



WEB COPY



A.No.1609
in C.S.(Comm.Div).No.199 of 2022

A.No.1609 of 2023
in
C.S.(Comm.Div).No.199 of 2022

S.SOUNTHAR, J.

This application is filed under Section 8 of the Arbitration and Conciliation Act, 1996 with a prayer to refer the suit to arbitration proceedings as per Clause - 11 of the agreement between the parties dated 01.06.2018.

2. The respondent herein filed a suit seeking recovery of a sum of Rs.3,62,04,927/- with interest at the rate of 24% per annum from the date of plaint till the date of payment in full.

3. The respondent/plaintiff entered into an Agreement dated 01.06.2018 with 1st applicant herein for providing SMS based Push services to Cellular mobile subscribers of BSNL. As per terms of the said agreement, the respondent sent various SMS push invoices to the applicants for the period from 20.07.2018 to 31.07.2019. According to the respondent, the applicants had miserably failed to pay the invoice amounts within the stipulated period of 21 days. The above said suit was laid by the respondent for recovery of the outstanding amount payable by the applicants against the various invoices raised by the respondent.

4. As seen from the records, it was recorded by the Assistant Registrar-I



(Original Side) on 18.11.2022 that the service of suit summon was treated as 'completed'. Thereafter, the applicants herein have come up with this application seeking reference of the matter to the arbitration by invoking arbitration clause.

5. In the present application, it was averred by the applicants that Clause – 11 of agreement between the parties dated 01.06.2018 provides for settlement of disputes through Sole Arbitrator namely CMD, BSNL, New Delhi. It is also stated by the applicants that in view of the arbitration clause in the agreement, the suit was not maintainable as arbitration was provided for dispute resolution. It is also stated by the applicants that the respondent/plaintiff suppressed the factum of arbitration clause and had filed the present suit in violation of Section 8(1) of the said Act. On these averments, the applicants prayed for reference to arbitration.

6. The respondent/plaintiff filed a counter and resisted the application. It was stated by the respondent that on 28.10.2022 the counsel for applicants undertook to file vakalat and thereafter, the papers were served on the counsel on 11.11.2022 and on 18.11.2022, the learned Assistant Registrar-I (OS) passed an order to the effect that service was completed. After taking number of adjournments for filing written statement, the applicants have come up with the present application seeking reference to arbitration. It was specifically pleaded by the respondent that the applicants had made the last payment as per the statement



of account on 02.08.2019 and the suit has to be filed within 3 years from the date of last payment. The suit was infact filed on 25.07.2022 before expiry of 3 years from the above said last payment. Hence, the last date for filing suit was 01.08.2022. The present application under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference to arbitration was filed only on 01.03.2023 well after expiry of limitation for suit claim. It was also stated by the respondent that even notice seeking reference to arbitration was issued by applicants only on 11.02.2023 beyond the period of limitation and hence, the present application seeking reference to arbitration being filed beyond 3 years period for maintaining the suit claim is not maintainable.

7. Heard the arguments of learned counsel for the applicants and respondent and perused the connected papers.

8. The learned counsel appearing for the respondent/plaintiff opposed this application on following two grounds:-

- (a) The present application has been filed after expiry of 120 days from the date of service of suit summons and consequently, having forfeited the right to file written statement, the present application is not maintainable.
- (b) The limitation for maintaining the suit claim had expired on 01.08.2022 and the present application has been filed only on 01.03.2023 after expiry



of limitation for maintaining the suit claim and consequently, the present application deserves to be dismissed.

9. As far as first objection raised by the learned counsel for the respondent is concerned, it is seen from the records that the learned Assistant Registrar-I (OS) recorded completion of service of suit summons on 18.11.2022. The same is as follows:-

“Learned counsel for the defendants Mr.S.Suresh filed vakalat for defendants and made endorsement as to service of notice and copies of plaint and other documents. Hence, service is treated as ‘completed’”.

10. Therefore, as per endorsement made by Assistant Registrar-I (OS), service was treated as ‘completed’ on 18.11.2022 based on the endorsement made by the learned counsel for the defendants. Though learned counsel for the respondent relied on proof affidavit filed by him dated 18.10.2022 whereunder it was stated that as per the order of Assistant Registrar-I (OS) private notice and copy of plaint was served on the applicants/defendants on 18.10.2022 by e-mail, service of suit summons and copies of plaint by e-mail is not recognised under Original Side Rules of this Court and therefore, date of service of e-mail cannot be taken as starting point for calculating limitation for filing written statement.



