ORDER SHEET

OD-16

AP No. 312 of 2020
IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION

RIPLEY AND CO STEVEDORING AND HANDLING PRIVATE LIMITED
VERSUS
STEEL AUTHORITY OF INDIA LIMITED

BEFORE:
The Hon'ble JUSTICE DEBANGSU BASAK
Date: 23rd March, 2021.

(Via Video Conference)

Appearance:
Mr. Sakya Sen, Adv.
Mr. Kuldeep Mullick, Adv.
Ms. Rituparna Saha, Adv.
Ms. Khusboo Chaudhary, Adv.
For the petitioner.

Mr. Arijit Chakrabarti, Adv.
Mr. Prabir Bera, 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.

The petitioner participated in a notice-inviting tender issued by the respondent. The petitioner was awarded a contract by a letter of acceptance dated August 30, 2014. The petitioner claims that, it performed in terms of the contract. The petitioner raised at least ten bills upon the respondent. According to the petitioner, the respondent deducted various amounts from the bills wrongfully. It is the contention of the petitioner that, the parties maintained a running, current and continuous account in respect of the transactions. The last bill of the petitioner being December 12, 2017 and the petitioner having invoked the three-tier arbitration agreement as provided in the contract, by requesting for appointment of conciliator on November 26, 2019, the claim is not barred by limitation.

Learned Advocate appearing for the respondent submits that, there is no dispute between the parties to refer to the arbitration. According to him, the respondent never deducted any amount of the bills raised by the petitioner, but withheld a portion of the bill amount. He submits that, the claim of the petitioner is barred by limitation. The bills are individual bills and that, the parties did not maintain a running, current and continuous account as claimed. He relies upon **AIR 1994 Supreme Court 1615 (Panchu Gopal Bose-Versus-Board of Trustees for Port of Calcutta) and AIR 2019 Supreme Court 4244 (M/s. Geo Miller & Co. Pvt. Ltd.–Versus-Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.)** in support of his contention of limitation.

In considering an application under Section 11[6] of the Act of 1996, the Court is to arrive at a prima facie finding as to whether there exists an arbitration agreement or not. The Court should refer the parties to arbitration in the event it is not in a position to arrive at a conclusive finding that, the claims are barred by limitation.

In the facts of the present case, a contract came into being between the parties by the respondent issuing the letter of acceptance dated August 30, 2014. The petitioner raised several bills on the respondent last of which is on December 12, 2017. The petitioner claims that, a running current and continuous account was maintained between the parties. The respondent contends otherwise.

In view of the rival contentions as noted above, this Court exercising jurisdiction under Section 11[6] of the Act of 1996 is not in a position to arrive at a conclusive finding as to whether the claim is barred by limitation. Limitation is a mixed question of fact and law. Limitation is also a question of jurisdiction. It is for the arbitral tribunal to decide both.

The existence of the arbitration agreement is not disputed. It is a three-tier arbitration agreement. Initially the parties were required to go in for conciliation, which the petitioner did invoke, by its letter dated November 26, 2019. The invocation for conciliation was within a period of two years from the date of last bill dated December 12, 2017. The claims of the petitioner cannot be said with certainty to be barred by the laws of limitation.

It is the contention of the respondent that, the bills were not deducted, but withheld by the respondent. The fact that, the respondent did not pay the entirety of the bill amount is a dispute, which is governed by the three-tier arbitration agreement between the parties.

Ultimately, the petitioner asked for arbitration in terms of the arbitration agreement, the respondent was supposed to suggest a panel of three arbitrators for the petitioner to choose one of them. In spite of lapse of the statutory period upon receipt of the notice of the arbitration, the respondent not forwarded any panel of arbitrators for the petitioner to choose therefrom.

Panchu Gopal Bose was rendered in the context of the Arbitration Act, 1940. In the facts of **M/s. Geo Miller & Co. Pvt. Ltd. (supra)** the Supreme

Court found the claim to be barred by limitation. The facts scenario obtaining in the present case are different.

In such circumstances, Mr. Jayanta Kumar Mitra, Senior Advocate, Bar Library Club is appointed as the Arbitrator in terms of the arbitration agreement between the parties. He is at liberty to fix his remuneration to be shared by the parties equally. The parties will bear the costs and expenses of the arbitration in equal share.

The parties are at liberty to inform this order to the learned Arbitrator.

AP No. 312 of 2020 is disposed of accordingly.

(DEBANGSU BASAK, J.)

snn.