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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 30th July, 2021

+ **ARB.P. 226/2020**

FIBERFILL ENGINEERS

..... Petitioner

Through: Mr. Neeraj Malhotra, Senior Advocate with Mr. Mayank Jain, Mr. Parmatma Singh, Mr. Madhur Jain, Ms. Aakriti Dhawan & Mr. Satyamev Saburn, Advocates.

versus

PUBLIC WORKS DEPARTMENT DELHI

..... Respondent

Through: Mr. Gautam Narayan, ASC, GNCTD with Mr. Adithya Nair, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] seeks appointment of a Sole Arbitrator to adjudicate the disputes arising from the Contract Agreement dated 27th October, 2009 executed between the parties.

2. Mr. Gautam Narayan, learned counsel for the Respondent, relying upon the judgment of the Supreme Court in *Bharat Sanchar Nigam Ltd. v.*

Nortel Networks India Pvt. Ltd.,¹ contends that the present case has become deadwood on account of the cause of action becoming stale and time-barred, and hence does not merit a reference to arbitration.

3. Since the scope of jurisdiction under Section 11 of the Act is limited, the short point that arises for consideration is whether the facts of the present case meet the tall threshold for non-reference to arbitration, as detailed in the decisions of the Supreme Court in *Nortel Networks (supra)* and *Vidya Drolia v. Druga Trading Corporation*.²

4. It may be noted that the facts giving rise to the present petition are undisputed, being a matter of record, and thus the objection of limitation is essentially a question of law in the present case. Nevertheless, for a complete conspectus of disputes, a brief narration of facts is necessary. The same is as follows:

4.1 On 27th October, 2009, a Contract Agreement was executed between the parties for providing installation of retro reflective road signages on various roads in Delhi in PWD Maintenance Zone M-3. The estimated cost of the project was Rs. 17,81,08,545/-. The Arbitration Agreement was incorporated by way of reference from Clause 25 of the General Conditions of Contract [*hereinafter referred to as 'GCC'*].

4.2 The project was completed on 9th August, 2011 and the completion certificate was issued on 5th July, 2012. Petitioner raised its 11th and final bill on 26th March, 2012 (revised on 31st March, 2012).

¹ 2021 SCC OnLine SC 207.

² 2021 2 SCC 1.

- 4.3 Payment against this bill was made by Respondent on 30th March, 2012 for an amount of Rs. 19.09 crores. However, Petitioner, *vide* letter dated 28th April, 2012 raised a claim of Rs. 12,99,04,623/- and alleged that Respondent had arbitrarily settled the final bill without considering all the claims.
- 4.4 On 30th June, 2012, the Petitioner raised an additional claim of Rs. 8,15,96,188/-, over and above the afore-said claim of Rs. 12,99,04,623/-, and requested settlement of disputes and release of pending payment of a total sum of Rs. 21,15,00,811/- (i.e., Rs. 8,15,96,188/- + Rs. 12,99,04,623/-).
- 4.5 In response thereto, the Executive Engineer, PWD *vide* letter dated 25th July, 2012 while referring to the afore-noted additional claims, rejected the contention of the Petitioner.
- 4.6 On 8th August, 2014, the Petitioner invoked arbitration in terms of Clause 25 of the GCC and raised its grievance before the Superintending Engineer, PWD against the short payment. On 10th October, 2014, another request to refer the disputes to arbitration was made, this time to the Chief Engineer, PWD. On 24th January 2015, the petitioner once again attempted to invoke arbitration, but to no avail. In the said communications, the Petitioner sought for appointment of an Arbitrator within thirty days from the receipt of the communication, contending that failure of the Respondent would constrain it to take further remedies in accordance with law.
- 4.7 It is contended that no action was taken by the Respondent on the afore-noted communications. Thus, the Petitioner *vide* letter dated

3rd May, 2018 wrote to the Chief Engineer, complaining that although the Superintending Engineer had agreed to refer the disputes for resolution to the Disputes Resolution Committee, however, since then, there was no progress.

