IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya.

AP 863 of 2022

And

AP 370 of 2023

Prathyusha- AMR JV

vs

Orissa Steel Expressway Private Limited

For the petitioner	:	Mr. Joy Saha, Sr. Adv. Mr. Sourojit Dasgupta, Adv. Mr. Vishwarup Acharyya, Adv.
For the respondents	:	Mr. Sarvapriya Mukherjee, Adv. Mr. Aritra Basu, Adv. Mr. Sanket Sarawgi, Adv.
Last heard on	:	19.09.2023
Delivered on	:	06.10.2023

Moushumi Bhattacharya, J.

1. The petitioner has filed two applications, one for appointment of Arbitrator under section 11 of The Arbitration and Conciliation Act, 1996 and the second for interim protection under section 9 of the said Act.

2. Learned counsel appearing for the petitioner and the respondent have made their respective submissions on both the applications. The parties are the same and there are facts common to both the matters. The Court therefore proposes to deal with both the applications in this judgment.

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3. The prayer for appointment of Arbitrator is on the basis of an EPC Contract executed between the parties on 27.7.2013 which contains an arbitration clause. The EPC Contract was entered into pursuant to a tender issued by the National Highways Authority of India (NHAI).

4. The controversy relating to the arbitration agreement between the petitioner and the respondent is briefly discussed below.

5. The NHAI issued a tender for construction of 4 Laning of Rimuli-Roxy-Rajamuda on NH-215 in the State of Orissa under NHDP Phase-III on Build, Operate and Transfer basis. The petitioner performed the work under the contract to the extent possible. The petitioner attributes the reason for delay in performance of the contract to the respondent on account of the respondent's breach of the fundamental terms of the contract. The petitioner says it suffered loss and damage by reason of the alleged breach on the part of the respondent and claims that the respondent is hence liable to compensate the petitioner.

6. The respondent opposes the application for appointment of arbitrator on the ground that the petitioner's claim is time-barred. The respondent says that

the exchange of letters between the parties does not extend the period of limitation and that the present application does not contain any specific pleading seeking exclusion of any period of limitation.

7. The petitioner on the other hand seeks to defend the application for appointment of Arbitrator on the sequence of events which took place from 15.9.2016 to 18.12.2019 and a Corporate Insolvency Resolution Process (CIRP) on and from 3.11.2021. The petitioner seeks to place emphasis on an arbitral proceeding initiated by the respondent against NHAI wherein the claims of the petitioner were included by the respondent.

8. These are the essence of the arguments urged by learned counsel appearing for the respondent and the petitioner, respectively.

9. The objection pertaining to limitation requires a few of the significant events transpiring from the letters written by one party to the other to be summarized, which is stated below.

10. The petitioner wrote to the respondent on 15.9.2016 with regard to the loss suffered by the petitioner amounting to Rs. 76.10 crores on account of the delay and other causes attributable to the respondent. The respondent replied to the petitioner on 15.11.2016 asking the petitioner to submit documents in support of its claims which the petitioner did by a letter dated 20.6.2017. The respondent informed the petitioner on 11.5.2018 that the respondent has initiated an arbitral proceeding against NHAI and had included the petitioner's claims. On 10.9.2018 the petitioner informed the respondent that the

petitioner's claims are independent of the arbitration between the respondent and the NHAI but agreed to wait for 6 months.

11. On 9.5.2019, the respondent informed the petitioner that an award of Rs.322.78 crores has been passed in favour of the respondent in the arbitration with NHAI and that the petitioner's claims which had been included by the respondent as its own claims have not been awarded. The petitioner thereafter expressed its intention to invoke the arbitration clause in the EPC Contract by a letter written to the respondent on 5.6.2019.

12. The petitioner invoked the arbitration clause in the agreement on 30.9.2019 by a notice under section 21 of the Act. The respondent disputed the petitioner's claim by a letter dated 18.11.2019 saying that the respondent's agreement with NHAI and the EPC Contract between the respondent and the petitioner were back-to-back contracts. The petitioner denied these contentions by its letter dated 18.9.2019.

13. A Corporate Insolvency Resolution Process was initiated on 5.11.2021 in respect of the lead member of the petitioner being M/s. Prathyusha Resources and Infra Private Limited before the National Company Law Tribunal, Amaravati Bench. Liquidation of the corporate-debtor was initiated thereafter on 4.7.2022 and the Liquidator issued a letter on behalf of the petitioner to the respondent on 5.12.2022 reiterating the petitioner's claims against the respondent.

