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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 30.08.2019

Pronounced on: 01.11.2019

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ARB.P. 178/2019

COUNCIL OF SCIENTIFIC & INDUSTRIAL RESEARCH

..... Petitioner

Through: Mr. Ravi Sikri, Senior Advocate with
Mr. Praveen Swarup, Mr. Deepank
Yadav, Mr. Rohit Agrawal,
Advocates.

versus

GODAVARI BIOREFINERIES LIMITED(GBL) Respondent

Through: Mr. Sameer Parekh, Mr. Sumit Goel,
Ms. Anwesha Padhi, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

I.A. 3753/2019 & 3755/2019 (for delay)

1. These are applications seeking condonation of 13 days' delay in filing and 97 days' delay in refiling the petition.
2. For the reasons stated in the applications, the same are allowed and the delays in filing and refiling the petition are condoned.
3. The applications stand disposed of.

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4. The present petition has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('the Act') seeking appointment of an Arbitrator for adjudication of disputes between the parties arising out of a loan agreement dated 14.3.2007.

5. To capture a few facts, an agreement dated 14.3.2007 was entered into between the parties whereby the petitioner had advanced a soft loan to the tune of Rs.4.82 crores to the respondent.
6. Clause 10 of the agreement provided that the agreement would be effective from the date of its signing and would be valid until the repayment of the entire loan.
7. On 26.2.2010, a supplementary deed was executed whereby the repayment schedule was revised and the loan amount was repayable from 1.10.2010 in ten equal instalments. The last payment was to be made by 1.10.2019. The petitioner wrote to the respondent to sign a supplementary deed in 2013 for rescheduling the re-payment but the respondent responded with the request to convert the loan to a Grant.
8. On 11.8.2014, the petitioner sent a legal notice to the respondent calling upon it to pay a sum of Rs.10,28,99,000/-. Respondent however, responded on 9.9.2014 denying its liability to re-pay the loan.
9. On 27.10.2014, petitioner invoked the Arbitration Clause and sought acceptance for three members of the Monitoring Committee to be appointed as an Arbitral Tribunal, in terms of the Arbitration Agreement between the parties. On 3.11.2014, one member out of the three members, expressed his inability to act as an Arbitrator.
10. The Arbitration & Conciliation (Amendment) Act, 2015 came into effect from 23.10.2015, whereby Section 12(5) was inserted. In view of the said Amendment, the petitioner sent a Notice dated 6.9.2017 to the respondent seeking its consent for referring the dispute to a Sole Arbitrator.

11. Respondent vide its letter dated 16.9.2017 insisted that the arbitration should be conducted by the remaining two members, who would in turn appoint the Presiding Arbitrator. It is pertinent to note here that in the same letter, respondent also requested that process of arbitration be initiated at the earliest. However, the arbitration proceedings never commenced between the parties and the present petition has been filed by the petitioner praying that a Sole Arbitrator be appointed for the adjudication of the inter se disputes between the parties.
12. Learned counsel for the petitioner contends that under sub-section (6A) to Section 11 inserted by the Amendment, this Court shall confine itself only to the examination of the existence of an arbitration agreement. Reliance is placed on the judgment of the Apex Court in ***Duro Felguera, S.A. vs. Gangavaram Port Limited (2017) 9 SCC 729*** wherein it has been held that after the 2015 Amendment in the Act, all that the Court needs to examine in a petition under Section 11 of the Act is, the existence of an arbitration agreement and nothing more and nothing else.
13. It is next contended that it is true that there is limitation of three years in terms of Article 137 of the Limitation Act, 1963 for filing an application under Section 11(6)(c) of the Act. He submits that initially cause of action had accrued on the date of receipt of communication dated 3.11.2014 from one of the members of the Committee expressing his inability to act as an Arbitral Tribunal. Reliance is placed on the judgment of this Court in the case of ***Prasar Bharti Vs. MAA Communication (2010) SCC Online Delhi 526***. It is submitted that between 3.11.2014 till 23.10.2015, before the Amendment came into effect, the petitioner could only seek replacement of one of the

