

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/1007/2024

RAKESH KUMAR CHAUDHARY
VS
STEEL AUTHORITY OF INDIA LIMITED, DURGAPUR STEEL PLANT

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR

For the petitioner ...

Mr. Sourajit Dasgupta,
Mr. Soumik Sen, Adv.

For the respondent ...

Mr. Lakshmi Kumar Gupta, Sr. Adv.

Hearing concluded on: 08.01.2025

Judgment on: 03.03.2025

Shampa Sarkar, J.:-

1. This is an application for appointment of an arbitrator. The dispute arose out of a Notice Inviting Tender No. PUR/PC/NOP/2.0/782 for the work of "additional infrastructure for road dispatch near Oxygen Plant- Civil & Electrical Works".

2. The need to narrate the facts and the sequence of events is necessitated by the vehement objection raised by the respondent on the ground that the claim of the petitioner was hopelessly time-barred.

3. The case run by the petitioner was that, as the successful bidder in the tendering process, a letter of acceptance was issued on November 15, 2005 by the respondent. The contract value was Rs.4,52,98,296/-. The

contract was to be completed within 9 months from the date of issuance of the letter. 90% of the payment was to be released by the authorised officer of the respondent on pro rata basis, upon completion of the work and the balance 10% was to be released upon issuance of the completion certificate.

4. The provisions of the General Conditions of the Contract (in short GCC), that is, the standard dotted line contract of the respondent were made applicable to the said work. The petitioner alleged to have invested in plant and machinery immediately, on receipt of the letter of acceptance. The petitioner also mobilized labour force. The obligations of the petitioner were dependent on reciprocal obligations of the authorised officer of the respondent. The authorised officer of the respondent was required to discharge the primary obligation of providing a hindrance-free site. The authorised officer of the respondent was further obliged to provide drawings, sketches, schemes, etc., to enable the petitioner to discharge its reciprocal obligations under the contract. Allegation is that, the authorised officer of the respondent failed and neglected to provide a hindrance-free site to the petitioner for a long time. As a result of which, the labourers and machinery of the petitioner remained idle. The petitioner suffered immense loss and damage. However, despite such breach and delay committed by the authorised officer of the respondent, the petitioner performed its obligation. On account of the delay, the price of goods, raw materials, hire charges, labour costs, etc., increased. The petitioner had to incur further expenses on such account.

5. Upon the expiry of the initial duration of the contract, the term was extended by the authorised officer of the respondent till May 31, 2008,

without imposing any liquidated damages. The extension stood ratified by a letter dated July 19, 2008. Allegation is that, the authorised officer of the respondent accepted the work done by the petitioner at enhanced rates and promised to make payment for the same. The authorised officer of the respondent also requested the petitioner to perform extra work, which did not cover the terms of the contract. Such extra work was done by the petitioner, solely on the condition that, the authorised officer of the respondent would make additional payment for such work, as per the revised offer submitted by the petitioner.

6. According to the petitioner, the plant unit was commissioned on May 31, 2008. The completion certificate was issued on July 5, 2008. For the work performed by the petitioner, invoices were raised amounting to Rs.7,51,91,637/- which included service tax under various heads. Out of the outstanding of Rs.7,51,91,637/-, the authorised officer of the respondent paid Rs.4,44,51,04.00/-. The outstanding, according to the petitioner, was around Rs.3,07,40,597.59/-, which included unpaid service tax.

7. The petitioner alleged to have repeatedly called upon the authorised officer of the respondent to release the balance payments from time to time, but the authorised officer of the respondent did not discharge its obligation. The authorised officer of the respondent caused fundamental breach of its obligation under the contract.

8. By a letter dated May 17, 2010, the authorised officer of the respondent asked the petitioner to accept a lesser amount. Allegedly, the petitioner was forced to sign some papers under duress, including a letter

dated July 3, 2010, indicating that the petitioner was willing to settle the amount at Rs.73,35,000/-. However, the said amount was not paid and instead, the petitioner was paid Rs.17,81,212/-. The payment was made sometime in November 2013. On the basis of such exercise, the authorised officer of the respondent unilaterally amended the contract value to Rs.4,62,60,597/-, on September 23, 2013.