- 4.8 In response thereto, the Chief Engineer wrote to the Superintending Engineer on 11th May, 2018 requesting for his comments on the disputes raised by the Petitioner/Contractor and also sought his decision thereon, requesting the Executive Engineer to examine the disputes and reply to the Petitioner/Contractor.
- 4.9 An internal noting of the Respondent dated 22nd June, 2018, (obtained by the Petitioner under Right to Information Act, 2005) reveals that the Chief Engineer sent a reminder to the Superintending Engineer/Executive Engineer to furnish their claim-wise comments. It is further noted that the Petitioner/ Contractor may apply for appointment of an Arbitrator in the prescribed proforma, as laid down in CPWD Works Manual, 2014.
- 4.10 Consequently, in June, 2018, the Superintending Engineer and the Executive Engineer submitted their claim-wise comments.
- 4.11 The Petitioner received communication dated 23rd July, 2018 wherein, request was made to apply for appointment of an Arbitrator in the standard application form. Accordingly, the Petitioner, in early August, 2018 filed an application seeking appointment of an Arbitrator in the prescribed format along with its Statement of Claim. The same were verified by the Executive

Engineer and then forwarded to the Chief Engineer on 21st August 2018.

4.12 Subsequently, the Petitioner was intimated that the matter was referred for legal opinion of the Government Counsel. On 18th December, 2019 the Chief Engineer informed the Petitioner that the request for appointment of Arbitrator was rejected in terms of the legal opinion dated 2nd December, 2019 rendered by the Government Counsel of the Respondent.

5. In the above background, the present petition has been filed on 1st July, 2020.

6. Mr. Neeraj Malhotra, learned Senior Counsel appearing on behalf of the Petitioner, has made the following submissions:

6.1 The claim of the Petitioner cannot be ousted on the ground of limitation arising due to the fault and laxity of the Respondent in deciding the Petitioner's request for arbitration. It is the office of the Respondent that took more than 18 months to seek legal opinion on the Petitioner's application, followed by a rejection of the same. The Superintending Engineer gave his comments on the claims filed by the Petitioner on 29th June, 2018 and that too, when a reminder was sent by the Office of the Chief Engineer. This is sheer negligence on the part of the Respondent and therefore, the present petition cannot be dismissed on the ground of limitation.

6.2 The letters from the Chief Engineer and the file noting of the Respondent clearly exhibit that till August 2018, negotiation/dispute settlement process was going on between the

parties, and thereafter, pursuant to the legal opinion, the Petitioner's request for appointment of an Arbitrator was unjustifiably rejected.

- 6.3 The invocation of arbitration on 8th August, 2014 and 10th October, 2014 is well within the period of limitation, reckoned from the date of accrual of cause of action. The time taken by the Respondent thereafter, cannot be attributable to the Petitioner, as a ground for rejection of the instant petition.
- 6.4 Since limitation is a mixed question of fact and law, the Court should appoint an arbitrator and the question of limitation can be left open for adjudication before him.
- 6.5 The Court must consider the entire conspectus of the case and particularly the fact that there were negotiation talks between the parties. The breaking point in the instant case occurred on 18th December, 2019 when the Petitioner's request for appointment of Arbitrator was rejected, and limitation to file the application under Section 11(6) of the Act would run from the afore-said date.
- 6.6 In support of his contentions, Mr. Malhotra places reliance on the judgment of this Court in *Yogesh Kumar Gupta v. Anuradha Rangarajan*,³ and decision of the Supreme Court in *Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors.*,⁴ to contend that communications of both sides, after the notice invoking arbitration, have to be considered, and a fresh period of limitation will start thereafter.

³ 2007 (95) DRJ 581.

⁴ (2006) 4 SCC 658, at para 23.

6.7 Benefit of Section 5 of the Limitation Act, 1963 [*hereinafter referred to as 'Limitation Act'*] ought to be granted to the Petitioner, in as much as the delay occasioned in filing of the petition was solely attributable to negligence on part of the Respondent. The Court must not embark upon examining the issue of 'arbitrability' or appropriateness of adjudication; the same should be left for consideration by the Arbitral Tribunal.

7. *Per contra*, Mr. Gautam Narayan, learned counsel for the Respondent, makes the following submissions:

7.1 The facts of the case demonstrate that the petition is *ex facie* barred by limitation. The cause of action was crystalized when the Respondent rejected the additional claims raised by the Petitioner on 25th July, 2012. Since then, the Petitioner has not taken steps for appointment of the Arbitrator and therefore, the claims have become time-barred. The present petition, filed belatedly, is not maintainable.

