IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 30 OF 2024

Chandra Shekhar Export Pvt. Ltd. ….Petitioner

Vs.

Babanraoji Shinde Sugar and Allied Industries Ltd. ….Respondent

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Mr. Yuvraj Narvankar for the Petitioner.
Mr. Viraj Parikh a/w Mr. Umang Mehta and Mr. Amir Attari i/b Dhruv Liladhar & Co. for the Respondent.

CORAM : ARIF S. DOCTOR, J.
DATE : 13TH DECEMBER, 2024

<u>**P.C.**</u>:-

1. The captioned Arbitration Petition has been filed under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 (**"*Arbitration Act*"**) and seeks the appointment of a sole Arbitrator in respect of disputes and differences which have arisen between the Petitioner and the Respondent arising out of a Deed of Agreement dated 10th October 2017 (**"*the said Agreement*"**).

2. Before adverting to the rival contentions, it is useful to set out the following facts, viz.

i. By and under the said Agreement, the Respondent was to sell to the Petitioner 10,000 Metric Tonnes of "A" grade molasses for which the Petitioner had made an advance payment of Rs. 3,00,00,000/- (Rupees Three Crore Only) to the Respondent. Clauses 8, 9, 10, 11 and clause E of the said Agreement are relevant and are as follows, viz.

"8. Delivery of Molasses will start from 15th November 2017. once the new season 2017-18 starts. The Molasses shall be made available by Party No. 2 to Party No. 1 as per the Delivery Schedule confirmed by Party No. 1 from time to time during the agreement period. Party No. 2 will deliver product of the first production of the crushing season 2017-18. Party No. 2 shall not deliver the product to any other party unless until! they complete the delivery to Party No. 1 under this agreement. Lifting of Molasses will be as per convenience of Party No.1 and. Party No. 1 shall give prior intimation of 3 days to begin lifting of molasses and Party No. 2 will arrange to deliver accordingly.

9. Party No. 2 is giving cheque of Rs. 300.00 Lacs (Rs. Three Crore) vide Cheque No.008355 dated 30 / 04 /2018. drawn on Bank of India to Party no.1 towards repayment of advance paid. This cheque can be presented by party No. 1 in case Party No.2 fails to supply Molasses as per this AGREEMENT within committed period. However after successful completion of this AGREEMENT the said cheque will be returned to party no.2 by party no.1.

10. If Party No. 2 fails to perform as per this Agreement, party no. 2 has to repay the advance to party no. 1 along with compensation penalty and losses incurred by party no.2 as claimed by party no.1.

11. Party No.2 will be liable to fulfill the conditions of this AGREEMENT.

if any circumstances and Party No. 2 fail to perform as per commitments, this AGREEMENT automatically converted into legal AWARD in favor of Party No.1 and for which they need not go· to any legal proceeding for recovery of their payment. This is the essence of this AGREEMENT.'

E. ARBITRATION *– In the event of any controversy or claim arising out of or relating to this agreement, or a breach thereof, the parties hereto shall, or claim shall be settled and referred to arbitration under the provision of THE ARBITRATION AND CONCILIATION ACT and the venue shall be at Kolhapur, Maharashtra, India."*

ii. Also, on 10th October 2017, the Petitioner executed an unconditional Bank Guarantee by which the Petitioner guaranteed due repayment of the amounts due and payable under the said Agreement.

iii. The Respondent then on 13th April, 2018 issued to the Petitioner a cheque for the sum of Rs.3,00,00,000/- (Rs. Three Crores Only) as contemplated in clause 9 of the said Agreement as and by way of security deposit. The Petitioner then on 16th April, 2018 issued a letter demanding the supply of molasses as per the said Agreement.

iv. Thereafter, it is the Petitioner's case that the Respondent had committed default in the supply of molasses under the said Agreement which inter alia necessitated the Petitioner to deposit the said cheque on 2nd June, 2018. The said cheque was however returned dishonoured.

v. Hence, the Petitioner therefore in the aforesaid circumstances filed a Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 **("I&B Code")** before the National Company Law Tribunal, Mumbai **("NCLT, Mumbai")** seeking to initiate the Corporate Insolvency Resolution Process ("CIRP") against the Respondent in respect of an unpaid operational debt of Rs. 4,42,54,918/-. (Rupees Four Crore Forty-two Lakh Fifty-four Thousand Nine Hundred and Eighteen Only). As per clause 11 of the said Agreement the Petitioner had computed the said amount by including the principle, compensation and interest at rate of 12% per annum.

vi. The Section 9 Petition was opposed by the Respondent who filed an Affidavit in Reply, in which, the Respondent opposed the Petition *inter alia* on the ground that (i) the said claim was required to be adjudicated upon; (ii) the said Agreement contained an arbitration clause hence the NCLT had no jurisdiction and (iii) the Petitioner was not entitled to claim compensation and interest.

vii. The NCLT, Mumbai vide an Order dated 28th April 2023 dismissed the Petition *inter alia* holding as follows, viz.

