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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 20th March, 2023

+ **ARB.P. 309/2023 & I.A. 5347-48/2023**

ASHOK KUMAR BAJORIA Petitioner
Through: Ms.Nilanjana Adhya &
Mr.Anshuman Chowdhury,
Advs.

versus

GAIL INDIA LIMITED Respondent
Through: Mr.Somiran Sharma &
Mr.Dhruvajit Saikai, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Letter of Acceptance dated 29.04.2011 for 'laying and construction of KCJP-GVK-Vemagiri Pipeline, Terminals and Associated Facilities in KG Basin'.
2. The learned counsel for the respondent, who appears on advance notice, submits that the present petition is barred by limitation inasmuch as the notice invoking arbitration was issued by the petitioner on 23.09.2016, while the present petition has been filed on or about 16.03.2023.
3. Placing reliance on the judgments of the Supreme Court in *Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited*, (2021) 5 SCC 738 and *Secunderabad Cantonment Board v. B. Ramachandraiah and Sons*, (2021) 5 SCC 705, the learned counsel for the respondent submits that for filing of

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the present petition the period of limitation has to be determined in terms of Article 137 of the Limitation Act, 1963 (in short, 'Limitation Act'), that is, the period of limitation for filing of the present petition shall run from 30 days after the date of issue of notice under Section 21 of the Act, and is three years therefrom. He submits that in the present case, the respondent had refused appointment of an Arbitrator vide reply dated 26.10.2016. Therefore, the cause of action, if any, for filing of the present petition arose in favour of the petitioner on 26.10.2016, and the present petition filed in 2023 would be barred by limitation.

4. On the other hand, the learned counsel for the petitioner submits that the petitioner had filed a petition under Section 9 of the Act seeking *interim* protection against the Show Cause Notice dated 04.08.2016 issued by the respondent, being OMP (I) (COMM) 331/2016, titled ***Harisons Industries v. GAIL India Ltd.*** The said petition was disposed of by this Court vide its order dated 30.11.2016, granting four weeks time to the petitioner to file its response to the Show Cause Notice and directing the respondent to pass a reasoned order thereon, after giving a hearing to the petitioner, within a period of four weeks thereafter. The respondent thereafter issued a notice dated 03.04.2017 placing the petitioner in the Holiday List barring him from participating in any bidding process of the respondent for a period of three years starting from 04.08.2016. The petitioner has challenged the said decision in form of an appeal to the respondent itself, however, the same has yet not been decided by the respondent.

5. She further submits that the petitioner thereafter, on 17.03.2020, filed a petition under Section 11 of the Act, being A.P. No.166 of

2020, before the High Court of Calcutta. The same was, however, withdrawn on 04.07.2022 as the said Court lacked territorial jurisdiction. The High Court observed that benefit of Section 14 of the Limitation Act shall be applicable to the petitioner in accordance with law. The petitioner has thereafter filed the present petition as this Court would have territorial jurisdiction to entertain the same. She submits that the petition before the Calcutta High Court was filed on 17.03.2020, that is within the period of limitation arising from the order dated 03.04.2017 issued by the respondent placing the petitioner on the Holiday List, and giving the benefit of Section 14 of the Limitation Act, therefore, the present petition would be within the period of limitation.

6. I have considered the submissions made by the learned counsels for the parties.

7. As held by the Supreme Court in ***Bharat Sanchar Nigam Limited and Another*** (*supra*), Section 11 of the Act does not prescribe any time period for filing an application under Sub-Section 6 for appointment of an Arbitrator. Since none of the Articles of the Schedule of the Limitation Act provides a time period for filing of an application under Section 11 of the Act, thus, it would be covered by the residual provision of Article 137 of the Limitation Act, which provides a period of three years starting from the date when the right to apply accrues. For the purposes of filing an application under Section 11 of the Act, the right to apply would arise upon failure to make the appointment of the Arbitrator within a period of 30 days from the issuance of the Notice invoking arbitration. An application under Section 11 of the Act can, therefore, be filed only after a notice

of arbitration in respect of particular claims/disputes to be referred to arbitration as contemplated by Section 21 of the Act is made and there is a failure to make the appointment. I may quote from the judgment as under:-

