**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of Reserve: 31.08.2022
Date of Decision: 30.09.2022

ARB No.2 of 2015 (O&M)

M/s Jitco Overseas Projects ......Petitioner
Vs
Uttar Haryana Bijli Vitran Nigam and another
.....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Puneet Bali, Senior Advocate with
Mr. Rose Gupta, Advocate
Mr. Sachin Jain, Advocate
Mr. Shivam Sharma, Advocate
for the petitioner.

Mr. Puneet Jindal, Sr. Advocate with
Mr. Amandeep Singh, Advocate
for the respondents.

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RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter to the referred as 'the Act') for appointment of an Arbitrator to decide the dispute between the parties.

[2]. It has been alleged that the petitioner-Company was granted work for supply of material, erection, testing and commissioning of 33 KV Sub-Stations, 33 KV Lines and 11 KV

Link Lines on Turnkey basis and the condition of contract was issued vide Bidding document in the month of September, 2004. The offer for supply of material equipments for 33/11 KV 5 nos. Sub-Station and supply of material for the 6 nos. 33 KV and 11 KV electrical lines from the Sub-Station and for the Sub-Station for Sarshana, Ferozpur, Nrasidon, Jind and Bhatgoan Sub-Station and its lines under Bid B-25 was accepted by the respondent-Nigam. Three contract numbers are Package D. Supply Portion PDC 101/B-25/Package D/Xen-DD III dated 15.02.2005 Package G. Supply Portion PDC 107/B-25/Package D/Xen-DD III dated 15.02.2005 Package H. Supply Portion PDC 109/B-25/Package D/Xen-DD III dated 15.02.2002. The 6th nos. 33 KV, feeder was Bhadurgarh to Jossore Line under package H was accepted by the respondent-Nigam on the terms and conditions mentioned in the above said contract and in the bid documents.

[3]. It has been pleaded that the offer for the erection of 5 nos. of 33/11 KV Sub-Station and establishing the 33 KV and 11 KV electrical lines from the Sub-Station and for the Sub-Station for Sarshana, Ferozpur, Nrasidon, Jind and Bhatgoan Sub-Station and its lines. The erection of 5 nos. Sub-Station and its erection of 6 nos. 33 KV H.V. Line was accepted vide contract no. details as below:-

PDC 102/B-25/Package D/Xen-DD III dated 15.02.2005

PDC 108/B-25/Package D/Xen-DD III dated 15.02.2005

PDC 110/B-25/Package D/Xen-DD III dated 15.02.2005

[4]. It has been further pleaded by the petitioner that 33 KV 6th feeder was Bhadurgarh to Jossore Line under package H was accepted by the respondent-Nigam on the terms and conditions mentioned in the contract and in the bid documents. After the receipt of 6 nos. award letter, respondent submitted the 6 nos. of performance bank guarantee to the tune of Rs..0.64 crore (Rs.64 lakhs) as detailed below:-

Sr. No.	*Package*	*Description*	*Bank Guarantee No.*	*Amount*
1	D	Supply	60051BG15050072	25,63,438/-
2	D	Erection	60051BG15050075	1,36,563/-
3	G	Supply	60051BG15050069	22,53,132/-
4	G	Erection	60051BG15050070	1,14,169/-
5	H	Supply	60051BG15050073	12,72,485/-
6	H	Erection	60051BG15050071	67,515/-

[5]. It has been alleged by the petitioner that as per the said contract, the Sub-Station Construction, respondent was to provide developed site for the construction of 33 KV yard and civil control room for Sub-Station equipment. For 33 KV overhead lines respondent was to provide right of way to construct the 33 KV lines in the public area. The contracts in question were to be completed in the period of 9 months from the date of letter of intent and supply of major equipments like power transformers, high tension panel were to be purchased

only from the Nigam approved supplier list. Due to non completion of civil control room, non-completion of development of Yard, boundary wall, non providing right of way for the construction of 33 KV lines, by the respondent-Nigam after awarding of the contracts, the hindrances, site constraints continued for the years together, therefore, the contract could not be completed within stipulated period due to the fault of respondent-Nigam. As soon as the control room, boundary wall was constructed, the area was developed by the respondent-Nigam Sub-Station and yard was completed and right of way issue was sorted out in 5 location which was completed in the year 2007-2008 for three Packages to the satisfaction of the Engineer-in-charge. In one feeder right of way issue could not be sorted out by the respondent as late as 2011 as the local villager had taken the court stay.