> *"20. The total amount claimed by the Operational Creditor is Rs. 4,42,54,918/- which includes a compensation of Rs 1,70,00,000, paid by the Operational Creditor to its client. However this*

Bench is of the considered view that the Operational Debt claimed by the Petitioner must be crystallized, undisputed and not something which requires adjudication by a competent authority. In the present case the claim for compensation of Rs. 1,70,00,000 does not become an Operational Debt until the liability is adjudicated upon and damages are assessed by a competent authority in law. Further with respect to the interest claimed by the Operational Creditor, we are of the considered view that the Deed of Agreement dated 10.10.2017 nowhere provides for the payment of interest on advance amount. Hence the claim of interest by the Operational Creditor cannot be justified."

viii. The Petitioners then challenged the Order of the NCLT, Mumbai before the National Company Law Appellate Tribunal (**"NCLAT"**). The NCLAT vide an Order dated 7th August 2023 dismissed the Appeal filed by the Petitioner, *inter alia* holding as follows, viz.

> *"4. As per Clause 10 of the agreement, the entitlement is for compensation and penalty if there is failure in performance on part of the Corporate Debtor. We are of the view that for crystallization of said compensation penalty adjudication is required by Competent Court and Adjudicating Authority has rightly not admitted Section 9 application. We are of the view that it is always open for the Appellant to take a remedy as available as per the contract in accordance with law. With these observations, the Appeal is dismissed."*

ix. The Petitioner thus, vide its letter dated 12th September 2023 invoked arbitration in terms of clause E of the said Agreement.

3. Mr. Narvankar, Learned Counsel appearing on behalf of the Petitioner submitted that the Petitioner had, in the aforesaid circumstances invoked arbitration. He then invited my attention to the notice invoking arbitration and pointed out that the Respondent had not replied to the same. He thus submitted that no dispute had been raised by the Respondent about the existence of the arbitration agreement or for that matter, even the claim made by the Petitioner as set out in the said notice invoking arbitration. He pointed out that the notice invoking arbitration was dated 12th September 2023 and the present Petition was filed on 9th November 2023 which was well within three years from the date of invocation. Basis this he submitted that the Petitioner had made out a case for the appointment of an arbitrator and accordingly the Petition could be allowed in terms of prayer clause (a).

4. Mr. Parekh, learned counsel appearing on behalf of the Respondent submitted that the Petitioner's claim was '*hopelessly time-barred and deadwood*'. He submitted that as per the Petitioner's own pleaded case, the delivery of the molasses was to start on 15th November 2017 and since according to the Petitioner no molasses was delivered, the Petitioner's cause of action accrued on that date. He then pointed out that the notice invoking arbitration was issued by the Petitioner on 12th September 2023 which was over six years from the date on which the cause of action according to the Petitioner had arisen. Basis this he submitted that the claim of the Petitioner was therefore barred by limitation.

5. Mr. Parekh then submitted that the Petitioner was aware of the fact that the claim was barred by limitation and had therefore sought to invoke the provisions of Section 14(2) of the Limitation Act, 1963 **(*"the Limitation Act"*)** by seeking an exclusion of time spent in prosecuting the Petition filed under Section 9 of the I&B Code. He submitted that the Petitioner could never be entitled to seek an exclusion of time from the proceedings adopted before the NCLT, Mumbai since proceedings under Section 9 of the I&B Code and proceedings for recovery of money were separate and distinct. He submitted that claim to be made in arbitration could not simply be kept alive because of the pendency of the Petition filed under Section 9 of the I&B Code. Mr. Parekh then, in support of his contention that proceedings for the appointment of an arbitrator and those under Section 9 of the I&B Code were separate and distinct, placed reliance upon the judgments of the Hon'ble Supreme Court in the case of ***HPCL Bio-Fuels Ltd. vs. Shahaji Bhanudas Bhad,***[1] and ***Jignesh Shah and Anr. vs. Union of India and Anr.***[2] Basis this, he submitted that the Petitioner could not seek any exclusion of time on the basis of the proceedings adopted by the Petitioner before the NCLT, Mumbai.

