OD-1

ORDER SHEET

AP/72/2022

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

REINFORCED EARTH INDIA PRIVATE LTD.
VS
M/S. SIMPLEX INFRASTRUCTURES LIMITED

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 26th June, 2024.

Appearance:
Mr. Puspal Chakraborty, Adv.
Ms. Amrita Panja Moulick, Adv.
..for the petitioner

Mr. Abhishek Banerjee, Adv.
Mr. Ashwin Nair, Adv.
..for the respondent

The Court: The present application under Section 11 of the Arbitration and Conciliation Act, 1996 has been opposed primarily on the ground of *ex facie* bar of limitation.

Learned counsel for the petitioner argues that the petitioner, in terms of an agreement with the respondent, had completed the scheduled work by October, 2015. Subsequently even after the expiry of the defect liability period and upon the rectification work being completed, allegedly by the month of October, 2016, the respondent did not release the amounts due to the petitioner.

It is submitted that the respondent did not categorically deny or refute the claim of the petitioner as well.

On August 26, 2020, by an e-mail annexed at page 61 of the affidavit-in-reply of the petitioner, it was acknowledged on the part of the respondent that the personal bank guarantee of the petitioner may be released because they had completed work before August, 2015.

Further, vide letter dated August 19, 2021 issued by the respondent to the Branch Manager of the Standard Chartered Bank, it was stated that on the request of the petitioner, the respondent was returning therewith the bank guarantee mentioned therein in original.

As such, it is argued that the cause of action for the present claim of the petitioner arose with the acknowledgment on August 26, 2020 by the respondent of the petitioner's claim.

Learned counsel for the petitioner cites *Arif Azim Company Limited vs. Aptech Limited* reported at (2024) 5 SCC 313 in support of the proposition that mere failure to pay may not give rise to a cause of action. Once the applicant has asserted its claim and the respondent has either denied or failed to reply, the cause of action will arise after such denial or failure.

It was further observed that the right to receive payment ordinarily begins upon completion of the work. A dispute arises only when there is a claim by one side and its denial/repudiation by the other and the accrual of cause of action cannot be indefinitely postponed by repeatedly writing letters or sending reminders. It was important to find out the "breaking point" at which any reasonable party would have abandoned the efforts at arriving at a settlement and contemplated referral of the disputes to arbitration.

In the present case, the respondent having not repudiated the claim of the petitioner, it is argued that the cause of action at the time of issuance of the notice under Section 21 of the Arbitration and Conciliation Act, 1996 on December 15, 2021 was a live cause of action. Accordingly, the issue of limitation cannot be a bar in allowing the present application under Section 11 of the 1996 Act.

Learned counsel appearing for the respondent submits that the stand taken by the petitioner in the application under Section 11 of the 1996 Act as well as in the notice under Section 21 of the said Act is not corroborated by the documents relied on by the petitioner.

By placing specific reliance on the purported letter dated August 19, 2021 issued by the respondent (Annexure P-6 at page 44 of the application) read with the purported e-mail dated August 26, 2020 annexed at page 61 of the affidavit-in-reply, it is pointed out that both the said documents refer to a bank guarantee dated October 17, 2011.

In such context, learned counsel places before the Court the provisions of retention money as embodied in Clause 17 of the agreement between the parties. In terms of the second paragraph of the said clause, the retention money shall be released after successful completion of work and the occasion to furnish the retention bank guarantee arose at that juncture only. Hence, even as per the argument of the petitioner, an occasion to furnish a retention bank guarantee would only arise after the completion of work in the year 2015. Thus, the bank guarantee of 2011 could not, by any stretch of imagination, be the retention bank guarantee. Hence, the very premise of the petitioner's argument, that the cause of action arose on August 26, 2020 when the retention bank guarantee was released, is belied by the contentions of the petitioner itself.

Hence, in the absence of such acknowledgement, the cause of action arose in October 2016 when even according to the petitioner, the work, including the rectification work, was finally completed. Accordingly, it is submitted that the present cause of action is nothing more than "dead wood" as referred to in the judgment of *Bharat Sanchan Nigam Limited and Another Vs. Nortel Networks India Private Limited* reported at (2021) 5 SCC 738. In the said judgment, it was inter alia held that the period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters or mere settlement discussions where a final bill is rejected by making deductions or otherwise.

