

HON'BLE SRI JUSTICE K. LAKSHMAN**ARBITRATION APPLICATION No.113 OF 2021****ORDER:**

The present Arbitration Application is filed under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act, 1996') for appointment of a presiding arbitrator to hear and adjudicate the claims between the Applicant and the Respondent herein.

2. Heard Mr. B. Chandrasen Reddy learned Senior Counsel representing Mr. Pasham Mohit learned counsel for the Applicant and Mr. Avinash Desai learned counsel appearing for the Respondent.

3. **Facts of the Case**

i) In the year 2007, the National Highways Authority of India (NHAI) invited proposals for construction of a four-lane access controlled expressway program for Pondicherry. Nagarjuna Construction Company Limited (NCC) which is the Respondent herein and IL&FS Engineering and Construction Company Limited formed a consortium to submit a bid in the proposed project of NHAI on 06.02.2007.

ii) On 05.03.2007, the NHAI awarded the project to the said consortium. For the execution of the project, a Special Purpose Vehicle named Pondicherry Tindivanam Tollway Private Limited (PTTPL) was incorporated by the Respondent and IL&FS. Since, IL&FS was facing financial constraints which

affected the EPC works, the Respondent terminated the contract and on 13.08.2009 awarded it to Terra Infra Development Limited which is the Applicant herein.

iii) According to the EPC Sub-Contract Agreement dated 13.08.2009, a contract price of Rs. 165,59,56.902 /- was agreed upon and the works were to be executed on “as is where is basis” and on “back-to-back basis”. According to the said agreement dated 13.08.2009, the works were to be completed by 10.07.2010. However, the work was delayed and the project was completed on 12.12.2011.

iv) The Applicant raised claims relating to the project works by sending a letter dated 05.02.2013 to PTTPL and a letter dated 06.02.2013 to the Respondent herein. In both the letters the Applicant claimed that it was entitled for a final claim amount of Rs. 96,92,20,221/-.

v) On 18.05.2013, the Respondent replied to the letter dated 06.02.2013 addressed by the Applicant. In the said letter, the Respondent disputed the claim amount of the Applicant. It stated referring to Clause 13, Clause 16 and Clause 33 of the Agreement dated 13.08.2009 that the Applicant is only entitled to compensation if the Respondent gets any compensation from PTTPL. The Respondent will only get compensation if the same is received by PTTPL from NHAI. Therefore, unless NHAI pays PTTPL, the Applicant cannot claim any compensation. In the said reply dated 18.05.2013, the Respondent also stated

that if at all the Applicant is entitled for any compensation, the same will be restricted to 60% of the total project value. The Respondent also alleged breach of contract in its reply.

vi) The Applicant issued various letters dated 29.07.2013, 20.03.2015, 29.08.2016 seeking release of its claim money. An email was addressed on 24.07.2019 by the Applicant regarding release of amount. To the said email, a reply dated 21.10.2019 was sent by the Respondent which again reiterated that the Applicant is only entitled to 60% of the claim amount. In the said reply, the Respondent informed about the initiation of arbitration by PTTPL against NHAI. It also stated that the claims of the Applicant were also forwarded to PTTPL.

vii) Subsequently, the Applicant replied to the letter dated 21.10.2019 and denied the contentions of the Respondent. Further, letters were issued by the Applicant on various dates to release the money and resolve the disputes. Ultimately, on 26.10.2020, the Applicant sent a letter to the Respondent invoking Clause 29 of the Agreement which included mutual negotiation before invoking arbitration.

viii) On 02.01.2021, the Applicant sent a notice to the Respondent invoking arbitration to resolve the disputes. On 02.03.2021, the Applicant appointed one Mr. Harish Balwani as their nominee arbitrator. On 03.04.2021, the Respondent appointed one Mr. Vipin Sharma as their nominee arbitrator. In

their letter dated 03.04.2021 appointing the arbitrator, the Respondent stated that the claims of the Applicant are barred by limitation and the arbitrator is appointed without prejudice to its rights.

ix) Mr. Harish Balwani vide email dated 01.07.2021 informed both the parties herein that the arbitrators have failed to appoint the presiding arbitrator. Therefore, the present Arbitration Application came to be filed.