9. As the outstanding dues were not paid, the petitioner filed a writ petition challenging the inaction and/or non-action of the respondent. The writ petition was registered as WP No.9173 (W) of 2015. By an order dated September 11, 2015, the writ court directed the authorised officer of the respondent to take appropriate steps to ameliorate the grievances of the petitioner and pay the outstanding, if found, due and payable. The authorised officer of the respondent, thereafter, issued various letters informing the petitioner that the claims were being examined. By a letter dated December 31, 2015, the authorised officer of the respondent called upon the petitioner to invoke the arbitration clause contained in the agreement between the parties. The authorised officer of the respondent relied upon an contract dated March 23, 2012. The petitioner denied the existence thereof. As the decision was not taken by the authorised officer of the respondent as directed by the High Court, a contempt application was filed. During the pendency of the contempt application, the authorised officer of the respondent hurriedly passed an order dated November 6, 2017, thereby repudiating the claims of the petitioner.

10. Being aggrieved by such repudiation, by a letter dated May 23, 2018, the petitioner called upon the authorised officer of the respondent to appoint

a conciliator to settle the dispute in terms of the contract. The authorised officer of the respondent, accordingly, appointed a conciliator. A letter dated November 22, 2018 was issued by the authorized officer of the respondent recording failure of the conciliation process. The petitioner issued a protest letter dated November 28, 2018. By a letter dated June 13, 2019, the claims of the petitioner were again rejected by the respondent and the authorised officer of the respondent asked the petitioner to take appropriate steps in view of the failure of the conciliation.

11. By a letter dated July 1, 2019, the petitioner claims to have invoked the arbitration clause i.e. clause 6 of the GCC and proposed the name of an arbitrator. Various letters were exchanged between the parties and by a letter dated August 31, 2019, the petitioner called upon the authorised officer of the respondent to appoint an arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Again, by a letter dated November 23, 2020, the petitioner proposed the name of another arbitrator and informed the authorised officer of the respondent that, the petitioner would be constrained to approach the High Court in the event the authorised officer of the respondents failed to accord consent to such appointment.

12. By a letter dated January 23, 2021, the authorised officer of the respondent refused to give consent for appointment of the suggested arbitrator. By an e-mail dated June 17, 2022, the authorised officer of the respondent informed the petitioner that the petitioner's case was being discussed and that the petitioner would be informed once a decision was arrived at. By a letter dated August 2, 2022, the petitioner called upon the

authorised officer of the respondent to communicate a decision. By another letter dated January 12, 2023, the petitioner asked the authorised officer of the respondent to release the dues. On March 3, 2023, the authorised officer of the respondent, inter alia, contended that the entire outstanding contractual amount had been paid. By a letter dated July 19, 2023, the petitioner asked the Director-in-Charge of the respondent to release payments. Such request was rejected by a letter dated August 10, 2023. Again, the authorised officer of the respondent amended the contract unilaterally and by a letter dated May 5, 2024, the authorised officer of the respondent informed the petitioner that the contract value was amended to Rs.4,60,71,807/-, and the petitioner would be entitled to Rs.55,53,646/- as per the signed voucher which were supplied. The petitioner contended that the vouchers were not signed by him. The petitioner contended that the entire outstanding would be Rs.2,52,67,752.59/-. The petitioner called upon the higher authorities and requested for further payment by a letter dated March 15, 2024.

13. The authorised officer of the respondent accordingly made payment of Rs.36,33,015/-, on March 23, 2024. As the entire claim was not satisfied, the petitioner enquired from the officers and was shocked to receive an undated memorandum of payment which recorded that the petitioner had accepted Rs.55,53,646/-, as full and final settlement of its dues. The petitioner contended that the signatures of the petitioner were obtained on blank papers and the same were used for the purpose of preparing the memorandum of payment, behind the back of the petitioner. The petitioner informed the Commissioner of Police, Durgapur, by a letter dated July 27,

2024, about such alleged forgery. The petitioner also raised protests and claimed its lawful dues of Rs.2,52,28,545/-, by letters dated July 24, 2024, and July 31, 2024. As the authorised officer of the respondent did not accept the request for arbitration and also did not make the payments as claimed by the petitioner, disputes and differences arose and the petitioner has moved this court for appointment of an arbitrator.