14. The present application under section 11(6) of the Act was filed on 22.12.2022.

15. The respondent's resistance to the prayer for appointment of Arbitrator is premised on Articles 55 and 113 of the Schedule to the Limitation Act, 1963. Under both these Articles, the period of limitation is 3 years for compensation for breach of any contract and for any suit where no period of limitation has been provided for in the Schedule, respectively. The respondent computes 3 years from 15.9.2016 when the petitioner intimated its claim of Rs. 76.10 crores to the respondent - which ends on 14.9.2019. According to the respondent, the claim is time-barred since the notice under section 21 was issued on 30.9.2019.

16. The respondent's computation of the period of limitation does not however take into account several significant events which goes to the root of the dispute. The correspondence exchanged between the parties from 15.9.2016 to 5.12.2022, does not show a single instance of the respondent denying the claim of the petitioner. On 11.5.2018 the respondent, in fact, admitted the petitioner's claims by stating that the respondent has included the petitioner's claims in the respondent's reference against NHAI

17. Section 18 of the Limitation Act deals with the effect of an acknowledgement in writing and contemplates a fresh period of limitation being computed from the time when the acknowledgement was made or signed. The respondent admitted to the claims of the petitioner by way of a letter of

11.5.2018. The period of limitation were hence renewed and refreshed for another 3 years from 11.5.2018 i.e. the date from the respondent's admission of the petitioner's claims.

18. Further the petitioner invoked the arbitration agreement on 30.9.2019 which falls within the limitation calculated from 11.5.2018. The law is settled that the period of limitation for filing an application under section 11(6) is 3 years from the date of invocation of the arbitration agreement or the refusal to appoint an arbitrator by the opposite party. In the present case, the date of invocation of the arbitration agreement is 30.9.2019; hence the application under section 11 was to be filed within 3 years from that date i.e. on or before 30.9.2022.

19. The CIRP of the lead member of the petitioner however intervened and continued from 3.11.2021 till 4.7.2022 under section 60(6) of The Insolvency and Bankruptcy Code, 2016 read with the section 14 of the IBC. The entire period of the CIRP from 3.11.2021 and 4.7.2022 would be excluded for the purpose of calculating the period of limitation. Section 60(6) discounts any events under the Limitation Act or any other law for the time being in force for the purpose of computing the period of limitation specified in any suit or application by or against a corporate-debtor for which an order of moratorium has been made under Part II of the IBC and provides that the period during which such moratorium is in place shall be excluded. The effect of section 60(6) of the IBC was considered in *New Delhi Municipal Council vs. Minosha India*

Limited; (2022) 8 SCC 384 where the Supreme Court held that the said provision of the IBC contemplated exclusion of the entire period during which the moratorium was in force in respect of the corporate debtor with regard to a proceeding contemplated therein.

20. The period of limitation would also stand extended by the orders of the Supreme Court passed in the wake of the Pandemic between 15.3.2020 and 28.2.2022.

21. Taking all of the above factors, the position with regard to limitation is this.

22. The right to sue accrued on 15.9.2016 when the petitioner complained of the loss which however got a fresh lease of limitation for a further period of 3 years from 11.5.2018 when the respondent acknowledged its liability. The arbitration agreement was invoked on 30.9.2019 which is well within the 3 years counted from 11.5.2018.

23. The present application under section 11 is also within the period of limitation from 30.9.2019 since the petitioner falls within the extension of all periods of limitation granted by the Supreme Court from 15.3.2020 to 28.2.2022.

24. The issue of limitation is a mixed question of fact and law and the Court must see whether a party opposing any extension of the period of limitation has established an irrefutable case on the facts pleaded together with statutory

provision and case law for the Court to hold in its favour. The Supreme Court in *Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited; (2021) 5 SCC 738* held that the issue of limitation goes to the maintainability / admissibility of the claim which is to be decided by the arbitral tribunal either as a preliminary issue or at the final stage after the parties lead evidence. In other words, the Court can interfere only where it is manifest at the referral stage that the claims are *ex facie* time-barred, dead or that there is no subsisting dispute; *Vidya Drolia vs. Durga Trading Corpn.; (2021) 2 SCC 1.* Moreover, in *Nortel* the arbitration clause was invoked after more than 5 years from the date of accrual of the cause of action. The parties also did not exchange any communications in the interregnum. Hence, the facts in *Nortel* are found to be distinguishable from those of the present case.