WEB COPY

11. In cases where counsel entered appearance notwithstanding personal service on the defendants, as per Order IV Rule 7(3) service of summons in the suit may be made on such counsel on behalf of defendants. In the case on hand, the said procedure appeared to have been followed and as per endorsement made by the learned counsel for the defendants, the Assistant Registrar-I (OS) recorded that service was completed on 18.11.2022. Even as per counter affidavit filed by the respondent in this application, it is specifically pleaded by the respondent that the papers were served on the counsel for the defendants only on 11.11.2022. If that date is taken as the starting point for calculating limitation for filing written statement, the outer time limit for filing written statement (120 days) expires only on 10.03.2023. The present application was presented on 01.03.2023. Therefore, the contention of the learned counsel for the respondent as if, the present application has been filed after forfeiting the right to file written statement is not correct and the same is rejected.

12. The learned counsel for the respondent also submitted that the last payment as per the statement of account was made by the applicants/defendants on 02.08.2019 and hence, the three years limitation period for filing the suit expired on 01.08.2022. The applicants herein presented this application under Section 8 of the Arbitration and Conciliation Act,1996 only on 01.03.2023 after



expiry of time limit for maintaining the suit claim and consequently, the present application is liable to be dismissed as time barred. In this connection, the learned counsel for the respondent relied on the judgment of the Hon'ble Apex Court in ***Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited*** reported in ***(2021) 5 SCC 738***.

13. This Court is not impressed with the said submission of the learned counsel for the respondent for the simple reason that the limitation for filing the application under Section 8 of the Arbitration and Conciliation Act, 1996 shall not be confused with the limitation for filing suit. In the case on hand, the suit was filed well within the limitation. As far as Section 8 application is concerned, cause of action for maintaining the application is filing of the suit by the opposite party ignoring the arbitration clause contained in the agreement.

14. Section 8 of the Arbitration and Conciliation Act, 1996 reads as follows:-

“8. Power to refer parties to arbitration where there is an arbitration agreement.-(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the



WEB COPY

dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.”

15. A close scrutiny of the aforesaid provision would make it clear that an application under Section 8 of the Arbitration and Conciliation Act, 1996 is maintainable, if it is filed before the party making such an application submits his or her first statement on the substance of the disputes. In the case on hand, admittedly the applicants have not filed their first statement on the substance of the dispute. As discussed earlier, on the date of filing of this application, the applicants had not forfeited their right to file written statement. In these circumstances, the



submission made by the learned counsel for the respondent as if, the present application filed by the applicants/defendants was liable to be dismissed as time barred cannot be accepted. As far as the limitation for maintaining the suit claim which is covered by arbitration clause is concerned, the said point can be decided by the arbitrator himself. In such circumstances, the two objection made by the learned counsel for the respondent is also not acceptable to this Court.

16. In ***Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited*** cited supra relied on by the learned counsel for the respondent while considering limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996, the Hon'ble Apex Court observed as follows:-

15. It is now fairly well-settled that the limitation for filing an application Under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims



WEB COPY

made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognized even Under Section 20 of the Arbitration Act 1940. Reference may be made to the judgment of this Court in J.C. Budhraja v. Orissa Mining Corpn. Ltd. wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows:

“26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition Under Section 8(2) of the Act. Insofar as a petition Under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition Under Section 8(2) seeking



appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Inder Singh Rekhi v. DDA, Panchu Gopal Bose v. Port of Calcutta and Utkal Commercial Corpn. v. Central Coal Fields Ltd. Also make this position clear.”

17. Various High Courts have taken the view that Article 137 of the Limitation Act would be applicable to an application Under Section 11 of the Arbitration Act.

17.1. The question of the applicability of Article 137 to applications under Section 11 of the 1996 Act came up for consideration before the Bombay High Court in Leaf Biotech (P) Ltd. v. Municipal Corpn., Nashik wherein it was held that the period of limitation for an application under Section 11 would be governed by Article 137 of the Limitation Act.

17.2. Subsequently, in Deepdharshan Builders (P) Ltd. v. Saroj the Bombay High Court framed the following issue:

“38. ... (ii) Whether Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application filed Under Section 11(6) of the Arbitration Act and if applies whether Section 5 of the Limitation Act, 1963 would be applicable to this arbitration application and if Section 5 applies to this arbitration application, whether the applicant has made out a sufficient cause for condonation of delay in filing this arbitration application?”

The Bombay High Court held that: [Deepdharshan Builders (P) Ltd. Case, SCC OnLine Bom paras 42 & 46-48]

“42. In my view, since the proceedings under



WEB COPY

Section 11(6) of the Arbitration Act are required to be filed before the High Court, Article 137 of the Schedule to the Limitation Act, 1963 would apply to such application filed under Section 11(6) of the Arbitration Act. In my view, since Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application under Section 11(6) of the Arbitration Act, Section 5 of the Limitation Act, 1963 would also apply to the arbitration application filed under Section 11(6) of Arbitration Act.

