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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 20th November, 2018

+ O.M.P. (COMM) 468/2018
WELSPUN ENTERPRISES LTD Petitioner
Through: Mr.Sameer Parikh, Ms.Smita
Bhardwaj, Ms.Tanya Chaudhary
and Ms.Malvika Bhanot, Advs.
versus
NCC LTD Respondent
Through: Ms.Priya Kumar, Mr.Adhish
Srivastava, Mr.Tejas Chhabra,
Mr.Anand Chichra & Mr.Sujit
Kumar Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

Cav.1057/2018

As the learned counsel for the respondent appears on advance notice, Caveat stands disposed of.

I.A. No. 15782/2018

This is an application seeking condonation of seven days delay in re-filing of the petition. For the reason stated in the application the delay is condoned and the application stands allowed.

I.A. Nos.15780-81/2018 (Exemptions)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 468/2018

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Majority Award dated 23.07.2018 passed by

the Arbitral Tribunal holding the claims of the petitioner to be barred by Law of Limitation.

2. The disputes between the parties had arisen in relation to the Memorandum of Agreement dated 19.12.2006 entered into between MSK Projects (India) Limited (MSK), which was subsequently acquired by the petitioner herein, and the respondent, whereby the respondent sub-contracted a flyover project to the petitioner's predecessor-in-interest on item rate basis for a total value of Rs. 53.25 crores.

3. Indian Oil Corporation Limited and Nafto Gaz India Private Limited (Nafto Gaz) entered into an EPC contract in respect of 'Balance Offsite & Utilities and Interconnection with Panipat Refinery / Marketing Terminal (EPCC-9 Package)' in the Panipat Naphtha Cracker Project. Nafto Gaz, in turn awarded the said contract in favour of the Respondent herein also on EPC basis. Out of the work awarded in favour of the respondent, the respondent sub contracted the work in respect of inter-connecting flyover between existing Panipat Refinery and Panipat Naphtha Cracker Project ("PNCP") to the petitioner.

4. The Arbitral Tribunal has curled out the necessary dates for the purpose of considering the question of limitation in paragraph 82 of the Majority Award as under:-

“82. For the purpose of considering the limitation issue, the following dates/events may be noticed at the outset:

- *03.08.2010 – Minutes of Meeting acknowledging the debt.*
- *30.10.2010 – The final RA Bill was certified.*
- *29.11.2010 – Due date for payment of Final Bill.*
- *30.11.2010 – The completion certificate was issued.*
- *17.05.2011 – The Respondent was finally asked to make*

payment to the Claimant.

- *13.07.2012 – The Respondent stated that they would consider the question of making payments to the Claimant.*
- *10.09.2012 – The Respondents stated that the payments would not be made to the Claimant.*
- *26.11.2012 – Dispute Settlement Clause invoked by making a request for the meeting of the CEO's of the parties.*
- *21.12.2012 – The CEOs met but no settlement could be arrived at.*
- *27.01.2014 – the Claimant invoked the Arbitration Clause.”*

5. The Arbitral Tribunal has held that in the present case the cause of action would accrue in favour of the petitioner on the date when the final bill should have been paid by the respondent, that is, 29.11.2010. Admittedly the petitioner had invoked the Arbitration Agreement vide its notice dated 27.01.2014 and therefore, in the opinion of the Arbitral Tribunal, the claim raised by the petitioner was barred by Law of Limitation. The Arbitral Tribunal rejected the submission of the petitioner that the cause of action would accrue only on the respondent refuting the claims of the petitioner vide its letter dated 10.09.2012 or when the parties could not arrive at a settlement before the CEOs on 21.12.2012.

6. The learned counsel for the petitioner submits that it was only with the letter dated 10.09.2012 that the respondent refuted the claim of the petitioner claiming the present to be a case of back to back Contract. The petitioner immediately invoked the Dispute Resolution Mechanism as contained in the Memorandum of Agreement between the parties and upon failure of the Chief Executives to arrive at a settlement, invoked the Arbitration Agreement vide its letter dated 27.01.2014. He submits

that the claims of the petitioner would therefore, be within the period of limitation. In any case, the Arbitral Tribunal has arrived at a contradictory finding inasmuch as for the claim of refund of retention money the Arbitral Tribunal had held the same to be within the period of limitation.

