

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA
APPLICATION FOR APPOINTMENT OF ARBITRATOR NO.
1 OF 2023

VEDANTA LIMITED THR. AUTH. SIGN,
BENECIO MENEZES Applicant.
versus
PROWESS INTERNATIONAL PVT. LTD.Respondent.

Mr A. Gosavi and Ms K. Naik, Advocate for the applicant.
Mr A. K. Shrivastava, Mr A. Sharma and Mr T. Rane, Advocate for
the respondent.

CORAM: **BHARAT P. DESHPANDE, J**

Reserved on: **30th November, 2023**
Pronounced on: **20th December 2023.**

ORDER:

1. By this application filed under Section 11 of Arbitration and Conciliation Act, 1996(“the said Act” for short) applicant seeks an appointment of Arbitral Tribunal consisting of three Arbitrators for the purpose of resolving dispute that have arisen between the parties out of Contract dated 02.06.2018 which is in reference to the EPC Contract for De-Dusting System for Blast Furnace 2 Cast House, Ladle Dumping Chamber, Coal Handling Plant and Coke Screening Plant 1 and 2.
2. Since in terms of the said contract, time was essence for completion of the work and a specific schedule was fixed for completion of each stage of the work as provided therein, respondent

were liable to perform their part within stipulated period.

3. During the correspondence between the parties, it was pointed out to the respondent that they failed to perform their part and within time framed, however, respondent turned a blind eye to such correspondence. Applicant then issued notice of termination of contract dated 8.12.2018 which was received by the respondent on 21.12.2018. In response, respondent acknowledged their fault but agreed to complete the work as mentioned in the amendment dated 9.1.2019, which they failed to adhere to the time line. The applicant informed the respondent about their default which they accepted and agreed to rectify the breach. However, the applicant vide another notice of intention to terminate the contract dated 22.5.2019 communicated to the respondent their intention and also the breach committed by them inspite of assurance. In response to such notice, respondent accepted their default but failed to remedy the breach.

4. Applicant had to appoint another agency to complete the work and had to spent huge amount. The applicant completed the said work through another agency and therefor entitled to recover the costs and other charges from the respondent which is around Rs. 4 crores.

5. Applicant therefore sent a notice dated 19.9.2022 calling upon the respondent to pay such amount of around Rs.4 crores with interest within a period of 15 days from the date of receipt of the said

notice. There was no response from the respondent though they received such notice. Applicant in terms of the conditions of the contract and the dispute resolution clause even attempted to amicably settle the dispute by way of mediation, in their notice dated 1.12.2022. Since mediation between the applicant and the respondent failed on account of no response from the respondent, the applicant vide notice dated 11.1.2023 invoked arbitration clause no. 16 and requested the respondent to appoint Arbitral Tribunal. Since there was no response from the respondent, applicant had to approach this Court.

6. Respondent appeared and contested the application.

7. Mr. Gosavi, would submit that in view of the settled proposition of law as laid down by various decisions, this Court has to only consider whether there is clause of arbitration and whether any arbitral dispute exist. Beyond this, all other aspects are required to be left to be decided by the Arbitral Tribunal. In this respect Mr. Gosavi placed reliance in the case of ***Uttarakhand Purv Sainik Valyan Nigam Limited Vs Northern Coal Field Limited'***, ***TLG India Pvt. Ltd Vs Rebel Foods Pvt. Ltd.***, to canvass his proposition. He submits that Supreme Court extended the period of limitation during the Covid period and therefore application filed before this Court under Section 11 of the Act is within limitation.

8. Per contra, Mr Shrivastava, appearing for the respondent raised objection with regards to limitation. His specific submission is, that substantive claim arose in the year 2018 itself when the notice of termination was issued, which is triggering point for cause of action. According to him, application filed for referring the matter to the arbitration is beyond the period of three years. He submits that even the Apex Court judgment extending the period of limitation would not help the applicant as cause of action first accrued to the applicant much prior to Covid i.e in the year 2018 and the limitation expired on 7.12.2021. he submits that as per paragraph 5.1 of the Apex Court judgment, period was extended up to 28.2.2022 and it was clarified in paragraph 5.3 that in case where limitation would have expired during the period between 15.3.2020 till 28.2.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have limitation period of 90 days from 1.3.2022. It was further clarified that in the event the actual balance period of limitation remaining with effect from 1.3.2022 is greater than 90 days, that longer period shall apply.

