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

% *Date of Decision: 16th November, 2021*

\+ **<u>ARB.P. 619/2021</u>**

M/S KSR BROTHERS THROUGH ITS PARTNER
JASWINDER SINGH ..... Petitioner
Through Mr. Mukesh Mohan Goyal, Adv.

Versus

IGNOU THROUGH ITS VICE CHANCELLOR ..... Respondent
Through Mr. Amit Gupta, Adv.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. ***(ORAL)***

1. The petitioner has filed the present petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereafter the 'A&C Act') praying that an arbitrator be appointed to adjudicate the disputes between the parties that have arisen in connection with the contract awarded to the petitioner for Operation and Routine Maintenance of Electrical Sub-Station installed at IGNOU Campus, New Delhi.

2. The said contract was awarded to the petitioner in terms of letter No. IG/CDU/45/ 2011/301 dated 30.03.2011 at a value of ₹4,98,500/-. The maintenance work was to be carried out for a period of one year to be reckoned from 01.04.2011. Thereafter, the parties entered into an

agreement dated 01.04.2011 (hereafter the 'Agreement'). It is stated that Clause 10 of the Agreement between the parties embodies an arbitration agreement whereby the parties had agreed to refer the disputes to arbitration.

3. The petitioner claims that during the term of the Agreement, the petitioner was required to carry out certain additional work in respect of the newly installed transformer, DG Set including LT panel and AMF panel, at the office of the Vice Chancellor of IGNOU on the same rates as mentioned in the Agreement. The petitioner claims that it had carried out the said works as per the directions of the officials of the respondent (IGNOU) and is entitled to be paid for the same. The petitioner has further averred that it had followed up with the respondent on numerous occasions for payment of its dues, however, the respondent has failed and neglected to clear the same. The petitioner states that it was informed that the requisite files have been put up for sanction and the payments would be released shortly. Since the payment was not released, the petitioner invoked the Arbitration Clause by a notice dated 15.03.2019.

4. The respondent neither disputes the existence of an agreement to refer the disputes to arbitration nor the fact that the petitioner has invoked the said agreement by its notice dated 15.03.2019. The respondent has opposed the present petition on the sole ground that the disputes sought to be raised by the petitioner are *ex facie* barred by limitation.

5. The works in question were completed prior to January, 2013 and admittedly the petitioner had invoked the arbitration beyond the period of three years from the said date.

6. The learned counsel for the petitioner contends that the petitioner's claims are not barred by limitation as the respondent had never disputed the same. He submits that after following up with the respondent, the respondent had issued a letter dated 17.03.2016 calling upon the petitioner to furnish logbooks for the site ESS-01 and ESS-05 with effect from 01.08.2011 to 31.12.2012 "for further action in the matter". He submitted that the respondent had also responded to the notice dated 15.03.2019 by an e-mail dated 04.04.2019 stating that it was looking into the matter for release of the payment against the aforesaid work order.

7. In terms of sub-section (6A) of Section 11 of the A&C Act, the scope for examination under Section 11 of the A&C Act is limited to the existence of an arbitration agreement. However, it is also well settled that the Courts would be required to briefly examine the disputes as the existence of an arbitration agreement cannot be examined without reference to the disputes.

8. Despite the limited scope of examination under Section 11 of the A&C Act, the Supreme Court had held in ***Vidya Drolia v. Durga Trading Corporation: (2021) 2 SCC 1*** that in cases where the disputes are *ex facie* barred by limitation, the Court would not appoint an arbitrator to compel the parties to incur costs on a futile exercise. In

the case of ***Bharat Sanchar Nigam Ltd. & Anr. v. Nortel Networks India Pvt. Ltd.: (2021) 5 SCC 738***, the Supreme Court following its earlier decision in ***Vidya Drolia v. Durga Trading Corporation*** (*supra*) observed as under:

> "47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that 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.
>
> 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."

9. In view of the above, the limited question to be examined is whether the claims sought to be raised by the petitioner are *ex facie* barred by limitation.