[6]. As per condition of contract, the defect liability period was of 12 months from the date of commissioning of all the sites. The said period was expired in the year 2009-2010. Final bill was submitted by the petitioner in the year 2007-2008 for three Packages which was prepared by the respondent-Engineer-in-charge of the respondent-Nigam unilaterally and the same was prepared for the payment and was processed for sending to the Account Section. The said bill still remains to be

paid. Completion certificates with regard to the Package D and H have been issued to the petitioner.

[7]. Petitioner has also pleaded that respondent-Nigam had taken over 5 nos. of 33 KV Sub-Station and 5 nos. 33 KV Lines and since 2007-2008 Sub-Station and overhead lines are put on commercial load. The Sub-Station and lines were tested jointly by the testing team in the presence of the petitioner and respondent-Nigam. The equipment and line were inspected by the Electrical Inspector. The period of maintenance had already been expired as per condition of contract.

[8]. On the basis of pleadings, the petitioner has staked its claim to recover a sum of Rs.63 lakhs towards retention money and a sum of Rs.64 lakhs which was recovered by the respondent-Nigam by encashing the bank guarantee in an illegal manner. In this way, the petitioner has staked its claim to recover a total sum of Rs.1.27 crores from the respondent-Nigam. Petitioner has also staked its claim to recover a sum of Rs.1.8 crores from the respondent-Nigam on account of pending bills which have become due since long for which the Engineer had already passed the bills for the payments. Petitioner has also staked its claim to recover Rs.64 lakhs of penalty which has been deducted from the bills of the petitioner in an illegal manner as the delay was solely attributed to the

respondent-Nigam. In this way, total claim to the tune of Rs.4.05 crores has been made by the petitioner which has been withheld by the respondent-Nigam in an illegal manner. The Chief General Manager of the respondent-Nigam kept on instructing the Bank of the petitioner to extend the bank guarantee till 2012 despite the repeated protest by the petitioner. On 30.05.2011, S.E. Construction of the respondent-Nigam i.e. Engineer-in-charge wrote a letter to the respondent-Nigam that the stay granted by the Court had been vacated and petitioner was asked to complete the work.

[9]. Petitioner submitted reply on 18.06.2011 with a copy to Chief General Manager explaining that by virtue of tender clause *force majeure* the work was closed as the same was stopped for more then six months and the reasons for stoppage of work was beyond the control of the petitioner in view of suspension clause No.22.4. The work stood closed. Petitioner also apprised the respondent-Nigam about the wrong decision and instructions for extending the bank guarantee of the project which had already been completed since 2008. Petitioner again apprised that 33 KV work was only for 5% of the total contract which was not completed because of right of way issue and the stay order granted by the Court. Petitioner also requested for release of payment of bank guarantee. The respondent was in a

dominant position and, therefore, the respondent-Nigam did not release the payment and kept on instructing the Bank to extend the bank guarantee of Rs.64 lakhs submitted by the petitioner for performance of 3 contracts of Bid B-25, Package D, G and H on the pretext that the work assignments were not completed. Petitioner was executing many projects in Haryana with the respondent-Nigam in crores of rupees in the year 2008-2009 and that is how the petitioner wanted to settle the issue amicably and kept on requesting the respondent-Nigam for release of payments and bank guarantee.