4. Contentions of the Applicant

- i. The question of limitation is a mixed question of fact and law and cannot be decided at the stage of appointment of arbitrator. Reliance was placed on Shree Ram Mills v. Utility Premises (P) Ltd.¹
- ii. The period of limitation was extended time and again as the Respondent never denied the claims of the Applicant.
- iii. The Respondent cannot claim that the presiding arbitrator cannot be appointed as it has already appointed its nominee arbitrator.

5. Contentions of the Respondent

- i. The question of limitation can be decided in proceedings initiated under Section 11 of the Act, 1996. Reliance was placed on BSNL v. M/s

¹. (2007) 4 SCC 599.

Nortel Networks India Pvt. Ltd.² and Vidya Drolia v. **Durga Trading Corporation³**.

ii. The claims of the Applicant are barred by limitation and the Applicant cannot raise the claims which accrued in the year 2013 after a lapse of seven years. Further, the period of limitation was not extended in terms of Article 18 of the Limitation Act, 1963. Reliance was placed on **Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.⁴**.

iii. The Respondent never accepted or acknowledged the claim of the Applicant.

6. **Findings of the Court**

i) From the facts of the case and the contentions raised by the parties, the question before this Court is whether a presiding arbitrator can be appointed in the present case. The Applicant contends that the presiding arbitrator shall be appointed as its claims are still alive. On the other hand, the Respondent contends that the claims of the Applicant are barred by limitation and as such no presiding arbitrator shall be appointed. Therefore, to decide whether a presiding arbitrator shall be appointed or not, this Court has to decide whether the claims of the Applicant are barred by limitation.

². 2021 SCC OnLine SC 207.

³. (2021) 2 SCC 1.

⁴. (2020) 14 SCC 643.

ii) It is relevant to note that under Section 43 of the Act, 1996 clearly states that the Limitation Act, 1963 (hereinafter ‘the Act, 1963’) is applicable to arbitration proceedings. The Supreme Court in **Panchu Gopal Bose v. Board of Trustees for Port of Calcutta**⁵ explained the application of the law of limitation to arbitration proceedings. It was held that the law of limitation applies to arbitral proceedings and the period of limitation shall start to run from the date on which a right to initiate arbitral proceedings accrues on the claimant. The relevant paragraphs are extracted below:

“11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

12. In *Russell on Arbitration*, at pages 72 and 73 it is stated thus:

“Disputes under a contract may also be removed, in effect, from the jurisdiction of the court, by including an arbitration clause in the contract, providing that any arbitration under it must be commenced within a certain time or not at all, and going on to provide that if an arbitration is not so commenced the claim concerned shall be barred. Such provisions are not necessarily found together. Thus the contract may limit the time for arbitration without barring the claim depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the courts. Or it may make compliance with a time-limit a condition of any claim without limiting the operation of the arbitration clause, leaving a party who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred. Nor, since the provisions concerned are essentially separate, is there anything to prevent the party relying on the

⁵ (1993) 4 SCC 338.

limitation clause waiving his objection to arbitration whilst still relying on the clause as barring the claim.”

At page 80 it is stated thus:

“An extension of time is not automatic and it is only granted if ‘undue *hardship*’ would otherwise be caused. Not all hardship, however, is ‘undue hardship’; it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a claim to be reopened after it has become barred. The mere fact that a claim was barred could not be held to be ‘undue hardship’.”

13. The Law of Arbitration by Justice Bachawat in Chapter 37 at p. 549 it is stated that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, so also in the case of arbitrations, the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) ‘action’ and ‘cause of action’ in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.

14. Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his *Law of Arbitration*, at p. 552 stated that “in an appropriate case leave should be given to revoke the authority of the arbitrator”. It was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings,

and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a court of law to arbitrate their disputes or differences. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence.”

iii) Similarly, following the decision in **Panchu Gopal Bose (Supra)**, a full bench of the Supreme Court in **State of Orissa v. Damodar Das**⁶ held as follows:

“*5. Russell on Arbitration* by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the “cause of arbitration” accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

“Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.”

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

6. In *Law of Arbitration* by Justice Bachawat at p. 549, commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) ‘action’ and “cause of arbitration” should be construed as arbitration and cause of

⁶. (1996) 2 SCC 216.

arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.

