



O.P.Nos.360 to 362 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 06.10.2021

Orders Pronounced on : 01.12.2021

Coram:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Original Petition Nos.360 to 362 of 2021

and

Application Nos.1846 to 1848 of 2021

V.K.Senthilkumaran,
S/o Vellakrishnan

.. Petitioner in O.P.No.360 of 2021

Vs.

1. M/s.Shriram Transport Finance Company Ltd.,
Represented by its Power of Attorney
Mr.S.Varadhan,
Mookamika Complex, 3rd Floor,
No.4, Lady Desika Road,
Mylapore, Chennai-600 004.

2. Mr.P.Rosaiah,
Sole Arbitrator.

3. Ragupathy .. Respondents in O.P.No.360 of 2021

Original Petition No.360 of 2021 filed under Section 14(2) of the
Arbitration and Conciliation Act, 1996, to terminate the mandate of the

Page No.1/25



O.P.Nos.360 to 362 of 2021

Arbitrator appointed, vide Reference, dated 30.12.2019 in Arbitration Agreement, dated 19.03.2013.

For petitioner : M/s.Sharath Chandran in O.P.No.360 of 2021

For respondents: Mr.B.Logesh for R-1 in O.P.No.360 of 2021

COMMON ORDER

In all the above Original Petitions (O.Ps), appointment of Arbitrator, vide reference dated 30.12.2019 by the first respondent, is put to challenge on two grounds, that, one the same is illegal and void in terms of the provisions of the Arbitration and Conciliation Act, 1996, and also in view of the law laid down by the Honourable Supreme Court of India on the subject matter. According to the petitioner, the arbitration clause in the agreement is against the principles laid down by the Supreme Court of India in the cases reported in 2019 SCC OnLine SC 1517 (Parkins Eastman Architects DPC and another Vs. HSCC (India) Limited) and 2021 (5) SCC 738 (Bharat Sanchar Nigam Limited Vs. Nortel Networks India Private Limited). Hence, unilateral appointment of arbitrator P.Rosaiah, is in

Page No.2/25



O.P.Nos.360 to 362 of 2021

contravention of the provisions of the said Act and also the said decisions of the Supreme Court.

2. Short facts which gave rise to the filing of the present Original Petitions (O.Ps) are that the petitioner has approached the first respondent-Company for the vehicle loan facility which was executed by them on 19.03.2013 (in O.P.No.360 of 2021), 16.03.2013 (in O.P.No.361 of 2021) and 20.03.2013 (in O.P.No.362 of 2021) and loans were advanced and be repaid in instalments as stipulated in the agreement. Dispute arose under the agreement and therefore, the first respondent-Company unilaterally invoked the arbitration clause and issued notice on 30.12.2019, calling upon the petitioner for payment of the outstanding amount(s) due to them and in case of any default of the payment, the dispute will be referred to sole arbitrator and accordingly, Mr.P.Rosaish, a retired District Judge was appointed as Arbitrator.

3. The present O.Ps. are filed challenging the said agreement and also notice dated 30.12.2019 unilaterally appointing the Arbitrator on the



O.P.Nos.360 to 362 of 2021

ground that the first respondent-Company cannot unilaterally appoint the Arbitrator and that the reference to arbitration is beyond the period of limitation.

4. The learned counsel for the petitioner(s) submitted that the present appointment of Arbitrator is almost a paid employee of the first respondent-Company and he cannot conduct impartial arbitration proceedings. According to the learned counsel, cyclo-styled format is being followed by the said Arbitrator and the very same Arbitrator had conducted numerous proceedings without following any due process of law and illegally helping the first respondent-Company to recover the monies which were clearly time-barred and not due to them.

5. In the conduct of the arbitration proceedings, no semblance of principles of natural justice is being followed and many a time, the Arbitrator operates from the first respondent-Company's address. As a matter of fact, it is imperative on the part of the learned Arbitrator to disclose his past and present relationship with the interested parties. The



O.P.Nos.360 to 362 of 2021

learned counsel also cited a decision of the Bombay High Court in the case of Sawarmal Gadodia Vs. Tata Capital Financial Services Limited, in Arb.P.No.562 of 2019, in which, by order dated 15.05.2019, the Award was set aside on the ground that non-disclosure of relationship, was fatal.