9. Relying on the aforesaid decision, Mr Shrivastava would submit that since triggering point was notice of termination dated 8.12.2018, limitation for three years expired on 17.12.2021. He submits that though such period was within covid time, as per direction of the Apex Court and as provided in paragraph 5(iii), the

applicant would at the most get 90 days from 1.3.2022. He, therefore, submits that application filed for referring the matter to the Arbitral Tribunal is beyond the period of three years.

10. Mr Shrivastava relied upon order of the ***Supreme Court in Suo Motu Writ Petition(C) No. 3 of 2020 decided on 10.1.2022, Bharat Sanchar Nigam Limited and another Vs Nortel Networks India Private limited², Sagufa Ahmed and others Vs Upper Assam Polywood Products Private Limited and others³, M/s B and T AG Vs Ministry of Defence⁴***.

11. In rejoinder, Mr. Gosavi would submit that time would start from the date of invocation of the arbitration clause. Applicant invoked arbitration clause by notice dated 11.1.2023 and therefore, application is within time. Relying upon the decision in the case of ***TLG India Pvt. Ltd.*** (supra), Mr Gosavi would submit that limitation aspect is a mixed question of fact and law and therefore needs to be agitated before the Tribunal.

12. Since objection has been raised and issue regarding limitation has been argued, it is necessary for this Court to analyse the proposition of law which emerges from the decision cited by respective counsel.

² (2021) 5 SCC 738

³ (2021) 2 SCC 317

⁴ 2023 Live Law (SC) 466

13. Though respondent were granted time on multiple occasions to file reply/affidavit, no such reply was placed on record. Matter was argued without filing such reply/affidavit.

14. There is no dispute about execution of the contract which is termed as EPC-contract for De-Dusting System for Blast Furnace 2 Cast House, Ladle Dumping Chamber, Coal Handling Plant and Coke Screening Plant 1 and 2. This contract was execution on 2.6.2018. Clause 32 of the said contract deals with arbitration. Clause 32.1 provided that any dispute or difference whatsoever arising between the parties out of or relating to the interpretation, meaning, scope, operation or effect of this Contract or existence, validity, breach or anticipated breach thereof or determination and enforcement of respective rights, obligations and liabilities of the parties thereto shall be amicably settled by way of mediation. If the dispute is not conclusively settled within a period of 21 days from the date of commencement of mediation, the dispute shall be referred to an independent engineer to be appointed mutually by the parties and the independent engineer shall make all efforts to resolve the dispute within a period of 21 days of the reference of the dispute. In the event the independent engineer fails to resolve the dispute within a period of 21 days, the dispute shall be referred to and finally resolved by arbitration under Indian Arbitration and Conciliation Act 1996. It further provides that arbitration shall be conducted with one

arbitrator nominated by each party and the presiding arbitrator selected by the nominated arbitrators.

15. It is not in dispute that some differences arose between the parties and accordingly notice dated 8.12.2018 was issued by the applicant.

16. In response to the said notice, respondent have sent email dated 21.12.2018 acknowledging that there was some delay on their part due to less working capital and undertake to complete the work. Accordingly, on 9.1.2019 amendment to the schedule was executed by the parties by providing new time line for completion of the work. This letter is at Exh. P-3. Respondent confirmed such dates vide their reply dated 19.3.2019. By another letter dated 18.3.2019 respondent confirmed about technical issues pertaining to the said project and agreed to the dates for completion of the work as mentioned in the said letter. Applicant vide their letter dated 22.5.2019 issued notice of intention to terminate the contract dated 2.6.2018.

17. Similarly vide letter dated 19.9.2022, applicant issued notice of dispute of the contract dated 2.6.2018. Vide letter dated 1.12.2022 applicant issued notice of invocation of mediation in clause 16 and requested the respondent to mediate the matter. Since there was no response, vide letter dated 11.1.2023, applicant issue notice of invocation of arbitration inters of contract dated 2.6.2018. With these facts, law laid down by the Apex Court and by this Court in decisions

referred by respective parties needs to be analysed.

18. Mr Shrivastava would submit that cause of action for the applicant arose on 8.12.2018 when the notice of termination was issued and thus period of three years expired in December 2021. Per contra, Mr Gosavi submits that as per the correspondence between the parties, amendment was executed to the time frame. However, the respondent failed to adhere to such time line and therefore the date when the arbitration clause was invoked has to be considered as the date for filing the application under Section 11 of the said Act.

19. In the case of ***Bharat Sanchar Nigam Limited*** (supra), issue before the Apex Court was in connection with filing of the application for appointment of arbitrator qua the period of limitation. While considering this issue, it was observed that period of limitation would began to run from the date when there is failure to appoint the arbitrator.