25. Further, contrary to the objection taken by the respondent, the petitioner has pleaded all the facts which are relevant for computing the period of limitation including the orders passed by the Supreme Court extending the periods of limitation in view of the Covid 19 Pandemic. The entire factual foundation is present before the Court. It is also relevant that the petitioner is required only to plead facts which are material; as prescribed in Order VI Rule 2 of The Code Civil Procedure, 1908. To clarify, Order VI Rule 2 requires pleadings to contain material facts and evidence by which the pleadings are to be proved; the Supreme Court in paragraph 67 of *The Maharashtra State Electricity Board vs. M/s. Madhusudan Dass and Brothers; AIR 1996 Bom 160. B and T AG vs. Ministry of Defence; 2023 SCC OnLine SC 657,* defines cause of

action to mean entire bundle of material facts which the plaintiff must prove in order to entitle him to succeed in the suit. The Supreme Court in that decision relied on *Geo Miller and Company Private Limited vs. Chairman, Rajasthan Vidyut Utpadan Nigam Limited; (2020) 14 SCC 643* to opine that the Court has to find out from the negotiations between the parties for ascertaining the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute to arbitration. *Geo Miller* held that this "breaking point" would be treated as the date on which a fresh cause of action would arise for the purpose of limitation.

26. Pleadings in the application leave little doubt that the petitioner has placed the entire negotiation history which is material to the question of limitation on record specifically for the purpose of computing exclusion of the period of limitation.

27. The Supreme Court in *B and T AG* frowned upon neverending negotiations between the parties solely for the purpose of postponing the cause of action and focused on the statutory limit of 3 years for the enforcement of claim.

28. The facts before the Supreme Court in that decision should be placed in context. The dispute between the parties arose in relation to the alleged wrongful encashment of warranty bond by the respondent pursuant to which the amount was encashed and remitted on 16.2.2016. The respondent deducted the concerned amount for recovery of applicable liquidated damages

on 26.9.2016 which was thereafter merged into the Government account. The parties however continued to engage themselves in bilateral discussions for exploring resolution of the dispute with regard to imposition of the LDs and encashment of the warranty bond. The respondent informed the petitioner on 29.9.2017 that the respondent's actions were in accordance with the terms of the contract and the petitioner was given sufficient opportunity to present its case. The petitioner claimed that even after the letter of 22.9.2017, the parties continued to negotiate and the petitioner requested the respondent on 4.9.2019 to review the imposition of LDs. The negotiations presented before the Supreme Court were from 2017 – 2022. The Supreme Court considering the import of such negotiations to an application under section 11(6) of the 1996 Act and held that the statutory time period under the Limitation Act cannot be defeated on the ground that the parties were negotiating and that the petitioner slept over its right for more than 5 years.

29. The petitioner in the present application has not foisted its entire case on negotiations. The negotiations have however been laid threadbare before the Court only for the purpose of bringing on record that the respondent admitted to its liability of outstanding amounts due to the petitioner on 11.5.2018 by stating that the respondent had included the petitioner's claims in its arbitral reference with NHAI. A distinction must necessarily be made between negotiations which are for the purpose of buying time simpliciter and those which refreshes the cause of action. "Cause of action" after all is nothing but facts taken together which are material for the plaintiff to successfully prove

the reliefs claimed in the suit. Cause of action becomes the deciding factor where the opposing party opposes the relief prayed for on the argument of the claim having become stale. Therefore, it is of utmost importance for the Court to assess the facts which are presented only to defeat limitation and those which constitute important bends in the flow of events leading to accrual or denial of valuable rights of the parties. There may be different stages in negotiations; a "turning point" can also change the status of talks and re-direct the parties to a new phase of claims or rival claims. The cause of action must be such so as to sustain a live claim and not seeking to breathe life into a dead claim. The facts brought to the Court in the present case fall into the former category.

30. The application for appointment of arbitrator is thus found to be maintainable for the above reasons.

31. The submissions made on behalf of the parties and the documents shown would establish that a dispute exists between the parties and is relatable to the arbitration agreement embedded in the contract dated 27.7.2013. The respondent has denied the fact of payments being outstanding to the petitioner on the ground that the respondent's contract with the petitioner is integral to/or is a back to back contract with that of the respondent and NHAI. The petitioner's claim including the question of limitation, if any, is wholly within the decision making domain of the arbitrator.

The referral Court in a section 11 matter is not required to look beyond the aforesaid two factors.

32. AP 863 of 2022 is accordingly allowed and disposed of by appointing Mr. R. K. Bag, former Judge of this Court to act as the Arbitrator subject to the learned Arbitrator communicating his consent in the prescribed format to the Registrar, Original Side of this Court within 3 weeks from the date of this judgment. The petitioner shall communicate this order to the learned Arbitrator within 4 days from the date of this judgment with the requisite details of the contact person of the petitioner.