[10]. It has been further pleaded that the respondent-Nigam i.e. Engineer-in-charge of contract Bid No.96 and contract Bid No.97 asked the Bank to extend the bank guarantee of the projects Bid No.96 and Bid No.97 amounting to Rs.6.5 crores. The bank guarantee had already expired due to which the Bank had not extended the bank guarantees. The respondent-Nigam Engineer of Bid No.96 and Bid No.97 on finding that the Bank was not extending the project bank guarantee and in order to cover up the wrong doing chose to encash the bank guarantee of Bid No.25 whose work had already been completed four years ago. Vide letter dated 08.02.2012, the respondent-Nigam instructed the Bank to encash 6 bank guarantees submitted for Bid No.25, Package D, G and H amounting to Rs.64,07,302/-.

[11]. According to learned Senior counsel for the petitioner the dispute arose only after encashing bank guarantee otherwise the completion certificate had already been issued vide Annexures P-2 and P-3. The pleading made in paras No.11 and 21 of the petition have not been denied in the written statement as the respondent-Nigam has not filed any written statement to this effect.

[12]. Learned Senior counsel further submitted that a *bona fide* dispute has arisen between the parties in respect of terms and conditions of the contract. Petitioner vide letter dated 05.05.2012 to the respondent for appointment of Arbitrator as per arbitration clause in the contract agreement for settlement of long pending dues for three projects i.e. Bid No.96, Bid No.97 and Bid No.25. The contract agreement having arbitration clause No.31 is reproduced hereasunder:-

> *"ARBITRATION*
>
> *All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequence or relating to this Contract whether or not obligations of either of both parties under this Contract be subsisting at the time of such dispute and whether or not this Contract has been terminated or purported to be terminated or completed, shall be referred to the Sole Arbitration of MD, UHBVN or an Officer appointed by the MD, UHBVN as his nominee,*

not below the rank of Superintending Engineer. The Award of the Arbitrator shall be binding on the parties to this Contract."

[13]. Learned Senior counsel further submitted that the respondents failed to appoint the Arbitrator as per arbitration clause. The petitioner filed a petition for the appointment of Arbitrator for Bid Nos.96 and 97 in the High Court vide ARB No.129 of 2012 which was allowed vide order dated 21.03.2014 and a retired Hon'ble Judge of the High Court was appointed as Sole Arbitrator in respect of Bid Nos.96 and 97. When no reply was received in respect of letter dated 05.05.2012, the petitioner sent another letter dated 29.11.2013 by registered post for appointment of Arbitrator as per arbitration clause 31 of the contract agreement. The respondent-Nigam did not reply to the letter dated 29.11.2013.

[14]. Perusal of letter dated 05.05.2012 would show that in the reference, Bid No.96, Bid No.97 and Bid No.25 were mentioned. The letter had factual domain with the recital that the XEN Ambala with some prejudice mind was looking after Bid No.96 and 97 and had wrongly encashed bank guarantee amounting to Rs.64.07 lakhs submitted against Bid No.25. The bank guarantees were not in respect of project Bid Nos.96 and 97 and the encashment of the bank guarantees against the

project Bid No.25 was not as per contractual obligation. List of claims for the contract Bid Nos.96 and 97 were attached with the letter dated 05.05.2012.

[15]. Learned Senior counsel for the petitioner referred to the ratio of ***Civil Appeal No.975 of 2021*** titled '***Sanjiv Prakash vs. Seema Kukreja and ors.***' decided on 06.04.2021 by the Hon'ble Apex Court wherein ratio(s) of ***Bharat Sanchar Nigam Ltd. and another vs. M/s Nortel Networks India Private Limited, 2021(2) RCR (Civil) 337*** and ***Vidya Drolia and others vs. Durga Trading Corporation, (2021) 2 SCC 1*** were duly discussed and endorsed.

[16]. On the other hand, learned Senior counsel for the respondents placed reliance upon ***Union of India vs. H.K. Dhruv, 2005(10) SCC 218*** on the issue of cause of action as the plea in respect of Bid No.25 ought to have been taken at the time of when pleas involving Bid No.96 and Bid No.97 were raked up before the High Court and the issue in respect of Bid No.25 is hit by Order 2 Rule 2 CPC. Learned Senior counsel also placed reliance upon ***Secunderabad Cantonment Board vs. M/s B. Ramachandraiah & Sons, 2021(5) SCC 705*** and ***M/s Geo Miller & Co. Pvt. Ltd. vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd., 2019(3) Apex Court Judgments (SC) 463*** on the issue of limitation.