6. In the above circumstances, the borrower cannot expect impartial consideration of his or her defence against the claim. Moreover, the Courts have frowned upon such unilateral appointment of Arbitrator and held that such appointment cannot be countenanced in law. Apart from the same, the proceedings are also hit by law of limitation, since the agreement was entered into in 2013 and the arbitration notice was issued only in 2019, much after the expiry of limitation. There is nothing on record to show that the limitation was extended by the act of the parties.

7. On the above significant grounds, the learned counsel for the petitioner assailed the notice appointing the Arbitrator.

8. The learned counsel while referring to the above decision of the



O.P.Nos.360 to 362 of 2021

Supreme Court reported in 2019 SCC OnLine SC 1517 (Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd) in regard to the first legal objection with regard to the unilateral appointment of the Arbitrator, has particularly referred to paragraphs 21, 24 and 25 therein, which are extracted hereunder:

"21. But, in our view that has to be the logical deduction from *TRF Limited (TRF Limited Vs. Energo Engineering Projects Limited = 2017 (8) SCC 377)*. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in



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O.P.Nos.360 to 362 of 2021

determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in *TRF Limited (TRF Limited Vs. Energo Engineering Projects Limited = 2017 (8) SCC 377)*.

24. In *Voestalpine (Voestalpine Schienen Gmbh Vs. Delhi Metro Rail Corpn. Ltd. - 2017 (4) SCC 665)*, this Court dealt with independence and impartiality of the arbitrator as under:

“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and nonimpartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an



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O.P.Nos.360 to 362 of 2021

arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Hashwani vs. Jivraj* (2011 (1) WLR 1872 : 2011 UKSC 40) in the following words : (WLR p. 1889, para 45)

“45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury*, underlined that:



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O.P.Nos.360 to 362 of 2021

“an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.”

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

.....
30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an



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O.P.Nos.360 to 362 of 2021

arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today.”

25. In the light of the aforesaid principles, the report of the Law Commission and the decision in *Voestalpine Schienen GmbH Vs. Delhi Metro Rail Corpn. Ltd - 2017 (4) SCC 665*, the imperatives of creating healthy arbitration environment demand that the instant application deserves acceptance."

9. The learned counsel for the petitioner, in regard to the aspect of limitation, referred to the following decisions:

(i) 2021 (5) SCC 738 (Bharat Sanchar Nigam Limited Vs. Nortel

Networks India Private Limited):

"45. ...

45.1. ...

..... At the referral stage, the Court can interfere

Page No.10/25



WEB COPY



O.P.Nos.360 to 362 of 2021

"only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute.

...

"48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions.

50. In the notice invoking arbitration dated 29-4-2020, it has been averred that:

“Various communications have been



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O.P.Nos.360 to 362 of 2021

exchanged between the petitioner and the respondents ever since and a dispute has arisen between the petitioner and the respondents, regarding non-payment of the amounts due under the tender document.”

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [*S.S. Rathore v. State of M.P.*, (1989) 4 SCC 582 : 1990 SCC (L&S) 50; *Union of India v. Har Dayal*, (2010) 1 SCC 394; *CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd.*, (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: “where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There must be a clear notice invoking arbitration setting out the “particular dispute” [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

52. In the present case, the notice invoking arbitration was issued 5½ years after rejection of the claims on 4-8-2014. Consequently, the notice invoking arbitration is ex facie time-barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case.



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O.P.Nos.360 to 362 of 2021

Conclusion

53. Accordingly, we hold that:

53.1. The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator. It has been suggested that Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings.

