



2024 : DHC : 3559



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of decision: 30th April, 2024*

+ **ARB.P. 182/2024**
SWASTIK PIPE LTD Petitioner
Through: Mr. Sanjay Jain & Ms. Ankita Kedia,
Advocates.
versus
STEELMAN INDUSTRIES THROUGH ITS PARTNER AND
OTHERS Respondents
Through: None.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT (oral)

1. The present Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the "Act, 1996"*) has been filed on behalf of the petitioner seeking appointment of an Arbitrator for adjudication of the disputes having arisen between the parties.
2. It is submitted in the petition that the respondent No.1 is a Partnership Firm engaged in the business of Service Provider of Solar Module, Structure etc. and have been purchasing Solar Module Structure etc. from the petitioner since 2019 on a running account basis. The products were delivered by the petitioner to the respondents on the basis of Purchase Orders-cum-Tax Invoices, for which ad hoc payments were made by the respondents.
3. It is submitted that a total balance of Rs. 54,53,734/-, including interest @18% per annum till 08.01.2020 amounting to Rs. 9,71,940/- is due and recoverable from the respondents. However, despite numerous



requests for payment by the petitioner, only assurances were given by the respondents and no payments were actually made by the respondents.

4. The petitioner, thus issued the Legal Notice dated 11.01.2020 seeking appointment of Arbitrator as per Arbitration Clause No. 2 of the Terms and Conditions of the Purchase Orders. The respondents have failed to give any reply despite the service of the Notice upon the respondents on 16.01.2020,.

5. Therefore, the present petition has been filed under Section 11(6) of the Act, 1996 on behalf of the petitioner seeking appointment of an Arbitrator.

6. Two objections have been taken on behalf of the respondents; *the first* being that there is *an inordinate delay* in filing the present petition and it has been filed beyond the period of three years from the date of Notice of Invocation dated 11.01.2020 and is, therefore, *barred by limitation*.

7. The *second objection* taken on behalf of the respondents is that the respondent No. 2/Gopal Luharka has resigned from the Partnership and thus, cannot be a party to the proceedings. Further, the Notice of Invocation dated 11.01.2020 has not been served upon the respondent No. 3/Gitadevi Luharka and the respondent No. 4/Rashmi Luharka, who are the partners of respondent No. 1/M/s Steelman Industries. *Therefore, no proper service of Notice of Invocation has been effected on the respondents* and thus, the present petition is not maintainable.

8. **Submissions heard.**

9. **The first objection taken is** that the claims of the petitioner have become *time barred* as the present petition has been filed beyond the period of three years from the date of Notice of Invocation and is thus not maintainable.



10. The distinction between the *claims being barred* by time and the application under Section 11 of the Act for referral of disputes to Arbitration itself being barred by time, was explained in the Case of J.C. Budhraj vs. Chairman, Orissa Mining Corporation Ltd. and Another, (2008) 2 SCC 444, wherein it was observed that while the limitation for the claim itself is to be calculated in a manner similar to limitation for filing of a suit; in the case of Arbitration, limitation for the filing of the Application under Section 11 of the Act, 1996 is to be calculated on the basis of the day on which the Arbitration is deemed to have commenced i.e. from the date of Notice of Invocation, as provided under Section 21 of the Act, 1996.

11. In the case of M/s B and Tag (supra), it was observed that there is no specific Article in the Limitation Act, 1963, applicable to the application under Section 11 and thus, the residual Article 137 of the Schedule to the Limitation Act, 1963 would become applicable and time would begin to run “*when the right to apply accrues*” as held in the case of Merla Ramanna vs. Nallaparaju and Others (1955) 2 SCR 938. The period of limitation to file an application under Section 11 is thus, three years from the date of refusal to appoint the Arbitrator or on expiry of 30 days from the Notice of Invocation, whichever is earlier.

12. In the present case, the Notice of Invocation was served on 11.01.2020, thus, the limitation begins from 30 days after its service i.e. from 10.02.2020. One ARB.P. 184/2020 was filed on 04.03.2020 which was well within the period of limitation. However, the said petition was withdrawn on 01.09.2022 by the petitioner with liberty to file the petition afresh on the same cause of action.