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33. The petitioner has prayed for an injunction restraining the respondent from withdrawing an amount of Rs. 76.32 crores out of the awarded amount of Rs. 3,22,77,58,577/- deposited by NHAI with the Registrar of the Delhi High Court and alternatively for a direction on the respondent to deposit the said amount with this Court. The prayers are contained in an application filed under section 9 of The Arbitration and Conciliation Act, 1996.

34. The facts leading to the dispute are not being repeated. The specific prayer of restraining the respondent from withdrawing the amount of Rs. 76.32 crores out of the awarded amount deposited by NHAI with the Registrar of the Delhi High Court however needs a little bit of elaboration.

35. The respondent was awarded a sum of Rs. 322.77 crores in an arbitration between the respondent and NHAI. The arbitral award is dated 31.3.2019. NHAI / award-debtor approached the Delhi High Court for setting aside of the award. On 24.7.2019, the Delhi High Court directed NHAI to furnish security of the entire awarded amount of Rs. 322.77 crores for stay of the award under section 36(2) of the Act. On 1.11.2019, the Delhi High Court permitted the respondent to withdraw the entire amount after furnishing a bank guarantee of an equivalent amount. The said order was however recalled by an order dated 3.6.2020. The Delhi High Court thereafter on 10.6.2020 permitted the respondent to withdraw the amount of the performance bank guarantee of Rs. 14.65 crores from the deposit made by the NHAI and the respondent accordingly withdrew this amount. On 9.11.2020, the Delhi High Court further permitted the respondent to withdraw another Rs. 35.21 crores after furnishing a bank guarantee for an equivalent amount. The respondent also withdrew this amount. As on date, the respondent has withdrawn a total of Rs. 49,86,90,670/- pursuant to orders of the Delhi High Court.

36. The petitioner's claim of unpaid dues against the respondent is of Rs. 76.32 crores, the relevant facts whereof have been stated in the first section of this judgment. The petitioner accordingly prays for a restraint on the respondent to withdraw an amount of Rs. 76.32 crores out of the amount awarded to the respondent.

37. The respondent opposes the prayer on the ground of limitation and the petitioner being disentitled to any order of attachment as the claim is one for damages. The respondent also says that the petitioner has not made out any case for orders of attachment. The respondent's case is essentially under Order XXXVIII Rule 5 of The Code of Civil Procedure, 1908 and the petitioner being required to satisfy the twin tests thereunder; namely whether the respondent is about to dispose of the property or intends to remove the whole or any part of the property for obstructing execution of a decree. The respondent also says that any order of attachment must precede the petitioner demonstrating an unimpeachable claim and the likelihood of the claim remaining unsatisfied unless security is furnished at the initial stage.

38. In response to the above arguments made on behalf of the respondent, a distinction must necessarily be drawn between the benchmarks statutorily-contemplated under section 9(1) of The Arbitration and Conciliation Act, 1996 and Order XXXVIII Rule 5 of The Code of Civil Procedure, 1908.

39. While the latter falls under the chapter "Arrest and Attachment before Judgment" and contains certain safeguards before any orders can be passed by the Court, section 9(1) is a quick-relief measure before or during the arbitration and even after the passing of an award but before it is enforced.

40. Order XXXVIII Rule 5 is a relief contemplated at any stage of a suit where the plaintiff must discharge the onus of showing that the defendant seeks to obstruct or delay the execution of any decree by disposing of the

entirety or part of the property or intends to remove the same from the local limits of the jurisdiction of the Court. The Court proceeds to pass an order on the defendant for furnishing security only on the plaintiff satisfying the conditions under Order XXXVIII Rule 5(1)(a) or (b). The provision envisages a measure of finality where a decree passed by the Court is at risk of being frustrated or rendered a cipher.

41. Section 9(1) of the 1996 Act, on the other hand, is usually at the pre-final stage where parties rush to the Court for preservation of the subject-matter of arbitration. The Court deciding such application is not required to go into the depth of the dispute and is never called upon to finally adjudicate the relief claimed. This would be evident from section 9(2) of the Act which requires the parties to commence arbitration proceedings within 90 days from the date of an order passed under section 9(1) of the Act or as the Court may direct. The Court will simply make a *prima facie* assessment of the application and whether refusal of an interim protection would frustrate the arbitration. Unlike Order XXXVIII Rule 5 where the Court intervenes to protect a decree, section 9(1) is simply an interim measure to protect and preserve the arbitration before it is finally adjudicated in the form of an award.