53.2. In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.

... .. "

(ii) The learned counsel for the petitioner also relied on Order dated 29.09.2020 passed by this Court in O.P.No.758 of 2015 (P.Kothai and another Vs. Shiram Transport Finance Company Ltd. and two others), wherein, he relied on paragraphs 12 to 15 and 22, which are extracted hereunder:

"12. This Court having set out the rival submissions, now proceeds to discuss the rival submissions, give its dispositive reasoning for



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O.P.Nos.360 to 362 of 2021

arriving at a conclusion and giving its verdict. As already delineated and alluded to supra, learned counsel for petitioners chose to argue the captioned OP on one point notwithstanding very many averments in the OP and that one point is limitation. This Court is clear in its mind that the provisions of Limitation Act will apply to arbitration proceedings owing to Section 43 of A and C Act, which reads as follows:

"43. Limitations. (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the



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O.P.Nos.360 to 362 of 2021

Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4)Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted'.

13. As Limitation Act is applicable to arbitration proceedings, it is certainly open to the petitioner in a Section 34 application to argue that arbitration proceedings are barred by limitation. The next limb which needs to be looked into is, limitation being founded on public policy is terra firma in a ocean of laws / legal principles and this is



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O.P.Nos.360 to 362 of 2021

because, limitation has to be examined even in cases where it is not set up as a defence by the defendant. This principle is ingrained in Section 3 of the Limitation Act. As limitation is terra firma founded on public policy, there is no doubt that limitation can certainly be raised as a point to say that an arbitral award is vitiated for being in conflict with public policy.

14. With regard to the case on hand, what is of utmost relevance is, even according to the impugned award and according to the undisputed submissions made by both sides, default commenced from first EMI. The first EMI, as mentioned supra, is payable on 16.03.2007. On a extreme demurrer even if the 36th EMI is considered as the reckoning date, 36th EMI fell due on 16.03.2010 and therefore, Ex.C4 legal notice dated 29.08.2014, which is the only communication referred to in the impugned award, is clearly beyond three years from the date of cause of action.

15. With regard to the submission of learned counsel for NBFC that there was some correspondence prior to 2014 i.e, sometime in 2010, the same is not before this Court. In any event, it



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O.P.Nos.360 to 362 of 2021

cannot be placed before this Court in the light of Canara Nidhi Limited principle laid down by Hon-ble Supreme Court in Canara Nidhi Limited vs M. Shashikala reported in 2019 SCC Online SC 1244, wherein it has been made clear that only those documents which were part of the arbitral proceedings can be placed before a Court in Section 34 proceedings and if any other document is to be introduced, the same has to be done only by taking leave of the Court. There is nothing of that sort or in other words no application in this regard in the instant case on hand.

22. A perusal of Appendix of Evidence reveals that the only notice post said contract i.e., loan agreement dated 16.02.2007, which was before the AT, is legal notice from NBFC dated 29.08.2014, which has been marked as Ex.C4. It is also to be noticed that there is no other document before the AT. This makes it clear that the trigger notice is clearly barred by limitation and therefore, the impugned award is vitiated for entertaining arbitral proceedings which are barred by limitation and not examining limitation though Section 3 of Limitation Act read with Section 43 of A and C Act



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O.P.Nos.360 to 362 of 2021

makes it statutorily imperative to do so even if it is not set up as a defence. ...

10. According to the learned counsel, in terms of Section 43 of the Arbitration and Conciliation Act, the limitation shall apply to arbitration, as it applies to the regular proceedings in Court.

11. In the above decision of this Court, a learned Judge had dealt with the issue in detail and held that the limitation is applicable to the arbitration proceedings. Further, the learned Judge factually held in that case that the claim made therein was time-barred in respect of the very same first respondent herein under similar circumstances.

12. Therefore, learned counsel for the petitioner submitted that on both the above legal submissions, he is entitled to succeed in these O.Ps.

13. On behalf of the first respondent-Company, a learned counsel

Page No.18/25



O.P.Nos.360 to 362 of 2021

is present and he made his submissions. He perfunctorily reiterated the facts that led to the initiation of the arbitral proceedings and the questionable appointment of the arbitrator by the first respondent-Company. However, as an effective response to the legal objection raised on behalf of the petitioners, there has been no plausible submission forthcoming, except contending that there is nothing wrong with the appointment of the Arbitrator.

