed the petitioner of the decision of the respondent-corporation to deduct WCT from the bills of the petitioners and accordingly, deducted the same from the bills of the petitioner.
 - (vii) 15.07.2013: Letter from the Director, Finance, to the Chief Engineer, Generation Wing, Kashmir informing that the concerned Executive Engineer should deduct the entire amount of WCT recoverable from the petitioner, but no copy of this letter was given to the petitioner.

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

- (viii) July,2013: The respondent started deducting WCT from the bills of the petitioner which was objected to by the petitioner.
 - (ix) 2013 to 2016: The petitioner claims that negotiations were going on between the parties regarding payment of WCT. The Law Minister of the Government of Jammu & Kashmir was also involved in the negotiation for settlement process.
 - (x) 29.12.2016: The petitioner submitted representation to the Managing Director, JKSPDC for reviewing the said decision of the corporation to deduct WCT from the bills of the petitioner.
 - (xi) 26.07.2018: The Chief Engineer, Generation Wing, Kashmir, JKSPDC wrote to the petitioner informing that the corporation considered all the letters issued by the petitioner in the past and the Law Department has made the observation that the claim of the petitioner is not tenable. Thus, the claim of the petitioner was formally rejected through this letter.
 - (xii) 11.08.2017: Final payments made in respect of Anantnag.
28.03.2018: Final payments made in respect of Baramulla.
05.04.2018: Final payments made in respect of Pulwama.
 - (xiii) 15.10.2018: The petitioner again requested the Chief Engineer, Generation Wing, Kashmir, JKSPDC to make payment of WCT wrongly deducted from the bills.
 - (xiv) 05.03.2021: The Petitioner invoked the arbitration clause by serving the notice to the respondent.
 - (xv) 30.03.2022: Delhi High Court allowed withdrawal of the petition Arbitration Petition No.722 of 2021 erroneously filed before Delhi High Court with liberty to approach the court of competent jurisdiction.
 - (xvi) 10.05.2022: Arbitration Petition Nos. 12 of 2022, 13 of 2022 and 14 of 2022 filed before this Court.
43. It is the plea of the respondent corporation that the dispute arose when the respondent corporation rejected the claim of the petitioner on 29.06.2013 by informing that WCT is to be paid by the petitioner and the respondent started deducting WCT from the bills of the petitioner thereafter since July, 2013. As the petitioner opposed this deduction, the dispute can be said to have arisen since then, as such, the limitation period of 3 (three) years would start running from then and would expire on 28.06.2016. Since, the petitioner belatedly invoked the arbitration

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

clause by serving notice on 05.03.2021, the claim is hopelessly time barred hence, no arbitrator can be appointed.

44. On the other hand, it is the case of the petitioner that since the petitioner did not agree to the said deduction of WCT from the bills of the petitioner in spite of earlier categorical assurance made to the petitioner to the contrary on 25.02.2010, by the letter of the Managing Director of JKSPDC, he made representations to the respondent corporation and other authorities which examined the claim of the petitioner and the claim was rejected specifically only on 26.07.2018 by the letter dated 26.07.2018 by informing that the claim of the petitioner is not tenable. Thus, it can be said that the dispute arose only on 26.07.2018 only when the claim of the petitioner was specifically repudiated by the respondent on 26.07.2018, and not before that.
45. From the above, it is discernible that a difference of opinion arose between the petitioner and the respondent corporation when the respondent started deducting WCT from the bills of the petitioner since July 2013 and also recovered WCT which were already released in favour of the petitioner in respect of Anantnag district, in spite of the earlier letter dated 25.02.2010 by the Managing Director of JKSPDC writing to the petitioner informing him that WCT deduction can be made only to the extent of erection part of the projects.
46. The petitioner claimed that all these happened after a meeting was called all of a sudden on 29.06.2013 by the JKSPDC and in the said meeting it was conveyed to the petitioner that WCT was not in the account of the

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

JKSPDC and to the surprise of the petitioner, payments against WCT which were earlier released in the project for Anantnag were recovered from the petitioner even without informing them in July 2013 which was protested by the petitioner.

