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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 11th March 2024

+ ARB.P. 631/2023

M/S AMBA ENTERPRISES PRIVATE LIMITED Petitioner

Through: Mr. Arun K. Srivastva, Mr. A.K. Singh and Mr. Ashish Sindhu, Advocates.

versus

CENTRAL WAREHOUSING CORPORATION Respondent

Through: Mr. Virendra Misra and Mr. Suyash Misra, Advocates

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks reference of the disputes that are stated to have arisen between the parties from a contract for 'Appointment of Service Provider for Handling Rail Borne Cargo at Railside Warehouse Complex, Alamnagar, Lucknow' arising from Tender dated 26.09.2018 ('Tender') issued by the respondent.

2. Notice on this petition was issued on 05.07.2023. Objections have been filed by the respondent by way of reply dated 21.09.2023.
3. Mr. Arun K. Srivastva, learned counsel appearing for petitioner submits that no rejoinder is required to be filed in the matter.



PETITIONER'S SUBMISSIONS

4. Mr. Srivastava has drawn attention to clause XIX of the Terms & Conditions governing the Tender, which comprises the arbitration agreement between the parties; and contemplates reference of the disputes between them to arbitration of a Sole Arbitrator, to be appointed by the Managing Director of the Central Railside Warehouse Company Ltd. (which has subsequently been merged with the Central Warehousing Corporation). The provision further stipulates that the 'venue' of arbitration may be at such place as may be fixed by the learned Arbitrator in his sole discretion; while also specifying that all disputes arising from the contract/tender will be subject to the jurisdiction of the Delhi High Court.
5. Mr. Srivastava submits, that the principal objection raised by the respondent that is relevant for purposes of the present petition, is that the petitioner's *claims* as well the *petition* are time-barred. Counsel points-out that a perusal of the reply would show that all other objections taken by the respondent relate to the merits of the matter; and are therefore, not relevant for purposes of deciding the present petition under section 11 of the A&C Act.
6. Insofar as the objection to the petition being time-barred is concerned, Mr. Srivastva submits, that in the *bona-fide* belief that the petitioner was an 'operational creditor', the petitioner, acting through its Managing Director, had approached the National Company Law Tribunal, New Delhi ('NCLT') *vide* application bearing No. (IB)2222(ND)/2019 on 04.09.2019; and had *bona-fide* pursued that



remedy up until the said application was dismissed by the NCLT *vide* order dated 04.03.2022, holding, that since there was a pre-existing dispute between the parties even prior to issuance of a demand notice by the petitioner, the application was not maintainable before the NCLT.

7. Mr. Srivastva fairly concedes, that though an appeal was filed against order dated 04.03.2022 passed by the NCLT, that appeal was dismissed as being time-barred.
8. Be that as it may, Mr. Srivastva explains, that as also recorded in order dated 04.03.2022 passed by the NCLT, and in invocation notice dated 19.02.2023 issued by the petitioner, their claims against the respondent arise from certain *invoices and bills for the period between January 2019 and April 2019*, in respect of which the petitioner had *bona-fide* filed the application before the NCLT on 04.09.2019.
9. Counsel further explains, that upon dismissal of the said application by the NCLT on 04.03.2022, the petitioner invoked arbitration *vide* Notice dated 19.02.2023; and it is therefore clear that the proceedings before the NCLT, as well as the subsequent invocation of arbitration, have all happened within the 03-year limitation period available in law for making a claim against overdue invoices, since the petitioner is entitled to exclusion of time, during which the petitioner was *bona-fide* pursuing another legal remedy before the NCLT, which remedy has subsequently failed by reason of defect of jurisdiction, under section 14 of the Limitation Act, 1963 ('Limitation Act').



