

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.7278 OF 2023

Shri Guru Gobindsinghji Institute
of Engineering and Technology,
Vishnupuri, Nanded
Through its Director

...Petitioner/
Non-applicant

Versus

M/s. Kay Vee Enterprises,
Main Road, Khamanghat,
Rangareddy, Hyderabad
Through its Proprietor
Chandrashekhar Reddy

...Respondent/
Ori. Claimant

...
Advocate for Petitioner : Mr. S. V. Adwant
Advocate for Respondent : Mr. Sachin Deshmukh
...

CORAM : NITIN B. SURYAWANSHI, J.

**RESERVED ON : 21st AUGUST, 2023
PRONOUNCED ON : 04th OCTOBER, 2023**

ORDER :

1. This petition is filed under Article 226 and 227 of the Constitution of India, with following prayers:-

- "a. The Writ Petition be allowed;*
- b. The Impugned Order dated 30/05/2023 passed by the learned Sole Arbitrator, on the application filed by the Petitioner for framing the issue of Limitation – Jurisdictional issue, as preliminary issue and deciding it first in order, be quashed and set aside;*
- c. The application filed by the Petitioner for framing preliminary issue of limitation be allowed and the learned Sole Arbitrator be directed to re-hear and decide the issue of limitation, first in order on the strength of the statement of claim filed by the Respondent- Claimant."*

2. It is the case of petitioner that tender for work of extension of the Ladies Hostel Building and Electronics Building was floated by the petitioner, in the year 2006. The work was allotted to the respondent and work order of both the works was issued to the respondent on 29/06/2006. Upon completion of work, respondent submitted its modified 13th R.A. Bill for clearance to the petitioner, along with claims and other disputes raised, on 03/01/2008. Petitioner replied to the respondent's claim by letters dated 01/02/2008 and 03/02/2008. Thereafter, there was correspondence between the parties. According to the petitioner, contracts were terminated by letters dated 22/12/2008 and 27/01/2009. Thereafter, there was no communication from respondent from 2009 to 2015 and from 2015 to 2022. Thereafter, letter dated 27/28th January, 2022 was addressed by the petitioner to respondent demanding Rs.12,83,432/- plus interest, towards excess amount expended by it for completion of work contracts entrusted to respondent, after termination of work contracts. Respondent issued notice dated 04/02/2022 under Section 21 of the Arbitration and Conciliation Act, 1996 (for short 'the said Act') and expressed its intention to invoke clause 56 of the tender document. Respondent then filed Arbitration Application No.10/2022, in this Court under Section 11(6) of the said Act, seeking appointment of sole Arbitrator under clause 56 of the

tender document. The said application was opposed by the petitioner contending that, the claim of respondent is hopelessly time barred. This Court by order dated 21/12/2022 appointed Mr. Shyam Borawake, Architect as sole Arbitrator to resolve the disputes between the parties, by clarifying that petitioner's objection of limitation and all other objections on merits as well as procedural aspects, were left open.

3. Proceeding before the Arbitrator commenced and the petitioner raised issue of limitation as a jurisdictional issue. By the impugned order, the Arbitral Tribunal held that, *"In the present case the sequence of events leading to initiating the present proceedings cannot be SEGREGATED in ISOLATION since the same is subsequently enveloped by other developments in the shape of CLAIMS and COUNTERCLAIMS"*. It is further held that, when the issue of limitation is a mixed question of facts and law, it cannot be summarily decided at this stage, without conducting elaborate trial by considering the documents, pleadings and evidence that will be placed forth by both the parties and law, facts, events and its sequence will have to be taken into account as the matter proceeds. Therefore, Arbitrator held that objection raised by the petitioner cannot be decided as a preliminary issue and the same will be decided as the judicial proceedings move ahead, and rejected the application. Petitioner is aggrieved by this order.

4. Heard learned advocate for petitioner and learned advocate for respondent.

5. Learned advocate for petitioner has assailed the impugned order contending that, *prima facie* it is clear from the record that stale claim is sought to be adjudicated by the Arbitrator. Admittedly, the contract was given in the year 2006 and first notice under Section 21 of the said Act was issued in the year 2008, so, the cause of action had accrued at that point of time. This Court has specifically held that, all the issues including issue of limitation is kept open. The Arbitrator has, therefore, erred in not deciding the issue of limitation as preliminary issue. All the claims raised by the respondent are of the period, prior to 2008-2009. There is total inaction on the part of respondent during the period 2009 to 2022. By relying on following the citations, he submits that the impugned order is liable to be quashed and set aside and the Arbitrator be directed to decide the issue of limitation as a preliminary issue.