[17]. Learned Senior counsel further submitted that as per short written statement filed by the respondents, the last work carried out in respect of Bid No.25 was on 30.11.2006 under Package G and the final bill was presented by the petitioner on 10.10.2007. Therefore the period of more than three years had passed for filing the petition under Section 11(6) of the Act. Learned Senior counsel by placing reliance upon ***ARB No.37 of 2009*** titled '***The Hisar Model Town Azad Co-operative Labour and Construction Society Limited vs. The State of Haryana and others'*** decided on 18.05.2011 further submitted that since there was no specific period of limitation prescribed for the petition under Section 11 of the Act in the Schedule to the Limitation Act, 1963, but the limitation in case of petition under Section 11 of the Act is governed by residuary Article 137 of the Limitation Act which prescribes period of limitation of three years from the date when the right to apply accrues.

[18]. Learned Senior counsel further submitted that the petitioner had already filed a petition bearing ARB No.129 of 2012 for the appointment of Arbitrator in respect of Bid No.96 and Bid No.97 and the same was allotted on 21.03.2014. Petitioner did not apply for appointment of Arbitrator in respect of Bid No.25. The petitioner never completed the work allocated to the it i.e. construction of 33 KV line from Harsana Kalan to

Bhatgaon and has wrongly stated that because of stay from the civil Court, the work could not be completed. The stay order was vacated in the month of May-June, 2009 and thereafter the petitioner was required to complete the work, but petitioner failed to complete the same. Final one month notice was given to the petitioner on 26.05.2010 and, therefore, the petitioner cannot claim extension of period of limitation.

[19]. Learned Senior counsel for the respondents further submitted that petitioner has requested for appointment of Arbitrator for the settlement of dispute in respect of Bid No.25 vide letter dated 05.12.2012, however as per record of all the documents/letters received by the respondent through courier/registered post/speed post, a different letter was received on the said date. In ARB No.129 of 2012, the petitioner had appended a letter dated 05.12.2012 for settlement of dispute in respect of Bid No.96 and Bid No.97 and the said letter was different having different dimensions. The receipt was not legible. Learned Senior counsel further submitted that even if an employee of the petitioner-Company had gone for sending two speed post letters simultaneously, the receipt being a computer generated would not have been given the same dimensions. In view of aforesaid, two separate letters to two different authorities for invocation of the arbitration clause were made in

respect of settlement of dispute in respect of Bid No.96 and Bid No.97 at one hand and Bid No.25 in addition to Bid No.96 and 97 on the other hand.

[20]. Learned Senior counsel with reference to the Annexures R-4 to R-6 submitted that the petitioner is in habit of placing wrong and fabricated documents on record for which the respondents/Nigam is contemplating to initiate criminal prosecution of the petitioner. In view of non-existent and fabricated documents, the respondents have prayed for dismissal of the petition. Petitioner had failed to get extended the bank guarantees. When the needful was not done on the request of the respondent No.1, the Bank sent the demand drafts as the petitioner had failed to approach the Bank for extension of bank guarantees. Petitioner had also alleged its claim in respect of these bank guarantees before the Sole Arbitrator in respect of Bid No.96 and Bid No.97. Since the petitioner has not fulfilled its obligations arising out of Bid No.25 and relied upon some forged and fabricated documents, therefore, the claim of the petitioner deserves dismissal.

[21]. I have considered the submissions made by learned Senior counsel for the parties and have gone through the material on record.

[22]. The issue involved in the present petition is in respect

of wrong encashment of bank guarantee amounting to Rs.64.07 lakhs by the XEN Ambala which was submitted against the Project B-25. Completion and non-completion of Project B-25 falls under disputed domain. Petitioner has already invoked the arbitration clause on 05.05.2012. The difference in letters dated 05.05.2012 viz.-a-viz. stand taken by the respondents requires leading of evidence as the same would fall under the disputed questions to be decided before the appropriate authority. The alleged criminality, if any, attached to Annexures R-4 to R-6, shall be seen by the competent authority, if at all the proposed action is initiated by the respondents in due course.

