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

+ **ARB.P. 645/2023**

GAIL (INDIA) LTD

..... Petitioner

Through: Mr. Deepayan Mandal, Adv.

versus

TRACK CARGO PVT LTD

..... Respondent

Through: Mr. Prakash Kumar, Mr. Abhay, Ms.
Mehak Ahuja, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

05.01.2024

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1. This is a petition seeking appointment of an Arbitrator to adjudicate the dispute between the parties.
2. The petitioner invited tenders for hiring of services for custom clearance of import and export cargo and inland transportation.
3. The terms of engagement included Clause 107 of the General Conditions of Contract (GCC) which contained an arbitration clause which reads as under:

“107 Arbitration

107.1 Unless otherwise specified, the matters where decision of the Engineer-in-Charge is deemed to be final and binding as provided in the Agreement and the issues/disputes which cannot be mutually resolved within a reasonable time, all disputes shall be referred to arbitration by Sole Arbitrator.



The Employer [GAIL (India) Ltd.] shall suggest a panel of three independent and distinguished persons to the bidder/contractor/supplier/buyer (as the case may be) to select any one among them to act as the Sole Arbitrator.

In the event of failure of the other parties to select the Sole Arbitrator within 30 days from the receipt of the communication suggesting the panel of arbitrators, the right of selection of the sole arbitrator by the other party shall stand forfeited and the EMPLOYER (GAIL) shall have discretion to proceed with the appointment of the Sole Arbitrator. The decision of Employer on the appointment of the sole arbitrator shall be final and binding on the parties.

The award of sole arbitrator shall be final and binding on the parties and unless directed/awarded otherwise by the sole arbitrator, the cost of arbitration proceedings shall be shared equally by the parties. The Arbitration proceedings shall be in English language and venue shall be New Delhi, India.

Subject to the above, the provisions of (Indian) Arbitration & Conciliation Act, 1996 and the Rules framed there under shall be applicable. All matter relating to this contract are subject to the exclusive jurisdiction of the court situated in the state of Delhi.

Bidders/suppliers/contractors may please note that the Arbitration & Conciliation Act 1996 was enacted by the Indian Parliament and is based on United Nations Commission on International Trade Law (UNCITRAL model law), which were prepared after extensive



consultation with Arbitral Institutions and centers of International Commercial Arbitration. The United Nations General Assembly vide resolution 31/98 adopted the UNCITRAL Arbitration rules on 15 December 1976.

107.2 FOR THE SETTLEMENT OF DISPUTES BETWEEN GOVERNMENT DEPARTMENT AND ANOTHER AND ONE GOVERNMENT DEPARTMENT AND PUBLIC ENTERPRISE AND ONE PUBLIC ENTERPRISE AND ANOTHER THE ARBITRATION SHALL BE AS FOLLOWS:

“In the event of any dispute or difference between the parties hereto, such dispute or difference shall be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government. If such resolution is not possible, then, the unresolved dispute or difference shall be referred to arbitration of an arbitrator to be nominated by Secretary, Department of Legal Affairs ("Law Secretary") in terms of the Office Memorandum No.55/3/1/75-CF, dated the 19th December 1975 issued by the Cabinet Secretariat (Department of Cabinet Affairs), as modified from time to time. The Arbitration Act 1940 (10 of 1940) shall not be applicable to the arbitration under this clause. The award of the Arbitrator shall be binding upon parties to the dispute, Provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to Law Secretary whose decision shall bind the parties finally and conclusively.”

4. The respondent was the successful bidder and was awarded the work



by Letter Of Award ('LOA') dated 09.08.2016. Since the respondent's work was not satisfactory, the petitioner *vide* notice dated 18.01.2018 terminated the LOA on the ground of non-performance.

5. Thereafter, the petitioner invoked arbitration *vide* legal notice dated 21.04.2022 and filed the petition in May 2023.

