

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

Present :

Hon'ble Justice Moushumi Bhattacharya

AP 555 of 2023

Manish Todi

vs

Pawan Agarwal

For the petitioner : Mr. Ratnanko Banerji, Sr. Adv.
Mr. Sabyasachi Chowdhury, Adv.
Mr. Nirmalya Dasgupta, Adv.
Mr. R.L. Mitra, Adv.
Ms. Priyanka Dhar, Adv.

For the respondent : Mr. Suddhasatva Banerjee, Adv.
Mr. Rittick Chowdhury, Adv.
Mr. Roshan Pathak, Adv.

Last heard on : 23.11.2023

Delivered on : 05.12.2023

Moushumi Bhattacharya, J.

1. The petitioner seeks appointment of an arbitrator. The application has been filed under section 11(6) of The Arbitration and Conciliation Act, 1996.

2. The respondent has taken a point of maintainability of the application on the ground that the application is barred under the laws of limitation.

3. The decision which follows is on the question of maintainability, that is, whether the present application can survive the objection on limitation.

The dispute as presented to the Court

4. A Memorandum of Understanding (MoU) was entered into between the parties on 28.3.2011 whereby the parties were to disassociate themselves from each other's businesses. In short, the petitioner was to resign from the respondent's business and was to receive Rs. 1.50 crores from the respondent in return. Disputes arose as the petitioner did not receive this money and with regard to properties where the parties were to construct residential flats. The petitioner issued a notice invoking the arbitration clause in the MoU on 11.3.2014. The petitioner was served with an award on 01.6.2015. The petitioner challenged the award under section 34 of the 1996 Act before

the learned Court at Alipore for setting aside of the award. The respondent preferred an appeal from the order passed by the Alipore Court in the petitioner's section 9 application. The respondent was directed to deposit a sum of Rs. 1.50 crores by the Appeal Court which the respondent deposited on 30.3.2015. The respondent preferred another appeal from an order passed by the Alipore Court on 22.02.2019 which was disposed of by the Appeal Court by inter alia permitting the respondent to withdraw Rs. 1.50 crores by furnishing an equivalent bank guarantee of an equivalent amount. The learned Court at Alipore allowed the petitioner's section 34 application by an order dated 28.9.2022 and set aside the award.

5. By a letter dated 9.4.2023, the respondent invoked the arbitration clause by way of a notice under section 21 of the Act. The petitioner sent a similar notice on 8.5.2023. The petitioner issued a second notice invoking the arbitration clause on 10.7.2023. The respondent disagreed with the choice of the petitioner's arbitrators by way of a letter dated 17.7.2023. The petitioner filed an application under section 11 of the Act on 9.8.2023 (AP 344 of 2023) which was dismissed for default on 9.8.2023. The petitioner filed the present application under section 11 of the Act on 17.8.2023.

6. The above facts are common to the submissions made on behalf of the parties.

7. There is little doubt that a dispute exists between the parties as to the implementation of the MoU dated 28.3.2011. While the petitioner states that the petitioner did not receive Rs. 1.50 crores from the respondent, the respondent says otherwise. The multiple notices issued by the petitioner and by the respondent for invocation of the arbitration agreement and the contested proceedings before the learned Court at Alipore and as well as Court would also contribute to this view.

8. The issue however is whether the disputes are ex facie barred by limitation.

9. Learned counsel appearing for the petitioner seeks to rely on section 43(4) of the 1996 Act and say that the entire period from 11.3.2014 (when the petitioner issued the first notice of invocation) to 28.9.2022 (when the petitioner's section 34 application was allowed) would be excluded. Counsel submits that the first notice of invocation dated 11.3.2014 was within the period of limitation and that the entire period from that date till 28.9.2022 would get excluded by virtue of section 43(4) of the Act. Counsel relies on the respondent's invocation notice of 9.4.2023 which records the respondent's willingness to refer the disputes and differences to arbitration.

10. Counsel submits that the statement of the respondent in the notice dated 9.4.2023 as well as in its affidavit in AP 344 of 2023 would show that the disputes are alive between the parties. Counsel relies on

decisions to urge that the question of limitation should be decided by the arbitral tribunal.