47. It has been stated by the petitioner that when the respondent corporation started deducting WCT from the bills since 2013, it was contested by the petitioner in every meeting with the respondents, concerned officials and various correspondences were exchanged between the petitioner and different officers of the respondent. According to the petitioner, because of the protestation, the matter was referred by the respondent to the Law Department on the above issue, thus, the petitioner was made to understand that his grievances was being looked into which dissuaded him from invoking the arbitration clause.
48. The petitioner also stated that on 29.12.2016 the petitioner had represented to the Managing Director JKSPDC in an internal meeting where the JKSPDC officials were also present, it was again decided to send the case to the Law Department for their opinion but the petitioner received a letter dated 26.07.2018 from the Chief Engineer, Generation Wing, Kashmir JKSPDC where in the respondent stated that the Law Department had considered all the letters issued by the petitioner in the past on the issue of applicability of WCT in the RGGVY Schemes and the Law Department was of the view that the claim of the petitioner for release of payment on account of WCT was not tenable.

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

49. According to the petitioner, it is for the first time on 26.07.2018 that the petitioner was informed in unambiguous terms that the claim of the petitioner for not paying WCT was not tenable. According to the petitioner, issuance of this letter dated 26.07.2018 would show that the respondent corporation, though had started deducting WCT from the bills of the petitioner, was still considering the request of the petitioner, which the respondent rejected only on 26.07.2018.
50. It has been further submitted by the petitioner that the deduction of the WCT was a continuing one and did not end with the deduction in July, 2013 but was continued till 11.08.2017 in respect of Anantnag, 28.03.2018, in respect of Baramulla and 05.04.2018, in respect of Pulwama when the final payments were made in respect of these districts and as such it can be said that it is a case of continuing and recurring cause of action.
51. Thus, it can be said that the cause of action arose on 26.07.2018, which continued on 11.08.2017, 28.03.2018 and 05.04.018, in which event, the limitation period would start running from those dates and would expire on 25.07.2021, or 10.08.2020, or 27.03.2021, or 04.04.2021.
52. This contention of the petitioner was however, vehemently objected by Ld. Counsel for the respondent contending that merely because the parties were exchanging letters and correspondences, it cannot have the effect of extending the period of limitation.
53. In this regard, the Id. Counsel for the respondent has relied on the decision of the Hon'ble Supreme Court in *M/s B AND T AG Vs.*

Ministry of Defence (supra) in which it was held that the period of limitation cannot be extended by mere exchange of letters.

54. It may be also mentioned that the Hon'ble Supreme Court had earlier considered the same issue and came to the same conclusion in *BSNL v. Nortel Networks (India) (P) Ltd.*, (supra) in the following words,

“51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters,³³ or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: “where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There must be a clear notice invoking arbitration setting out the “particular dispute”³⁴ (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.”

33: *S.S. Rathore v. State of M.P.*, (1989) 4 SCC 582 : 1990 SCC (L&S) 50; *Union of India v. Har Dayal*, (2010) 1 SCC 394; *CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd.*, (2020) 5 SCC 185

34: Section 21 of the Arbitration and Conciliation Act, 1996.

(emphasis added)

55. In short, the plea of the petitioner is that even though the respondent corporation had started deducting WCT since 2013, the respondent corporation was showing willingness to reconsider their stand because of which the matter was referred to the Law Department. The petitioner had also approached the then Law Minister who directed for reconsideration. Thus, only after obtaining the view of the Law Department, the respondent corporation finally made known to the petitioner vide letter dated 26.07.2018 that the claim of the petitioner was not tenable. Thereafter, the petitioner ceased to negotiate with the respondent corporation.

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

56. On the other hand, the plea of the respondent corporation is that the cause of action commenced from 29.06.2013, and as such the limitation expired on 28.06.2016 and any amount of correspondence or negotiation would not extend the limitation period.
57. Thus, we have to examine whether in the facts and circumstances as discussed above, and in the light of the legal position obtaining, the claim of the petitioner can be said to be *ex-facie* time barred so as to disentitle the petitioner to seek appointment of an arbitrator.
58. Though, at the first blush, the claim of the petitioner appears to be time barred if we keep into consideration only the decision of the respondent corporation conveyed to the petitioner on 29.06.2013 that the WCT will be deducted from the bills of the petitioner and, on the basis of which the respondent started deducting WCT from the bills of the petitioner since July, 2013. To that extent it appears that the cause of action arose on 29.06.2013 and as such the claim of the petitioner appears to be time barred. However, if we consider other attending circumstances, it cannot be said that the claim of the petitioner is *ex-facie* time barred, or hopelessly time barred. This Court is persuaded to take this view for the following reasons.