20. In this matter, notice to invoke arbitration clause and to appoint the arbitrator or Tribunal was served on the respondent somewhere in January 2023 wherein application was filed before this Court in June 2023. Thus there is no issue with regards to bar of limitation. In that case claim of Nortel was rejected by BSNL on 4.8.2014 whereas notice of arbitration was invoked on 29.4.2020 i.e. after the lapse of five and half years. In that context, Apex Court observed that period of limitation for issuing notice of arbitration

would not get extended by mere exchange of letters or mere settlement, discussion where final bill is rejected by making deductions or otherwise, which is not the case in the matter in hand. After termination notice dated 8.12.2018, amendment to the schedule was executed by the respondent in the year 2019. Correspondence show that respondent failed to execute the work due to lack of funds. Accordingly they agreed by way of amendment to carry out work with a fresh time line. Therefore, contention of Mr Shrivastava that the triggering point was 8.12.2018 is a debatable issue. Such aspects will have to be considered along with other correspondence between the parties and specifically letters from the respondents subsequently showing that they are ready to carry out the work.

21. In the case of ***Sagufa Ahmed and others*** (supra), the Apex Court clarified its own order in extending the prod of limitation during covid period. It states that what was extended by its order was only period of limitation and not period up to which delay can be condoned in exercise of discretion conferred by the statue. In this matter there is no application for condonation of delay. Applicant argued that there is absolutely no delay in filing the application under Section 11 of the said Act and it is not their case that they are covered by judgment of the Apex Court while extending the period of limitation.

22. In the case of ***M/s B and T AG*** (supra), the Apex Court

observed in paragraph 34 that the starting point of limitation under Article 137 according to third column of the Article is the date when ‘the right to apply arises’. This being a residuary Article to be adopted to different classes of applications, the expression ‘the right to apply’ is an expression of a broad common law principle and should be interpreted according to the circumstances of each case.

23. The Apex Court further observed that limitation for arbitration and cause of action to appoint an arbitrator would commence from the breaking point at which any reasonable party would abandoned efforts for arriving at a settlement and contemplated referral of the dispute for arbitration. Such breaking point should be treated as a date on which the cause of action arises, for the purpose of limitation. It further observed that the entire history of the negotiations between the parties must be specifically pleaded and placed on record in order to facilitate the Court to find out what was breaking point for purpose of limitation computation. Mere negotiations would not postpone the cause of action for the purpose of limitation. The period of three years for filing such application would commence from the date when the cause of action arose. Subsequent negotiations between the parties which took place after cause of action has arisen would not postpone cause of action for the purpose of limitation computation. Cause of action would mean material facts and which are necessary to be proved by the applicant to succeed in the suit. It plays a necessary

role in computation of limitation for bringing an action. Cause of action as normally contemplated are bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to succeed in the suit.

24. In the present case, applicant has disclosed entire history of negotiations and placed on record documents. After notice dated 8.12.2018, respondent vide their email dated 21.12.2018 accepted their fault and thereafter parties agreed for amendment to the original contract by rescheduling the dates for completion of the work. Last such letter was dated 30.4.2019.

25. Further vide letter dated 19.3.2019 date of completion was further extended and last date for completion was 30.6.2019. Thus it is difficult to accept that the triggering point was the notice dated 8.1.2018. Arbitration clause no.32 is not simply providing for reference of dispute to the arbitrator. Firstly it direct the party to refer the matter to the medication within a period of 21 days from the date of commencement of mediation. Applicant vide their notice dated 22.5.2019 about their intention to terminate the contract intimated the respondent accordingly. Subsequently, vide notice of dispute dated 19.9.2022 i.e. after covid period was over called upon the respondent to pay an amount of Rs. 3,83,77,325/- along with 12% interest since respondent failed to adhere to their terms and the applicant had to carry out such work through another agent. There

was no response to such notice.

26. Applicant vide their letter dated 1.12.2023 then invoked mediation clause and called upon the respondent to mediate and arrived at a settlement. There was no response from the respondent to such notice of mediation.

27. Finally the applicant invoked arbitration clause vide notice dated 11.1.2023. Again there was no response from the respondent. Thus the applicant had to approach this Court under Section 11 of the said Act.

28. In this scenario, the aspect of limitation would be necessarily to be construed as a mixed question of fact and law and cannot be gone into while deciding arbitration application under Section 11 of the said Act.

29. In the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (supra), the Apex Court elaborately discussed the powers to be exercised under Section 11 of the said Act and observed in paragraph 7.8 that by virtue of the non obstante clause incorporated in Section 11(6A), previous judgments rendered in *Patel Engineering* (supra) and *Boghara Polyfab* (supra), were legislatively over-ruled. The Apex Court further observed that the scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

30. In paragraph 7.10, Apex Court further observed that in view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the competence principles.

