OCD 14

ORDER SHEET
AP-COM/414/2025
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

DAMODAR VALLEY CORPORATION
VS
R S CASTING PVT. LTD.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 19th June, 2025.

Appearance:
Ms. Amrita Pandey, Adv.
Mr. Supratim Ghosh, Adv.
...for the petitioner

Mr. Shailendra Jain, Adv.
Mr. Sourav Mandal, Adv.
Mr. Swapnadwip Roy, Adv.
...for the respondent

The Court:

1. Liberty is granted to the learned advocate for the respondent to file the vakalatnama within a period of ten days.

2. Learned advocate for the respondent submits that the application should be rejected on the ground that the claims are deadwood. According to the learned advocate for the respondent, the petitioner has raised a dispute with regard to the electricity charges from 2009 to 2013, along with delayed payments surcharge. Such pleadings are available from the application before this Court. Reliance has been placed on such averments. It is submitted that the proceedings before

the Calcutta High Court and the Jharkhand High Court challenging the bills had not been filed by the respondent, and pendency of those applications will not extend the period of limitation. The petitioner remained silent and for the first time raised a dispute in 2020. Even assuming that the matter was pending before the Hon'ble Apex Court and disposed of sometime in 2017, the notice invoking arbitration was issued in 2025 which was barred by inordinate delay. There is nothing on record to explain how the period between 2017 to 2025 was consumed and what prevented the petitioner from raising the dispute within three years from the date when the claim became due. Thus, it is submitted that the claim between 2009 to 2013, cannot be referred to arbitration in 2025, as the same was dead wood.

3. Ms. Pandey, learned advocate for the petitioner submits that the West Bengal Electricity Regulatory Commission (WBERC) had not published the tariff, when the electricity bills along with delayed payment surcharge were claimed by the petitioner for the period 2009 to 2013. The claim was on provisional basis and as per the tariff issued by the Central Electricity Regulatory Commission (CERC) and not as per the WBERC. Such imposition of provisional tariff was challenged by various customers of the petitioner before the Calcutta High Court and the Jharkhand High Court. While the Calcutta High Court rejected the basis of the bills, the Jharkhand High Court permitted the petitioner to raise those bills. Ultimately, the orders of both the High Courts were challenged before the Hon'ble Apex Court. By an order dated January 18, 2017, the Hon'ble Apex Court disposed of the appeals on the ground

that the final fixation of the tariff had been done and the discussion would only be academic. The appeals were disposed of as being infructuous, keeping the point of law open. It is also on record that upon disposal of the appeals before the Hon'ble Apex Court, a bill was raised by the petitioner on March 8, 2017, on the basis of provisional tariff. It is submitted that, the tariff was ultimately finalized subject to several rounds of checks and balances on March 19, 2020 and the petitioner issued the revised bill on January 1, 2021 upon the finalization of the tariff. The respondent did not pay any heed to such demand and another demand was issued on May 21, 2021. The respondent remained silent.

4. Thereafter, the petitioner approached the National Company Law Tribunal (NCLT), Kolkata Bench, by filing an application in 2021 under Section 9 of the Insolvency and Bankruptcy Code, 2016. The NCLT dismissed the application. It was held that, the debt due was for the period between March 25, 2020 and March 25, 2021. According to Section 10A, initiation of CIRP cases, when the default arose after March 25, 2020, was barred by law. The order was passed on August 13, 2024. The Tribunal observed that WBERC published tariffs on March 19, 2020 for the period 2009-2013 and on June 19, 2020, for the period 2006-2009. The bill raised by the petitioner on January 1, 2021, was in terms of the tariff order dated June 19, 2020. Thus, the default in respect of payment of such bill could not be recovered in view of the prohibition under Section 10A of the IBC. While rejecting the said application, the petitioner was granted liberty to pursue any other

remedy available to it, under the law. Upon disposal of the proceeding by the NCLT, the petitioner issued a notice invoking arbitration on January 28, 2025. The prayer for reference of the dispute to arbitration, is in terms of Clause 24 of the Power Purchase Agreement dated 9th April, 2007 which was executed between the parties. The existence of the arbitration clause is not in dispute. The arbitration clause is quoted below:-