7.2 The Petitioner continued to delay the matter, after invoking arbitration *vide* notices dated 8th August, 2014 and 10th October, 2014. Then, after a period of nearly four years, the Petitioner sent a communication dated 3rd May, 2018 requesting for appointment of an Arbitrator.

7.3 The Petitioner has erred in placing reliance upon the communications subsequent to 3rd May, 2018, to contend that the period of limitation has extended. The said communications would not revive a right that is already time-barred and dead. The said

communications also do not amount to any acknowledgment of liability in terms of Section 18 of the Limitation Act. In any event, the said communication of 3rd May, 2018 had been issued after expiry of the statutory period of three years from the date of issuance of the invocation notice.

- 7.4 The communication dated 11th May, 2018, makes a request, contrary to the final view taken by the Respondent, regarding rejection of additional claims. This self-serving communication would not result in extension of the period of limitation.
- 7.5 Request for appointment is in violation of Clause 25 of the GCC. The said clause stipulates that a notice for appointment of Arbitrator has to be sent within 120 days of receiving the intimation regarding payment of the final bill. This procedure was not complied with. Reliance upon the claims raised *vide* communications dated 28th April, 2012 and 30th June, 2012 to contend that the same were within 120 days' time period, is erroneous. None of the said letters were for appointment of an Arbitrator, as required under Clause 25. Thus, the petition is barred by the principles of waiver, in respect of such belated claims.
- 7.6 Petitioner's request for appointment of an Arbitrator on 3rd May, 2018, after a lapse of about 4 years from date of first invocation of Clause 25, *vide* letter dated 8th August, 2014, and about 3½ years from the last invocation, under the legal notice dated 24th January, 2015, is beyond the prescribed period, and is *ex-facie* time barred. Thus, on the date of invocation, Petitioner had lost its right to seek

appointment of an Arbitrator.

7.7 Respondent's letters dated 23rd July 2018 and 18th December 2019 would not revive a dead claim. Reliance on the said letters is thus misplaced.

7.8 In support of his contentions, Mr. Narayan relies upon the following judgments of the Supreme Court: (a) *Nortel Networks (supra)*, (b) *Vidya Drolia (supra)*, (c) *SBP & Co. v. Patel Engineering*,⁵ and (d) *National Insurance Co. Ltd. v. Bhoghara Polyfab Pvt. Ltd.*⁶ to contend that the Courts can, at the referral stage, interfere in cases where it is "manifest" that the claims are *ex facie* barred by time and the Applicant is seeking to resurrect claims that are dead.

8. The Court has considered the rival contentions of the parties. The Supreme Court in the case of *Nortel Networks (supra)* has held that 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. The period of limitation will begin to run from the date on which there is failure to appoint the Arbitrator. Further, the Court has observed, that 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 under Section 11 of the Act. To determine the same, let us take a closer look at the facts recounted above which are undisputed.

9. The Petitioner invoked arbitration in terms of Clause 25 of the GCC, for the first time, on 8th August, 2014. It invoked the said clause once again

⁵ (2005) 8 SCC 618.

⁶ (2009) 1 SCC 267.

on 10th October, 2014, and relies upon the same as the notice of invocation under Section 21 of the Act. Be that as it may, even if the limitation period under Article 137 of the Limitation Act is reckoned from the said date, it would not make any difference. The present petition, undeniably filed on 1st July, 2020 after a lapse of nearly six years from the date of the second notice, is certainly beyond the prescribed time period i.e., three years.

10. The next question that falls for consideration is whether the intervening events that transpired between 8th August, 2014 / 10th October, 2014, and the filing of the instant petition, would extend the period of limitation in any way. Under Section 18 of the Limitation Act, the acknowledgment of claim must be before the expiration of the prescribed period of limitation. On this aspect, it is pertinent to note that after the 3rd notice of invocation dated 24th January, 2015, the next communication was sent on 3rd May, 2018, after more than three years from invocation. This communication itself is beyond the period of three years from the date of invocation, and therefore, any communication exchanged between the parties thereafter, even if construed to be an acknowledgement of claims, would not come to the aid of the Petitioner and extend the period of limitation.