13. Accordingly, the present petition has been filed on 03.02.2024.



Significantly, the period from 04.03.2020 to 01.09.2022 for which the aforesaid earlier Arbitration Petition was pending, is liable to be excluded in terms of the Section 14 of the Limitation Act, 1963. If the said period is excluded, the present petition is well within the time of three years from the date of Notice of Invocation.

14. It remains to be determined as to *when the cause of action is said to have arisen or accrued in favour of the claimant*. The Apex Court in the case of Panchu Gopal Bose vs. Board of Trustees for Port of Calcutta, (1993) 4 SCC 338, wherein it was observed that, the period of limitation for the commencement of an Arbitration runs from the date on which the cause of action would have accrued. Thus, the cause of action becomes important for the purpose of calculating the limitation period for bringing an action. It is imperative that a party realizes when a cause of action arises.

15. The Calcutta High Court in Dwijendra Narain Roy vs. Joges Chandra De and Others, AIR 1924 Cal 600, placed reliance on Coburn vs. Colledge, (1897) 1 Q.B. 702 to explain that the *true test of determine when a cause of action* can be said to have accrued is when there is in existence a person, who can sue and another, who can be sued and when all the facts have happened, which are material to be proved to entitle the plaintiff to succeed. It was observed that the cause of action arises only when a person has a right to apply to the proper Tribunal.

16. In the present case, the cause of action accrued on the non-payment of the tax Invoices. The last Invoice was raised on 07.10.2019 and hence, the cause of action accrued at the said date. The period of limitation for recovery of money in a Civil suit being three years it has to be seen whether the proceedings have been instituted within the said time frame.



17. Pertinently, Section 21 of the Act, 1996 provides that the arbitral proceedings in respect of a particular dispute, commences on the date on which a request for that dispute to be referred to arbitration, is received by the respondent. The Notice of Invocation in the present case was issued by the petitioner on 11.01.2020 i.e. within four months of the last Invoice raised. This was well within the time from the date of accrual of cause of action on non-payment of dues. Therefore, *prima facie*, it cannot be said that the claims of the petitioner have become time barred.

18. In any case, it is only when the court finds that on prima facie basis the claims are ex facie not arbitrable that the petition for referring the dispute to arbitration may be rejected. It has been held in the case of Vidya Drolia and Ors vs. Durga Trading Corporation, (2019) SCC Online SC 358 that when there is a doubt about the authenticity of the claim, the thumb rule is that “*when in doubt, do refer*”. The question of limitation being a mixed question of fact and law, it should be best left to the Arbitrator to adjudicate on the aspect of limitation.

19. Therefore, the parties are at liberty to agitate the point of limitation before the Arbitrator.

20. **The second objection taken on behalf of the respondents** is that the Notice of Invocation has not been served on the respondent No. 3/Gitadevi Luharka and the respondent No. 4/Rashmi Luharka who are the partners of the respondent No.1/M/s Steelman Industries.

21. A perusal of the Notice of Invocation shows that the same has been served on the Partnership Firm/respondent No. 1, M/s Steelman Industries through its partners. The Partnership Firm is a compendium of its partners and service in the name of Partnership Firm is deemed to be a service on all



the partners. Therefore, it cannot be said that the Notice of Invocation has not been served on the respondents.

22. Insofar as the respondent No. 2/Gopal Luharuka who is claimed to have resigned from the Partnership Firm is concerned, it is again a question of fact whether, respondent No.2 has ceased to be a Partner, for which the parties are at liberty to agitate before the Arbitrator.

23. In view of the submissions made and the petitioner has raised the arbitrable disputes and there is a valid Arbitration Clause between the parties, the present petition is allowed. Mr. Yashmeet Kaur, Advocate, Mobile No. 9810788943, is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

24. The parties are at liberty to raise their respective objections before the Arbitrator.

25. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule of the Act, 1996 or as consented by the parties.

26. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of the Act, 1996 and not being ineligible under Section 12(5) of the Act, 1996.

27. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry of this Court.

28. Accordingly, the present petition is disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

APRIL 30, 2024
S.Sharma