AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBP No.29 of 2022

Sunflag Iron and Steel Company Limited	….	***Petitioner***

-versus-

Tarini Prasad Mohanty	….	***Opposite Party***

Advocates appeared in this case:

For the Petitioner	:	Mr. S.K. Padhi, Senior Advocate Mr. B. Panigrahi, Advocate
For the Opposite Party	:	Mr. Pitambar Acharya, Senior Advocate Mr. S.S. Tripathy, Advocate

CORAM:
THE CHIEF JUSTICE

JUDGMENT
22.11.2022

Dr. S. Muralidhar, CJ.

1. The Petitioner-Sunflag Iron and Steel Company Limited has filed this petition under Section 11 (6) of Arbitration and Conciliation Act 1996 (Act) seeking the appointment of an Arbitrator to adjudicate the disputes between the parties arising out of an agreement for sale dated 12th February 2004 under which the Petitioner agreed to buy from the Opposite Party the entire output of the mine over an area of 48.117 hectares in Naibaga and Katupali District-Keonjhar, Odisha in respect of

which mining lease was granted in favour of the Opposite Party by the State of Odisha for a period of 20 years on 9th October, 2002.

2. Under the agreement of sale, the Petitioner agreed to purchase at least 10000 metric ton on a monthly average of a quarter after 12 months of operation. Clause-9 of the agreement contained an arbitration clause, which reads as under:

> "**9. ARBITRATION:**
> Any dispute or difference arising under or in connection with or regarding the interpretation of this agreement, which cannot be settled by mutual discussion shall be settled by an arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The arbitration proceedings shall be held in Bhubaneswar and shall be conducted in the English language. The arbitration award shall be final and binding on the parties."

3. On 23rd December 2006, a supplementary agreement was entered into between the parties to amend the above agreement. According to the Petitioner, this became necessary since the Opposite Party did not obtain all the necessary permissions, approvals etc. for commencing the mining operations. Under the supplementary agreement, the Petitioner agreed to pay a sum of Rs.110 lakhs out of Rs.300 lakhs to be paid to the Opposite Party as interest free advance.

4. On 13th July 2009, another agreement was entered into between the parties whereby the Petitioner agreed to release non-

refundable and non-adjustable amount of Rs.2 crores to the Opposite Party.

5. On 9th January 2011, a second amendment agreement was entered into between the parties [hereafter the "Second Ore Sales Amendment Agreement (SOSAA)"] in terms of which a pre-determined sale consideration was payable by the Petitioner to the Opposite Party fixing a price component. The SOSAA extended the term of the agreement to 11 years from 10 years, amended the scope of supply of iron ores from iron ore lumps to calibrated lumpy ores, iron ore fines and rejects and further stipulated that the rights and obligations of the parties were subject to such limitations or restrictions as may be imposed by the applicable law and further that the mine owner would not transfer the mining lease in any manner. According to the Petitioner, the SOSAA was intended to supersede the first two agreements. The Petitioner states that up to this point, it had paid more than Rs.5 crores to the Opposite Party.

6. Commercial production is stated to have commenced on 7th June 2011 and the agreement was valid till 6th June, 2022. According to the Petitioner, prior to the expiry of the agreement, the Petitioner issued to the Opposite Party on 11th April 2022 a notice for the appointment of an Arbitrator.

7. In the meanwhile, correspondence was exchanged between the parties regarding the dispute that arose with each party alleging

that the other had failed to perform their part of the obligations under the agreement. The Petitioner on 16th November 2020, called upon the Opposite Party to comply with the terms of the SOSAA and sought amicable resolution of the disputes between the parties. By a reply dated 21st November 2020, the Opposite Party sought time for response. In this legal notice, the Petitioner had claimed a sum of Rs.39 crores.

8. With no effective response forthcoming, on 8th January 2021, Petitioner issued a notice to the Opposite Party invoking the arbitration clause and calling upon the Opposite Party to choose one among the two Arbitrators suggested by the Petitioner.

9. By letters dated 12th and 15th January 2021, Opposite Party sought to initiate a meeting with the Petitioner to amicably settle the matter between the parties. It is stated by the Petitioner that on account of the intervening COVID-19 pandemic, the dispute could not be resolved.