11. Learned counsel appearing for the respondent argues that the present application is not maintainable and that both the application as well as the claims of the petitioner is time-barred. According to counsel, the notice under section 21 was issued on 10.7.2023, which is 12 years after the right to sue accrued. Counsel submits that the petitioner's application would be after 4 years 3 months from the date on which cause of action accrued, even if the petitioner's case under section 43(4) of the Act is accepted. Counsel relies on Article 137 of The Limitation Act to say that the period of limitation commenced from 27.6.2011 and ended on 26.6.2014.

12. The question which should be answered is whether the petitioner's cause of action can be given a fresh lease of life on the award being set aside by the learned Court at Alipore on 28.9.2022. The petitioner and the respondent's arguments essentially revolve around this issue. The related contentions on The Limitation Act, 1963 and section 43(4) of The Arbitration and Conciliation Act, 1996 will form part of the answer to the first issue. The relevant dates are pivotal to the discussion and are briefly stated.

"28.03.2011 – A Memorandum of Understanding (MOU) was executed between the parties. Clause 7 (iii)(c) states that the last tranche of Rs. 50 lakhs to be paid within 90 days from the MOU.

11.03.2014- Notice under section 21 of the Arbitration and Conciliation Act, 1996 issued by the petitioner.

03.01.2015- An award was forwarded to the petitioner by the named Arbitrators namely Mahesh Saraf and Rajesh Tulsian.

28.09.2022- The Award was set aside by the Learned District Judge Alipore in the application filed under Section 34 of the Arbitration and Conciliation Act, 1996.

09.24.2023- Notice of the respondent under section 21 of the Arbitration and Conciliation Act, 1996.

08.05.2023 – Notice of the petitioner under section 21 of the Arbitration and Conciliation Act, 1996 wherein the petitioner has abandoned his claim in respect of the Guwahati Property.

10.07.2023 – Notice of the petitioner under section 21 of the Arbitration and Conciliation Act, 1996 and the notice dated 8th May, 2023 was withdrawn.

17.07.2023 – Reply of the respondent to the notice dated 10th July, 2023.”

13. Clause 7(iii) (c) of the MOU executed between the parties states that the last tranche of Rs. 50 lakhs was to be paid within 90 days from the MOU. The MOU was executed on 28.3.2011 and 90 days therefrom would be 27.6.2011. Article 137 of the Limitation Act, 1963, is a residual provision and provides that the period of limitation is 3 years from the day when the right to apply accrues. Therefore, the period of limitation would be counted from 27.6.2011 - which is the date for performance stipulated in the MOU - and would end on 26.6.2014.

14. Further, the petitioner's cause of action arose on the respondent's failure to pay the last tranche of Rs. 50 lakhs within the agreed time frame under the MOU i.e. within 27.6.2011. In other words, Article 137 of the Limitation Act prescribes that the petitioner would have to apply within 3 years from the day when the petitioner's right to apply accrues which would end on 26.6.2014 (27.6.2011 + 3 years).

15. Admittedly, the petitioner invoked the arbitration agreement for the purpose of the present application on 10.7.2023, which is 12 years after the petitioner's right to sue / apply accrued under Article 137 of the Limitation Act. The petitioner's earlier invocations of the arbitration agreement on 11.3.2014 and on 8.5.2023 are irrelevant since the present application is founded on the invocation dated 10.7.2023. The petitioner, has in any event, withdrawn the notice dated 8.5.2023 in the notice of invocation dated 10.7.2023.

16. The petitioner's argument on section 43(4) of The Arbitration and Conciliation Act, 1996 is required to be tested on the architecture of the said provision. Section 43(4) is set out below:

"43(4). Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

17. Section 43(4), simply put, excludes the time from commencement of arbitration to the date of setting aside of the arbitral award for the purpose of computing the time for commencement of the proceedings with respect to the dispute between the parties. Sub-section (4) of section 43 declares that The Limitation Act, 1963 will apply to arbitrations in the same manner as that of proceedings in a Court of law.