- (i) Before the respondent corporation started deducting WCT from the bills of the petitioner since July, 2013 in terms of the decision of the respondent on 26.09.2013 based on the letter dated 15.07.2013 of the Director, Finance, there was already a decision conveyed to the petitioner on 25.02.2010 by the

Managing Director of the JKSPDC to the petitioner that the WCT deduction can be made only in respect of the erection part of the project.

- (ii) The said letter of the Managing Director of the JKSPDC dated 25.02.2010 was never rescinded or withdrawn by the respondent corporation before the final decision was conveyed to the petitioner vide letter dated 26.07.2018.
- (iii) If we carefully examine the decision of the respondent to deduct WCT from the bills of the petitioner based on the letter dated 15.07.2013 of the Director, Finance addressed to the Chief Engineer, Generation Wing, Kashmir, a copy of which is annexed as Annexure III to the objection file by the respondents, it is seen that copy of the said letter dated 15.07.2013 was not given to the petitioner. It appears that the respondent corporation deducted the WCT from the bills of the petitioner without any formal letter issued to the petitioner in this regard.
- (iv) Therefore, even if WCT was deducted from July, 2013 and the petitioner was till executing the work, he was engaged continuously in negotiation with the respondent corporation.
- (v) The petitioner has specifically pleaded that he had approached the concerned officials of the respondent and the Law Minister directed the Law Department to look into it. Finally, the respondent corporation made its decision regarding deduction

of WCT by rejecting the claim of the petitioner only on 26.07.2018 by issuing the letter dated 26.08.2018.

- (vi) Thus, under the circumstances, it cannot be said with certainty that the claim of the petitioner is *ex-facie* time barred or that it is hopelessly time barred.
- (vii) If we consider the plea of the petitioner in the aforesaid circumstances, it can be said that there is some element of doubt about the claim of the respondent corporation that the claim of the petitioner is time barred, in which event, as held in a catena decisions as also referred to above, the appropriate course of action would be to leave to the arbitral tribunal to examine this issue of limitation by considering the pleas and evidences as may be produced by the parties. Though, this Court could have also undertaken this exercise by directing the parties to produce more materials and evidences, such an exercise would entrench upon the domain of the arbitral tribunal which must be eschewed by the Court at the stage of consideration for appointment of arbitrator under Section 11 of the Act.
- (viii) This Court is also of the view that the decision in *M/s B AND T AG vs. Ministry of Defence* (supra) may not be applicable in the present case for the reason that in the aforesaid case, the Hon'ble Supreme Court was dealing with an *ex-facie* time barred claim. In the aforesaid case, the cause of action arose on

16.02.2016 when the Ministry of Defence encashed the bank guarantee and deducted liquidated damages. The Ministry of Defence, accordingly, informed the petitioner therein about the encashment of the bank guarantee. Thereafter, certain negotiations took place between the parties. But the Ministry wrote to the petitioner therein on 22.09.2017 that it would not reconsider the request of the petitioner. In spite of such a letter dated 22.09.2017, the parties were still in negotiation and the petitioner therein wrote to the Ministry on 03.02.2022 after about 4 ½ years after the aforesaid letter dated 22.09.2017 invoking the arbitration clause. The Hon'ble Supreme Court under the circumstances held that it was a hopelessly time barred claim. In the present case, the petitioner was informed in writing on only 26.07.2018 that the claim of the petitioner is not tenable, and the petitioner invoked the arbitration clause on 05.03.2021, that is within 3(three) years of the latter dated 26.07.2018 and as such, it cannot be said with certainty that it was a hopelessly time barred claim, though it is also an equally possible position that it was time barred, if look only into the act of the respondent in deducting WCT since July, 2013.

(xvii) It may also be noted that, though the respondent corporation started deducting WCT from the bills of the petitioner since July 2013, the process of deduction continued till 11.08.2017 when final payments were made in respect of Anantnag, till

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

28.03.2018, in respect of Baramulla and till 05.04.2018 in respect of Pulwama. Thus, it can be said to be a case of continuing and recurring cause of action and not restricted to any single particular point of time.

