

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.1 OF 2023

Shahani Bhanudas Bhad] .. Petitioner

vs.

HPCK Bio-Fuels Ltd.] .. Respondent

Ms.Anjali Chandurkar a/w Durgaprasad Poojari and Sudyumna Nargolkar i/b PDS Legal for the Petitioner.

Mr.Pralhad Paranjape a/w Manish Kelkar, for the Respondent.

CORAM : BHARATI DANGRE, J

DATE : 31st January, 2024.

P.C.

1] The Petitioner Shahaji Bhad, Sole Proprietor of M/s. S.S. Engineers, MIDC, Bhosari, Pune, has filed the present Arbitration Petition, requesting to nominate and appoint a retired Judge of this Court or any other fit person under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act" for short) , in terms of Clause 14.1 of the General Terms and Conditions of the Tender read with Purchase Order, to arbitrate the disputes and differences, that had arisen with the Respondent, HPCL Bio-Fuels Ltd., a Company owned by the Government of India and *interalia* engaged in manufacturing of bio-fuels.

2] The Respondent was desirous of installing and expanding its integrated sugar plants situated at villages Lauriya and Sugauli in Bihar and for this purpose, invited bids. The Petitioner was declared as a successful bidder and 10 Purchase Orders (two of them being revised) were issued, providing the details of the description, quantity, units, rate per units total amount including taxes and duties and levies.

The Purchase Order interalia provided that the terms and conditions would be as per the attachments to the Tender and the specimen copy of the General Terms and Conditions attached to the Tender would be applicable to the Purchase Order.

It is the case of the Petitioner that, he carried out the work assigned under the Purchase Orders diligently and properly and a total consideration of INR Rs.38,18,71,026/- became due and payable.

During the period from 21.11.2012 to 25.03.2014, the Petitioner supplied various equipments under the Purchase Orders and raised invoices and the Respondent issued various Form (C) in respect of the goods supplied, under the Central Sales Tax Act. The Petitioner received Rs.19.02 Crores against the supplies made under the Purchase Orders, but since the balance amount remained unpaid, the Respondent unilaterally issued debit notes to the Petitioner for the alleged consumption of spares and consumables, which were accepted by him.

3] As per the Petitioner, the amount of INR Rs.18,12,21,452/- , remained payable to him and through various letters, the Respondent was called upon to clear the amount.

Instead of making the payments, the Respondent vide its letter dated 02.01.2014, 04.02.2014 and email dated 28.02.2014 alleged that the Petitioner is in breach of the contract and refused to pay the amount.

It is the case of the Petitioner that he performed his part of the contract diligently and the allegation that he was in breach of the contract was baseless. According to him, separate Purchase Orders had separate values assigned for supply of goods, civil work and services and each of the Purchase Order was for distinct contracts for supply of goods, civil work and services.

Since the amount claimed by the Petitioner remained unpaid, the dispute arose and therefore the Petitioner vide its letter dated 09.07.2016 invoked arbitration in the wake of the arbitration clause contained in general terms and conditions of the Tender, for referring the disputes to Arbitration. However, there was no response at the end of the Respondent, which constrained the Petitioner to file an Application under Section 11 of the Act, and according to him inadvertently, he relied upon the general terms and conditions in which parties had submitted to the exclusive jurisdiction of the Courts at

Patna and he was advised to withdraw the Arbitration Petition and approach the National Company Law Tribunal (NCLT).

The Petitioner sought withdrawal of the Arbitration Petition and by order dated 01.10.2018, the Petition was disposed off as withdrawn.

Pursuant thereto, he filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short “the Code”) before the NCLT, Kolkata for initiation of Corporate Insolvency Resolution Process (CIRP).

4] In an Appeal filed by Hindustan Corporation Limited and the Director of suspended Board of the Respondent, before the Appellate Tribunal, by order dated 10.01.2022, the order dated 12.02.2020 passed by the NCLT was set aside, by recording that communication exchanged between the parties read alongwith the arbitration invoked by the Operational Creditor was indicative that there is an “existence of a dispute” between the parties which is a genuine dispute and in the wake of the ratio of the Apex Court in case of *Mobilox Innovations (P) Ltd. vs. Kirusa Software (P) Ltd.*, (2018) 1 SCC 353, Insolvency Application of the Operational Creditor under IBC cannot be dismissed.

The Adjudicating Authority has directed to close the proceedings and the Corporate Debtor was released from all rigors of law and was allowed to function independently through its Board of Directors.