[23]. It is true that the cause of action accrued to the petitioner only after wrong encashment of bank guarantee submitted against the Project B-25. According to petitioner, the said encashment was done by the XEN Ambala, who was looking after Bid No.96 and Bid No.97. The encashment of bank guarantee was a wrongful act by XEN Ambala and the same was done on 08.02.2012. The cause of action is a bundle of facts which are yet to be proved. The limitation based on such cause of action would also fall under disputed domain and the same cannot be held to be *ex facie* time barred.

[24]. In ***Bharat Sanchar Nigam Ltd. and another's*** case (supra) the Hon'ble Apex Court after considering the ratios of

numerous judgments held that the limitation of filing an application under Section 11 of the Arbitration and Conciliation Act would arise upon the failure to make the appointment of the Arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 of the Arbitration and Conciliation Act can be filed only after a notice of arbitration in respect of the particular claim to be referred to arbitration is made and there is a failure to make the appointment. The period of limitation for filing a petition for appointment of an Arbitrator cannot be confused with the period of limitation applicable to the substantive claims. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the substantive disputes is necessarily distinct from that of filing an application for appointment of an Arbitrator. Under Article 137 of the Limitation Act 1963, an application for appointment of Arbitrator under Section 11 of the Act is covered being a residual provision. Since none of the Articles in the Schedule of the Limitation Act, 1963 provide a time period for filing an application for appointment of an Arbitrator under Section 11 of the Act, therefore, it is covered under the residual provision of Article 137 of the Limitation Act and the period of limitation is three years from the time when the right to apply accrues. The right to apply accrues only when there is a failure to make the appointment of the Arbitrator within a period of 30 days from issuance of notice of invoking arbitration. In other words, the application under Section 11 of the Act can be filed only after a notice of arbitration in respect of the claim to be referred to the Arbitrator is made and there is a failure to make appointment by the respondents.

[25]. The issue of limitation is normally a mixed question of law and facts and would lie within the domain of the arbitral Tribunal. There is a distinction between jurisdictional and admissibility issues. Jurisdictional issue pertains to the power and authority of the Arbitrator to hear and decide a case. The jurisdictional issue includes objections as regards the competence of the Arbitrator to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. The issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, as the same pertain to the jurisdiction of Arbitrator/arbitral Tribunal. Admissibility issue relates to procedural requirements such as a breach of pre-arbitration requirement or a challenge to the claim being time barred. Admissibility issue relates to the nature of the claim and the same is not a challenge to the jurisdiction of the Arbitrator. The issue of limitation which concerns the admissibility of the claim,

must be decided by the Arbitrator/arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

[26]. In ***Vidya Drolia and others' case*** (supra), the Hon'ble Apex Court has illustrated the scope of power under Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 and it has been held that the Court must undertake a primary first review to weed out manifestly *ex facie* non-existent and invalid arbitration agreements or non-arbitrable disputes. The *prima facie* review at the reference is to cut the deadwood where dismissal is bare faced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration clause exists or that the subject matter is not arbitrable and then reference may be refused. In this context ratio of ***Bharat Sanchar Nigam Ltd. and another's*** case (supra) can also be referred. It is only in the very limited category of cases where there is not even an instinct of doubt that the claim is *ex facie* time barred the Court may decline to make the reference. However, if there is a slightest doubt, the rule is to refer the dispute to arbitration otherwise it would encroach upon what is essentially a matter to be determined by the Arbitrator/arbitral Tribunal. In ***Secunderbad Cantonment Board's*** case (supra) it has been held by the Hon'ble Apex

Court that the limitation is not a jurisdictional issue but is an admissibility issue. It is only in the very limited category of cases where there is not even a vestige of doubt when the claim is *ex facie* time barred or that the dispute is non-arbitral, the Court may decline to make the reference. However, if there is a slightest doubt, the rule is to refer the dispute to the Arbitrator otherwise it would encroach upon what is essentially a matter to be determined by the Tribunal. While observing the aforesaid, the reference was made to ***Vidya Drolia and others'*** case (supra) wherein scope of power under Sections 8 and 11 of the Act has been elaborately discussed and it has been held that the Court must undertake a primary first review to weed out manifestly *ex facie* non-existent and invalid arbitration agreements or non-arbitrable disputes. The *prima facie* review at the reference is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first stage. It is equally true that the Arbitrator can himself decide the issue of jurisdiction under Section 16 of the Act.