31. In ***TLG India Pvt. Ltd***(supra), learned Single Judge at Principal Seat, after referring to various decisions observed in paragraph 9 that it is in rare and exceptional cases, where the claim is ex-facie time barred, making it manifest that there is subsisting dispute, the Court may refuse the reference, though the issue of claim being time barred, being permitted to be raised before the Arbitral Tribunal, since it concerns the admissibility of the claim, which shall be adjudicated as a preliminary issue or at the final stage, after the evidence is led by the parties.

32. Finally in paragraph 15 learned Single Judge further observed as under:-

“While the limitation period for filing a petition, seeking appointment of an arbitrator or reference or disputes to the arbitration, is to be examined by the Court, the limitation aspect of the substantive claims is to be looked into by the Arbitral Tribunal and not by the Court. The only exception being, if the claim to be referred to arbitration is hopelessly barred by limitation and this should be apparent from the admitted facts and documents. There may be a situation where a petition may be fled within limitation because it was fled within three years of arising out of the dispute, however, whether main

claim is time barred or not is an issue on merits, to be decided in arbitration proceedings. In contrast, if on admitted facts it is noticed that the claims are clearly barred by limitation at the time of passing of an order under Section 11, then there need not be reference of the dispute because that may not survive in its entitlement, necessarily conveying that the claim is dead one. Now, with the development of law of arbitration, with amendment being brought in Section 11, the Court while considering an application for appointment of arbitrator must confine itself to the question, whether the arbitration agreement exists or not and need not go into any other aspect, however, the moot question, which arises is whether the Court would simply ignore that the claim which is sought to be referred for arbitration is a dead claim, hopelessly barred by limitation and there is nothing to be referred to the arbitration and whether the Court may refuse an appointment on this ground”

33. Keeping in mind the above settled proposition, this Court is only require to consider whether there is arbitration clause in the agreement and whether there is arbitral dispute. On both these counts, no arguments were advanced on behalf of the respondents. Besides this clause 32 of the contract provides that dispute shall be referred to Arbitral Tribunal consisting of three arbitrators. Though it provides for mediation at the first instance, such mediation was also attempted by the applicant by invoking such clause and by inviting the respondent, however there was no response. Correspondence between the parties show that there is dispute which needs to be referred to arbitrator.

34. At this stage learned counsel Mr Gosavi submit that instead of referring the dispute to a Tribunal of three arbitrators, applicant

would desire and request that the dispute be referred to single arbitrator.

35. Respondent through Mr Shrivastava submit that they would file pursis, if agreed upon. Accordingly, respondent filed a pursis dated 1.12.2023 thereby agreeing to refer the dispute to sole arbitrator. Thus both the parties agreed that in case this Court comes to the conclusion that arbitrator needs to be appointed, instead of appointing a Tribunal of three learned arbitrator, matter be referred to single arbitrator.

36. From the above discussion, it is clear that arbitration clause exist and there is a dispute between the parties which is arbitrable.

37. Accordingly, I deem it appropriate to exercise the power under Section 11 of the Arbitration and Conciliation Act to appoint sole arbitrator to adjudicate the dispute between the parties. Hence, I pass the following:-

ORDER

(a) **Appointment of Arbitrator** : Justice U. V. Bakre (Retired) of this Court, is hereby appointed as a Sole Arbitrator to decide the disputes and differences between the parties under the documents referred to above.

(b) **Communication to Arbitrator of this order** :- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the

Advocates for the applicant/petitioner within one week from the date this order is uploaded.

(c) **Disclosure** : The learned Arbitrator, within a period of 15 days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Registrar of this Court, to be placed on record of this application, with a copy to be forwarded to both the parties.

(d) **Appearance before the Arbitrator** :The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the learned Arbitrator shall fix up a first date of hearing in the week commencing from 08/01/2024. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

(e) **Contact and communication information of the parties** : Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. This information shall include a valid and functional Email address as well as mobile numbers of the parties, participating in the process as well as of the Advocates.

(f) **Section 16 application** : The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) **Fees** : The Arbitrator shall be entitled to fees prescribed under

Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

(h) **Venue and seat of Arbitration** : Parties agree that the venue and seat of the arbitration will be in Panaji, Goa.

(i) **Procedure** : These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

38. The rights and contentions of the parties are kept open.

39. The Application stands disposed off in the aforesaid terms.

BHARAT P. DESHPANDE, J.

VINITA VIKAS NAIK

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