RESPONDENT'S SUBMISSIONS

10. On the other hand, Mr. Suyash Misra, learned counsel appearing for the respondent submits, that the present *petition* as well as the *claims* sought to be made *are clearly time-barred* under the terms and conditions of the contract.
11. Mr. Misra points-out that the parties to the proceedings before the NCLT were not the same as the parties in the present petition; and therefore the petitioner would not be entitled to avail the benefit of section 14 of the Limitation Act in the present case.
12. Mr. Misra also draws attention *inter-alia* to the proviso to clause XIX (*viz.*, the arbitration clause), to submit that that provision specifically provides that any demand for arbitration in respect of any claim (by the service provider, *i.e.* the petitioner in this case) “.....*shall be in writing and made within one year of the date of termination or completion (expiry of the period) of the contract.....*”. (emphasis supplied). Mr. Misra submits, that in the present case the respondent terminated the petitioner's contract *vide* notice dated 16.08.2019; and therefore invocation notice dated 19.02.2023, through which the petitioner raised its claims for the first time, was issued *beyond the 01-year limitation period* stipulated for the purpose in the Terms & Conditions of the Tender.

DISCUSSION & CONCLUSIONS

13. Upon a conspectus of the averments contained in the petition and in the reply; and having heard learned counsel for the parties, the aspects of the matter that are *admitted* between the parties, are the following :



- 13.1. The claims in the present case relate to invoices stated to have been raised by the petitioner upon the respondent for services rendered for the period between *January 2019 and April 2019*.
- 13.2. In respect of such claims, the petitioner had filed a application before the NCLT on 04.09.2019, which came to be dismissed *vide* order dated 04.03.2022, with the Tribunal holding that since there were pre-existing disputes between the parties, the application was “.....*not maintainable*.....”.
- 13.3. Thereafter, the petitioner is stated to have preferred an appeal before the National Company Law Appellate Tribunal (‘NCLAT’); which appeal has been dismissed *vide* order dated 12.10.2022 as being time-barred. Be that as it may, in view of the order that the court proposes to pass in the present proceedings, it is not considered necessary to delve further into the proceedings taken by the petitioner under the Insolvency & Bankruptcy Code, 2016.
- 13.4. Subsequently, the petitioner invoked arbitration *vide* Notice dated 19.02.2023, pursuant to which the present petition has been filed, since the respondent did not concur with the appointment of a Sole Arbitrator.
14. In the above admitted factual backdrop, the respondent’s objections are two-fold :
- 14.1. First, that the present *petition* is time-barred; and
- 14.2. Second, that the *claims* sought to be raised are time-barred.



15. On the other hand, the petitioner claims exclusion of time for computing limitation in terms of section 14 of the Limitation Act, 1963 both, insofar as the petition, as well as the claims are concerned.
16. The legal position is clear. The question whether the present *petition* is time-barred is required to be decided by this court. The question whether the *claims* are within time is to be considered by this court only to examine if the claims are *ex-facie* time-barred and ‘deadwood’; but, if the question of whether the claims are time-barred requires deeper scrutiny, on points of fact and/or law, this court must refer the matter to arbitration. These aspects are discussed in detail hereinafter.

Objection as to the *petition* being time-barred

17. Now, the petitioner admittedly filed an application before the NCLT on 04.09.2019 raising its claims against the respondent for the period between January 2019 and April 2019. The petitioner therefore exercised its legal remedy (before the NCLT) within the 03-year limitation period provided for invoking such remedy under the Limitation Act.
18. The NCLT dismissed the application *vide* order dated 04.03.2022, holding that the application was not maintainable, that is to say by reason of a defect of jurisdiction. The NCLT did not decide the claims on merits. The petitioner then filed an appeal before the NCLAT, which appeal was dismissed *vide* order dated 12.10.2022, as being time-barred.



19. Thereafter, the petitioner invoked arbitration *vide* notice dated 19.02.2023, which was within 03 years of the dismissal of its application by the NCLT *vide* order dated 04.03.2022.
20. Subsequently, the petitioner filed the present petition on 28.05.2023, which was again within 03 years of the issuance of invocation notice dated 19.02.2023.
21. In so far as the filing of the present petition is concerned, the law on the point is clear. A petition under section 11 of the A&C Act must be filed within 03 years after expiration of 30 days from receipt (by the addressee) of a notice invoking arbitration under section 21 of the A&C Act¹. In the present case, the invocation notice issued by the petitioner is dated 19.02.2023 and the present petition has been filed on 28.05.2023. These two dates are not in dispute. The present petition is accordingly held to be within time.