14. Mr. Dasgupta, Learned Advocate for the petitioner submits that the fact that the letter of acceptance was issued was not in dispute and as per Clause 12 of the letter of acceptance, all the terms of the GCC, had been made applicable. Clause 6 of the GCC contained the arbitration clause. The clause stated that disputes and differences arising between the parties or relating to the construction, meaning, scope and operation of the contract, would be settled between the parties amicably and if the amicable settlement failed, the differences would be settled by arbitration in accordance with the rules of the Indian Council of Arbitration (ICA), and award made in pursuance thereof, shall be binding between the parties. The venue of the arbitration would be the site.

15. According to Mr. Dasgupta, the conduct of the authorised officer of the respondent would clearly indicate acceptance on the part of the respondent that the petitioner incurred additional expenses and had executed additional work, which were beyond the scope of the contract. The difference in the claim and what was admitted by the authorised officer of the respondent and subsequent payment thereof, after unilateral amendment of the contract value, gave rise to the dispute. Further dispute was with regard to the memorandum of payment which was disclosed to the

petitioner, indicating settlement of the claim. The supply of the memorandum of payment indicating full and final settlement of the claim at Rs.55,53,646/- and the unilateral amendment of the contract value to Rs.4,60,71,807/-, which was informed to the petitioner by letter dated March 5, 2024, were all subject matters of the dispute.

16. Although, the dispute arose out of a letter of acceptance dated November 15, 2005, the dispute was alive. In March, 2024, the authorised officer of the respondent amended the contract value. Thus, the question of the claim being barred by limitation did not arise. The dispute arose out of a contract which was amended unilaterally twice, lastly on March 5, 2024. The payment voucher which was relied upon by the authorised officer of the respondent allegedly indicating settlement of the claim, was also issued sometime in March, 2024.

17. Relying on the communications dated November 23, 2020 and January 23, 2021, Mr. Dasgupta contended that those were the notices invoking arbitration in terms of Section 21 of the Arbitration and Conciliation Act, 1996. Support had been drawn from the order of the Hon'ble Apex Court by which the period of limitation had been extended, upon excluding the pandemic period. The period between March 15, 2020 to February 2022 had been exempted and the petitioner was entitled to a period of 3 years from February 2022 to approach this court for appointment of an arbitrator. The authorised officer of the respondent refused to accept the proposal of the petitioner by the letter dated November 23, 2020.

18. Mr. Dasgupta emphasized that even after the authorised officer of the respondent had repudiated the claim by a reasoned order dated November 6, 2017, the parties agreed to solve the dispute by a conciliation process. The authorised officer of the respondent by a letter dated May 19, 2018, nominated the General Manager (BE), Sri S.P. Gupta as the conciliator for settlement of the dispute. Such action of the authorised officer of the respondent were proof of the fact that according to the respondent, the dispute was alive and the parties were willing to settle the same amicably.

19. The claims of the petitioner which were forwarded by letter dated November 28, 2018, after termination of the conciliation proceeding were again rejected by the authorised officer of the respondent. The letter recorded that the authorised officer of the respondent had gone through the claims and found the same to be untenable. Nothing was found due and payable.

20. By a letter dated July 1, 2019, the petitioner requested the authorised officer of the respondent to appoint an arbitrator as per clause 6 of the GCC. The petitioner proposed to appoint Mr. Mahadev Ghosh, District Judge (retired) as the sole arbitrator. The authorised officer of the respondent responded to such proposal by a letter dated July 30, 2019, and submitted that the dispute was to be settled by arbitration in accordance with the rules of the Indian Council of Arbitration and the unilateral choice of the sole arbitrator by the petitioner was not in accordance with the provisions of the arbitration clause. By letter dated August 31, 2019, the petitioner once again approached the authority for substitution of the Arbitration Clause No.6 and for an agreement to settle the dispute by a sole arbitrator. The said

proposal was not responded to and admittedly no agreement had been reached for settlement of the dispute by a sole arbitrator.