18. According to counsel appearing for the petitioner, the petitioner would get the benefit of exclusion between the period starting from 27.12.2014 (which is the respondent's notice of invocation of the arbitration agreement) and 28.9.2022 (being the date of the order of setting aside of the arbitral award). This period would span 7 years 9 months.

19. However, even if the petitioner's argument on the applicability of section 43(4) of the 1996 Act is accepted and the period of 7 years 9 months is excluded from computation of limitation, the present application would still be after 4 years and 3 days from the date when the petitioner's right to apply accrued under Article 137 of the Limitation Act. To repeat, the petitioner's right to apply accrued from 27.6.2011 and ended, as per Article 137 of the Limitation Act, on 26.6.2014. The petitioner's notice of invocation was sent on 10.7.2023 which is 12 Years after the petitioner's right to apply accrued on 27.6.2011. Section 43 of the 1996 Act embraces the Limitation Act and is not in conflict with the latter. Section 43(4) must hence be read in

the context of Article 137 of the Limitation Act which clearly provides for 3 years from the day when the right to apply accrues. Therefore, even if 7 years 9 months is excluded / subtracted from 12 years, the petitioner would still have exhausted the limitation period by 4 years and 3 months.

20. To clarify further, by the time the arbitration commenced with the respondent's section 21 Notice (27.12.2014), the limitation period for the petitioner to apply under Article 137 was already over. The petitioner's right to apply accrued, as stated above, on 27.6.2011. Therefore, the limitation of 3 years ended on 26.6.2014. Further fine-tuning these dates; the period of limitation from 27.6.2011, (which was the date where the petitioner's right to apply accrued) to 27.12.2014 (the date for invocation of the arbitration by the respondent's 21 notice) is 3 years 6 months. The petitioner's section 21 Notice dated 11.3.2014 would hence not revive limitation since the arbitration commenced under section 21 of the 1996 Act with the respondent's section 21 Notice dated 27.12.2014.

21. The petitioner's recourse to section 43(4) of the 1996 Act, even if applied to the facts, does not come to the petitioner's rescue since the petitioner would lag behind the limitation period by 4 years 3 months. The petitioner's claims as well as the section 21 Notice are hence clearly barred by limitation.

Section 43(4) of the 1996 Act vs. Section 18 and Article 137 of The Limitation Act

22. Although, the petitioner relies on sections 18 and 19 of The Limitation Act - namely effect of acknowledgement in writing and effect of payment on account of debt, respectively - in support of the contention that a fresh period of limitation should be computed from the date of the respondent's acknowledgement, the argument is unacceptable for the following reason.

23. Both sections 18 and 19 of The Limitation Act presume subsistence of the period of limitation which would be clear from the words of the provisions. Both the sections start with

“Where, before the expiration of the prescribed period.....” (Section 18)

“Where payment on account of a debt is made before the expiration of the prescribed period.....”(Section 19)

Therefore, a claim which is time-barred cannot be resuscitated by taking recourse either to sections 18 or 19 of the Limitation Act.

24. It is also relevant that limitation should be construed as per the provisions of the Limitation Act as if there is no arbitration agreement. Section 43 of the 1996 Act is a special scheme since it makes the provisions of the Limitation Act applicable to arbitrations in the same manner as proceedings in a Court of law. Section 43(4) is a beneficial addition to this scheme for the purpose of commencement of

proceedings relating to a dispute (including of arbitration) without the parties being confronted with the objection of the dispute being time-barred. Section 43(4) however, is not in derogation of the Limitation Act and cannot breathe life into a proceeding which is already dead under Article 137 of the Limitation Act. Therefore, it cannot be concluded that the date of setting aside of the award will create a fresh period of limitation. As stated earlier, the petitioner's right to apply was already over on 27.12.2014 when the arbitration commenced.

25. Commencement of the period of limitation from the date on which the cause of action or the claim sought to be arbitrated first arose was considered by the Supreme Court in *Geo Miller v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited*; (2020) 14 SCC 643. The Supreme Court relied on *Panchu Gopal Bose v. Port of Calcutta*; (1993) 4 SCC 338 in that decision where the petitioner had sent bills to the respondent in 1979 but had not received payments. The petitioner sent a notice after a decade to the respondent in 1989 for reference to arbitration. The Supreme Court relied on paragraph 11 of the decision in *Panchu Gopal Bose* where it categorically held that

“therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued.”