10. Before proceeding further, it would be essential to refer the

notice dated 15.03.2019 sent by the petitioner for invoking the agreement to refer the disputes to arbitration. The said letter is set out below:

> "EXECUTIVE ENGINEER (E), Dated: 15th March, 2019
> CDU, IGNOU,
> NEW DELHI
>
> Subject :Invocation of Arbitration to adjudicate the dispute.
>
> Name of Work :Operation and Routine Maintenance of Electrical Sub-Station Equipments installed in ESS-5 at IGNOU Campus, New Delhi
>
> Reference : Work Order No. 1G/CDU/45/2011/301 Dated March 30, 2011.
>
> Sir,
>
> The above work was awarded to us vide your award letter No.IG/CDU/45/2011/301 Dated March 30, 2011 with the cost of work Rs.4,98,500/-. The work was awarded for a period of one year to be reckoned from 01.04.2011. The said contract however could be extended for further period as decided by the department with mutual understanding and after accessing performance of the agency. Agreement No.EE/COU(E)/WO/2011-12/01 dated April 1, 2011 was executed between the parties.
>
> During the continuation of the above work, we were also requested to carry out the Additional work for operation of newly installed Transformer, DG Set including LT panel and AMF panel etc. for VC office at ESS-1, as per item no.-1 of the above agreement/Contract and on the same rates, terms and conditions. We continued the work till 31.12.2012 and also handed over the site on 2nd January, 2013 but no payment was made to us for the

work done after January, 2012 for the main work and also for the Additional work w.e.f. 01.08.2011. The amount due is approximately Rs.10 Lac since January, 2013.

We have been pursuing regularly for release of our due payment but every time you informed that file has been sent to higher authority for sanction, but no payment released. However, vide your letter No. IG/CMD/2015-16/310 Dated: 17.03.2016, we were required to submit log books for the sites of ESS-01 and ESS-05 w.e.f. 01.08.2011 to 31.12.2012 for further necessary action in this matter even though the site has already been handed over to you on 02.01.2013. The original as well as photo copy with spiral binding of log books were handed over to you.

On further pursuance, in November, 2018 it was informed that our case has been placed in the technical Committee meeting for release of our payment.

Since then also more than three months have passed, but neither any payment has been made so far nor getting any satisfactory response from you as such the dispute has arisen for non-payment of our work done and we invoke Arbitration Clause 10 of the agreement dated April 1, 2011. You are, therefore, requested to refer the dispute to competent authority for appointment of Arbitrator in terms of Clause 10 of the Agreement.

Thanks & Regards

Jaswinder Singh

KSR Brothers

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11. As is apparent from the tenor of the said letter, it is the petitioner's case that the amount claimed by it was due since January, 2013. Such claim would be barred by limitation unless the petitioner is able to establish that the respondent had acknowledged the payments due to it. Unfortunately, the only communication available with the petitioner is the letter dated 17.03.2016 whereby the respondent had asked the petitioner to submit logbooks for the period of 01.08.2011 to 31.12.2012 for necessary action in the matter. Clearly, the said letter would not extend the period of limitation for two reasons. Firstly, it is not an acknowledgment of any debt due. Secondly, the said letter was issued beyond the period of three years from the date of the cause of action. According to the petitioner, it had handed over the site in January, 2013 and the amount of ₹10,00,000/- was owed by the respondent as on that date.

12. The learned counsel for the petitioner submitted that the period of limitation has not begun as it is not the respondent's practice to ask the contractor to issue any final bills. The final bill were prepared by the respondent and in this case, the said bill has not been prepared. By a letter dated 17.03.2016, the respondent had called upon the petitioner to submit the logbook for preparation of the final bill and

therefore, the period of limitation would only begin once the said bill was prepared. The said contention is clearly unmerited and is contrary to the petitioner's own stand in its notice invoking arbitration.

13. As noted above, the petitioner has clearly stated in its notice that the amount of ₹10,00,000/- is due since January, 2013. The petitioner had also asserted that the work had continued till 31.02.2012 and the sites were handed over on 02.01.2013. There can be no dispute that the payments in respect of the work done by the petitioner prior to 31.12.2012 would be due and payable to the petitioner on completion of the said work. The time taken by the petitioner in pursuing the respondent or by sending reminders would not extend the period of limitation (See: ***Geo Miller & Co Pvt Ltd v Rajasthan Vidyut Utpadan Nigam Ltd: 2019 SCC OnLine SC 1137***)

14. In view of the above, this Court does not consider it apposite to allow the present petition and appoint an arbitrator.

15. The petition is accordingly dismissed.

VIBHU BAKHRU, J

NOVEMBER 16, 2021
'gsr'

Click here to check corrigendum, if any