21. By another letter dated November 23, 2020, the petitioner again requested the authorised officer of the respondent to settle the dispute by arbitration and proposed the name of a learned Senior Advocate as its nominee.

22. The documents were relied upon by Mr. Dasgupta in support of his contention that, the reference to arbitration and invocation of the Clause 6 of the GCC had been properly done.

23. Mr. Lakshmi Kumar Gupta, learned Senior Advocate for the respondent, submitted that the claim was highly belated. It was 'deadwood'. Not only the so called invocation was belated, but the same was not in proper form. The application before this court for appointment of an arbitrator was also belated and contrary to what had been agreed upon by the parties. Mr. Gupta submitted that final payments had been made in September 2013, upon amendment of the contract value to Rs.4,62,60,597/-. Thereafter, in compliance of the order of the High Court passed in the writ petition, the claims were repudiated by a letter dated November 6, 2017.

24. The period of limitation to invoke the arbitration clause expired within three years from November 6, 2017. The petitioner did not invoke arbitration in the proper manner as provided in Clause 6 of GCC. According to Mr. Gupta, arbitration was to be conducted as per the Rules of the Indian Council of Arbitration. The petitioner requested for amendment of the arbitration clause and requested the respondent to agree to arbitration by a

sole arbitrator. The petitioner unilaterally proposed names of sole arbitrators, which were contrary to the provisions of Clause 6 of the GCC and the ICA Rules. Till date, there was no invocation in terms of the arbitration clause.

25. Thus, Mr. Gupta's contention was that, the application should be rejected on three grounds. First, that the claim was barred by limitation and neither the subsequent communications between the parties nor the conciliation proceedings held at the behest of the parties, would arrest the period of limitation. Secondly, till date, there was no notice invoking arbitration in terms of Clause 6 of the GCC. Thirdly, the petitioner could not have approached this court at such a belated stage, when the claims were denied way back in 2017.

26. Mr. Gupta also relied on Section 18 of the Limitation Act, 1963, to submit that the documents relied upon by the petitioner would not indicate that, within a period of three years from November 6, 2017, the authorised officer of the respondent had either admitted a part of the claim or made payment of such amount. Subsequent efforts to settle the dispute and partial payment made after the period of three years from rejection of the petitioner's claim, would not extend the period of limitation.

27. Mr. Gupta relied on the following decisions:-

- (a) ***B.K. Consortium Engineers Private Ltd. vs Indian Institute of Management, Calcutta*** reported in **2023(4) CHN (CAL) 242**,
- (b) ***Bharat Sanchar Nigam Ltd. vs Nortel Networks India Private Ltd.*** reported in **(2021) 5 SCC 738**.

28. The rival contentions and the facts have been discussed in details. This court finds that the documents which have been considered, indicate that the dispute was continuing and the parties had made a sincere effort to resolve the same by amicable settlement and through a conciliator appointed by the authorised officer of the respondent. The conciliator was an employee of the respondent. Even after the reasoned order of November 6, 2017, (which according to Mr. Gupta was the starting point of limitation to invoke arbitration), the records reveal that conciliation continued and several correspondences were exchanged between the parties. The authorised officer of the respondent had specifically informed the petitioner that the claim was under consideration. An email dated June 17, 2022, reads as follows:-

“ M/s RK Engineering Works
Durgapur – 713216

This has reference to your claim against the project “Additional infrastructure for road despatch”. This case is being discussed internally by the committee and on the finalization of the same, it will be informed to you.