10. The Petitioner then refers to a series of correspondences exchanged between the parties in the month of March, 2022. Another notice was issued by the Petitioner to the Opposite Party on 11th April 2022 seeking the appointment of an Arbitrator. Thereafter, on 2nd May 2022, the present petition was filed.

11. By a letter dated 11th May 2022, the Opposite Party declined the suggestion of the Petitioner regarding the appointment of a sole Arbitrator and again stated in the reply as under:

> "We propose that the parties engage in informal or formal mediation to resolve their differences amicably. Failing any amicable resolution, the parties can each suggest two names of proposed arbitrator and a sole arbitrator can be jointly decided from the list."

12. In response to the present petition, the stand of the Opposite Party is that the claims of the Petitioner are time barred. According to Mr. Pitambar Acharya, learned Senior Advocate appearing for the Opposite Party, the cause of action arose in 2016 when the notice of arbitration was first issued as recorded in the e-mail communication of 4th July 2016 and 5th July, 2016. Ultimately, a legal notice was issued on behalf of the Petitioner on 6th January 2017, and a second legal notice was issued on 10th July 2017, to which the Opposite Party responded on 27th July, 2017. It was accordingly contended that the subsequent notice of arbitration issued on 8th January 2021 i.e., more than three years after issuance of the first legal notice rendered the Petitioners claims in the said notice dated 8th January 2021 time barred.

13. It is further submitted by Mr. Acharya that the notice dated 8th January 2021 was marked "without prejudice" and therefore could not be relied upon in a court of law without the consent of the concerned party. Thus, it is contended that not only is the initial

notice dated 8th January 2021 invoking arbitration invalid, but the subsequent notice dated 11th April 2022, also titled "without prejudice" was also invalid. It was contended that the arbitration proceedings have not commenced under Section 21 of the Act.

14. Lastly, it was contended that the claims themselves were time barred and therefore referring the dispute to the arbitration would be a futile exercise. Reliance *inter alia* is placed on the decision in ***Geo Miller & Co. Pvt. Ltd. v Chairman, Rajasthan Vidyut Utpadan Nigam Ltd. (2020) 14 SCC 643***.

15. Mr. S.K. Padhi, learned Senior Advocate for the Petitioner countered the above submissions by pointing out that in terms of the decision of the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1*** followed by the ***Emaar India Ltd. v. Tarun Aggarwal Projects LLP (2022) SCC OnLine SC 1328*** and ***Indian Oil Corporation Limited v. NCC Limited (2022) SCC OnLine SC 896***, the issue whether any of the claims were time-barred can be decided by the Arbitrator to be appointed by the Court. It could not be said on the face of it that the claims are time barred or that the arbitration clause was not properly invoked.

16. In the present case, on perusal of the correspondence between the parties, this Court is unable to be convinced at this stage that on the face of it, the claims of the Petitioner are time-barred or that there was no proper invocation of the arbitration clause as

contended by the Opposite Party. The parties may have to lead evidence on these aspects as limitation is a mixed question of fact and law. In the considered view of the Court, these are also the issues that can be decided by the Arbitrator. As explained in ***Vidya Drolia*** *(supra)*, the Court may interfere at the stage of Section 8 or Section 11 of the Act only when it is manifestly and *ex facie* certain that "the arbitration agreement is non-existent, invalid or disputes are non-arbitrable". It was further noted in ***Vidya Drolia*** *(supra)* that the restricted and limited review under Sections 8 and 11 of the Act was to "check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood.

17. Applying the test in ***Vidya Drolia*** *(supra)*, this Court is not satisfied that the prayer of the Petitioner for appointment of an arbitrator should be summarily rejected at this stage on the grounds put forth by the Opposite Party. This Court nevertheless clarifies that this is only a prima facie view and it would be up to the Arbitrator to independently decide all the issues raised by the Opposite Party in opposition to the prayer for arbitration in accordance with law not influenced by any of the observations that may have been made by the Court in this order.

18. With the above clarification, the Court appoints ***Justice A. K. Patnaik***, former Judge of the Supreme Court of India, as sole Arbitrator to adjudicate the disputes between the parties including

the claims and counter claims. The learned Arbitrator will fix his terms.

19. The arbitration petition is disposed of accordingly. A copy of this order be communicated to the learned Arbitrator forthwith.

(S. Muralidhar)
Chief Justice

S. K. Guin/PA