26. The Supreme Court also found in *Geo Miller* that the respondent had stated that the final bill became due on 1.8.1989 and the limitation period therefore ended on 10.8.1992. The appellant had

served notice for appointment of arbitrator in 2002 and made an application in 2003. The Supreme Court accordingly found the appellant's claim to be barred by limitation.

27. The petitioner's contention in this case is found to be contrary to the law and this Court accordingly holds that section 43(4) of the 1996 Act must defer to the other provisions of the Limitation Act. The period of limitation cannot be extended to create a new window after expiry of the limitation. The question of limitation must also be decided on the underlying principles of the Limitation Act and discounting the existence of an arbitration clause. To use a colloquial analogy but without the cruelty, one cannot flog a dead horse and force it to run.

Would the respondent's notice under section 21 dated 9.4.2023 make a difference?

28. The petitioner seeks to rely on the respondent's notice invoking arbitration wherein the respondent had egged the petitioner on to file an application for appointment of an arbitrator.

29. The Court's view would be similar to what has already been stated above with regard to applicability of section 18 of the Limitation Act. For ease of reference, any acknowledgement made in writing and its consequent impact on limitation presumes subsistence of the period

of limitation as on the date of acknowledgement; *Sampuran Singh v. Niranjana Kaur*; 1999 2 SCC 679.

30. In the present facts, the prescribed period of limitation had ended on 26.6.2014, that is before the respondent invoked the arbitration clause on 9.4.2023. Hence, the respondent's notice, notwithstanding its encouragement to the petitioner to apply to the Court for appointment of an arbitrator, cannot give a fresh lease of life to the period of limitation and postpone the cause of action : *B and T AG v. Ministry of Defence*; 2023 SCC OnLine SC 657.

31. Therefore, the respondent's notice of invocation does not support the petitioner's case for the purpose of enlarging the period of limitation.

What then, is the test?

32. The consensus from the relevant case-law is that the limitation for filing an application will start to run from the day when the cause of action accrues regardless of the existence of an arbitration clause. In other words, the cause of action arises when the claimant acquires the right to require arbitration. An application for appointment of an arbitrator under section 11 of the 1996 Act is governed by Article 137 of the Schedule to the Limitation Act and must be made within 3 years from the day when the right to apply first accrues. Needless to state, the right to apply can only arise when such right is unequivocally

denied by the respondent. The claim for arbitration must therefore be raised, without delay, as soon as the cause for arbitration arises similar to a civil action.

Should the question of limitation be referred to the arbitrator?

33. The petitioner's argument that the arbitrator is best-suited to decide the issue of limitation overlooks the settled proposition that the arbitrator will only step in to decide that question where it's an iffy affair, that is, where the question of the claims being time-barred is not patently obvious. The referral Court can reserve the decision to itself only where the question of delay is clear and undisputed. Ref. *BSNL vs Nortel Networks*; (2021) 5 SCC 738.

34. The proposition in *Hari Shankar Singhania vs. Gaur Hari Singhania*; (2006) 4 SCC 658 of limitation commencing from the date of the last correspondence between the parties cannot be sustained after *B and T AG. Shree Ram Mills Ltd. vs. Utility Premises (P) Ltd.*; (2007) 4 SCC 599 was a case where existence of a live claim was found on the facts before the Supreme Court. *Dakshin Haryana Bijli Vitran Nigam Limited vs. Navigant Technologies Private Limited*; (2021) 7 SCC 657 was on the proposition of parties being free to commence a fresh arbitration after an award is set aside and on whether section 43(4) can be seen in isolation divorced from the provisions of The Limitation Act.

35. The above reasons are good grounds, in the Court's view, to allow the objection to maintainability to succeed. The petitioner's claims and the present application are found to be barred by the laws of limitation and must accordingly be held as not maintainable.

36. A.P. 555 of 2023 is accordingly dismissed for that reason but without any order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)