“13.1. Section 11 does not prescribe any time period for filing an application under sub-section (6) for appointment of an arbitrator. Since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Limitation Act, 1963, as per Section 43 of the Arbitration Act, which provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in court:

“43. Limitations.—(1) The Limitation Act, 1963 (36 of 1963) shall apply to arbitrations, as it applies to proceedings in court.”

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14. Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of an arbitrator under Section 11, it would be covered by the residual provision Article 137 of the Limitation Act, 1963. Article 137 of the Limitation Act, 1963 provides:

“THIRD DIVISION – APPLICATIONS			
	<i>Description of application</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
137.	<i>Any other application for which no period of limitation is provided elsewhere in this Division.</i>	<i>Three years</i>	<i>When the right to apply accrues.”</i>

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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.

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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.”

8. The Supreme Court further clarified that the period of limitation for filing a petition seeking appointment of an Arbitrator cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for the claims shall be governed by various Articles of the Limitation Act, however, the same shall be distinct from the period of limitation for filing of an application seeking appointment of an Arbitrator. I may quote paragraph 16 from the judgment, as under:-

“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 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 recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraj v. Orissa Mining Corpn. Ltd., (2008) 2 SCC 444, 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 (1988) 2 338, (1993) 4 SCC 338, Panchu Gopal Bose v. Port of Calcutta and Utkal Commercial Corpn. v. Central Coal Fields Ltd, (1999) 2 SCC 571, also make this position clear.”

9. In ***Secunderabad Cantonment Board*** (*supra*), the Court, reiterating the law as settled by the Supreme Court in ***Bharat Sanchar Nigam Limited and Another*** (*supra*), on the facts of that case, observed as under:-

19. Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, which letter itself informed the appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12-2-2007. The appellant's laconic letter dated 23-1-2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12-2-2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the respondent and time began running from that day. Obviously, once time has started running, any final rejection by the appellant by its letter dated 10-11-2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 6-11-2013, they were within the limitation period of three years starting from 10-11-2010. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time-barred, no arbitrator could have been appointed by the High Court.

20. Even otherwise, the claim made by the respondent was also ex facie time-barred. It is undisputed that final payments were received latest by the end of March 2003 by the respondent. That apart, even assuming that a

demand could have been made on account of price variation, such demand was made on 8-9-2003. Repeated letters were written thereafter by the respondent, culminating in a legal notice dated 30-1-2010. Vide the reply notice dated 16-2-2010, it was made clear that such demands had been rejected. Even taking 16-2-2010 as the starting point for limitation on merits, a period of three years having elapsed by February 2013, the claim made on merits is also hopelessly time-barred.

10. The same would clearly apply to the facts of the present case as well. In the present case, the failure to appoint arbitrator occurred on 26.10.2016, when the respondent refused appointment of an Arbitrator. The petition under Section 11 of the Act was filed before the Calcutta High Court on 17.03.2020, that is, beyond the period of limitation. Therefore, the petitioner cannot get any benefit under Section 14 of the Limitation Act for the time spent in pursuing the said petition before the Calcutta High Court. Though there may be some merit in the submission of the petitioner that the cause of action for the substantive claim would arise in the favour of the petitioner on 03.04.2017, as the present petition has been filed based on the notice dated 23.09.2016 issued under Section 21 of the Act, the period of limitation for the present petition has to be determined from the date of this notice and the rejection of the respondent to appoint an Arbitrator based on such notice, which occurred on 26.10.2016.

11. The present petition is, therefore, barred by limitation and is dismissed along with all the pending applications.

NAVIN CHAWLA, J

MARCH 20, 2023/rv