

OD-26

ORDER SHEET

AP/870/2023

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

M/S. N. P. ENGINEERING COMPANY AND ANR.
VS
BHARAT SANCHAR NIGAM AND ORS.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 15th July, 2024.

Appearance:

Mr. Kamal Jahiruzzaman, Adv.

Mr. Narendra Nath Malakar, Adv.

Mr. Saptarshi Guha, Adv.

...for the petitioner

Mr. Anil Kr. Gupta, Adv.

Mr. Yogesh Kr. Sharma, Adv.

...for the respondents

The Court: The present application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the proposed claimant/petitioner in view of lack of consensus between the parties regarding appointment of Arbitrator.

Learned counsel appearing for the respondents takes a preliminary objection to the application on the ground that the claims sought to be referred

to arbitration are palpably barred by limitation and amount to 'dead wood'. Learned counsel places reliance on Clause 25 of the agreement between the parties, which is also relied on for other purposes by the petitioners, where it is provided that if the contractor does not make any demand for appointment of Arbitrator in respect of any claims in writing as stated thereinabove within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived as an absolute bar and the BSNL (respondent) shall be discharged and released of all liabilities under the contract in respect of the claim.

It is argued that the said intimation was given by the Engineer-in-Charge some time in 2019 and, as such, the invocation of the arbitration clause in the year 2023 is itself at a juncture when the claim has already become time-barred.

It is thus submitted that the application under Section 11 ought to be dismissed.

Learned counsel for the petitioners controverts such submissions and places reliance on the communication dated November 5, 2020 annexed to the present application and also points out that the invocation was made on October 23, 2023.

The question which arises is whether the claim of the petitioner sought to be referred to arbitration is *ex facie* barred by limitation. Although Clause 25, in one of its sub-paragraphs, provides that in the event no demand for appointment of Arbitrator is made within 120 days of receiving the intimation

from the Engineer-in-Charge that the final bill is ready for payment, the claim shall be deemed to have been waived, in the present case, it is arguable as to whether the claim of the petitioner was time-barred.

Such waiver clause may or may not be unqualified since it may very well be argued by the petitioner that the waiver provision itself was waived by the respondent by its letter dated November 5, 2020 annexed at page 252 of the application. In the said letter, the BSNL/respondent, inter alia, states that the third R/A Bill amounting to around Rs. 8 lakh is “also under earnest effort for payment from this end”. Thus, it is palpable from the said letter that the BSNL, even on November 5, 2020, was making earnest efforts for payment of the dues of the third R/A Bill raised by the petitioner.

Hence, to say the least, the issue as to whether the claim is time-barred or was waived is arguable. It is well-settled that this Court, under the limited jurisdiction conferred by Section 11 of the 1996 Act, cannot decide issues raised by the parties on merits and it is for the Arbitrator to finally adjudicate such issues. Unless the bar of limitation appears *ex facie*, this Court cannot turn down a request for appointment of an Arbitrator. In any event, the issue as indicated above is required to be adjudicated by the Arbitrator as and when raised by the parties.

Since the dispute between the parties regarding payment of due bills is otherwise covered by the arbitration clause and since the dispute is inherently arbitrable, there cannot be any impediment in appointing an Arbitrator to resolve the disputes between the parties.

Accordingly, AP/870/2023 is allowed, thereby appointing Mr. Jishnu Chowdhury, Advocate, a member of the Bar Library Club, as the sole Arbitrator to resolve the dispute between the parties, subject to obtaining a disclosure from the said learned Arbitrator under Section 12 of the Arbitration and Conciliation Act, 1996. The sole Arbitrator shall fix his own remuneration within the confines of the Arbitration and Conciliation Act, 1996 read with Schedule – IV thereof.

All issues, including limitation, are kept open to be decided by the learned Arbitrator, if raised in the arbitral proceeding.

(SABYASACHI BHATTACHARYYA, J.)