The question which arises in the present case is whether ex facie, it is found from the materials before the Court that the dispute sought to be raised before the Arbitrator is dead wood, being palpably barred by limitation.

Even taking the best case argued by the respondents, that the bank guarantee referred to in the communications dated August 26, 2020 and August 19, 2021 was not the retention bank guarantee furnished by the petitioner, the fact remains that it transpires from the e-mail dated August 26, 2020 that it was at least admitted on the part of the respondents that a particular bank guarantee of October 17, 2011 may be released "because they have completed work before 2015 August."

Thus, at least it can be said from the said document that there was an admission on the part of the respondents as to completion of work before 2015 August. However, certain arguable questions are required to be resolved before a conclusive adjudication of the issues involved. For example, as to whether the bank guarantee so referred to in the communication of August, 26, 20220 at all pertained to the work-in-question. Secondly, it is also to be ascertained as to whether there was any specific refusal of the claim of the petitioner as referred to in the notice under Section 21 of the 1996 Act. However, such issues are arguable and require a factual adjudication, thereby partaking the character of mixed questions of law and fact which cannot be decided at the outset, particularly, within the limited conspectus of Section 11 of the 1996 Act. It has been consistently held by the Supreme Court and several High Courts of late that the domain of the Court taking up an application under Section 11 of the 1996 Act is more of an administrative nature than of a judicial character.

It is not for this Court to interdict an arbitral process at the stage of deciding an application under Section 11, by adjudicating even prima facie on the mixed questions of facts and law involved.

As apparent from the notice under Section 21 of the Arbitration and Conciliation Act, 1996 annexed to the application, the petitioner has made a claim which comes within the broad purview of the arbitration clause of the agreement between the parties, i.e., Clause 28. Clause 28 refers to any difference or dispute arising out of or in connection with the work order.

Insofar as the question of limitation is concerned, as referred to above, the documents annexed to the application under Section 11 have to be taken as true for the limited purpose of adjudication involved in a proceeding under section 11. Going by such standard, the claim of the petitioner pertains to an issuance of a completion certificate and release of certain amount of money in favour of the petitioner. As per the documents dated August 26, 2020, prima facie a claim of completion of work has been admitted by the respondents and it remains to be adjudicated as to whether the petitioner is actually entitled to such claim.

In the absence of any document on record specifically to indicate that there was any express repudiation or denial of the claim of the petitioner at any point of time, it cannot be said that the cause of action for the arbitral reference is dead wood, being *ex facie* barred by limitation. It is, at best, arguable, by taking a cue from the *Arif Azim* judgment, as to whether there was any actual claim which has been repudiated by the respondents at any point of time.

The mere fact that the right to get the amount accrued in favour of the petitioner arose after completion of work in October, 2016 cannot be the sole criterion for deciding such issue in terms of the ratio laid down in *Arif Azim* (supra).

In such view of the matter, this Court is of the opinion that the issue raised by the parties can only be decided by the arbitral tribunal as and when appointed and ought not to be gone into on merits by this Court within the limited framework of Section 11 of the 1996 Act.

Since the dispute is otherwise arbitrable and falls within the purview of the arbitration clause, there is no further impediment to refer the matter to arbitration by appointing an Arbitrator.

Accordingly, AP/72/2022 is allowed, thereby appointing Mr. Subhankar Nag, Advocate, (Mobile no.: 9830012175) as the sole Arbitrator to resolve the dispute between the parties in terms of the arbitration clause, subject to a declaration being obtained from the said learned Arbitrator in terms of Section 12 of the Arbitration and Conciliation Act, 1996. The remuneration of the learned Arbitrator shall be decided by the Arbitrator within the framework of the Arbitration and Conciliation Act, 1996, read with its Schedules.

(SABYASACHI BHATTACHARYYA, J.)

R.Bhar/bp/S.Bag