Arbitrators. However, after the coming into force of Section 12(5), the other members of the Committee also became ineligible to act as Arbitral Tribunal and thus the entire composition of the Arbitral Tribunal stood abrogated by virtue of this Amendment of 2015. The learned senior counsel contends that in these circumstances the petitioner had written to the respondent on 6.9.2017 for appointment of a Sole Arbitrator and in fact the respondent had conveyed its written consent for arbitration vide its reply dated 16.9.2017 subject to a caveat that the two members of the Committee would appoint a third member and the arbitration could be proceeded with. This gave a fresh cause of action to the petitioner. Learned senior counsel therefore argues that the present petition is within the prescribed period of limitation from the happening of the contingency under Section 11(6) of the Act as well as on account of respondent's consent to arbitration and is thus maintainable. He further submits that in view of the written consent of the respondent even Section 18 of the Limitation Act would be applicable. In fact, according to learned senior counsel the benefit of Section 5 of the Limitation Act would also come to its rescue as the facts pleaded in the petition constitute 'sufficient cause' for condonation of delay in terms of the judgment of this Court in *Yogesh Kumar Gupta Vs. Anuradha Rangarajan (2007) SCC Online Delhi 287*.

14. *Per contra*, learned counsel for the respondent submits that the present petition is not maintainable as both the claims of the petitioner are barred by time. Learned counsel contended that way back on 9.9.2014 the respondent had sent a reply to the legal notice of the petitioner dated 11.8.2014, denying its liability to pay any amount and had

terminated the agreement on account of the same being vitiated by fraud on the part of the petitioner. He submits that on 27.10.2014 the petitioner had sent a letter to the three members of the Monitoring Committee, under Clause 15 of the Agreement pointing out that disputes had arisen between the parties and sought their acceptance to act as Members of the Arbitral Tribunal. Thus, according to the learned counsel, the arbitration stood invoked on 27.10.2014 and the limitation would start from this date. Assuming that one Member had conveyed its regret to act as a Member on 3.11.2014, even then more than three years have elapsed from this date. On the issue of written consent having been sent by the respondent on 16.9.2017 to refer the dispute to an Arbitrator, the respondent submits that the respondent had responded to a letter of the petitioner dated 6.9.2017, but the petitioner never replied to this letter for the last nearly two years and suddenly the present petition has been filed.

15. Learned counsel for the respondent has placed reliance on the judgment of this Court in *Prasar Bharti (supra)*, more particularly para 6 where it has been held that the position under the 1996 Act in Section 11 is akin to that under Section 8 and not to Section 20 of the 1940 Act. Under the 1996 Act, a party to an Arbitration cannot straightaway approach the Court for appointment of an Arbitrator and has to first issue notice to the other party proposing the names of the Arbitrators and only upon failure of consensus within 30 days of such notice the party can approach the Court. Thus, the limitation for filing an application under Section 11(4) or 11(6) of the Act cannot but accrue only upon the failure of the procedure prescribed and will have nothing to do with the limitation for preferring the claim.

16. The learned counsel has next placed reliance on the judgment of the Punjab and Haryana High Court in the case of ***The Hisar Model Town Azad Co-operative Labour and Construction Society Limited vs. State of Haryana*** decided in 18.05.2011 in Arbitration Case No. 37 of 2009 to contend that the cause of action arises from the date the invocation notice is sent, of course, by excluding 30 days from the receipt of notice and this period cannot be interrupted and the limitation cannot be stopped. Reliance is also placed on ***Golden Chariot Recreations Pvt. Ltd. vs. Mukesh Panika & Anr. 2018 SCC OnLine Del 10050*** and ***Duro Felguera (supra)***.
17. I have heard the learned senior counsel for the petitioner and the learned counsel for the respondent and examined their rival contentions.
18. In a nutshell, Mr. Sikri, learned senior counsel for the petitioner has contended that in view of the Amendment to the Arbitration Act and the insertion of sub-section (6A) to Section 11, this Court would now only confine itself to examining whether there exists an Arbitration Agreement or not between the parties. He has relied on the judgment of ***Duro Felguera (supra)*** for the said proposition.
19. The question whether the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as “Act 2015”) which came into effect from 23.10.2015, would apply to proceedings which had commenced prior to the coming into force of the Act 2015, arose in the case of ***Union of India vs. Parmar Construction Co. 2019 SCC OnLine SC 442*** decided by the Apex Court on 29.03.2019. In the said case, the disputes had arisen between the parties under a contract, pursuant to which a demand notice was sent to the appellant to appoint