42. Therefore, cornering a party in a section 9(1) application to satisfy the rigours of Order XXXVIII Rule 5 and produce an affidavit to substantiate the apprehension on which an order for security is prayed for, would result in nullifying the object of section 9(1) of the 1996 Act. An applicant who comes to

the Court for relief in time-sensitive matters cannot be drawn and quartered by being relegated to the stranglehold of Order XXXVIII Rule 5. It would indeed be absurd to hold the applicant to satisfactory evidence that the opposite party will fritter the substance of the arbitration away before the Court steps in to salvage the situation. A party who seeks urgent intervention of the Court cannot be strung to the structure of the statute - which guards against errant defendants – and pilloried for want of incriminating evidence. In most cases this would be a tall and impossible order. If the Court drags its feet, the respondent may well deport and decamp with what was intended to be preserved. This would be regressive to the whole purpose of timely, effective and focussed interim relief under section 9(1) of the 1996 Act.

43. *Raa Projects Limited vs. Seaway Shipping Ltd.; (2010) 4 CHN 34 (Cal)* was a claim for damages in a suit and a Co-ordinate Bench accordingly held that the plaintiff cannot claim attachment before judgment in respect of an un-liquidated claim in damages. In *Jai Balaji Industries Ltd. vs. Hyquip Systems Pvt. Ltd.; (2010) 4 CHN 87 (Cal)*, a Co-ordinate Bench directed the appellant to furnish an undertaking backed by a Resolution of the appellant company before the Commercial Court that the appellant will honour the award passed by the arbitrator and pay the awarded amount subject to the challenge which may be filed before a higher forum. *State of Gujarat vs Kothari and Associates; (2016) 14 SCC 761* has been cited for the proposition that a claim for damages must be filed within the period of limitation. This decision would cease to be

relevant in view of the finding of this Court in the first section of this judgment with regard to the plea of limitation.

44. On the other hand, *Essar House Private Limited vs. Arcelor Mittal Nippon Steel India Limited; 2022 SCC OnLine SC 1219* reinforces the Court's power to grant interim measures under section 9(1) of the 1996 Act. *Rahul S. Shah vs. Jinendra Kumar Gandhi; (2021) 6 SCC 418* empowers the Court to grant appropriate orders during the pendency of a suit by invoking inherent powers under section 151 of the CPC. A Division Bench of this Court in *Tata Chemicals Limited vs. Kshitish Bardhan Chunilal Nath; 2022 SCC OnLine Cal 3343* held that refusal of an order of injunction or attachment in a money claim cannot be an absolute proposition. The Division Bench proceeded to hold that Order XXXVIII of the CPC does not restrict the Court's power to pass orders which are considered just and expedient.

45. In essence, the respondent's demand for demonstrating an unimpeachable liquidated claim before any order of security can be passed is contrary to the 1996 Act itself and to the wide-spectrum of powers conferred on the Court to grant quick-remedy reliefs on a *prima facie* assessment of the irretrievable injury and balance of convenience made out by the party.

46. Apart from the foregoing reasons the respondent is admittedly a Special Purpose Vehicle (SPV) which was incorporated only for the purpose of discharging its obligations under the contract with NHAI. The claim of the petitioner is in excess of Rs. 76 crores along with accrued interest. Hence, since

the contract has been performed and the respondent has been discharged from the contractual terms, the petitioner's entire claim may be frustrated if the respondent is dissolved. Further, the fact of the respondent going through financial stress would also be evident from the orders passed by the Delhi High Court allowing the respondent to withdraw the amount of Rs. 49.81 crores.

47. Since the respondent was incorporated as a SPV and has no other business, the petitioner is entitled to interim protection. This is all the more so when the respondent has admitted to the petitioner's claims in its letter of 11.5.2018. Section 9(1) of the Act entails interim measures of protection for securing the amount in dispute in the arbitration and the reasons for the petitioner's apprehension has been made out in the application.

48. Admittedly, the respondent was permitted to withdraw in excess of Rs. 49 crores by the Delhi High Court from the total awarded amount. The respondent hence must secure the petitioner's claim in view of the respondent's admission that the respondent had included the petitioner's claim in the reference between the respondent and NHAI. The facts and the law as well as the statutory position under section 9(1) of the 1996 Act persuade this Court to grant the reliefs as prayed for.

49. AP 370 of 2023 is accordingly allowed and disposed of by directing the respondent to deposit an amount of Rs. 76.32 crores with the Registrar, Original Side of this Court within two weeks from the date of this judgment

50. Since an Arbitrator has been appointed in AP 863 of 2022, the interim order of injunction shall remain in place till 6 weeks from the date of this judgment or until 2 weeks from the first sitting of the arbitral tribunal whichever is earlier. The petitioner's claim of securing the amount of Rs. 76.32 crores together with any other claims/ counter claims will thereafter be considered by the learned Arbitrator.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)