GAHC010138882023

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./22/2023

M/S. JCL INFRA PVT. LTD.,
(FORMERLY KNOWN AS J. SONS COMPANY LTD. AND THEREAFTER M/S JCL INFRA LTD.), CORPORATE OFFICE AT E-341, MAYUR VIHAR PHASE-2, DELHI-110091, REPRESENTED BY ITS ASST GENERAL MANAGER, SRI VIJAY RAJVANSHI, S/O- LATE RAM KISHAN DAS, E-341, MAYUR VIHAR PHASE-2, DELHI-110091.

VERSUS

THE UNION OF INDIA AND ANR
MINISTRY OF RAILWAYS, THROUGH ITS GENERAL MANAGER, NORTH FRONTIER RAILWAYS, MALIGAON, GUWAHATI, ASSAM-781011.

2:THE CHIEF ENGINEER/CON-IV
NORTH FRONTIER RAILWAYS
MALIGAON GUWAHATI
ASSAM-781011

Advocate for the Petitioner : MR. R A CHOUDHURY

Advocate for the Respondent : DY.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

Date : 03.06.2024

1. Heard Mr. F. Hassan, learned counsel for the petitioner. Also heard Mr. H. Gupta, learned CGC for the respondents.

2. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act'), for appointment of an Arbitrator in terms of the Arbitration Clause provided in the Contract Agreement dated 20.07.2010.

3. The petitioner's counsel submits that as per Clause 15.0 of the contract agreement executed between the parties, arbitration and settlement of disputes is to be governed in terms of Clause 63 and 64 of the General Conditions of Contract. He submits that the petitioner had completed the contract work in all respects in the month of June, 2017. However, the security deposit and PVC bill has not been released by the respondents despite submitting letters of release for the same by the petitioner. The petitioner's counsel submits that the petitioner had submitted a letter dated 11.05.2021 for release of the security deposit and PVC bill and as the same has not been acted upon by the respondents, the petitioner submitted letter dated 28.01.2023 to the respondents invoking the Arbitration Clause provided in the contract agreement, for appointment of an Arbitrator to decide the dispute between the parties.

4. The petitioner's counsel further submits that in terms of the petitioner's letter dated 14.01.2022, the final bill for the contract work had been signed by the Deputy Chief Engineer/Con/SPTR on 19.11.2018. He however submits that the petitioner is not agreeable to the final bill made and signed by the respondents on 19.11.2018. As the respondents have not acted upon the Arbitration Clause, this Court should appoint an Arbitrator to decide the dispute between the parties.

5. Mr. H. Gupta, learned CGC appearing for all the respondents submits that

the present application under Section 11(6) of the Arbitration Act is time barred in terms of Section 21 and Section 43(1) & 43(2) of the Arbitration Act. He accordingly submits that the Arbitration Petition should be dismissed in terms of the judgment of the Supreme Court in the case of ***B and T AG Vs. Ministry of Defence, 2023 SCC OnLine SC 657.***

6. I have heard the learned counsels for the parties.

7. Section 21 and Section 43 of the Arbitration Act states as follows-

> "***21. Commencement of arbitral proceedings.***- *Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*
>
> "***43. Limitations.-***
>
> *(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.*
>
> *(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.*
>
> *(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the*

agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963),for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

8. As can be seen from a reading of Section 21 of the Arbitration Act, arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent, unless otherwise agreed upon by the parties. In the present case, the letters issued by the petitioner dated 11.05.2021, 14.01.2022, 23.08.2022 and 28.01.2023 show that the contract work had been completed by the petitioner in all respects in June, 2017. The petitioner in his letter dated 14.01.2022 had stated that the final bill of the work had been signed by the Deputy Chief Engineer/Con/SPTR on 19.11.2018. However, the petitioner has written a letter to the respondents for appointment of an Arbitrator only on 28.01.2023, i.e., beyond the period of 3 years from the date of completion of the contract. Also, the letter dated 28.01.2023 is beyond the period of 3 years from the date of the date of signing the final bill for the work by the Deputy Chief Engineer/Con/SPTR, which was on 19.11.2018. The final bill is disputed by

the petitioner.

9. The petitioner has also written letter dated 23.08.2022 to the respondents praying for payment of his dues and stating in the last line of the letter as follows-

"*It is a notice as per Clause 63 of agreement"*

Assuming the above letter dated 23.08.2022 is to be counted as the commencement of arbitration proceedings, then also the said letter has been issued beyond the period of 3 years from the date of conclusion of the contract work and the signing of the final bill of the contract work by the Deputy Chief Engineer. Besides the above, Section 21 of the Arbitration Act requires the limitation period to be counted from the time the request for arbitration is received by the other party and not from the date of issuance of the request.

10. In the case of ***B and T AG (Supra),*** the Supreme Court has held that as none of the articles in the Schedule to the Limitation Act provide a time period for filing an application for appointment of an Arbitrator under Section 11, it would be covered by the residual provision under Article 137 of the Limitation Act, which provides that the period of limitation is three years for any other application for which no period of limitation is provided elsewhere in the divisions. The time limit starts from the period when the right to apply accrues. It has further held that 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. 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 arising in a civil action. The Supreme Court thereafter held in the above case that the petition under Section 11(6) of the Arbitration Act was a hopelessly barred claim, as the petitioner by its conduct had slept over it's right for more than 5 years.

11. The Supreme Court in the case of ***B and T AG vs. Ministry of Defence (supra)*** at para 52 has formulated the two questions that were to be decided by the Supreme Court, which are as follows:-

> "*1. The period of limitation for filing an application under Section 11 of the Act 1996, and*
>
> *2. Whether the Court may decline to make the reference under Section 11 where the claims are ex-facie time barred?"*

Insofar as the period of limitation for filing an application under Section 11 of the Arbitration Act is concerned, the period of limitation would run from the date when a Section 11 petition is received by the other side. However, the Court can decline reference under Section 11, when the claims are *ex-facie* time barred.

The Supreme Court in the above case has held that there is a fine distinction between the plea that the claim received is barred by limitation and the plea that the application for appointment of an Arbitrator is barred by limitation. It has held that 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. Thus the

claim for arbitration must be raised as soon as the cause for arbitration arises, as in the case of cause of action that arises in a civil action.

12. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. Section 43(2) states that for the purpose of Section 42 of the Limitation Act, 1963, an arbitration proceeding shall be deemed to have commenced on the date on which a request for a dispute to be referred to arbitration is received by the respondent. As the letter under Section 21 of the Arbitration Act has been issued only on 28.01.2023, which is beyond the period of 3 years from the date of completion of the contract and signing of the final bill by the Deputy Chief Engineer on 19.11.2018, the same is beyond the period of 3 years for invoking the Arbitration Clause.

13. In the case of ***M/s Arif Aziz Co. Ltd. vs. M/s Aptech Ltd.*** (Arb. P. No. 29/2023), the Supreme Court has held that although, limitation is an admissibility issue, yet it is the duty of the courts to prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process.

14. The Supreme Court in the case of ***Vidya Drolia and Others v. Durga Trading Corporation*** reported in ***(2021) 2 SCC 1*** held as follows:

> "*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."

15. Considering the fact that more than 3 years have elapsed from the date when the right to require arbitration is acquired by the petitioner, for payment of his PVC bill and release of security deposit which has been signed by the Deputy Chief Engineer on 19.11.2018, the present claim for arbitration under Section 11(6) of the Arbitration Act is barred by limitation.

16. The Arbitration Petition is accordingly dismissed. However, the petitioner may avail of alternative remedies for redressal of his grievance as per the law.

JUDGE

Comparing Assistant