an Arbitrator and the invocation notice was dated 23.12.2013. On the failure of the appellant to appoint the Arbitrator, an application under Section 11(6) of the Act 1996 was filed and the High Court of Rajasthan appointed an independent Arbitrator, in view of Section 12(5) of the Act 2015. The High Court was of the view that the amended provisions of Act 2015 would apply. On an appeal filed by the appellant, the Apex Court examined the effect of the Act 2015 on pending proceedings. Interplay between Section 21 of the Act 1996 and Section 26 of the Act 2015 was looked at in order to decide this controversy. The Apex Court observed that the Act 2015 was Gazetted on 01.01.2016 and as per Section 1(2), it came into force on 23.10.2015. As per Section 21 of the Act 1996, the Arbitral proceedings commence from the date on which request for referring the dispute to arbitration is received by the respondent and Section 26 of Act 2015, on the other hand is self-explicit and stipulates that nothing in the Amendment shall apply to arbitral proceedings that have commenced in accordance with Section 21 of the Act 1996, unless the parties otherwise agree. The Apex Court further observed that a conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that provisions of Act 2015 shall not apply to arbitral proceedings which have commenced in terms of Section 21. Relevant portion of the judgment is extracted hereinunder:

“24. As on 1st January, 2016, the Amendment Act, 2015 was gazetted and according to Section 1(2) of the Amendment Act, 2015, it deemed to have come into force on 23rd October 2015. Section 21 of the Act, 1996 clearly envisage that unless otherwise agreed by the parties, the arbitral proceedings in respect of a dispute shall commence from the date on which a request for that dispute to be referred to

arbitration is received by the respondent and the plain reading of Section 26 of Amendment Act, 2015 is self-explicit, leaves no room for interpretation. Section 21 & 26 of the Act, 1996/Amendment Act, 2015 relevant for the purpose is extracted hereunder:—

“21. Commencement of arbitral proceedings. —
Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

26. Act not to apply to pending arbitral proceedings -
Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

25. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the Amendment Act, 2015 shall not apply to such of the arbitral proceedings which has commenced in terms of the provisions of Section 21 of the Principal Act unless the parties otherwise agree. The effect of Section 21 read with Section 26 of Amendment Act, 2015 has been examined by this Court in Aravali Power Company Private Limited v. Era Infra Engineering Limited (supra) and taking note of Section 26 of the Amendment Act, 2015 laid down the broad principles as under:—

“22. The principles which emerge from the decisions referred to above are:

22.1. In cases governed by 1996 Act as it stood before the Amendment Act came into force:

22.1.1. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or

impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

22.1.2. Unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of the 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

22.1.3. The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

22.1.4. While exercising such power under sub-section (6) of Section 11, if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

22.2. In cases governed by 1996 Act after the Amendment Act has come into force: If the arbitration clause finds foul with the amended provisions, the appointment of the arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the court would be within its powers to appoint such arbitrator(s) as may be permissible.”

which has been further considered in S.P. Singla Constructions Pvt. Ltd. case (supra).

“16. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna

Infrastructure Projects case; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23.10.2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and, therefore, provisions of the Amended Act cannot be invoked.”

26. We are also of the view that the Amendment Act, 2015 which came into force, i.e. on 23rd October, 2015, shall not apply to the arbitral proceedings which has commenced in accordance with the provisions of Section 21 of the Principal Act, 1996 before the coming into force of Amendment Act, 2015, unless the parties otherwise agree.”

20. In the present case, it is not in dispute that the disputes and differences had arisen between the parties in the year 2014 with respect to an agreement executed between them on 14.03.2007. The notice invoking arbitration was sent by the petitioner to the respondent on 27.10.2014 and thus in terms of Section 21 of the Act 1996, the proceedings commenced, when notice of invocation was received by

the respondent which was also in 2014. Thus Act 2015 would not apply to the present case in view of explicit language of Section 26 of Act 2015 and the judgment of the Apex Court in ***Parmar Construction Co. (supra)***. Once Act 2015 does not apply to the present case, Section 12(5) which has been introduced by way of this Amendment, would also not govern the present case between the parties. Therefore, the parties will remain governed by the procedure agreed upon for appointment of the Arbitrator in the Arbitration Agreement, governing the parties when they entered the agreement, as per Act 1996.