> *"If at any time question, dispute or difference between the Corporation and the Consumer in regard to any matter relating to or in connection with this Agreement. barring any such which may arise in the Corporation's exercising power or doing acts under the provision of Damodar Valley Corporation Act, 1948 (Act XIV of 1948) or under any other Act for the time being in force or under the terms of this Agreement, either party may forthwith give to the other in writing to the existence of such question. dispute or differences and the same shall be referred to the three Arbitrators, one to be appointed by each party hereto and the third Arbitrator to be appointed by the Arbitrators appointed by each party as presiding Arbitrator for adjudication of dispute in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification thereof the time being in force. The cost of Arbitration so agreed to by and between the parties, shall equally be borne by both the parties.*
>
> *Provided that in case of any such reference it will be obligatory on the consumer to make full payment of all arrear*

dues along with surcharge, if any and current dues and any other dues to the Corporation beforehand and continue paying such dues which may accrue from time to time Within the period as mentioned in the forgoing clauses so long the Arbitration is pending. Should the consumer be held entitled to any return it will be credited by the Corporation afterwards on receiving the Award of the Arbitration and after having accepted by the Corporation such award and will be through subsequent bills in the form or adjudication in a manner to be decided by the Corporation."

5. The clause provides that the disputes shall be referred to a panel of three arbitrators. Each of the parties will nominate their arbitrator and the two arbitrators will appoint the third arbitrator. Both the parties submit before this Court, through their learned advocates, that they agree that the dispute be referred to a sole arbitrator.

6. I have considered the pleading and the documents on record. The provisional bills of 2009 and 2013 were revised as per the tariff order of March 19, 2020 and claimed from the respondent, firstly on January 1, 2021 and thereafter May 21, 2021. Prima facie, this Court is of the view that the claim of 2009 to 2013, were initially provisional and the final bill could not be raised as the tariff had not been finalized. Several litigations were also pending with regard to the provisional claim and those challenges were ultimately put to rest by the decision of the Hon'ble Apex Court on January 18, 2017. The WBERC published the finalized tariff on March 19, 2020. The petitioner made a claim on

January 1, 2021 and thereafter, May 21, 2021. When the bills were not paid, the petitioner approached the NCLT under Section 9 of the IBC. The matter was heard by the NCLT and rejected, inter alia, holding that the claim could not be treated as deadwood, by operation of Section 10A of the IBC. Such decision of the NCLT came on August 13, 2024. In view of the liberty granted by the NCLT, the petitioner invoked arbitration. The respondent did not take steps. The petitioner approached this Court.

7. In view of the discussions made hereinabove, this Court as a referral court is satisfied that the issue of limitation is a mixed question of law and fact in this case and the same will have to be raised before the learned arbitrator.

8. Mr. Jain's contention that the claims were barred by limitation and there does not exist any arbitrable dispute must be raised before the learned arbitrator. It is his specific contention that the bills as per the tariff applicable, were paid on time. The question of arbitrability goes to the very root of the jurisdiction of the learned arbitrator and as such, this Court, as the referral court, cannot go deeper into such aspect. The other issues with regard to the admissibility of the claim, the calculation, the tariff applied etc. are all matters of evidence which shall decided by the learned arbitrator. Keeping all the questions raised by Mr. Jain, open, this application is allowed and both the parties submit that they agree for reference of the dispute to the sole arbitrator and request the Court to refer the dispute to a sole arbitrator.

9. Under such circumstances, the Court appoints Justice Debasish Kar Gupta, former Chief Justice of this Court, as the Arbitrator, to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his own remuneration as per the Schedule of the Act.

10. AP-COM/414/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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