

O.P.No.406 of 2013

and

A.No.2657 of 2013

SENTHILKUMAR RAMAMOORTHY,J.

This petition is filed under Section 37(2) of the Arbitration and Conciliation Act 1996 (the Arbitration Act) to set aside the order dated 24.05.2013 of the Arbitral Tribunal whereby certain issues which had been framed earlier were eschewed.

2. I heard the learned Counsel for the Petitioner and the learned Counsel for the first Respondent. The learned Counsel for the petitioner pointed out that a petition was filed under Section 11 of the Arbitration Act for appointment of an Arbitrator and that, in the counter to the said petition, the plea of limitation was raised. Thereafter, he referred to the order in the Section 11 petition and pointed out that the said order does not discuss or enter any findings in respect of limitation and the issue of limitation was left open to be decided by the Arbitral Tribunal. Consequently, he pointed out that issues were framed by the Arbitral Tribunal and that the first issue was

whether the proceedings had been initiated within the prescribed period of limitation. Subsequently, he submitted that an application was filed by the first Respondent to eschew some of the issues, as specified in the said application, including the issue relating to limitation. The said application was disposed of by the impugned order wherein the learned Arbitrator referred to the submissions of the two parties and, thereafter, concluded at Para 8 and 9 of the said order that in the "absence of any such direction in the order under Section 11 it has to be construed that the Hon'ble Chief Justice comes to a finding that there exists a live issue and the respective claim of the parties have not become barred by limitation and this Arbitral Tribunal cannot re-examine the issue of limitation, as it would amount to interference with the order of the Hon'ble Chief Justice in O.P.No.793 of 2008 dated 28.11.2011". The learned Counsel for the petitioner pointed that the application to eschew the issue of limitation was allowed entirely on the basis of this patently erroneous finding and conclusion of the learned Arbitrator. He also referred to and relied upon judgments of the Hon'ble Supreme Court in MANU/SC/0300/2010 (Indowind Energy Ltd. Vs. Wescare (I) Ltd. And Ors.) and MANU/SC/0525/2013

(Schlumberger Asia Services Ltd. Vs. Oil and Natural Gas Corporation Ltd.) so as to contend that the question of limitation may be left open to be decided by the Arbitral Tribunal in proceedings under Section 11 of the Act. By relying on the said judgments, he concluded his submissions by pointing out that the present petition is clearly maintainable under Section 37(2) read with Section 16(2) and (3) of the Arbitration Act.

3. In response, the learned Counsel for the first respondent submitted that the question of limitation was expressly raised in the Section 11 proceedings and the Hon'ble Chief Justice did not discuss the said issue or enter any finding with regard to the same or issue a direction to the Arbitral Tribunal to decide the question of limitation. In the absence of a specific direction by the Hon'ble Chief Justice in the Section 11 order, he submitted that it is not open to the Arbitral Tribunal to frame an issue on this question and decide the same. He further submitted that the appeal under Section 37 (2) is not maintainable in this case. In specific, it was his contention that such an appeal is maintainable only in respect of orders of the Arbitral Tribunal

under Sections 17, 16(2) or 16(3) of the Arbitration Act. On the contrary, he submitted that the impugned order is merely a procedural direction under section 19 of the Arbitration Act because the parties did not stipulate the procedure in the contract.

4. The records were examined and the oral submissions were considered carefully. The questions that arise for consideration are whether the Arbitral Tribunal has the jurisdiction and authority to decide the question of limitation in the light of the order passed by the Hon'ble Chief Justice in the Section 11 petition and whether this petition is maintainable under Section 37(2) of the Arbitration Act. On perusal of the order passed in the Section 11 petition, it is evident that there is no discussion or finding with regard to the question of limitation. This leads to the question as to whether in the absence of a specific direction to the Arbitral Tribunal, the Arbitral Tribunal has the jurisdiction or authority to decide the question of limitation. In this regard, it is pertinent to point out that once the arbitrator is appointed by the Chief Justice or his designate under Section 11, the jurisdiction or authority of the Arbitral Tribunal flows from the contract. Therefore,

unless the question of limitation was decided in the Section 11 petition or there is some restriction or limitation in the contract, it is open to the Arbitral tribunal to decide the issue.

5. In this case, in view of the fact that there are no findings with regard to limitation in the Section 11 order, the Arbitral Tribunal is obligated to decide this question especially because limitation has been expressly pleaded in defence in the Arbitral proceedings. It is true that, ordinarily, limitation is not a question relating to the jurisdiction of the Arbitral Tribunal as held in IFFCO Ltd. V. Bhadra Products (2018) 2SCC534. However, in this case, the first respondent took out an application contending that the Arbitral Tribunal does not have the authority or jurisdiction to decide the question of limitation on account of the absence of a specific direction, in that regard, in the Section 11 order. The said contention was accepted by the Arbitral Tribunal while allowing the application. In effect, the Arbitral Tribunal decided that it does not have jurisdiction to decide the question of limitation. On account of the said impugned decision, the order challenged, in this petition, is effectively an order accepting a

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jurisdictional plea. Therefore, the present petition is maintainable under Section 37(2) read with Section 16(2) and (3) of the Act.

6. In view of the foregoing discussion, I hold that the petition is maintainable and that the impugned order is liable to be set aside insofar as it relates to eschewing the issue relating to limitation.

7. Consequently, the order dated 24.05.2013 of the Arbitral Tribunal is set aside and the Arbitral Tribunal is directed to reinstate the issue relating to limitation, proceed with the arbitration as per the Arbitration Act and determine the issue on limitation at the appropriate stage of the proceedings. In view of this order, the connected application is closed.

23.10.2019

Speaking/Non-speaking Orders.

Index: Yes/No

Internet: Yes/No

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