IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION APPLICATION NO.15 OF 2023

Mahavir Enterprise	]	..	Applicant
vs.			
Chandravati Sunder Salian	]	..	Respondents

Mr.Anoshak Daver a/w Nehaa Shah i/b Dhiren Shah for the Applicant.

Mr.Durgaprasad Sabnis a/w Hiten Lala i/b Lex Firmus for the Respondent.

CORAM : BHARATI DANGRE, J

DATE : 29th February, 2024.

P.C.

1] The present Commercial Arbitration Application seek reference of the disputes arising between the parties, out of the Memorandum of Understanding dated 11.11.2012, for Arbitration.

The sequence and chronology of events would reveal that the Memorandum of Understanding was entered, on 11.11.2012 for granting development rights of the suit property in favour of the Applicant for consideration of Rs.7 Crores. Pursuant thereto, the Power of Attorney was executed by the Respondent, to enable the Applicant to deal with the Tenants on the subject property.

Somewhere in 2014, the Applicant addressed a letter to the Respondent for execution and registration of the Development Agreement and Power of Attorney in its favour, however, before it could be fructified, on 06.04.2015, the Respondent issued a notice of termination, attributing breaches at the end of the Applicant and the notice contemplated a period of 30 days for terminating the Agreement.

The Applicant filed its response to the notice expressing its readiness and willingness to comply with the obligations under the MoU pursuant to which, the Respondent also filed a Rejoinder.

For some point of time, there was exchange of names of the proposed Arbitrator between the parties, but the reference was never made to the Arbitrator.

2] The Law of Limitation is based on the maxim "*Vigilantibus non dormientibus jura subveniunt*" which means, "the law serve the vigilant and not those who sleep over their rights". The Halsbury's Law of England state the objectives of the law of limitation in the following words :

> "The Courts have expressed at least three different reasons supporting the existence of statutes of limitation i.e. -
> (a) that long dormant claims have more of cruelty than justice in them;
> (b) that a defendant might have lost the evidence to

dispute the State claim; and
(c) that persons with good causes of actions should pursue them with."

It is a well accepted principle that long dormant claims on being entertained would cause more injustice than resulting in justice and this is the principle which is to be found underlined in the decision of the Apex Court in the case of *Bharat Sanchar Nigam Ltd. vs. Nortel Networks India Pvt.Ltd. (2021) 5 SCC 738*, where, the issue for filing an Application under Section 11 in the Scheme of the Arbitration Act, 1996 is specifically dealt with. By examining the scheme being juxtaposed against the Limitation Act, it has been categorically held as under :-

"47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if a there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

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, 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" (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."

3] The law as laid down to the above effect, clearly pronounce, that in rare and exceptional cases, where the claims are ex-facie time barred and it is manifest that there is no subsisting dispute, the Court may refuse to make reference of the proceedings to an Arbitrator.

This principle is further reiterated by the Apex Court in the case of *Uttarakhand Purv Sainik Kalyan Nigam Ltd. vs. Northern fCoal Field Limited (2020) 2 SCC 455 as well as M/s. B & T AG vs. Ministry of Defence, (2023) SCC OnLine 657* where, their Lordships have specifically culled out the aspect of “cause of action” and the statutory scheme under the Arbitration Act, 1996, has been discussed in great

detail in reference to the Limitation Act and in particular Article 137 of Limitation Act.

4] Mr. Davar would assertively submit that upon termination, the parties were into discussion and there was an assurance of dissolving the discord and the Applicant was assured by the Respondent that all the obligations under the MoU shall be discharged and the letters of administration shall be obtained, but I must mention that except a bald statement to that effect, no material is placed on record to that effect.

The next milestone after the year 2015, is only on 11.08.2022, when the Respondent addressed a letter to the Applicant which is accompanied with a cheque of Rs.51,00,000/- being projected as the amount to be paid at the time signing of the MOU with a request to encash the same.

5] Perusal of the letter would also reveal that subject of the aforesaid communication, is the letter dated 28.05.2015. In Para 2 of the correspondence dated 11.08.2022, the Respondent has categorically stated that there was exchange of correspondence between the parties, but it ended with a letter dated 26.06.2015, and termination notice was never challenged in any court of law, thereby attaining finality.

6] Merely because the cheque has been forwarded in the year 2022, in my considered opinion would not amount to a dead claim coming alive as it is evident from the conduct of the Applicant that from the year 2015 onwards till the cheque was issued and to be precise till 15.10.2022, when the present Application is filed under Section 11, no steps have been taken to challenge the termination, before any forum of law, nor any grievance is raised by the Applicant. It can therefore, be said with certainty that the Applicant has virtually abandoned the claim and it would be perfectly fall within the term “dead wood”, which in no case can survive or be brought to life on expiry of period of 7 years.

7] In the wake of the above, I find it a fit case where the reference to the Arbitrator shall be refused, though in cases where it is doubtful whether there is a delay or not and whether the delay is attributed to the claimant, if there is some scope, the issue of limitation can be left, to be determined by the Arbitrator to be appointed.

However, it is in rare and exceptional cases, where it is seen that the claim is ex-facie time-barred, I do not deem it necessary to make reference ot the Arbitrator.

As a result, the Commercial Arbitration Application is rejected.

[BHARATI DANGRE, J]