7. In *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* [(1993) 4 SCC 338] , this Court had held that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question is when the cause of arbitration arises in the absence of issuance of a notice or omission to issue notice for a long time after the contract was executed? Arbitration implies to charter out timeous commencement of arbitration availing of the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after a considerable lapse of time, would be a harassment to the opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12(2)(b) of the Act.”

iv) Therefore, the law of limitation applies to arbitration proceedings and the period of limitation starts to run from the date on which right to initiate arbitral proceedings accrues.

v) It is also relevant to note that the question whether a claim is barred by limitation can be decided at the preliminary stage of appointing an arbitrator under Section 11. In **Vidya Drolia (Supra)**, the Supreme Court has held that only where the claims are *ex facie* time-barred, the Court can refuse to appoint an arbitrator. In all other cases, the matter shall be referred to arbitration where the arbitrator shall decide such issues. The relevant paragraph is extracted below:

“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. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in *Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)]*, it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”

vi) Now, coming to the facts of the case, the Respondent contends that the Applicant admittedly completed the works under the EPC Agreement on 12.12.2011 and it raised claim for the first time on 06.03.2013 by addressing a letter. The claim of the Applicant was disputed by the Respondent on 18.05.2013. The Applicant though wrote letters and emails to the Respondent multiple times, it initiated the arbitral process only on 26.10.2020. Therefore, the Applicant's claim is barred by limitation.

vii) The Respondent relying on the decision of the Supreme Court in **Geo Miller (Supra)** contended that mere writing of letters and correspondences will not extend the period of limitation.

viii) On the other hand, the Applicant relying on the decision in **Shree Ram Mills (Supra)** has contended that the issue of limitation is a mixed question of law and fact. Such a question cannot be decided at a preliminary stage of appointing an arbitrator. The Applicant also contended that the period of limitation in the present case was extended from time to time as the Respondent accepted its liability and did not reject the Applicant's claim. Further, it was contended that appointment of Mr. Vipin Sharma as Respondent's nominee arbitrator is nothing but accepting that there is an arbitral dispute.

ix) It is relevant to note that the facts of the present case are similar to that of **Geo Miller (Supra)**. In the said case, a full bench of the Supreme Court

held that the period of limitation cannot be extended merely because the Claimant kept demanding the dues. Limitation starts to run the moment the claim is raised and is disputed by the other party. The Court therein also held that the time invested in bona fide negotiations can be excluded from the period of limitation, provided material is placed on record evidencing such negotiations. However, the Court also made it clear that accrual of cause of action cannot be postponed merely by sending reminders. The relevant paragraphs are extracted below:

“20. Our finding is supported by the decision of a three-Judge Bench of this Court in *Grasim Industries [Grasim Industries Ltd. v. State of Kerala, (2018) 14 SCC 265 : (2018) 4 SCC (Civ) 612]* . In *Grasim Industries [Grasim Industries Ltd. v. State of Kerala, (2018) 14 SCC 265 : (2018) 4 SCC (Civ) 612]* , similar to the present case, the arbitration agreement provided for reference to be made under the 1940 Act. However the appellant raised their claim in 2002, attracting the application of the 1996 Act. This Court was therefore faced with the issue of whether an application for appointment of an arbitrator under the 1996 Act would be barred by limitation in respect of the appellant's claim. This Court found that, in view of Section 28 of the Contract Act, 1872, the parties in the arbitration agreement could not stipulate a restricted period for raising a claim. However, the limitation period for invocation of arbitration would be three years from the date of the cause of action under Article 137 of the Limitation Act, 1963. However in the facts of that case, this Court found that certain claims had arisen within the three-year limitation period and hence, could be allowed.

21. Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that

the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7-10-1979 and 4-4-1980 arose on 8-2-1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8-2-1986. Similarly, with respect to Arbitration Application No. 28/2003 relating to the work order dated 3-5-1985, the respondent has stated that final bill was handed over and became due on 10-8-1989. This has not been disputed by the appellant. Hence the limitation period ended on 10-8-1992. Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a court only by the end of 2003, his claim is clearly barred by limitation.

