OCD-10

AP-COM/477/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISON

ROHITASH KUMAR KOTHARI
VS
SIMPLEX INFRASTRUCTURE LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 20th March, 2025.

Appearance:
Mr. Ratul Das, Adv.
Mr. Sunit Biswas, Adv.
Mr. Rajashree Bhowmick, Adv.
. . .for the petitioner.

Mr. Abhishek Banerjee, Adv.
Mr. Sitikantha Mitra, Adv.
. . .for the respondent.

The Court:

1. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the said Act. The petitioner carries on business as a proprietor of Chandigarh Trade Link. The petitioner is engaged in the business of manufacturing, distributing, and providing service for construction of chemical products. The petitioner claims to be a wholesale supplier of construction, chemicals and tools of Sika, BASF, Fosroc Pidilite, STP, Delta and Fischer etc. The respondent is a well-known construction company. The respondent is engaged in civil and structural construction work, throughout India. The petitioner and the

respondent entered into an agreement for supply of chemicals and materials for such construction work of the respondent. Accordingly, a purchase order was issued by the respondent to the petitioner. Two invoices followed the purchase order. The dispute arose in respect of alleged non-payment of the balance due, amounting to Rs.3,86,057/-. The total bill raised by the petitioner was approximately Rs.8,86,057/-. Part payment thereof was made on August 10, 2018, to the tune of five lakhs. The petitioner invoked arbitration by a notice dated November 15, 2023, as the remaining portion was unpaid. According to the petitioner, clause 23 of the purchase order contained an arbitration clause. The clause provided as follows:

> *"In the event of any difference or dispute arising out of or in connection with this order, the same should be first amicable settled by mutual dialogue. If the parties fail to settle the difference or disputes arising out of or in connection with the order (including interpretation of the terms thereof), the same shall be referred to Arbitration. The arbitration proceedings shall be conducted by a sole Arbitrator appointed by Company secretary of Simplex Infra. Ltd. and awards/decision of such Arbitrator shall be final and binding upon both the parties. The Venue of the Arbitration proceedings shall be Kolkata. . ."*

2. The petitioner contends that an application under Section 11 of the said Act being AP No.844 of 2022, was also filed before this Court. The pendency of the matter before the Hon'ble Court should be taken into consideration. The period during which the application was pending before this Court, should be exempted in computing the period of limitation in filing the application, upon granting the benefit under Section 14 of the Limitation Act, 1963.
3. Mr. Banerjee, learned advocate for the respondent, relies on the affidavit- in-opposition and submits that this Court should not entertain the application as the petitioner had given up the claim in respect of the purchase order and invoices which are part of the present dispute. Reference is made to the order dated January 4, 2024. A learned Court recorded that the learned counsel appearing for the petitioner had given up the claim in respect of the purchase order relating to the construction work at Telengana. Admittedly, this proceeding arises out of the purchase order and the invoices in respect of the construction work at Telengana.
4. However, this Court finds that the Hon'ble Court had granted liberty to the petitioner to invoke arbitration in respect of the remaining purchase order. Thus, the contention of Mr. Banerjee that the claims have been entirely given up, does not appear to be correct. The Hon'ble Court was of the view that the notice invoking arbitration did not cover the purchase order of Telengana and a consolidated reference could not be

made. Accordingly, liberty was given to proceed according to law, in respect of the said purchase order. Thus, the petitioner has approached this Court by filing an application under Section 11 of the said Act.

5. The question is whether such liberty can be construed as condonation of the delay caused by the petitioner in respect of the work order at Telengana. In my opinion, when the liberty was given to the petitioner to proceed under the law, it meant that the liberty would be subject to the rigours of law, which includes the laws of limitation, jurisdiction of the referral Court etc. Although, the jurisdiction of the Court is not in dispute, in view of the arbitration clause, but this Court finds that the invocation of the arbitration clause by the petitioner, in respect of the purchase order and invoices arising out of the construction work at Telengana was made in November 15, 2023. Thus, Mr. Das's contention that the invocation and filing of the application were in exercise of the liberty granted by the Hon'ble Court, is not correct. The contention that the notice invoking arbitration and the application for reference should be held to be within time, upon excluding the period which was consumed in disposing of AP/844/2022, is also not accepted. The invocation of the arbitration clause by issuing a notice under Section 21 of the said Act was on November 15, 2023. The invocation was already time barred. The period of limitation to invoke arbitration is within three years from the date when the cause of action arose or the right to refer arose. In my opinion, the cause of action to

invoke arbitration arose after part payment was made within the period of limitation i.e. on and from August 10, 2018. The records do not reveal that in respect of the construction work at Telengana, any further communication or assurance was made by the respondent, thereby acknowledging the remaining claim. Even if the exclusion of time during the covid pandemic is allowed, the invocation is time barred.

6. The petitioner invoked the arbitration clause on November 15, 2023, in respect of the balance amount payable against the invoices arising out of the construction at Telengana. Instead of filing a separate application under Section 11 of the said Act, the petitioner had clubbed the claim arising out of the construction of work at Telengana, in the application filed before this Court, seeking a consolidated reference with regard to the disputes arising out of the work orders in respect of construction at Srinagar and Telengana. The learned Court was of the view that the claims could not be consolidated and the petitioner withdrew the claim in respect of the said construction work at Telengana. The learned Court granted liberty to proceed in accordance with law.

7. The invocation with regard to the dispute arising out of the Telengana construction, was not made pursuant to the liberty granted by the Court. The invocation had already been made. The claim was clubbed in my view, in order to circumvent the fact that the invocation was already barred by limitation. In any event, as I have already discussed hereinabove, liberty granted by a court does not mean that such liberty

could be exercised in ignorance of or in violation to the statutory requirement. It is well settled that the period of limitation to invoke arbitration is three years from the date of accrual of the cause of action.

8. In the decision of ***Arif Azeem Co. Ltd. vs Aptech Ltd.*** reported in ***(2004) 5 SCC 313***, the Hon'ble Apex Court held as follows:-

> **72.** In Bharat Sanchar Nigam Limited (supra), this Court while observing that although the arbitration petition was not barred by limitation, yet the cause of action for the underlying claims having arisen much earlier, the claims were clearly barred by limitation on the day notice for arbitration was invoked. Relevant paragraphs are extracted herein below:
>
> > "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 4-8-2014. The notice of arbitration was invoked on 29-4-2020. 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 4-8-2014, 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 29-4-2020, 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, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] 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" [Section 21 of the Arbitration and Conciliation Act, 1996.] (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 5½ years after rejection of the claims on 4-8-2014. 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." (emphasis supplied)

****

87. Similarly, in Bharat Sanchar Nigam Limited (supra), it was held by this Court thus:

"51<u>. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters,</u> [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] 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." <u>There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party</u>

> within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail." (emphasis supplied)

9. Thus, this application fails.

10. AP-COM 477 of 2024 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

sp/