59. In view of the above and for the reasons discussed above, I am satisfied that this is not a case of an *ex-facie* time barred claim and as such I am inclined to allow the application.

60. In this regard, this Court would refer to the arbitration clause which provides for appointment of an arbitrator. The aforesaid arbitration reads as follows:-

“47. Settlement of disputes

47.1 *Any dispute(s) or difference(s) arising out of or in connection with the Contract.*

47.2 *If any dispute or difference of any kind; whatsoever; shall arise between the Employer and the Contractor, arising out of the Contract for the performance of the Works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place; be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the Employer and the Contractor.*

47.3 *Save as hereinafter provides, such decision in respect of every matters so referred shall be final and binding upon the parties until the completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the works with all due diligence, whether he or the Employer requires, arbitration as hereinafter provided or not.*

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

47.4 If after the Engineer has given written notice of his decision to the parties, no claim to arbitration has been communicated to him by either party within thirty (30) days from the receipt of such notice, the said decision shall become final and binding on the parties.

47.5 In the event of the Engineer failing to notify his decision as aforesaid, or in the event of either the Employer or the Contractor being dissatisfied with any such decision, or within thirty days, as the case may be, either party may require that the matters in dispute be referred to arbitration as hereinafter provided.

48.0 Arbitration

48.1 All disputes or differences in respect of which the decision, if any, if the Engineer has not become final or binding as aforesaid shall be settled by arbitration in the manner hereinafter provided.

48.1.1 The Arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Employer and the third to be appointed an umpire by both the arbitrators in accordance with the Indian Arbitration Act. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration.

48.1.2 The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be Srinagar.

48.2 The decision of the majority of the arbitrators shall be final and binding on the parties. The arbitrators may, from time to time with the consent of all the parties enlarge the time for making the awards. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act or any reason, it will be lawful for the party concerned to nominate

another arbitrator in place of the outgoing arbitrator.

48.3 The arbitrator shall have full powers to review and/or revise any decision, opinion, direction, certification or valuation of the Engineer in accordance with the Contract, and neither party shall be limited in the proceedings before such Engineer for the purpose of obtaining the said decision.

48.4 No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him as being called as the witness or giving evidence before the arbitrators on any matter whatsoever relevant to the dispute or difference referred to the arbitrators as aforesaid.

48.5 During settlement of dispute and arbitration proceedings, both parties shall be obliged to carry out their respective obligations under the Contract.

61. The petitioner in order to invoke the arbitration clause wrote to the respondent vide letter dated 05.03.2021 and also requested the respondent to appoint an “Engineer”, after informing the respondent that the petitioner had appointed one Sri Ram Singh Baswana (Retd.) District Judge, Haryana as his nominee arbitrator in case the dispute raised could not be resolved by the appointed Engineer. Arbitration Clause 48.1.1 provides that the Arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Employer and the third to be appointed an umpire by both the arbitrators in accordance with the Indian Arbitration Act. It has been further provided that if either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the

Arb P. No.12/2022

Arb P. No.13/2022

Arb P. No.14/2022

Arbitration clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration.

62. The respondent replied on 27.03.2021 that as the claim is time barred no occasion arises for resolution of the dispute by arbitration.
63. In view of the failure of the respondent to appoint its nominee arbitrator in terms of the aforesaid arbitration clause, there may not be any need to have the arbitral tribunal consisting of three members. Since the petitioner has been able to make out a case for appointment of an arbitrator to resolve the dispute, I hereby appoint Justice Bansilal Bhat, Retired Judge of this High Court, as the Arbitrator to resolve the dispute between the parties. However, in view of the objection raised by the respondent that the claim is time barred, the Arbitrator shall first decide this issue of limitation and only after giving a decision on the said issue, the Arbitrator will proceed with the matter in accordance with law.
64. The Registry is to inform Justice Bansilal Bhat of his appointment as the Arbitrator who shall proceed with the matter in terms of the above direction and in accordance with law.
65. The petition is accordingly allowed as above.

(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
19.10.2023
Shameem H.

Whether approved for reporting? Yes/No

Arb P. No.12/2022
Arb P. No.13/2022
Arb P. No.14/2022