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23. Turning to the other decisions, it is true that in *Inder Singh Rekhi* [*Inder Singh Rekhi v. DDA*, (1988) 2 SCC 338] , this Court observed that the existence of a dispute is essential for appointment of an arbitrator. A dispute arises when a claim is asserted by one party and denied by the other. The term “dispute” entails a positive element and mere inaction to pay does not lead to the inference that dispute exists. In that case, since the respondent failed to finalise the bills due to the applicant, this Court held that cause of action would be treated as arising not from the date on which the payment became due, but on the date when the applicant first wrote to the respondent requesting finalisation of the bills. However, the Court also expressly observed that “*a party cannot postpone the accrual of cause of action by writing reminders or sending reminders*”.

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28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the “breaking point” at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This “breaking point” would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.

29. Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile.

30. We are of the considered opinion that the decisions in *Hari Shankar Singhania* [*Hari Shankar Singhania* (2) v. *Gaur Hari Singhania*, (2006) 4 SCC 658] and *Shree Ram Mills Ltd.* [*Shree Ram Mills Ltd.* v. *Utility*

Premises (P) Ltd., (2007) 4 SCC 599] will not be applicable to the appellant's case as in these cases the entire negotiation history of the parties had been made available to this Court. In the present case, the appellant company vaguely stated before this Court that it was involved in “negotiation” with the respondents in the 14 years preceding the application dated 4-10-1997 before the Settlement Committee. However it did not place on record any evidence to show when it had first made a representation to the respondent in respect of the outstanding amounts, and what was the history of their negotiation with the respondents such that it was only in 1997 that they thought of approaching the Settlement Committee. Further, they have not brought anything on record to show that they were required to proceed before the Settlement Committee before requesting the appointment of an arbitrator. The arbitration clause does not stipulate any such requirement.”

x) According to this Court, the claim of the Applicant is barred by limitation. It is clear from the facts that the Applicant's claim was disputed by the Respondent on 18.05.2013. Therefore, the period of limitation started from 18.05.2013 and expired on the 18.05.2016.

xi) Thereafter the Applicant instead of enforcing the arbitration clause kept on writing to the Respondent demanding the dues. As stated above, mere exchange of correspondences will not extend the period of imitation. The Applicant contended the reason for delay in invoking the arbitration clause was the efforts made by it to negotiate the disputes. This Court cannot accept the said contention. The claims of the Applicant were disputed by the Respondent on 18.05.2013. After that multiple letters were addressed by the Applicant to

which no reply was sent by the Respondent till 2019. The silence of the Respondent amounted to denial of the Applicant's claim. The Applicant waited for nearly 6 years to initiate the arbitration proceedings. If at all negotiations were in progress, the Respondent would have participated in the same. The failure of the Respondent to reply to the Applicant's letters suggests that there were no negotiations between the parties. Therefore, the limitation started to run from 18.05.2013 and no period can be excluded as no negotiations took place between the parties.

xii) Further, the Applicant relying upon the letter dated 21.10.2019 to contend that its claim is alive as the limitation was extended by the alleged acknowledgment of 60% claim by the Respondent. The said contention even if accepted cannot extend the period of limitation. Article 18 of the Act, 1963 provides that the period of limitation can be extended by a party against whom a claim lies, if there is an admission and acknowledgement of such a claim by such a person. The claim acknowledged shall pertain to property or right. Further, such an acknowledgement shall be made in writing and shall be signed by the party against whom the claim exists before the expiry of period of limitation. In other words, the period of limitation can be extended only by a party against whom a claim exists. It can only be extended before the expiry of limitation.

xiii) In the present case, there was no extension of limitation as the requirements of Article 18 were not satisfied. There was no acknowledgement before the expiry of limitation as the limitation started on 18.05.2013 and ended on 18.05.2016. There could not have been an extension of limitation in the year 2019. Therefore, according to this Court the Applicant's claim is barred by limitation and the limitation was not extended.

xiv) The other argument advanced by the Applicant was that the Respondent already appointed a nominee arbitrator and the same is acknowledgment of its liability. The said contention cannot be accepted. In its letter appointing the nominee arbitrator, the Respondent made it clear that the claims of the Applicant are barred by limitation and the arbitrator is appointed without prejudice to its rights. Therefore, mere appointment of nominee arbitrator does not mean acknowledgment of dispute or liability.

7. **Conclusion:**

In light of the aforesaid discussion, the present Arbitration Application is dismissed.

As a sequel, the miscellaneous applications, if any, pending in the Arbitration Application shall stand closed.

20th June, 2022
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K. LAKSHMAN, J