



\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI*Decided on: 06th September, 2022*

+

ARB.P. 675/2017

BIZIBI INFOTECH PVT LTD.(BIPL)

..... Petitioner

Through: Mr. Ramjee Pandey, Advocate.

versus

HCL INFOSYSTEM LTD.

..... Respondent

Through: Mr. Harsh Kaushik, Advocate.

%

CORAM:**HON'BLE MR. JUSTICE PRATEEK JALAN****JUDGMENT**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as “the Act”] has been filed by the petitioner [hereinafter referred to as “Bizibi”] seeking appointment of an arbitrator for adjudication of disputes between it and the respondent [hereinafter referred to as “HCL”], arising out of an agreement between them dated 19.12.2001, entitled “Call Centre Consultancy Agreement” [hereinafter referred to as “the Consultancy Agreement”].

2. The Consultancy Agreement contains an arbitration clause in Clause 16 thereof. Clause 16.1 provides for adjudication of disputes by two arbitrators, one each to be nominated by Bizibi and HCL, and



an umpire, appointed by the arbitrators so nominated. It is provided that the place of arbitration shall be New Delhi.

3. It is averred in the petition that the parties first entered into a Memorandum of Understanding dated 07.11.2001, with regard to sale of a call center software license by HCL to Bizibi, pursuant to which the Consultancy Agreement was entered into for certain services to be provided by HCL to Bizibi in this regard. Bizibi, alongwith its rejoinder, has filed another agreement between the parties dated 22.05.2002, entitled “High Seas Sale Agreement” [hereinafter referred to as “the High Seas Agreement”]. However, it is clear from the petition that the appointment of the arbitrator is sought only under the Consultancy Agreement, and not under the High Seas Agreement.

4. Bizibi has averred that, under the Consultancy Agreement, it paid a sum of ₹30,55,000/- to HCL. It refers to further correspondence between the parties, and alleges that the conduct of HCL was vitiated by fraud. Bizibi claims to have invoked the arbitration clause by a letter dated 09.05.2016, to which HCL replied on 08.06.2016. As HCL did not accede to Bizibi’s request for constitution of the arbitral tribunal, it has filed this petition under Section 11 of the Act.

5. Although HCL has taken various grounds in the reply filed by it to resist the constitution of the arbitral tribunal, Mr. Harsh Kaushik, learned counsel for HCL, confined his arguments to two points:-

- a. That the claims raised by Bizibi are hopelessly barred by limitation, and the parties ought not to be referred to arbitration on this ground, and



- b. That part of the claims raised by Bizibi are not under the Consultancy Agreement, but under the High Seas Agreement, which does not contain an arbitration clause at all.
6. With regard to the question as to the circumstances in which a petition under Section 11 of the Act may be rejected on the ground that the substantive claims sought to be agitated are barred by limitation, Mr. Kaushik relied upon the judgments of the Supreme Court in *Bharat Sanchar Nigam Limited and Anr. vs. Nortel Networks India Private Limited*¹ and *Geo Miller and Company Private Limited vs. Chairman, Rajasthan Vidyut Utpadan Nigam Limited*². Mr. Kaushik also relied upon the following four judgments of this Court in support of the aforesaid submissions: -
- a. *M/s KSR Brothers through its Partner Jaswinder Singh vs. IGNOU, through its Vice Chancellor*³.
 - b. *Glocaledge Consultants Private Limited vs. Rec Power Distribution Company Limited*⁴.
 - c. *GAIL (India) Limited vs. Kesar Alloys and Metals Private Limited*⁵.
 - d. *Siemens Healthcare Private Ltd. vs. Director General Armed Forces Medical Services*⁶.

¹ (2021) 5 SCC 738.

² (2020) 14 SCC 643.

³ Judgement in Arbitration petition 619/2021 dated 16.11.2021.

⁴ Judgement in Arbitration petition 1045/2021 dated 21.02.2022.

⁵ Judgement in Arbitration petition 325/2021 dated 25.03.2022 [Against this judgment, GAIL filed S.L.P.(C) 13087/2022 before the Supreme Court, which was dismissed on 05.08.2022].

⁶ Judgement in Arbitration petition 84/2022 dated 05.07.2022.



