

ORDER SHEET

AP/534/2023

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

M/S. BANTIYA METALS
VS
HINDUSTHAN COPPER LIMITED

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 5th September, 2023

Appearance:

Mr. Rishad Medora, Adv.

Mr. Pushan Kar, Adv.

Ms. A. Banerjee, Adv.

Ms. Shreya Ghosh Dastidar, Adv.

...for the petitioner

Ms. Aasia Hasan, Adv.

Mr. Diganta Paul, Adv.

...for the respondent

The Court: The respondent has taken a preliminary objection to the maintainability of the application filed under Section 11 of the Act for appointment of an Arbitrator. The objection relates to the alleged delay on the part of the petitioner in issuing a notice under Section 21 of the 1996 Act invoking the arbitration clause in the contract between the parties.

According to learned counsel appearing for the respondent, there is a delay of about four years from the commencement of the cause of action which is the petitioner being awarded the contract dated 27th November, 2017. Counsel submits that the limitation period of three years expired on 27th

December, 2020. Counsel submits that the petitioner invoked the arbitration clause by the notice dated 21st March, 2022 which is, hence, about four years from the date of commencement of the cause of action bringing the present dispute before the Court.

The facts relevant to the matter as narrated by learned counsel appearing for the parties show that the respondent floated a tender for sale of old and used Furnace Bricks containing precious metals. The parties thereafter entered into a Sale Order on 27th November, 2017. The petitioner thereafter took some time to excavate the material bought from the respondent and realised much later that the petitioner could only extract a negligible proportion of gold and silver from the bricks contrary to what was projected in the tender document by the respondent.

In any event, the petitioner is saved from the argument on limitation by reason of the protection given by the Supreme Court in the series of orders passed in the *suo motu* writ petition for extending the limitation periods under the General and Special Laws with effect from 15th March, 2020 to 28th February, 2022. Therefore, even if the most unfavourable case to the petitioner is taken, the limitation period starting from the date of the contract would end while the orders of the Supreme Court were in force i.e., 27th November, 2020 (the orders of the Supreme Court came into force from 15th March, 2020). The starting point of the cause of action is also arguable since the respondent takes the agreement as a starting point whereas the petitioner takes the alleged breach i.e., which is about 26th February, 2020 when the petitioner sent its

first letter to the respondent on the alleged breach on the part of the respondent. Hence, the preliminary objection with regard to delay is answered in favour of the petitioner.

Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited, (2021) 5 SCC 738 has been placed by the respondent on the ground of delay. In that decision, however, the Supreme Court held that the Court will not be inclined to refer the matter to arbitration only where the delay is palpable, clear and unambiguous.

B and T AG vs. Ministry of Defence, 2023 SCC OnLine SC 657 has been cited for the proposition on the importance of causes of action and a claim becoming time-barred.

These decisions do not assist the respondent in successfully urging the ground of delay for the factual reasons as stated above.

The fact that the petitioner has brought a dispute before the Court which is to be adjudicated by an Arbitrator would appear from the letter of demand as well as the notice invoking the arbitration clause which is present in the contract entered into between the parties. The petitioner's notice of invocation was of 21st March, 2022. The respondent did not reply to the invocation notice. The respondent did not dispute the arbitration clause but raised the point of delay.

The dispute is relatable to the contract entered into between the parties since the petitioner claims to have been misled by the representation of the respondent in its tender document on the quantity of precious metals which

the petitioner was expected to recover from the Furnace Bricks. Admittedly, the petitioner recovered a negligible amount of what was promised by the respondent in the tender. There is hence a dispute between the parties.

The Court, accordingly, finds that there is an arbitration agreement between the parties and also a dispute which is required to be resolved by an Arbitrator.

AP/534/2023 is accordingly allowed and disposed of by appointing Ms. Amrita Pandey, advocate to act as the Arbitrator subject to the learned Arbitrator communicating her consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrator by 8th September, 2023 along with the requisite details of the contact person of the petitioner.

The respondent will file its Vakalatnama by 4.30pm tomorrow i.e., 6th September, 2023 and the petitioner will give all assistance for the same.

The Department is directed to take steps for correcting the cause title as pointed out by the advocate-on-record of the petitioner in the meantime.

(MOUSHUMI BHATTACHARYA, J.)