T. Muthukumar
CGM(Projects)”

29. Most importantly, it appears that the contract value was amended on March 5, 2024, by the authorised officer of the respondent. Thus, the closure of the contract, prima facie, appears at that relevant time when the contract value was lastly amended. Another letter dated March 3, 2023, issued by the Senior Manager of the authorised officer of the respondent, indicates that the claims contained in the petitioner’s letter dated January 12, 2023, addressed to the Secretary, Ministry of Steel, were examined by

the authorised officer of the respondent and an amicable settlement was requested. The contents of the letter is quoted below:-

“Sir/Madam

We acknowledged the receipt photocopy attachment of your letter dated 03.03.2023 and the contents of the attachment has surprised us because the full facts have not been mentioned. The meeting with DSP dated 07.02.2023 have been mentioned in the said letter but outcome for the same has not been mentioned anywhere in the attachment.

Sir, we are of your very oldest contractor working since 1986 and have done various challenging projects to the entire satisfaction of our valued client DSP such as installation of Bloom Caster, installation of Re-Heating Furnaces, Installation of Ladle Furnaces No. 1 and 2, Tank No. 1 and 2 SGP of BF#4, Construction, installation of INBA BF#3 and its galleries, conveyors complete, repeatedly Capital Repair of all Blast Furnaces. Dismantling of Collapsed Buffer Water Tank in BF#4, Construction of various Roads, Restoration of Railway Tracks more than 100 KM along with 80 nos. of Turnouts, construction of chimney of COB#2 and others, structural work of New Slag Yard and Open Slag Yard Phase-II, various challenging jobs under shutdown, dismantling and modification of many collapsed galleries earlier in past and various others repair maintenance jobs directly and indirectly.

But such type of peculiar situation have never been faced earlier other than the subject. All and entire works as per requirement of DSP we have submitted our most competitive offer in advance and after getting clearance the said jobs has been completed/commissioned and are commercial production since then. Hence there is no problem about release of our payables. During execution the concerned authority communicated us that all payments will be released after completion of the unit. Much after completion 3/4 years the concerned started bargaining which is not at all acceptable to us. Sir, in the case of local contractors the concerned authority have no problem to pay them Rs. 5 Lakh per Tonne with free issue of fabricated structures and open the flood gate of DSP and for outsider like us when we ask you 20%/30% even then the payment are not releasing even after expiry of 10/15 years we are facing financial disastrous and hand to mouth situation. Due to non release of our payables we become handicapped and not able to bag any job in the open market.

We request you to kindly look into so that our payment can release without bargaining for which we shall be thankful to you. Attached please find herewith 5 pages of attachment mentioning the details

Thanking you,”

30. Along with the said letter, the views of the authorised officer of the respondent were annexed. The views justified negation of the claims of the petitioner. Thus, in my view, it is a debatable question as to whether the period of limitation to invoke arbitration should be calculated from November 6, 2017, or from June 13, 2019 when there was another denial of the claim, upon the conciliation having failed, or from March 3, 2023 or lastly from March 5, 2023, when the contract was once again amended and the authorised officer of the respondent referred to an invoice, memorandum of payment and payment vouchers, dated March 22, 2024. In this case, limitation is a mixed question of facts and law.

31. In my prima facie view, the dispute continued and the conduct of the authorised officer of the respondent does not indicate that the contract was not closed until March 5, 2024, when the second amendment of the contract value was made by the authorised officer of the respondent. The petitioner also disputes having signed the memorandum of payment and having accepted the full and final payment as contended by the authorised officer of the respondent. This is also a dispute which arose in March 2024.

32. Thus, in my view, whether the claim is time barred or not or whether the petitioner failed to take steps within the period of limitation will have to be proved in evidence. The dispute with regard to non-payment, unilateral amendment of the contract in March 5, 2024, memorandum of payment allegedly signed by the petitioner and acceptance of the payment vouchers

dated March 22, 2024 by the petitioner, are very much alive. These disputes cannot be considered to be “deadwood”.

33. The decision of ***B.K Consortium (supra)*** will not be applicable in this case. The discussions made herein above and the documents relied upon and referred to by this court, do not, *prima facie*, indicate that the disputes are *ex facie* time barred. This is not a case where the referral court can hold that there is no surviving dispute. The decision cited/laid down the principle that vexatious and frivolous claims should be weeded out at the initial stage, by the referral court. However, in the facts and circumstances of this case, for the referral court to hold thus, would tantamount to stepping into the arbitrator’s jurisdictional territory.