7. Mr. Kaushik referred me to the contents of the letter of invocation dated 09.05.2016, as also the contents of the present petition, to submit that Bizibi has not made any allegation against HCL, at the latest, beyond April, 2011. In view of the fact that arbitration proceedings commence on the date of invocation of Section 21 of the Act, which, in the present case, is admittedly 09.05.2016, Mr. Kaushik submitted that the claims of Bizibi are wholly, and *ex facie* barred by limitation.

8. In response to the objection, Mr. Ramjee Pandey, learned counsel for Bizibi, only submitted that Bizibi has suffered as a result of HCL's alleged fraud, and that it would be inequitable to deny Bizibi the opportunity to have its claims adjudicated by an arbitral tribunal, as contemplated under the Consultancy Agreement. Mr. Pandey submitted that several cases have been instituted against HCL by third parties, and that Bizibi has also instituted criminal proceedings against HCL and its officers. According to Mr. Pandey, the filing of criminal complaints would serve to extend the period of limitation under Section 14 of the Limitation Act, 1963 [hereinafter referred to as "the Limitation Act"].

9. In order to adjudicate the controversy on this ground, it is first necessary to examine the scope of the Court's consideration in a petition under Section 11 of the Act.

10. In *Vidya Drolia and Others vs. Durga Trading Corporation*⁷, a three-Judge Bench of the Supreme Court has considered various issues

⁷ (2021) 2 SCC 1.



arising under Section 11 of the Act. As far as the issue of limitation is concerned, the Court held thus:-

*“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. **Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute.** All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”⁸*

11. The judgment of the Supreme Court in *Vidya Drolia*⁹ was considered in *Nortel*¹⁰, wherein the Supreme Court held that the issue

⁸ Emphasis supplied.

⁹ Supra (note 7).



of limitation with regard to the substantive claims sought to be urged by the petitioner, should generally be left to the arbitral tribunal to decide, being a mixed question of fact and law¹¹. However, after consideration of the judgment in *Vidya Drolia*, the Supreme Court proceeded to hold as follows:-

“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.

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

¹⁰ Supra (note 1).

¹¹ Paragraph Nos. 38 to 40 of *Nortel*.



(which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions.

xxxx

xxxx

xxxx

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.*¹²

12. Even prior to these judgments, in *Geo Miller*¹³, the Supreme Court declined relief under Section 11 of the Act on the ground that the petitioner- claimant had not approached the High Court within the period of limitation from the date on which the substantive cause of action arose.

13. The four judgments of this Court, cited by Mr. Kaushik, follow the principles laid down by Supreme Court in *Vidya Drolia*¹⁴, and in *Nortel*¹⁵, to decline relief under Section 11 of the Act.

14. In the light of these judgments, the question to be determined is whether the claims of Bizibi are *ex facie* barred by limitation, so as to render the present case one of “*deadwood*”. A reading of the notice of invocation of arbitration dated 09.05.2016, and Bizibi’s averments in the present petition, leave me with no doubt that this case falls within the narrow category of cases in which the Court ought to decline reference to arbitration.

¹² Emphasis supplied.

¹³ Supra (note 2).

¹⁴ Supra (note 7).

¹⁵ Supra (note 1).



15. In the notice of invocation dated 09.05.2016, Bizibi has enumerated its disputes in the following paragraphs:-

“5. That my client has roughly calculated his expenditure and loss caused to him till April, 2011, which comes to ₹ 87,44,24,232/- (Rupees eighty seven crores forty four lacs twenty four thousand two hundred and thirty two).

6. That the cause of action is arising day by day continuously and rate of interest is also increasing day by day till the payment of total amount of Rs. 87,44,24,232/- (Rupees eighty seven crores forty four lacs twenty four thousand two hundred and thirty two). Therefore total due amount will increase on the date of payment for which you are liable.

7. That due to breach of contract by you my client could not pay bank loan to the bank or financial institutions hence the State Bank of India dismantled the call centre and took possession of the call centre was also taken away by the State Bank of India and whole machinery was also taken away to the tune of Rs. 4,33,79,275/- (Four crores thirty-three lacs seventy nine thousand two hundred and seventy five).

8. That HCL InfoTech gave a software to my client for operation in dialing system and for which my client paid Rs. 82,81,000/- (Eighty-two lacs eighty one thousand) by bank drafts.