6. Mr. Prakash, learned counsel for the respondent states that the petition is barred by limitation, delay and laches and hence cannot be entertained by this Court since the cause of action in favour of the petitioner arose on 18.01.2018 and the notice invoking arbitration on 21.04.2022, and is therefore barred by limitation.

7. The learned counsel for the respondent further submits that thereafter this petition seeking appointment of the Arbitrator has been filed on 03.07.2023 and is again barred by limitation.

8. Both parties rely on the judgment of the Supreme Court in "***Bharat Sanchar Nigam Ltd. & Ors. vs. Nortel Networks India Pvt. Ltd.***" (2021) 5 SCC 738.

9. I have heard learned counsel for the parties.

10. The operative portion of the judgment of ***Bharat Sanchar Nigam Ltd. & Ors. (Supra)*** are reproduced as under:

"40. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the Arbitral Tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.



....

48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are *ex facie* time barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The notice of arbitration was invoked on 29.04.2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood / no subsisting dispute since the cause of action arose on 04.08.2014, when the claims made by Nortel were rejected by BSNL. The Respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the Final Bill by making deductions.

50. In the notice invoking arbitration dated 29.04.2020, it has been averred that:

“Various communications have been exchanged between the Petitioner and the Respondents ever since



and a dispute has arisen between the Petitioner and the Respondents, regarding non payment of the amounts due under the Tender Document.”

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that : “where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There must be a clear notice invoking arbitration setting out the “particular dispute” (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

52. In the present case, the notice invoking arbitration was issued 5 ½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration is ex facie time barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case.

Conclusion

53. Accordingly, we hold that :

53.1. The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation



will begin to run from the date when there is failure to appoint the arbitrator. It has been suggested that the Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings.

53.2 In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.”

11. A perusal of the same shows that the notice invoking arbitration is governed under Article 137 of the Limitation Act, 1963. The period for invoking the arbitration has to be 3 years from the date when the cause of action arose.

12. In the present case, the cause of action for invoking the arbitration arose on 18.01.2018 when the LOA awarded to the respondent was terminated. The petitioner should have invoked arbitration on or before 17.01.2021. However, the same was not done.

13. The judgment of the Hon’ble Supreme Court in ***Cognizance for Extension of Limitation, In re***, (2022) 3 SCC 117 comes to the rescue of the petitioner and more particularly para 5 which reads as under:

“5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:

5.1. The order dated 23.03.2020 is restored and in continuation of the



subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings.

5.2. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

5.3. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

5.4. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

14. In the present case, the notice invoking arbitration has been issued on 21.04.2022 i.e. within 90 days from 01.03.2022 and hence is within the period of limitation.



15. The second aspect which needs to be adverted to is whether the present petition u/s 11 of the Arbitration and Conciliation Act, 1996 having been filed on 03.07.2023 is within the period of limitation.

16. The conclusion at para 53 in the judgment of *Bharat Sanchar Nigam Ltd. & Ors. (supra)* holds that the period of limitation for filing an application under Section 13 would be governed by Article 137 of the first Schedule in the Limitation Act, 1963.

17. In the present case, notice invoking arbitration has been served on 21.04.2022 and the petition under Section 11 could have been filed within 3 years thereafter, which has been so done.

18. For the said reasons, I am of the view that the petition filed by the petitioner is within limitation.

19. There are no other grounds raised by the respondent in its reply opposing the appointment of an Arbitrator.

20. For the said reasons, the petition is allowed and is disposed of with the following directions:

- i) Mr. Justice V.K. Jain (Retd.) (Mobile No. 9650116555)s is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- iii) The learned Arbitrator is requested to furnish a



declaration in terms of Section 12 of the Act prior to entering into the reference.

- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
 - v) The parties shall approach the learned Arbitrator within two weeks from today.
21. The petition is allowed and disposed of in the aforesaid terms.

JASMEET SINGH, J

JANUARY 5, 2024/dm

Click here to check corrigendum, if any