5] The Petitioner assailed the order of NCLAT, New Delhi before the Apex Court and by order dated 15.07.2022, Appeal is dismissed, by recording that there are noticeable differences in the IBC for the procedure or initiation of CIRP by a Financial Creditor and that by an Operational Creditor or on reading of Sections 8 and 9 of the IBC and it is patently clear that Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and the default in payment thereof. It was held that if the claim of an Operational Creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not contenance dishonesty or deliberate failure to repay the dues of an Operational Creditor, but if the debt is disputed the application of Operational Creditor for initiation of CIRP must be dismissed. While dismissing the Appeal, the Apex Court, however, recorded as under :

“35. Needless to mention that the appellant may avail such other remedies as may be available in accordance with law including arbitration to realise its dues, if any.”

It is in the wake of this liberty being conferred, the Petitioner filed the Arbitration Petition on 09.12.2022, seeking appointment of an Arbitrator in the wake of Clause 14.1 of the General Terms and Conditions of the Tender read with the Purchase Orders.

6] Mr.Pralhad Paranjape, the learned counsel representing the Respondent would oppose the Petition on two grounds, the first being that earlier Section 11 Petition filed by the Petitioner has been withdrawn and hence this Petition is not maintainable and the second ground, the delay in seeking invocation of arbitration by the Petitioner.

7] Ms. Anjali Chandurkar, by inviting my attention to the sequence of events and particularly the order passed by the Apex Court while dismissing the Appeal filed by the Petitioner on 15.07.2022, would assert that the Apex Court had clarified that dismissal of the Appeal shall not preclude the Appellant from availing such remedies that may be available in accordance with law and which shall include the remedy of arbitration, to realize its dues.

According to her, since the amount against the distinct Purchase Orders is due and payable, the dispute exist between the parties and since the Clause 14 of the General Terms and Conditions of the Contract contemplate that all disputes and differences of whatsoever nature, whether existing or arising in future between the parties, touching or concerning the Agreement, meaning, operation or effect thereof or to the rights and liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before after determination, foreclosure, termination or breach

of the Agreement, its adjudication shall be by a Sole Arbitrator, to be appointed in the manner prescribed.

Undisputedly, Clause 14.2 which permit the Appointing Authority to act as an Arbitrator or nominate some officer/retired officer of HBL/ HPCL, with specification that the Contractor shall not be entitled to raise any objection to the appointment of such person as a Sole Arbitrator on the ground that such person is/was an Officer and/or shareholder of the owner, another Government Company or Central Government may not continue in its form as it would hit by the amended provision of the Arbitration and Conciliation Act reflecting upon neutrality and impartiality of the Arbitrator, however, since this is not the point on which the parties are contesting, I deem it appropriate to leave the point here and here.

8] As regards the first submission of Mr. Paranjape, that once the Section 11 Petition is withdrawn no second Petition shall lie, I do not find any provision in the Act imposing such a restraint.

It is not the case, where the appointment of Arbitrator was prayed before the Court and the Application was turned down on merits, holding that no arbitrator deserve to be appointed in absence on an Arbitration Agreement. The Petitioner chose to withdraw the Petition and as it is categorically stated in the Petition that he was under advise

to do so and pursuant thereto he approached NCLT under the IBC but did not succeed in the endeavour as the NCLT did not find such proceedings to be maintainable and even the Apex Court upheld the said order by recording that an Operational Creditor can only trigger the CIRP process when there is an undisputed debt and default in payment thereof, but if the debt is disputed, then the Application of the Operational Creditor for initiation of CIRP must be declined.

Be that as it may be, while dismissing the Appeal, being conscious of the position that the dues of the Petitioner/Appellant are yet to be realized, liberty was conferred to avail such remedies in accordance with law which shall include the remedy of arbitration.

With this clear indication, by the Highest Court of the country, I am not persuaded to accept the submission of Mr. Paranjape that an Application under Section 11 of the Act seeking appointment of an Arbitrator is not maintainable.

9] The Petitioner by his invocation notice had triggered the arbitration and accordingly approached the Court seeking appointment of an Arbitrator as the Respondent failed to agree to the appointment of Arbitrator within the period stipulated under Section 11, but instead of prosecuting the said remedy, he chose to adopt the path of initiating the proceedings under the IBC, but unfortunately, remained unsuccessful.