9. That my client had paid 7500/- US\$ to you (HCL) in terms of business purpose.

xxxx

xxxx

xxxx

12. That as per clause 11.1 you had to give consultancy service for a period of three years and as per clause 9.1 & 9.2 my client had already paid consultancy fee and service tax in advance to the tune of \$25,000.00 (USD) and INR 12,25,000/-



(Twelve lacs twenty five thousand) as advance payment for software and hardware.

13. That as per the terms and conditions of MOU the Strata Soft INC was to provide my client a Global Outsourcing Solutions Inc. Process for 125000 hours US dollar 12.00 per agent per hour for 260 days for eight hours a day. This work was allotted to my client on 09.08.2002, but started on 09.09.2002, my client had dialed this process up to 4th March, 2003 but you took place away business of Global Outsourcing Inc. which was a sister concern of Strata Soft Inc. after six months, although as per agreement Clause 11.1 the consultancy period was for three years. Therefore, there is flagrant violation of agreement and due to this violation my client had suffered huge loss for not functioning the call centre.

14. That on 04.03.2002 you (HCL Info Systems Ltd.) stopped consultancy support for which you are responsible for non commitment of S.L.A. i.e. after period of six months while the agreement was up to 20.08.2005.

15. That thus you have broken the agreement 30 months prior to its completion, hence you breached, violated the contract against my client's billing and purchase of material from Strata Soft.

xxxx

xxxx

xxxx

19. That recently on 05.04.2016 my client had demanded the entire amount of loss amounting of Rs. 87,44,24,232/- (Rupees eighty seven crores forty-four twenty-four thousand two hundred and thirty two) till the April, 2011. It was also stated that this amount would certainly increase because rate of interest is increasing day by day till the date of payment and cause of action is also arising day by day. Hence, there is no question of limitation in any manner. But till date you have not taken any step for settling the dispute.”¹⁶

¹⁶ Emphasis supplied.



16. Similarly, in the present petition, Bizibi has averred as follows:-

"8.6 That on 2nd May, 2002, the applicant entered into an agreement with STRATA SOFT INC to purchase the software and hardware from Strata Soft Inc. having its office at 6401, South West Free way, Suite 201, Houston, TX-77074 and this document was signed by the Head of Finance of HCL Info System Ltd. But refused to sign the exhibit A-L which was also part of the agreement dated 2nd May 2002. As per the exhibit-C of the said agreement, the cost of the Dialer equipment Hardware was US \$ 1,00,000/ and the cost of software license 60 agents 120 lines was US\$ 1,44,000/-. After this incident, the HCL authorities raised the invoices bearing No. S-2100391, dated 05.06.2002 amounting ₹ 82,82,000/ which is equal to US\$ 1,69,138-00 at the prevailing rate 48.96 per dollar. The applicant paid the amount of ₹ 82,81,000/ on good faith prior the issuing the invoice 22 days before.

8.7 That is very important to mention herein that the cost of equipment was only US \$ 75,000/ instead of US\$ 1,44,000/. As the same is evident from the HCL letter No. NIL dated 04-02-2002 and 28.02.2002 whereby the STRATA SOFT INCS invoice No. 106-012402 dated 24th February 2002 and Invoice No. 106-012402 dated 18th February 2002.

***8.8 That the applicant came to know about such fraud in the year of 2005** when he was on the visit of USA and he talked at one from USA to President of HCL Mr. J.V. Ramamurthy. **The applicant met personally to Mr. J.V. Ramamurthy in the first week of January 2006 and made complaint regarding the fraud** committed against his company and he promised to refund the consultancy fee and fraud billing but he had shown his inability to compensate the loss in the nosiness. Mr. D.K. Singh used to meet the applicant to represent the President of HCL and last meeting held during the October 2010 and he showed his inability to solve the*



dispute. The complainant asked the appointment with President of HCL but he refused to give the appointment.

8.9 **That the respondent had played fraud with the applicant which is clear from the High Sea Sale Agreement** to bring the software to India wherein the Invoice shows that cost ₹ 82,81,000/ taken from the applicant as cost of only software is cost of Strata Dial Engine and Software. A true copy of the High Sea Agreement dated 22nd May 2002 is annexed herewith and marked as Annexure No. P-3.