46. It is not in dispute that under Section 20 of the Arbitration Act, 1940, an application was required for taking the arbitration agreement on record and for appointment of an arbitrator in accordance with the arbitration agreement before a Court. Since the said proceedings under Section 20 were required to be filed before an appropriate Court, the provisions of Article 137 of the Limitation Act, 1963 were applicable to such proceedings filed before such appropriate Court. In my view, since the proceedings under Section 11(6) or Section 11(9) of the Arbitration Act for seeking appointment of arbitral tribunal are also now required to be filed before the High Court or the Hon'ble Supreme Court, as the case may be. Article 137 of the Schedule to the Limitation Act, 1963 would apply. It is not in dispute that no other Article of Schedule to the Limitation Act, 1963 provides for any other period of limitation for filing an arbitration application filed under Section 11(6) or Section 11(9) of the Arbitration Act respectively.

47. It is not in dispute that Article 137 of the Schedule to the Limitation Act, 1963, such application has to be



WEB COPY

filed within three years from the date when the right to apply accrues. In my view, under Article 137 of the Limitation Act, 1963, application for appointment of an arbitrator under Section 11(6) or Section 11(9) of the Arbitration Act before the High Court or the Hon'ble Supreme Court would apply from the date when a notice invoking an arbitration agreement is received by other side and other side refuses to the name suggested by the opponent or refusing to suggest any other name in accordance with the provisions of Section 11 or the agreed procedure prescribed in the arbitration agreement within the time contemplated therein or specifically refuses to appoint any arbitrator in the event of such other party being an appointing authority.

48. In my view, the limitation prescribed under Article 137 of the Schedule to the Limitation Act, 1963 which applies to an application under Section 11(6) or Section 11(9) of the Arbitration Act filed before the High Court or before the Hon'ble Supreme Court cannot be mixed up with the period of limitation applicable to the claims prescribed in various other Articles of the Schedule to the Limitation Act, 1963. Both these periods of limitation i.e. one applicable to the claims being made and another being applicable to the application under Section 11(6) or Section 11(9) of the Arbitration Act to which Article 137 of the Schedule to the Limitation Act, 1963 applies, are two different periods of limitation and cannot be made applicable to each other.

The special leave petition [SLP (C) No. 305 of 2019] against the said judgment was dismissed vide Order dated 16-1-2019.

18. Other decisions of High Courts on the applicability of



WEB COPY

Article 137 are Prasara Bharti v. MAA Communication and Golden Chariot v. Mukesh Panika passed by the Delhi High Court. The SLP filed in the case of Golden Chariot was dismissed vide order dated 31-1-2019 in Golden Chariot Recreations (P) Ltd. v. Mukesh Panika.

19. The reasoning in all these judgments seems to be that since an application under Section 11 is to be filed in a court of law, and since no specific Article of the Limitation Act, 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application under Section 11 is 3 years from the date of refusal to appoint the arbitrator, or on expiry of 30 days', whichever is earlier.”

17. Therefore, as held by the Hon’ble Apex Court in the above mentioned case, the limitation for filing an application under Section 8 of the Arbitration and Conciliation Act, 1996 is different from the limitation for substantive suit claim. The present application being made well before submitting the first statement on the substance of the dispute. The present application is very well maintainable and it cannot be treated as time barred.

18. Clause – 11 of the Agreement between the parties dated 01.06.2018 reads as follows:-

“11. Dispute Settlement

11.1 In the event of any question, dispute or difference



WEB COPY

arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BSNL, New Delhi or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD, BSNL or the said officer is unable or unwilling to act as such, then the sole arbitration of some other person appointed by the CMD, BSNL or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996.

There will be no objection to any such appointment on the ground that the arbitrator is a BSNL employee or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a BSNL servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.

11.2. The arbitrator may from time to time with the consent of both the parties enlarge the time frame for making and



WEB COPY

publishing the award. Subject to the aforesaid, Arbitration and Conciliation Act, 1996 and the rules made there under, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.”

19. A perusal of the above said clause between the parties would make it clear that there is an arbitration clause in the agreement providing for resolution of the disputes, whenever there is a dispute arising under the agreement. The above said clause would amount to an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of the Arbitration and Conciliation Act, 1996. In such circumstances, the present application filed by the applicants/defendants seeking reference to arbitration deserves to be allowed.

20. Accordingly, the present application is allowed as prayed for. In the facts and circumstances of the case, there will be no order as to costs.

08.06.2023
(1/2)

dm



WEB COPY



A.No.1609
in C.S.(Comm.Div).No.199 of 2022

S.SOUNTHAR, J.

dm

A.No.1609 of 2023
in C.S.(Comm.Div).No.199 of 2022

08.06.2023
(1/2)