34. The decision of ***Bharat Sanchar Nigam Limited and another (supra)*** also does not apply, as this court has, *prima facie*, opined with reference to the documents that the order of November 6, 2017, may not be considered as the final rejection of the claim of the petitioner. In the decision relied upon, the ratio laid down was that, subsequent communications and exchange of letters between the parties or discussions for settlement of the dispute, would not extend the period of limitation.

35. The next contention of Mr. Gupta is accepted by the Court. That the invocation of the arbitration clause was not proper. Clause 6 of GCC provides as follows.

“6. Settlement of Disputes.- Any disputes or differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract shall be settled between the Employer and the Contractor amicably. If however, the Employer and the Contractor are not able to resolve their disputes / differences amicably as aforesaid the said disputes / differences shall be settled by Arbitration in accordance with the Rules of Arbitration of

the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

The arbitration shall be governed and regulated in all respect according to the laws of India and the Arbitration proceedings shall be regulated and governed by Indian Arbitration and Conciliation Act 1996 or such modifications or re-enactment thereof. The venue of Arbitration in case of Indian Contractors shall be the place where site is situated and in case of Overseas Contractors shall be New Delhi, India.”

36. Admittedly, the parties agreed that the dispute would be settled by arbitration in accordance with Rules of Indian Council of Arbitration.

37. Rule 15 deals with initiation of arbitration and provides as follows:-

“Rule 15

- (i) Any Party wishing to commence arbitration proceedings under these rules (Claimant) shall give a notice of request for arbitration to the Registrar of ICA and to the Respondent.
- (ii) The notice of request (application) for arbitration to the Registrar shall be accompanied by:-
 - (a) the names and full addresses of the parties to the dispute including emails, phone numbers, hand/mobile phone numbers, fax nos. of the parties to the dispute and their legal representative, if any.
 - (b) statement of the claim and facts supporting the claim, points at issue and relief or remedies sought with other details of the Claimant's case.
 - (c) original or duly certified copies of the arbitration agreement, any contract or agreement out of or in connection with which the dispute has arisen and such other documents and information relevant or relied upon.
 - (d) Non-Refundable Registration Fee of Rs.15,000/- plus any applicable tax for claims up to Rs. Two Crore and Rs. 30,000/- plus any applicable tax for claims more than Rs. Two Crore.
 - (e) The Arbitral proceedings in respect of dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent.
 - (f) In the event that the Claimant fails to comply with any of the requirements referred to herein above, the Registrar may fix a time limit not exceeding 15 days within which the Claimant must comply, failing which the file shall be closed without prejudice to the Claimant's right to resubmit the same claims at a later date in another notice of request for arbitration.”

38. In terms of Rule 15(1), a party wishing to commence arbitration proceedings (claimant) is required to give a notice of request for arbitration to the Registrar of ICA and to the authorised officer of the respondent. In the present scenario, the petitioner issued letters to the authorised officer of the respondent requesting amendment of the clause and settlement of dispute by a sole arbitrator, but the authorised officer of the respondent did not accede to the same and continuously maintained a stand that the clause provided for resolution of dispute as per the ICA Rules. The petitioner unilaterally referred certain names of sole arbitrators as its nominee, contrary to the provisions of the arbitration clause.

39. Thus, in my view, the invocation was not in terms of the requirement of the agreement and the ICA Rules have not been followed. The court has already opined that the issue of limitation at this stage is a mixed question of law and fact and the actions of the authorised officer of the respondent which were taken in March 2024, were also part of the dispute raised by the petitioner. The petitioner is at liberty to approach the Registrar ICA in terms of the Rules of the Indian Council of Arbitration, thereby invoking arbitration as per the said Rules.

40. Accordingly, the application is disposed of.

41. There will be no order as to cost.

42. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)