- 1) ***Bharat Sanchar Nigam Ltd. and Another Vs. Nortel Networks India Pvt. Ltd., (2021) 5 SCC 738;***
- 2) ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd., (2020) 2 SCC 455;***
- 3) ***M/s. Bharat Barrel and Drum Mfg. Co. Ltd. Vs. The Employees State Insurance Corporation, (1971) 2 SCC 860;***
- 4) ***Surendra Kumar Singhal and Others Vs. Arun Kumar Bhalotia and Others, 2021 SCC OnLine Del 3708;***
- 5) ***Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil, (2010) 8 SCC 329;***

- 6) *Deep Industries Ltd. Vs. Oil and Natural Gas Corporation Ltd. and Another, (2020) 15 SCC 706;*
- 7) *Punjab State Power Corporation Ltd. Vs. EMTA Coal Ltd., and Another, (2020) 17 SCC 93;*
- 8) *Bhaven Construction Vs. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. and Another, (2022) 1 SCC 75;*
- 9) *Arulvelu and Another Vs. State, (2009) 10 SCC 206;*
- 10) *Kranti Associates Pvt. Ltd. and Another Vs. Masood Ahmed Khan and Others, (2010) 9 SCC 496;*
- 11) *Sukhbiri Devi and Others Vs. Union of India and Others, 2022 SCC OnLine SC 1322;*
- 12) *Narne Rama Murthy Vs. Ravula Somasundaram and Others, (2005) 6 SCC 614;*
- 13) *Abdul Rahman Vs. Prasony Bai, (2003) 1 SCC 488;*
- 14) *Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others, (2006) 5 SCC 638;*
- 15) *M/s. B and T AG Vs. Ministry of Defence, 2023 SCC OnLine SC 657;*

6. Learned advocate for respondent, on the other hand, supported the impugned order. He pointed out that in the application raising preliminary objection of limitation, petitioner has deliberately not mentioned event of 27/28th January, 2022. He further submits that petitioner has already filed Special Civil Suit No.170/2022, on 27/07/2022 and this was not disclosed in the earlier writ petition and to the Arbitrator. By relying on the affidavit-in-reply filed by respondent, he submits that there is no merit in the petition and the petition is liable to be dismissed.

7. Perused the writ petition memo, annexures thereto, the impugned order and affidavit-in-reply filed by respondent as well as citations relied upon by the parties.

8. In ***SBP and Company Vs. Patel Engineering Ltd. and Another, (2005) 8 SCC 618***, the Constitution Bench of the Supreme Court has considered the question of maintainability of the petition under Article 226 and 227 of the Constitution of India against interlocutory order passed by the Arbitrator in arbitral proceedings. In the said judgment it is held,

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."

9. This Court at Nagpur Bench in Writ Petition No.798/2020, by relying on the decision in ***SBP and Company*** (supra) as well as the decision of learned Single Judge of this Court [Coram: Rohit B. Deo, J.] in Writ Petition No.6985/2015 and the decision of learned Single Judge [Coram: A.S. Chandurkar, J.] in Writ Petition No.316/2019, rejected the challenge raised by the petitioner therein to the interlocutory order passed by the Arbitral Tribunal, thereby rejecting proposed amendment in the arbitration proceedings.

10. It appears from record that invocation of arbitral clause by the respondent is in response to the filing of Special Civil Suit No.170/2022, by the petitioner, in terms of notice dated 27/28th January, 2022, raising claim of Rs.12,83,432/-. Respondent has raised counterclaim and further sought invocation of arbitral clause 56 of the tender document. Even in the present petition, petitioner has not disclosed that it has filed Special Civil Suit No.170/2022. On this ground also, petitioner is not entitled for any relief.

11. There does not appear any error of law or illegality in the approach of the Arbitrator in holding that sequence of events leading to arbitration proceedings cannot be segregated in isolation without considering documents, pleadings and the said will be decided after both the parties lead their evidence. Since the

Arbitrator has kept the issue of limitation open, no prejudice is caused to the petitioner.

12. Petitioner is not entitled for relief as the order impugned in present petition is interlocutory order, in view of the decision in ***SBP and Company*** (supra), which is consistently followed by this Court.

13. There cannot be any dispute about the ratio laid down in the citations relied upon by the petitioner. However, in the facts of the present case, this Court is not inclined to interfere in the order passed by the Arbitral Tribunal, in exercise of extraordinary writ jurisdiction. Writ petition being devoid of merit, is dismissed.

(NITIN B. SURYAWANSHI, J.)