6. Mr. Parekh, then even otherwise and without prejudice to the above, submitted that, it could never be said that the Petitioner was prosecuting the Petition before the NCLT in good faith. He submitted that the claim which was sought to be made in arbitration was in the nature of claim for unliquidated

1 2024 SCC OnLine SC 3190
2 (2019) 10 SCC 750

damages and that it was well settled that a claim for unliquidated damages could never form the basis of a Petition filed under Section 9, since the same was not a debt. He submitted that it was not open to the Petitioner to claim ignorance of such a well settled legal position.

7. Mr. Parekh then invited my attention to the Petition filed under Section 9 of the I&B Code by the Petitioner and pointed out that the Petitioner had also stated therein that the cause of action had arisen on 15th November 2017. He submitted that the cause of action for recovery of debt and for the recovery of damages, penalty and interest cannot be different. It was thus he submitted that it was incumbent upon the Petitioner to have taken steps for the adjudication of the claim for damages etc. within 3 years from the date of the accrual of cause of action i.e. 15th November 2017 and that since the Petitioner had not done so, the Petition ought to be dismissed on the ground of the same being barred by limitation. Mr. Parekh submitted that even assuming the claim qua the recovery of unliquidated damages, penalty and interest required to be adjudicated the said fact was clearly established, since the Respondent had disputed the claim qua the unliquidated damages, penalty and interest in Affidavit in reply filed before the NCLT on 26th December 2019 and thus the claim now sought to be made was barred by limitation.

8. Mr. Parekh then placed reliance upon the judgment of this Court in the case of ***Graceworks Realty & Leisure Pvt. Ltd. vs. Zahid Hussain Khan***[3] to

3 2022 SCC OnLine Bom 550

submit that the Court when exercising jurisdiction under Section 11 of the Arbitration Act was required to consider whether the claim being made was manifestly time barred. He reiterated that in the present case, the notice invoking arbitration was issued almost 6 years after the cause of action arose and therefore, the claim made under the invocation notice was barred by the limitation.

9. Mr. Narvankar in rejoinder submitted that the limitation period to file an application under Section 11(6) of the Arbitration Act is three years from the date on which the party receiving notice of invocation fails to act upon the same. He then submitted that while exercising powers under Section 11 of the Arbitration Act this Court is only required to come to a *prima facie* finding as to the existence of an arbitration agreement between the parties and all other issues were to be left open to be decided by the Arbitral Tribunal. In support of his contention, he placed reliance upon the judgments of Hon'ble Supreme Court in ***Bharat Sanchar Nigam Limited and Others vs. Nortel Networks India Private Ltd.***[4] and in the case of ***SBI General Insurance Co. Ltd. vs. Krish Spinning***[5].

10. Mr. Narvankar reiterated that in the present case, the notice invoking arbitration was admittedly sent on 12th September 2023 and the Petition was filed on 1st December 2023 which was within limitation. In this context, Mr. Narvankar then placed reliance upon the judgment of the Hon'ble

4 (2021) 5 SCC 738
5 2024 SCC OnLine SC 1754

Supreme Court in ***Aslam Ismail Khan Deshmukh vs. ASAP Fluid Pvt. Ltd. and Another***[6] to submit that if the application under Section 11(6) for appointment of Arbitrator is filed within limitation i.e. three years from the date of refusal or failure on the part of the other party in complying with requirements mentioned in invocation notice, then the Court at the stage of appointment of an Arbitrator need not go into the question of the claim being barred by limitation and can refer the Parties to arbitration, keeping the issue of limitation open to be decided in arbitration.

11. Mr. Narvankar then without prejudice to the above contentions submitted that in the facts of the present case, the cause of action for recovery of damages, penalty and interest was not the same as the cause of action for recovery of the debt. He invited my attention to Clause 11 of the said Agreement and pointed out that the Parties had specifically agreed that in the event Respondent failed to fulfill the conditions of the said Agreement, the said agreement would be converted to a Legal Award and that the Petitioner would not have to opt for legal proceedings for recovery of their payment. He thus took pains to point out that as per the said Agreement, there was no requirement of the Petitioner having to separately adjudicate the claim for compensation, penalty and losses that the Petitioner might suffer, since the same was provided for in the said Agreement itself. He submitted that it was only because the Respondent had reneged on the said Agreement, particularly clause 11 thereof

6 2024 SCC OnLine SC 3191

before the NCLT by contending that Petitioner's claim qua compensation, penalty and losses was required to be adjudicated before an arbitrator that the Petitioner had invoked arbitration. Basis this he submitted that the Respondent cannot now oppose the appointment of an arbitrator on the ground that the claim made by the Petitioner was barred by limitation.

12. Having heard learned counsel for the parties and having considered the case law upon which reliance is placed, I find no merit in the Respondent's contentions to oppose the appointment of an arbitrator for the following reasons, viz.

