

OD 2

AP/44/2023

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

M/S. SRIMUKHEE ENGINEERS
VS
UNION OF INDIA AND ORS.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 17th April, 2023.

Appearance:
Ms. Mousomee Shome, Adv.
Ms. Labani Pan, Adv.
...for the petitioner

Mr. Ashoke Kumar Chakraborty,
Ld. Addl. Solicitor General
Ms. Aparna Banerjee, Adv.
...for the respondents

The Court: Learned counsel for the petitioner contends that as per Clause 25(i) of the contract between the parties (General Condition of Contract, which was a part of the main agreement), there was a specific arbitration clause.

However, despite the petitioner having exhausted the prior remedies as contemplated therein, the respondent authorities are not expressing their agreement with regard to arbitration. Only after the present application was filed, it is submitted, a communication was made on behalf of the respondents to name an Arbitrator.

The learned Senior Advocate appearing for the respondents contends at the outset that Clause 25(i) clearly envisages that the parties shall promptly, within 15 days of the arising of the disputes, request the Chief Engineer/CPM for reference of the dispute to the Dispute Redressal Committee (DRC) within 15 days along with a list of disputes, etc. Only thereafter, on the recommendation of the DRC, would an Arbitrator be appointed.

It is submitted that in the present case, the agreement with the present petitioner was terminated by the respondents on January 7, 2022, whereas, reference was made to the Chief Engineer for the DRC only on January 18, 2022, which is much after the stipulated limitation period of 15 days.

Further, relying on the clause in question, learned Senior Advocate points out that the same envisages that each party invoking arbitration must exhaust the mechanism of settlement of claims/disputes as given thereinabove prior to invoking arbitration, which includes the stipulated limitation of 15 days for seeking the reference.

It is further contended that the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 ought to be read in conjunction with Section 16 of the same and as such, it is well within the jurisdiction of this Court to look into the issue as to whether the dispute, being patently time-barred, is a dead claim and should not be carried to arbitration.

In support of such contention, the learned Senior Advocate cites *Indian Oil Corporation Limited vs. SPS Engineering Limited*, reported at (2011) 3 SCC 507.

Learned senior counsel further argues that the present dispute pertains to certain factual circumstances, which cannot be gone into by this Court or referred to arbitration, in view of the claim itself being dead.

Upon consideration of the submissions of parties, it transpires clearly that the petitioner has sought to plead that there were further communications between the parties even after the termination notice was issued on January 7, 2022 and even after the filing of the present application under Section 11 of the 1996 Act, a communication was made by the respondents seeking appointment of an Arbitrator from the panel of the respondents. It is further contended that the dispute in effect arose when the agreement was sought to be cancelled after its expiry by efflux of time.

Hence, at the inception, the respondents invoked clauses of the agreement after the expiry of the same and, as such, cannot now turn back and place reliance on the 15 days' limitation as stipulated in Clause 25(i) of the same.

Both the factual contentions raised by the petitioner are squarely disputed by the learned Senior Advocate for the respondents. Such issues, to say the least, make the question of limitation debatable, arguable and requiring detailed evidence to be adduced on facts as well as legal arguments to be made for a final adjudication to be made on such score.

Hence, as well settled in *Vidya Drolia and others Vs. Durga Trading Corporation*, reported at (2021) 2 SCC 1, such question has to be referred to arbitration.

Although the learned Senior Advocate for the respondents might have a point in arguing that Section 11 and Section 16 of the 1996 Act are to be read conjointly, even a conjoint reading of the said two questions has to factor in the subsistence of Sub-Section (6A) of Section 11 of the 1996 Act which, in turn, extremely restricts the scope of consideration of the High Court while taking up an application under Section 11 of the 1996 Act.

The principle laid down in *Vidya Drolia (supra)*, taken with the provisions of Section 11(6A) of the 1996 Act, clearly mandates that all arguable questions even regarding limitation and maintainability are to be referred to the Arbitrator. Hence, in the present case, since the parties have not agreed to the Arbitrator to be appointed, it is the incumbent duty of the Court under Section 11 of the 1996 Act to appoint an Arbitrator to decide the dispute arising between the parties.

Accordingly, AP/44/2023 is allowed, thereby appointing Mr. Ayan Banerjee (Mobile No. – 9830916210), an Advocate practising in this Court and a member of the Bar Association, as the sole Arbitrator to resolve the dispute between the parties, subject to obtaining consent/declaration under Section 12 of the 1996 Act.

It is, however, made clear that the merits of the contentions of the parties, including the question of maintainability and limitation, have not been entered into by this Court, as such an examination is debarred by Section 11(6A) of the 1996 Act, and it will be open to the appointed Arbitrator to decide on all such questions on their merits in accordance with law upon giving an opportunity of hearing to the parties.

(SABYASACHI BHATTACHARYYA, J.)