It is, thus, imperatively clear that the Petitioner was prosecuting the IBC proceedings before the NCLT or NCLAT, which was a completely wrong forum for him for redressal of his grievance, he was ultimately turned away by the Apex Court on 15.07.2022 by declaring that since the debt which he claims is disputed, he cannot initiate the CIRP.

10] Since he was availing a wrong remedy, he was turned down on 15.07.2022, by availing the liberty conferred, he has filed the Arbitration Petition.

Worth it to note that initially when he approached the NCLT, Kolkata, under Section 8 and 9 of the IBC for institution of CIRP process against the Respondent, his claim was entertained and it is only the Respondents, who approached the Appellate Tribunal, the order passed by the NCLT in favour of the Applicant came to be reversed. Therefore, it cannot be said that the Petitioner was sitting idle and not taking any steps for recovery of his dues, but it is a case where he was availing remedy for recovery of his dues before a wrong forum and he is entitled to take benefit of Section 14 of the Limitation Act, 1963.

In fact, the NCLT by its order dated 28.02.2020, admitted the Application under Section 8 and 9 of the IBC and even declared the

said moratorium public announcement and in accordance with Section 13 and 14 of the IBC and Moratorium under Section 14 of the IBC was also imposed.

11] Another point raised by Mr. Paranjape in respect of time barred claim being prosecuted by the Petitioner must also meet the same fate.

The learned counsel would place reliance upon the decision in case of *Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited (2021) 5 SCC 738*, where it is held that since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, recourse must be held to the Limitation Act as per Section 43 of the 1996 Act and since none of the Articles in the schedule to Limitation Act provide time for filing such Application, it would be governed by residual provision in Article 137.

A reading of the said decision would also disclose that, it has been held that limitation is normally mixed question of fact and law and would lie within the domain of Arbitral Tribunal, but claim is hopelessly barred or a deadwood, in that case, the Court exercising the power under Section 11 may not deem it expedient to refer an exfacie time barred and dead claim to the Arbitrator.

“Nortel Networks” was an extreme case where the claim raised was found to be hopelessly timebarred as in a tender process Respondent Company “Nortel” was worded as accorded with a Purchase Order and on completion of the work thereunder, BSNL withheld an amount towards liquidated damages and other levies. “Nortel” thereafter raised a claim for payment of the amount on 13.05.2014 which was rejected by BSNL on 04.08.2014. After a period of about 5 and half years, ‘Nortel’ invoked arbitration on 29.04.2020 and requested for appointment of an independent Arbitrator by contending that the dispute of withholding amounts would fall within the ambit of arbitrary disputes under the Agreement. It is in this context the question arose whether the Application under Section 11 of the Act, is liable to be rejected for it being time-barred and whether the Court may refuse to make the reference under Section 11 where the claims are exfacie time-barred.

12] In B and T AG vs. Ministry of Defence, 2023 SCC OnLine SC 657, the very same principle of a deadwood not being referred to Arbitrator has been reiterated and it is held that by exercising the jurisdiction under Section 11, as a judicial forum, the Court may exercise the prima facie test to screen and discourage exfacie meritless, frivolous and dishonest litigation. A limited jurisdiction of the

Court would ensure expeditious and efficient disposal at reference stage and at this stage the Court shall interfere “only” when it is “manifest” that the claims are exfacie time-barred and dead or there is no subsisting dispute.

13] I do not agree with the learned counsel that the claim of Petitioner is exfacie time-barred as a deadwood, as all the while the claim was kept alive, though it was being agitated before a wrong forum, but ultimately when the Petition was turned down by the Apex Court, he was granted liberty to stake his claim by availing such remedies as may be available to him, in accordance with law, including the remedy of Arbitration.

Since the remedy of Arbitration cannot be denied to him, merely on the ground that he had at earlier point of time, before knocking the doors of NCLT withdrew the Petition filed for appointment of Arbitrator, on validly invoking arbitration.

Since I do not find that the claim is exfacie time-barred for it was being prosecuted though before a wrong forum, the objection cannot be sustained.

14] In the wake of existence of an arbitration agreement between the parties, the dispute must be referred to an Arbitrator, though I leave it

open to the Respondent to agitate the point of limitation before the Arbitrator.

15] In the wake of the above, Mr. Justice Dilip Bhosale (retired Chief Justice of Allahabad High Court) is appointed as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent in the two applications.

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s.11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record.

The Arbitrator, shall after entering the reference fix the date of first hearing and issue further directions as are necessary.

The Sole Arbitrator shall be entitled for the fees as per Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

All rights and contentions of the parties are kept open.

[BHARATI DANGRE, J]