14. In regard to the first legal objection, this Court finds that what flows from the ratio laid down by the Honourable Supreme Court in the above referred decision is that, it is legally no more open to a person or entity to appoint an arbitrator who has an interest in the outcome or decision of the arbitration. Such unilateral appointment would take away the concept of independence and impartiality of the arbitration, which are held to be the hallmarks of arbitration proceedings.

15. In these cases, it could be seen that multitude of arbitration proceedings had been concluded in favour of the first respondent-Company, mechanically or without any pretension of impartial adjudication. The



O.P.Nos.360 to 362 of 2021

arbitrator has gone about discharging his duties dutifully as a paid employee and servant of the first respondent-Company. Such arbitral exercise is a mockery of a dispute resolution mechanism/regime created under the Arbitration and Conciliation Act, 1996.

16. This Court, as a matter of fact, has witnessed several cliched/templated awards put to challenge by the aggrieved parties passed by the same learned Arbitrator. In all the cases, the learned Arbitrator has gone through the motion summarily, treating the proceedings as an empty ritual. Such arbitration proceedings are nothing but a charade and cannot be countenanced in law.

17. The awards fashioned on such shoddy and sham proceeding in the name of the arbitral exercise in terms of the Arbitration and Conciliation Act, 1996, without a modicum of judicious application, amounted to caricaturing of dispute resolution mechanism. Stereotyping justice dispensation favouring one party alone, notwithstanding any possible legal defence against the recovery of claim, is a violative of the letter and spirit of



O.P.Nos.360 to 362 of 2021

the Act, 1996.

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18. Moreover, in terms of Section 12(1) of the Amended Act, 2015 (3 of 2016) (of the Arbitration and Conciliation Act), read with Clauses 22 and 24 of the Fifth Schedule, if the appointment of the Arbitrator herein gives rise to a justifiable doubt as to the independence or impartiality, the mandate of the Arbitrator is liable to be terminated. The relevant Clauses as aforementioned are extracted hereunder:

"Fifth Schedule (Refer Section 12(1)(b))

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

.. ..

Previous services for one of the parties or other involvement in the case

...

22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

.. ...



O.P.Nos.360 to 362 of 2021

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

..."

The scheme of the Act, 1996, thus place paramountcy on the independence and impartiality in the appointment of the Arbitrator.

19. No doubt, the claimants cannot be denied of their right to recover the monies due to them, but it does not mean that the claimants are entitled to resort to unfair, unjust and ignoble means towards realisation of their outstanding dues.

20. On facts, in these cases, loan agreement was entered into in the year 2013. The agreement is said to have expired on 20.09.2015. The default in payments of EMDs appeared to have occurred from the year 2013 onwards. However, the notice of appointment of Arbitrator is dated 30.12.2019. In the notice, nothing has been stated or explained as to any

Page No.22/25



O.P.Nos.360 to 362 of 2021

action taken by the first respondent during the loan period from 2013 to 2019. In the circumstances, the claim is ex-facie barred by limitation. The Courts have held that dead-woods needed to be weeded out at the threshold. This is one such case where the claims for recovery is barred by limitation and on this ground alone, the prayer in the O.Ps. is liable to be allowed.

21. This Court is in agreement with the submissions made on behalf of the learned counsel for the petitioner. By applying the above cited legal principles laid down by the Honourable Supreme Court and this Court, both on the appointment of Arbitrator and on non-enforceability of the claim, as the same being hit by limitation, the O.Ps. are liable to be allowed.

22. Accordingly, the present O.Ps. are allowed. Consequently, A.Nos.1846 to 1848 of 2021 are closed. No costs.

01.12.2021

Index: Yes/no

Page No.23/25



O.P.Nos.360 to 362 of 2021

Speaking Order: Yes

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V. PARTHIBAN, J

Page No.24/25



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O.P.Nos.360 to 362 of 2021

CS

Pre-delivery Common Order
in O.P.Nos.360 to 362 of 2021

Order pronounced on : 01.12.2021

Page No.25/25