8.10 That as per the MOU dated 9th August 2002 between the Global Outsourcing Solution Inc. and applicant, the Strata Soft INC was to provide to applicant process for 12500 hours US Dollar 12/ per agent per hours for 260 days for eight hour a day. **The applicant has dialed this process on 9th September 2002 and due to fraudulent Vox file, the process was taken back.** The respondent was to provide the consultancy service for 3 years as per SLA but they took back the Jawa back after six month.

8.11 **That on 4th March 2003, the respondent has stopped consultancy service and thereby they had breached the terms and conditions of the SLA.** They had also committed fraud billing for the purchase of Strata Soft. Consequent thereon, the applicant suffered a lot in finance. **The financier, State Bank of India took the possession of the Call centre on 21st December 2007 and carried the whole machinery of ₹ 4,33,79,275/-.** **The applicant suffered the loss for ₹ 27,18,27,387/- till 2011.** The applicant has to pay following other dues as under: 1) HPSEB dues for power supply: ₹ 1,98,000/- VSNL dues ₹ 18,09,225/- BSNL dues IPLC chargers. 2,50,000/ 4) Software technology Parks of India charge ₹ 23,50,000/-.”¹⁷

¹⁷ Emphasis supplied.



17. A reading of these documents leads me to accept both the submissions of Mr. Kaushik- that the claims raised by Bizibi, to a large extent, are not claims under the Consultancy Agreement at all, and that the claims are, in any event, *ex facie* barred by limitation. The contents of paragraph Nos. 5 to 9, 12 to 15 and 19 of the notice of invocation dated 09.05.2016, and paragraph Nos. 8.6 to 8.11 of the petition clearly refer to the purchase of hardware by Bizibi from one M/s Strata Soft INC, in respect of which the parties entered into the High Seas Agreement. The High Seas Agreement expressly refers to the purchase of *Stratadial CRM System* by Bizibi from HCL, which is the subject matter of the two invoices of HCL dated 24.01.2002 and 18.02.2002, to which reference is made in the High Seas Agreement. Clause 1.3 of the Consultancy Agreement indicates that Bizibi was to procure hardware under “*separate agreements with vendors*”. The scope of services was provided in Clause 2.1 of the Consultancy Agreement, read with Schedule III of the Consultancy Agreement, and Clause 2.3 of the Consultancy Agreement expressly provides that procurement of equipment software and other facilities of the project did not form part of the Consultancy Agreement. As the High Seas Agreement does not contain an arbitration clause at all, these claims do not fall within the scope of arbitration contemplated by the Consultancy Agreement.

18. In any event, all the claims referred to in the notice, and in the petition, are also *ex facie* barred by limitation. The contents of the notice of invocation dated 09.05.2016, extracted above, shows that Bizibi has sought losses until April, 2011, and that the possession of



the call centre was taken by Bizibi's banker in 2007. Bizibi also contended that HCL has stopped providing consultancy services since 04.03.2002, whereas the Consultancy Agreement was valid for three years i.e., until 20.08.2005.

19. The arbitral proceedings, having been commenced only on 09.05.2016 with the issuance of the notice, all these claims are *ex facie* barred by limitation on Bizibi's own averments. There is no averment, either in the notice of invocation dated 09.05.2016, or in the petition, with regard to any intervening facts which may have extended the period of limitation, as claimed by Mr. Pandey. Mr. Pandey's oral argument with regard to criminal proceedings filed by Bizibi against HCL is of no avail, as the said argument is unsupported by any material on record, and, in any event, such proceedings would not fall within the ambit of Section 14 of the Limitation Act. To the extent that Mr. Pandey sought to rely upon proceedings filed by other parties against HCL, again unsupported by documents, these would also not serve to extend the limitation. Mr. Pandey did not urge any other ground in this regard.

20. For the aforesaid reasons, I am of the view that, in the present petition, Bizibi has failed to make out a case for appointment of an arbitrator under Section 11 of the Act.

21. The petition, is therefore, dismissed with costs assessed at ₹20,000/-.

PRATEEK JALAN, J.

SEPTEMBER 06, 2022

'vp/Faisal'