21. This would be in accordance with the observations of the Apex Court made in para 27 in the case of ***Parmar Construction Co. (supra)***, and which I quote as under:-

“27. In the instant case, the request was made and received by the appellants in the concerned appeal much before the Amendment Act, 2015 came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of Amendment Act, 2015, in terms of Section 21 of the principal Act, 1996. In our considered view, the applications/requests made by the respondent contractors deserves to be examined in accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015 which came into force from 23rd October, 2015.

22. The arbitration clause between the parties reads as under:

“15. ARBITRATION

Except, as herein before provided any dispute arising out of this agreement or relating to its interpretation, the same shall be referred to the Committee comprising of three members of Monitoring Committee. All the three members of Monitoring Committee shall act as the Arbitral Tribunal and the decision of the majority shall be final and binding on all the parties. The venue of the arbitration shall be at such places as may be fixed by such arbitral tribunal and the arbitration proceedings shall take place under the Indian Arbitration and Conciliation Act 1996. Each party shall bear and pay its own cost of the arbitration proceedings unless the arbitrator otherwise decides in the award (or shall be shared equally). The provision of this clause shall not become inoperative notwithstanding this agreement expires or ceases to exist or its terminated or revoked.”

23. In view of the judgment in ***Parmar Construction Co. (supra)***, the said Arbitration Clause will govern the appointment of the Arbitral Tribunal. As per the said clause, the disputes arising out of the agreement between the parties are to be referred to a Committee comprising of three members of the Monitoring Committee and all the three members shall act as Arbitral Tribunal and the decision of the majority is final and binding on all the parties.
24. Reliance by Mr. Sikri on the judgment of ***Duro Felguera (supra)*** is of no avail. In the said judgment, the Apex Court was dealing with the effect of the Act 2015 on Section 11 of the Act and the scope of power of the Court while appointing an Arbitrator in the light of the newly added sub-section (6A) to Section 11. While dealing with this issue, the Apex Court held that after the Amendment of Section 11 and sub-section (6A) having been added to the Statute, the power of the Court is now restricted only to examination of the existence of an arbitration

agreement in contradistinction to the earlier situation where while appointing an arbitrator under Section 11, the power of the Court was wide and it could examine other aspects as well such as limitation, whether there was arbitrable dispute etc.

25. In view of the express Arbitration Clause between the parties, a Committee of three Members of the Monitoring Committee is the Arbitral Tribunal. Hence the contention of the learned senior counsel for the petitioner that Section 12(5) of the Act 2015 would govern the appointment of the Arbitral Tribunal, has to be rejected.
26. The next contention that requires to be dealt with is, the issue of limitation in filing the present petition. The stand of the petitioner is that the cause of action first arose on 03.11.2014 when one of the members of the Committee expressed his inability to act. It again arose on 23.10.2015, when the Amendment Act of 2015 came into operation and the Committee envisaged in the Arbitration Clause acquired a disability to act in terms of Section 12(5) and it lastly arose on 16.09.2017, when the respondent wrote to the petitioner consenting for arbitration, objecting, however, only to the appointment of a Sole Arbitrator being outside the provisions of the Arbitration Clause. Stand of the respondent per contra is that the cause of action if any, arose on 09.09.2014 when the respondents replied to the legal notice denying its liability to pay. Assuming that the cause of action arose on the invocation notice dated 27.10.2014 being received by the respondent, that too was in the year 2014 and the present petition is barred by limitation, even from the said year. As per the respondent, even if the best case of the petitioner is accepted that the limitation would start from 23.10.2015, the present petition being filed in 2019,

is beyond a period of 3 years. Lastly the stand of the respondent in response to the contention of the petitioner that the respondent had consented to participate in the arbitration proceedings vide a letter dated 16.09.2017, is that even from the said date, the petitioner took no steps and has filed the petition after 2 years.