Objection as to the *claims* being time-barred

22. The next question is, whether invocation notice 19.02.2023 was issued within the 03-year limitation period reckoned from the time when the cause of action arose for making the claims, the claims having arisen from invoices for the period from January 2019 to April 2019. It would appear not, *except* that the petitioner claims exclusion of time spent in pursuing the remedy before the NCLT. To succeed in claiming exclusion of time, the petitioner would have to establish the following :

¹ cf. *Bharat Sanchar Nigam Limited & Anr. vs. Nortel Networks India Private Limited*, (2021) 5 SCC 738, para 15



- 22.1. that the petitioner was prosecuting, with due diligence, and in good faith;
- 22.2. another civil proceeding, relating to the same matter, against the same party;
- 22.3. before a forum, which was unable to entertain the claims by reason of defect of jurisdiction or other like cause.
23. The respondent contends that the parties before the NCLT were not the same as the parties in the present proceedings. As regards that objection, it is noticed that the application before the NCLT was filed with the cause-title : “*Ajay Kumar Singh, s/o Shri Daroga Singh, Managing Director, Amba Enterprises Pvt.Ltd. vs. Sh. Arun Kumar Shrivastava, MD Central Warehousing Corporation & Ors*”. It is therefore seen that though the name of the Managing Director of the petitioner company *appeared first* in the description of the applicant before the NCLT, it is clear that it was really the company that was the applicant in those proceedings. Similarly, though the (first) respondent in the NCLT proceedings was described with the name of the Managing Director *appearing first*, it is clear that the respondent before the NCLT was the same party that is respondent in the present proceedings. In the circumstances, in the opinion of this court, merely the manner in which parties were described in the memorandum of parties before the NCLT is not dispositive of the matter; and it is evident that the petitioner and the first respondent before the NCLT, were exactly the same parties, as the petitioner and the respondent in the present proceedings.



24. It also appears beyond cavil that the NCLT dismissed that application, *not on merits* but holding that the application was not maintainable. This would amount to the NCLT having been unable to entertain the application from a defect of jurisdiction or other cause of like nature, within the meaning of section 14 of the Limitation Act.
25. Insofar as the respondent's contention that the *claims* sought to be raised by the petitioner are *ex-facie* time-barred, this argument is premised on the basis that the period of limitation available to the petitioner for raising its claims was 01 year in view of the proviso to clause XIX of the Terms & Conditions of the Tender *instead of* the 03-year limitation period provided under the Limitation Act. In the opinion of this court, this objection must be rejected since it is in the teeth of section 28 of the Indian Contract Act 1872, which reads as follows :

28. Agreements in restraint of legal proceedings void.—Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

is void to that extent.

Exception 1.

* * * * *

Exception 2.

* * * * *



Exception 3. * * * * *

Explanation.—(i) * * * * *

(ii) * * * * *

26. A quick reference may be made in this regard to the decision of the Supreme Court in ***Grasim Industries Ltd. vs. State of Kerala***², which holds that an arbitration clause which restricts the period for raising an arbitral dispute will be void; and the limitation period will continue to be governed by Article 137 of the Limitation Act. The relevant portion of the judgment reads as under :

“9. Having perused Clause 9 of the supplementary agreement dated 27-10-1988, we are of the view that the interpretation placed by the High Court on Clause 16, was wholly misconceived. The aforesaid clause, did not postulate the period within which a claim could have been raised by the parties to the contractual agreements. Even otherwise, we are of the view that in terms of Section 28 of the Contract Act, 1872, such a stipulation in a contractual obligation would not be valid and binding.

* * * * *

“11. Section 28(b) unequivocally provides that an agreement which extinguishes the right of a party on the expiry of a specified period, would be void. Therefore, even if a restricted period for raising an arbitral dispute had actually been provided for (as was determined in the impugned order), the same would have to be treated as void.