7. It is further submitted that the defence of the respondent is contrary in nature inasmuch as on one hand it is contended that the claim of the petitioner is premature while on the other the claim of the petitioner has been rejected on the ground that it is barred by limitation.

8. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same. The claim setup by the petitioner before the Arbitral Tribunal was clearly on the basis of certification of the final bill by the respondent. The Arbitral Tribunal has therefore, rightly held that the cause of action accrued in favour of the petitioner on the said date, that is, on 29.11.2010. The letter dated 10.09.2012 was sought to be relied upon by the petitioner as a rejection of the claim of the petitioner by the respondent. However, that would not extend the period of limitation as the cause of action has already accrued in favour of the petitioner and mere exchange of correspondence between the parties cannot extend the period of limitation or provide a fresh date of commencement of cause of action.

9. As far as the invocation of the Dispute Resolution process by the petitioner vide its letter dated 26.11.2012 is concerned, admittedly the same resulted in a failure on 21.12.2012. The petitioner finally invoked the arbitration only on 27.01.2014. In terms of Section 21 of the Act, the date on which a request for the disputes to be referred to arbitration

is received by the respondent, is the date of commencement of arbitration proceedings. The Supreme Court in *State Of Goa vs M/s Praveen Enterprises*, (2012) 12 SCC 581 has held that the date of invoking arbitration will be a determinative factor for the purpose of limitation.

10. The Disputes Resolution Mechanism as provided in the Memorandum of Agreement reads as under:-

“Disputes and Settlement

In the event of any dispute arising between the parties relating to the various terms and conditions set forth hereinabove, the parties undertake to resolve the differences by mutual negotiation. If such dispute or difference cannot be resolved within one month from the date it is arisen, the same shall be referred to the Chief Executives of NCC and MSK. If the Chief Executives also fail to agree then such differences/disputes shall be referred to a Sole Arbitrator be appointed by NCC and MSK by mutual consent.”

11. It may be true that before invoking the Arbitration Agreement between the parties the petitioner was required to explore the possibility of a settlement through reference of the dispute to the Chief Executives of the parties, however, in the present case the same had also resulted in a failure on 21.12.2012. The petitioner thereafter invoked the arbitration proceedings only on 27.01.2014. The petitioner was, therefore, not considering this reference to the Chief Executives as a pre condition to the invocation of the arbitration, but as a step for making an attempt to amicably resolve the disputes. No reason has been given by the petitioner for not invoking arbitration between 21.12.2012 to 27.01.2014.

12. The Arbitral Tribunal has also considered the issue of limitation in detail and has held that the letter dated 26.11.2012 by itself did not stop the period of limitation from running. It further held that mere exchange of correspondence between the parties would not extend the period of limitation and the petitioner was bound to take recourse to the legal remedy within the prescribed period of limitation, failing which it was to suffer the consequences thereof. It has held that all claims falling under the final bill are therefore, barred under the Law of Limitation.

13. As far as the submission of the learned counsel for the petitioner that the respondent had taken contradictory pleas, wherein on one hand it had contended that the claim of the petitioner is premature, while on the other it was contesting the claims as being time barred is concerned, I may only note that the period of limitation has to be considered on the basis of the cause of action asserted by the petitioner as a Claimant. The petitioner was disputing the claim of the respondent that the Agreement between the parties was a back to back Agreement and the petitioner was not entitled to the payment until and unless respondent receives the same from Nafto Gaz. Therefore, the limitation for such a plea has to be considered on the basis of the case setup by the petitioner. Interestingly, the petitioner did not place reliance on the respondent's letter dated 10.09.2012 as an admission of liability but treated it as a rejection of petitioner's claim by the respondent.

14. As far as the refund of retention money is concerned, the Arbitral Tribunal has accepted the plea of the respondent that the same was refundable only once the same was received by the respondent from Nafto Gaz. For this purpose, the Arbitral Tribunal has placed reliance

on the Minutes of Meeting dated 03.08.2010 between the parties. The same, therefore, was a claim held to be premature in nature and therefore, within the period of limitation. The same cannot be said to be a case of contradictory finding by the Arbitral Tribunal.

15. In view of the above, I find no merit in the present petition and the same is dismissed, with no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 20, 2018/rv