27. I have carefully examined the rival stands of the parties on this issue. No doubt that the notice invoking arbitration was given by the petitioner on 27.02.2014, but the fact is that on 03.11.2014, one member of the Three-membered Committee, expressed his inability to act as a member of the Arbitral Tribunal. This gave rise to a contingency envisaged in Section 11(6). Within three years from this date, the petitioner had written to the respondent on 06.09.2017 to give its consent for referring the dispute to a Sole Arbitrator. Vide a letter dated 16.09.2017, the respondent had principally consented to arbitration. The only caveat attached by the respondent was that the arbitration will be through an Arbitral Tribunal constituted by the remaining two Members, who would then appoint a third Member. Through this letter, a request was also sent by the respondent to initiate arbitration at the earliest. In my view, therefore, the disputes were alive between the parties and they were negotiating to resolve them through the process of arbitration. It cannot thus be said that present petition is barred by limitation, more particularly, when the respondent had consented to resolution of the disputes through arbitration in 2017. It is also important to note that the last instalment of the loan is admittedly payable only in 2019.

28. The disputes between the parties had arisen in 2014 and in the same year, the petitioner had invoked the Arbitration Clause. The

Amendment of 2015 did lead to some confusion on the applicability of Section 12(5) to a case where arbitration had been invoked prior to the Amendment. It is in this background that the petitioner had written to the respondent to appoint a Sole Arbitrator. What is of significance is that when the petitioner made this request, the respondent did not object to arbitration. On the contrary, the respondent expressed its willingness to resort to arbitration proceedings. This act of the respondent naturally led the petitioner to believe that the disputes will be resolved through arbitration and gave a fresh lease of life to the petitioner. I thus find that there is merit in the contention of the petitioner that the letter of the respondent written on 16.09.2017 consenting to arbitration would have a bearing on the issue of limitation. The respondent has not given any plausible defence/explanation for this letter, other than simply stating that the petitioner took no steps till 2019, even after the respondent had consented. Thus, having led the petitioner into believing that the parties would resort to arbitration, in the view of this Court, it is not open for the respondent to now raise a plea that the petition is barred by limitation. Taken from 16.09.2017, which is the letter written by the respondent, the present petition is definitely within a period of three years.

29. The judgment of *Prasar Bharti (supra)* relied upon by the respondent is hardly of any avail to the respondent since it only lays down the procedure to be followed under Section 11 and para 7 of the judgment which was relied upon, mentions the limitation for filing an application under Section 11(4) and Section 11(6). In fact, the judgment in my view would only inure to the benefit of the petitioner,

since it has been held therein that limitation under Section 11 (6) commences from the happening of a contingency mentioned in sub-clause (a) or (b) or (c) thereof.

30. The next judgment relied upon by the respondent is by a single Judge of this Court in the case of ***Golden Chariot (supra)***. In the said case, learned Single Judge has held that a response by the respondent to a notice given by the petitioner after three years of the cause of action will not give a fresh cause of action. However, the facts of the said case are distinguishable inasmuch as in the said case, when the petitioner had sent a second notice invoking the Arbitration Clause, it was beyond three years and the respondent had responded by unequivocally denying that the parties had entered into a partnership deed or that any arbitration agreement existed between the parties. In stark distinction to the said fact, in the present case, when the petitioner had sent a notice in 2017, it was within 3 years from 27.10.2014 and the respondent far from disputing the arbitration clause or the agreement, had consented to arbitration and had sought expediting the proceedings.
31. In my view, therefore, the petitioner has made out a case for appointment of an arbitrator under Section 11 (6) of the Arbitration & Conciliation Act, 1996.
32. In view of the law laid down in ***Parmar Construction (supra)***, the appointment will be as per the Arbitration Clause between the parties. The parties are thus directed to appoint three members from the Monitoring Committee, who will constitute the Arbitral Tribunal in terms of clause 15 of the agreement between the parties. The needful would be done within a period of one month from today. The three

members so appointed will give a disclosure under Section 12 of the Act before entering upon reference.

33. In view of the judgment of the Apex Court in *SBP & Co. vs. Patel Engineering Ltd. & Ors.* (2005) 8 SCC 618 and *National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd.* (2009) 1 SCC 267, the question of the claims of the petitioner being time barred or not is left open to be decided by the Arbitral Tribunal.
34. The petition is allowed with the aforesaid terms with no order as to costs.

NOVEMBER 1st, 2019

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JYOTI SINGH, J



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