“12. In view of the legal position expressed hereinabove, the limitation with reference to the claim raised by the appellant, would have to be determined only under Article 137 of the Limitation Act.”

(emphasis supplied)

² (2018) 14 SCC 265



27. The question of whether the petitioner prosecuted the proceedings before the NCLT with due diligence and in good faith, may, in the opinion of this court require a deeper consideration, which ought to be left for the learned Arbitrator to decide.
28. It may also be observed that since the period of limitation in respect of claims arising from invoices raised between January 2019 and April 2019 would straddle the period from 15.03.2020 till 28.02.2022, the petitioner *may* be entitled to exclude that period for calculating limitation in view of order dated 10.01.2022 passed by the Supreme Court in *In Re: Cognizance for Extension of Limitation*³, wherein the Supreme Court has *inter-alia* held that the period between 15.03.2020 and 28.02.2022 shall stand excluded for purpose of computing limitation prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.⁴ The period between 15.03.2020 and 28.02.2022 is therefore to be treated as a ‘null’ period for purposes of computing limitation.
29. Furthermore, the position contemplated in clause XIX, *viz.* that the arbitrator was to be appointed by the Managing Director of the respondent corporation, is also untenable in law, in light of the verdict of the Supreme Court in *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd*⁵.
30. Moreover, this court is also guided by the decision of the Supreme Court *inter-alia* in *Vidya Drolia & Ors. vs. Durga Trading*

³ (2022) 3 SCC 117

⁴ cf. *In Re: Cognizance for Extension of Limitation* (supra), para 5.1

⁵ (2020) 20 SCC 760



Corporation⁶ and *Bharat Sanchar Nigam Limited* (supra), in which the Supreme Court has held as follows :

Vidya Drolia & Ors. vs. Durga Trading Corporation :

“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits.”

(emphasis supplied)

Bharat Sanchar Nigam Limited & Anr. vs. Nortel Networks India Private Limited:

“34. In view of the legislative mandate contained in the amended Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal is empowered, and has the competence to rule on its own jurisdiction, including determination of all jurisdictional issues. This was intended to minimise judicial intervention at the pre-reference stage, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by the parties.”

(emphasis supplied)

⁶ (2021) 2 SCC 1



31. The principle to be followed by a referral court is therefore clear : *when in doubt, do refer*⁷.
32. Upon a conspectus of the averments contained in the petition, the stand taken by the respondent, and the submissions made, this court is therefore, satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties, as set-out *inter-alia* in invocation notice dated 19.02.2023, do not appear *ex-facie* to be non-arbitrable.
33. In view of the above, the present petition is allowed; and as agreed-to by learned counsel for the parties, **Mr. Ashok Kumar Tripathi, Retired District Judge (Cellphone No.: +91 7042784387)** is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties; with arbitration proceedings to be conducted under the aegis of the Delhi International Arbitration Centre ('DIAC'), in accordance with its applicable rules.
34. The learned Sole Arbitrator would furnish to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
35. The learned Arbitrator shall then proceed with the arbitral proceedings in accordance with the rules and regulations of DIAC and subject to arbitrator's fee and arbitration costs, as may be applicable.

⁷ *Vidya Drolia* (supra) at para 238



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36. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on merits, in accordance with law, including whether the petitioner is entitled to the benefit of section 14 of the Limitation Act in relation to its *claims*. It is made clear that the question whether the present *petition* was within time has been decided by this court and the issue is therefore closed. The view expressed by this court as to whether the petitioner's claims are within time, is only a *prima-facie* view and is not a conclusive opinion.
37. A copy of this order be communicated *forthwith* to the Co-ordinator, DIAC, for information and compliance.
38. A copy of this order be communicated by the Registry *via* e-mail to the learned Sole Arbitrator, as also to learned counsel for the parties.
39. The petition stands disposed-of in the above terms.
40. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

MARCH 11, 2024

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