[27]. Perusal of ***Union of India vs. H.K. Dhruv's case (supra)*** in terms of para no.3 would show that during pendency of the first application, another claim was preferred by the respondent (therein) which was also turned down by the

Railways in that context, the respondent did not seek reference of subsequent dispute for adjudication by the Arbitrator. In the facts and circumstances of the aforesaid case, the plea is distinguishable as it is not clear whether the bid was common or not.

[28]. There is no dispute about the proposition of law that the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation, 1996 Act would be governed by Article 137 of the First Schedule of Limitation Act, 1963 and the period of limitation will begin to run from the date when there is a failure to appoint Arbitrator. In rare and exceptional cases where claims are *ex facie* time barred and is manifest that there is no subsisting dispute, the Court may refuse to make reference.

[29]. It is also a settled principle of law that mere correspondence of limitation by way of writing letters, reminders to the opposite party subsequent to the date in question would not extend the period of limitation. Limitation period for seeking appointment of Arbitrator is three years from the date on which the cause of action arose. The cause of action in any case has to be reckoned when there is a failure to make appointment of Arbitrator within a period of 30 days from the date of issuance of notice of invocation. In view of letter of invocation dated

05.05.2012 and non-adherence to the plea of petitioner within a period of 30 days thereafter, the limitation would have started on the basis of cause of action accrued to the petitioner. In view of date of filing of the present petition on 05.01.2015 it would be doubtful as to whether the claim is *ex facie* time barred and is manifest that there is no subsisting dispute. The ratio of ***Secunderabad Cantonment Board's*** case (supra) to the extent of appreciating that the petitioner has waited unreasonably for long time to refer the dispute to Arbitrator on account of respondent's failure to settle the claim is not applicable. In my considered opinion, admissibility issue would depend upon mixed question of law and facts for the purpose of limitation and so as to jurisdictional issue for which the Arbitrator is competent to decide his/her jurisdiction under Section 16 of the Act. The controversy involves an arbitral issue between the parties which needs to be referred to the sole Arbitrator.

[30]. For the reasons recorded hereinabove, I hereby appoint HMJ N.C. Jain, Chief Justice (Retd.), R/o H.No.292, Sector 6, Panchkula, New Address: Kothi No.2045, Sector 21-C, Chandigarh, Tel.No.0172-2585586, Mobile Nos.9810022412, 9815326225 as the sole Arbitrator, to resolve the dispute/difference between the parties. The appointment of the Arbitrator shall be subject to the declaration to be made by

him/her as required under Section 12 of Arbitration and Conciliation Act, 1996 in respect of hisher independence and impartiality to settle the dispute between the parties.

[31]. The Arbitrator would complete the proceedings within the specified time in terms of Section 29-A of the Act. The Arbitrator shall be paid fee in accordance with the IVth Schedule of the Act as amended from time to time. The fee shall be borne by both the parties equally.

[32]. Seat of the Arbitrator shall be at Panchkula, however the venue of the Arbitration shall be the place as per convenience of the Arbitrator.

[33]. A copy of this order be dispatched to the Arbitrator at the following address:-

HMJ N.C. Jain, Chief Justice (Retd.),
R/o H.No.292, Sector 6, Panchkula,
New Address: Kothi No.2045, Sector 21-C, Chandigarh,
Tel.No.0172-2585586,
Mobile Nos.9810022412, 9815326225

[34]. Petition stands disposed of accordingly.

(RAJ MOHAN SINGH)
JUDGE

September 30, 2022
Atik

Whether speaking/reasoned Yes/No

Whether reportable Yes/No