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Arb.O.P.(Com.Div.).No.245 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.10.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.245 of 2023

M/s. Promac Engineering Industries Limited,
Represented by its Director (Finance)

Mr.J.U.Srinivasan,
Kanakapura Road,
Alahalli,
Anjanapura Post,
Bangalore – 560 108

... Petitioner

Vs.

M/s.Tamilnadu Newsprint and Papers Limited (TNPL),
Represented by its Executive Director,
No.67, Mount Road, Guindy,
Chennai – 600 032.

... Respondent

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to adjudicate the dispute among the parties arising out of the Purchase Order, dated 19.08.2010.



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For Petitioner : Mr.S.Sathiyanarayanan
For Respondent : Mr.V.Suresh for
M/s.Shivakumar and Suresh

ORDER

The petitioner has invoked the jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. The petition filed by the petitioner precedes a notice under Arbitration and Conciliation Act on 30.04.2002, requesting the respondents to consent for appointment of an Arbitrator. In response to the same, the respondent had responded on 28.05.2022 stating that the invocation of arbitration Clause under the purchase orders placed by the respondent on the petitioner on 19.08.2010 was time barred in the light of the decision of the Hon'ble Supreme Court in ***Bharat Sanchar Nigam Limited and another Vs. M/s.Nortel Networks India Private Limited*** in Civil Appeal Nos.843 to 844 of 2021 and therefore question of appointing an Arbitrator cannot be countenanced.

2. The application was contested by the respondent on the ground that the contract was awarded to the petitioner pursuant to a purchase order dated 19.08.2010. It is further submitted that there was a delay in completion of the



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work entrusted to the petitioner and therefore the respondent had deducted a sum of Rs.2,05,54,104/- towards Liquidated Damages, in terms of the aforesaid purchase order dated 19.08.2010.

3. The learned counsel for the respondent would submit that the petitioner had asked the respondent to issue a completion certificate as early as 12.10.2015 and that a certificate was given as early as 31.05.2016. Thereafter, there was no further communication from the respondent expecting the claim of the petitioner for excess deduction of Rs.2,05,54,104/- towards damages. It is submitted that only on 30.04.2022, i.e., long after expiry of limitation period, a notice under Section 21 was issued which was clearly time barred. It is therefore submitted that in the light of the decision of the Hon'ble Supreme Court in *Bharat Sanchar Nigam Limited and another Vs. M/s.Nortel Networks India Private Limited* in Civil Appeal Nos.843 to 844 of 2021 and a recent decision of the Hon'ble Supreme Court in *B and T AG Vs. Ministry of Defence* [(2023) SCC Online SC 657, this petition was liable to be rejected on the ground of limitation.



4. By way of rejoinder, the learned counsel for the petitioner would submit that after completion certificate was issued on 31.05.2016, several letters were sent to the respondent from time to time through Email. However, the respondent failed to respond to the same and therefore the petitioner was constrained to issue a notice under Section 21 of the Arbitration and Conciliation Act, 1996 on 30.04.2022. It is submitted that limitation would therefore stand protected, it is for the first time, the respondent has contended that the claim of the petitioner was time barred.

5. The learned counsel for the petitioner has drawn attention to the same decision of the Hon'ble Supreme Court in ***Bharat Sanchar Nigam Limited and another Vs. M/s.Nortel Networks India Private Limited*** in Civil Appeal Nos.843 to 844 of 2021 which was referred to in the reply dated 28.05.2022 of the respondent.

6. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

7. The limitation is always both fact and question of law. Question of limitation can be decided by an arbitrator under Section 16 of the Arbitration

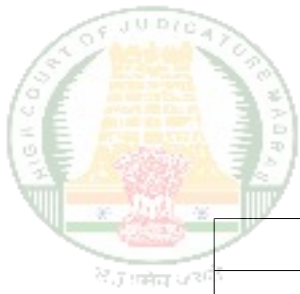


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and Conciliation Act, 1996, if the parties have an arbitration Clause. In this case, there is an arbitration Clause in the Purchase Order dated 19.08.2010.

8. Whether the petitioner was indeed entitled to relief in the year 2021 can be decided by an Arbitrator after a preliminary issue regarding limitation is decided by the Arbitrator under Section 16 of the Arbitration and Conciliation Act, 1996. As far as plea that the purchase order dated 19.08.2010 is insufficiently marked and therefore there is no binding contract between the petitioner and the respondent in the light of the Hon'ble Supreme Court in **N.N.Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others**, 2023 SCC Online SC 495 cannot be countenanced. In the light of the exemption to Article 5 to Schedule to Indian Stamp Act, 1899 which reads as under:

<i>Description of Instrument</i>	<i>Proper Stamp-duty</i>
5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT- (a) If relating to the sale of a bill exchange; (b) if relating to the sale of a Government security or share in an incorporated company or other body corporate; (c) if not otherwise provided for	Two annas. Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the security or share.



<i>Description of Instrument</i>	<i>Proper Stamp-duty</i>
Exemptions Agreement or memorandum of agreement — (a) for or relating to the sale of goods or merchandise exclusively, not being a NOTE OR MEMORANDUM chargeable under No. 43; (b) made in the form of tenders to the Central Government for or relating to any loan;	Eight annas

9. Further the aforesaid decision is a recent decision, whereas the parties have decided on the terms of the contract in the Purchase Order dated 19.08.2010. Even otherwise, Purchase Order dated 19.08.2010 placed by the respondent cannot be stated to under stamped at this distant point of time.

10. Considering the above, Court is inclined to pass the following order:-

(i) Hon'ble Mr. Justice V. Parthiban, (Retired), Judge, Madras High Court, as the sole arbitrator. The Hon'ble Mr. Justice V. Parthiban, (Retired), Judge, Madras High Court shall enter appearance and decide the dispute in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

(ii) The learned Arbitrator appointed herein, shall after issuing notice to



the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order touching on the limitation.

(iii) The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondent remains *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondent.

11. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.



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12. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondent to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

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Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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C.SARAVANAN, J.

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