ORDER SHEET

OD-6

AP No. 62 of 2021
IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION

BRAND ALLOYS PRIVATE LIMITED
VERSUS
BURN STANDARD COMPANY LIMITED

BEFORE:
The Hon'ble JUSTICE DEBANGSU BASAK
Date: 24th March, 2021.

(Via Video Conference)

Appearance:
Mr. Pankaj Agarwal, Adv.
Ms. Komal Toshniwal, Adv.
For the petitioner.

Mr. Dhruba Ghosh, Sr. Adv.
Mr. Arijit Basu, Adv.
Mr. Swarbhanu Bhattacharya, Adv.
For the respondent.

The Court :- In this application under Section 11[6] of the Arbitration and Conciliation Act, 1996, the petitioner seeks appointment of an arbitrator.

Learned Advocate appearing for the petitioner submits that, the parties entered into a contract. Purchase order was issued to the petitioner for manufacture and supply of 900 bogies on March 27, 2012. The petitioner raised invoices from time to time. The last of such invoices was on December 30, 2013. He submits that there is a dispute with regard to the bill numbers in the sense that, the respondent adopted an accounting principle, which was at variance with that of the petitioner thereby leading to mis-match of bill numbers. In any event the respondent made part payments lastly on June 17, 2017. The petitioner issued statutory notice on January 6, 2015. The winding up petition under Sections 433, 434 and 439 of the Companies Act, 1956 being CP No. 209 of 2015 was filed before the High Court on March 24, 2015. Such winding up petition is still pending. Thereafter a corporate resolution process was initiated as against the respondent before the National Company Law Tribunal, Kolkata Bench. In such proceedings initially, a corporate insolvency resolution plan was prepared which showed a sum in excess of Rs.1.75 crores to be due and payable by the respondent. The same was unilaterally reduced to Rs.85 lakhs and odd. Upon the petitioner coming to know of the same, the petitioner applied for recall of such reduction. In the meantime, the resolution plan was approved by the Ministry of Railways on March 6, 2018. On September 11, 2018 the petitioner received some payment. He submits that, such payment cannot be construed to be a full and final payment of the claim of the petitioner. The petitioner filed an application before the National Company Law Tribunal, Kolkata Bench on October 9, 2018, which was withdrawn by the petitioner with liberty to file afresh on March 14, 2019. A fresh application was filed by the petitioner on April 16, 2019. However, on July 15, 2019 the Hon'ble Supreme Court held that, the provisions of the Insolvency and Bankruptcy Code, 2016 so far as the respondent is concerned are not attracted.

Learned Advocate appearing for the petitioner relies upon **2021 SCC OnLine SC 207 (Bharat Sanchar Nigam Ltd. and Another-Versus-Nortel Networks India Pvt. Ltd.)** and submits that, the Court should not, in the facts of the present case, return a final finding that, the claim of the petitioner is barred by limitation.

Learned Senior Advocate appearing for the respondent submits that, the claim of the petitioner is barred by limitation. Moreover, the petitioner received payment from the respondent in full and final settlement of its claim. He draws the attention of the Court to the various correspondences issued. He submits that, the claim of the petitioner is now making are in respect of bills which were not even placed before the National Company Law Tribunal. Such bills are ex facie barred by limitation. So far as the bills, which were placed before the National Company Law Tribunal, Kolkata, are concerned, the same were paid in full and final satisfaction of the claim of the petitioner. Therefore, the petitioner cannot sustain any claim as against the respondent.

In the facts of the present case, the contract between the parties is not disputed. The contract contains an arbitration clause. However, the issues raised are one of limitation and full and final settlement of the claim.

The last invoice raised by the petitioner was on December 30, 2013. The last part payment made by the respondent on March 17, 2014.The winding up petition filed in 2015 is otherwise pending.

The winding up petition under the provisions of Companies Act, 1956 is yet to be decided. The order of the Supreme Court holding that, the provisions of the Insolvency and Bankruptcy Code, 2016 is not applicable to the respondent does not ip so facto mean that, the winding up petition was decided by the Hon'ble Supreme Court. The winding up petition will be decided by the appropriate forum.

In the instant case, the present application was filed subsequent to the respondent undergoing corporate insolvency resolution programme before the

National Company Law Tribunal, Kolkata. In such corporate insolvency resolution of the respondent an initial sum in excess of Rs. 1.75 crores was admitted to be payable to the petitioner. It was subsequently reduced to Rs.85 lakhs and odd. The petitioner received a sum of Rs.85,57,416/- from the respondent towards one time full and final settlement of its dues

The Hon'ble Supreme Court by its order dated July 15, 2019 held that, the provisions of the Code of 2016 are not attracted so far as the respondent is concerned. Noticing such fact the National Company Law Tribunal, Kolkata dismissed the application of the petitioner, which challenged the reduction of the claim of the petitioner from Rs.1.75 crores to Rs.85 lakhs and odd.

As on date of the filing of the application under Section 11[6] of the Act of 1996, the claim of the petitioner relates to the period of the last bill of the petitioner being December 30, 2013 and last part payment of the respondent being made on March 17, 2014. The payment before the National Company Law Tribunal was on a full and final settlement basis.

Bharat Sanchar Nigam Ltd. (supra) is of the view that, if in the facts of a case, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, then 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.

In the facts of the present case, as noted above, the claim raised is in respect of last part payment on March 17, 2014 with the last bill being raised on

December 30, 2013. The winding up petition is yet to be relegated to a suit or to an appropriate proceeding. Therefore, at this stage, it can be said it with certainty that, the claim of the petitioner is barred by laws of limitation so far as the arbitration is concerned. However, this order cannot be construed to mean that, the Court pronounced on the validity of the claim of the petitioner in the winding up petition.

AP No. 62 of 2021 is, therefore, dismissed without any order as to costs.

(DEBANGSU BASAK, J.)

snn.