11. Besides, a perusal of the communications relied upon by the Petitioner referred above, does not exhibit any acknowledgment on part of Respondent that would extend the period of limitation. As noted above, the work was completed on 9th August, 2011 by the Petitioner, and thereafter, a completion certificate was issued by the Respondent on 5th July, 2012. The Petitioner submitted the 11th and final bill for payment against which

Respondent made payment on 31st March, 2012. The Petitioner *vide* its letters dated 28th April, 2012 and 30th June, 2012 alleged that a total amount of Rs. 21,15,00,811/- was outstanding. The Respondent expressly repudiated the claims *vide* letter dated 25th June, 2012, relevant portion whereof is extracted below:

"With reference to your letter No. FE/ PWD/ CRMD/ 312/ 11- 12/ 0428 at 28.04.2012 (Received in this office on 26.05.2012) on subject cited above. It is intimated that the work was completed on 09.08.2011. After a great persuasion, the final bill of the above work was submitted by you on 26 .03. 2012. As per the Department's administrative decision, all the bills related to CWG-2010 works were to be cleared on or before 31.03 .2012 positively. Thus, a very little time was available for making a written request to you for acceptance of the final bill. However, you will remember that you were regularly present in this office during scrutiny of the said bill the payment on bill but you always refused to accept the final bill. In the above circumstances there was no option available but to pay the final bill on 31.03.2012 after scrutinizing it. Thus, your statement that bill was paid without your acceptance is not acceptable in the above circumstances. Further, there is nothing arbitrary in the payment of the final bill."

12. The above stand of the Respondent has crystalized the cause of action. Petitioner, however, invoked arbitration after two years, i.e., on 8th August, 2014 and then again for ample measure on 10th October, 2014, followed by a legal notice, yet again, invoking arbitration on 24th January, 2015. Thus, after a lapse of about 4 years from the 1st invocation, and about 3 ½ years from the last invocation, Petitioner sent the letter dated 3rd May, 2018 requesting for appointment of an Arbitrator. The claims for recovery of money were barred by time by the said date. Respondent's letter dated 23rd July, 2018 requesting the Petitioner to apply for appointment of the Arbitrator, in a standard application form along with a statement of claim, cannot extend limitation by reviving a dead claim. It is also not an

acknowledgment of any claim.

13. In this regard, the Petitioner has raised the argument that the breaking point in the instant case occurred in December 2019 when the Petitioner's request for appointment of Arbitrator was rejected. This argument is without any merit. Evidently, the Respondent had taken a clear stand with respect to the claims of the Petitioner as early as 25th July, 2012. On this issue, as rightly pointed out by Mr. Narayan, the facts of the judgment of the Supreme Court in *Nortel Networks (supra)* are quite similar. In the said decision, the Supreme Court also took note of a similar stance, i.e., limitation argued to be extended on the basis of communications exchanged between the parties. The Court rejected the contention by observing that the period of limitation for issuing notice invoking arbitration would not get extended by mere exchange of letters or settlement discussions, where a final bill is rejected by making deductions or otherwise. The Supreme Court also observed that Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions.

14. To conclude, the invocation notice was issued for the first time on 8th August, 2014. As prescribed under Section 21 of the Act, the arbitration proceedings commenced from the said date. Respondent failed to appoint an Arbitrator, despite the receipt of notice. The right to approach the Court under Section 11 of the Act accrued, from the expiry of 30 days from 8th August, 2014. The Petitioner abstained from exercising this right and instead indulged in issuing multiple notices seeking reference of disputes to arbitration. These notices cannot revive the right that stood extinguished with time. The petition has been filed after a lapse of almost 8 years from

the repudiation of Petitioner's claims by the Respondent and around 6 years from the date of first invocation of arbitration.

15. In view of the fore-going, and in light of the facts of the instant case, even on a *prima facie* basis, it cannot be demonstrated that the claims are not *ex facie* time barred or fall in the excepted category of cases.

16. This Court does not find any merit in the present petition and accordingly, the same is dismissed.

SANJEEV NARULA, J

JULY 30, 2021

as

(corrected and released on 27th August, 2021)