A. *First*, there is no dispute that (i) there exists an Agreement between the Parties which contains an arbitration clause and (ii) that the Petitioner has filed the present Petition under Section 11(6) of the Arbitration Act, within three years from the date of invocation. Thus, in my view of the facts the judgement of the Hon'ble Supreme Court in the case of ***Aslam Ismail Khan Deshmukh*** would squarely apply and any issue that the Respondent might have qua the claim being barred by limitation would have to be urged before the Tribunal in an appropriate Application.

B. *Second* even on merits the contention raised by the Respondent to oppose the appointment of an arbitrator is that the Petitioner's claim is *hopelessly time-barred and deadwood*' in my *prima facie* view deserves only to be stated to be rejected. Clause 11 of the said Agreement in terms provides that if the Respondent failed to perform as per commitments in the said agreement, it would automatically convert the said agreement into a Legal Award in favour of the Petitioner. It was basis this that the Petitioner had filed a Petition under Section 9 after quantifying the debt due as per the said Agreement. The Respondent however in the Affidavit in Reply filed in the NCLT took the stand that the claim of the Petitioner required to undergo adjudication. The NCLT dismissed the Petition by *inter alia* holding that "*that the Operational Debt claimed by the Petitioner must be crystallized, undisputed and not something which requires adjudication by a competent authority*" and the NCLAT then dismissed the Appeal filed by the Petitioner by holding that "*We are of the view that for crystallization of said compensation penalty adjudication is required by Competent Court and Adjudicating Authority has rightly not admitted Section 9 application. We are of the view that it is always open for the Appellant to take a remedy as available as per the contract in accordance with law*". In these circumstances, for the Respondent to now do a volte facie and now allege delay or that the Petitioner's claim is barred by limitation is in my view, entirely untenable. In any event, given that there is no dispute to the existence of the arbitration agreement in the facts of the present case, such contention of the claim being barred by limitation can always be made before the Tribunal.

C. *Third,* the judgments in ***HPCL Bio Fuels Limited, Jignesh Shah and Another*** and ***Graceworks Realty & Leisure Pvt. Ltd.*** would in my view be of no assistance to the Respondent in facts of the present case. It is crucial to note that in none of the said cases cited did the Agreements in question contain a clause similar to clause 11 of the said Agreement. Hence, in my view Mr. Parekh is not correct when he submits that in the facts of the present case, the cause of action for recovery of a debt and for recovery of damages, penalty and interest cannot be different. In my view, given clause 11 of the Agreement and the stand taken by the Respondent before the NCLT, Mumbai in the teeth of such clause, I am of the *prima facie* view that the cause of action for the two claims would indeed be different. Hence, in my view and in these facts, it would be wholly unconscionable for the Respondent to now oppose arbitration on the ground that the Petitioner's cause of action had arisen on 15th November, 2017 given what had transpired in the interregnum.

13. In view aforesaid observations, I appoint Mr. Sudhir Purushottam Kulkarni, Former District Judge, Kolhapur as an Arbitrator to decide the dispute and differences between the parties arising out of Deed of Agreement dated 10th October 2017.

TERMS OF APPOINTMENT

(a) **Appointment of Arbitrator**: Mr. Sudhir Purushottam Kulkarni, Former District Judge, Kolhapur is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties.

(b) **Communication to Arbitrator of this order**:

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Petitioner within one week from the date this order is uploaded.

(ii) The Advocates for the Petitioner will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s	**Mr. Sudhir Purushottam Kulkarni**
Address	20, Vaibhav Housing Society, Near Shahu Toll Plaza, Ujlaiwadi, Kolhapur-416004.
Mobile	9370521999
Email	sudhirpk21@gmail.com

(c) **Disclosure**: The learned Sole Arbitrator is requested to forward, in hard copy or soft copy (or both), the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to Advocates for the parties as soon as possible. The Advocates for the Petitioner will arrange to file the original statement in the Registry. If the statement is forwarded in soft copy, a print out of the covering email is also to be filed in the registry.

(d) **Appearance before the Arbitrator**: Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

(e) **Contact/communication information of the parties**: Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. The information is to include functional email addresses and mobile numbers.

(f) **Section 16 application**: The Respondent is at liberty to raise all questions within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) **Interim Application/s**:

(i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(ii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.

(h) **Fees**: The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(i) **Sharing of costs and fees**: All arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) **Consent to an extension if thought necessary**. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) **Venue and seat of arbitration**: The venue and seat of the arbitration will be in Kolhapur.

14. The Petition is disposed of in these terms. No costs.

(ARIF S. DOCTOR, J.)