

**THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE**

**ARBITRATION APPLICATION No.175 of 2023**

**ORDER:**

Mr. Paras Kuhad, learned Senior Counsel representing Mr. Tarun G. Reddy, learned counsel for the applicant.

Mr. Vedula Venkataramana, learned Senior Counsel representing Mr. P.Sri Harsha Reddy, learned counsel for the respondent.

2. This arbitration application under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the Arbitration Act"), has been filed to appoint a nominee arbitrator on behalf of the respondent for adjudication of the claims and disputes between the applicant and the respondent as per Clause 16.2 of Article 16 of the Agreement for Development & Raising Contract between Uranium Corporation of India Limited and SMS Infrastructure Limited (Contractor) for Tummalapalle Project, dated 06.02.2008.

3. Facts leading to filing of this application briefly stated are that the applicant is a Private Limited Company incorporated under the provisions of the Companies Act, 1956. The respondent is also a company registered under the Companies Act, 1956 and is a Public Sector Undertaking under the Department of Atomic Energy, Government of India and has the exclusive rights to undertake activities for mining and processing uranium in India. The respondent has several operating underground mines, processing plants, bi-product recovery plants and plays a significant role in generation of Nuclear Power in India.

4. The parties entered into an agreement dated 06.02.2008 captioned as “the Agreement for Development & Raising Contract between Uranium Corporation of India Limited and SMS Infrastructure Limited (Contractor) for Tummalapalle Project” (hereinafter referred to as, ‘the Agreement’). Under the aforesaid Agreement, the applicant was entitled to undertake mining activities in the area of Tummalapalle as defined in the Agreement for a period of

eight years. The total value of the Agreement was determined at Rs.626,04,44,749.53 crores (Rupees six hundred and twenty six crores four lakhs forty four thousand seven hundred and forty nine and fifty three paise only). It is the case of the applicant that even though the respondent asked the applicant to deviate from the terms specified in the Agreement on several occasions, the applicant completed the obligations under the Agreement as per the timelines and specifications provided in the Agreement. However, it is the case of the applicant that while doing so the applicant incurred additional expenditure which was brought to the notice of the respondent.

5. The applicant issued a letter dated 08.06.2023 with regard to its claims which was placed before the Chairman and Managing Director of the respondent, wherein a request was made to settle the claims of the applicant. It was further stated in the aforesaid communication that if disputes are not settled amicably, the applicant reserves the right to initiate arbitration proceedings. Despite receipt

of the aforesaid letter, the respondent neither responded to the communication dated 08.06.2023 nor came forward for amicable settlement of the disputes.

6. Thereupon the applicant initiated arbitration proceedings and by notice dated 17.07.2023, Mr. Justice A.K.Sikri, Former Judge of Supreme Court, was appointed as its nominee for Arbitral Tribunal and called upon the respondent to nominate its nominee arbitrator within a period of thirty days so that the arbitration proceedings could be initiated. The respondent neither responded to the aforesaid notice nor nominated its nominee arbitrator as required under Clause 16.2 of Article 16 of the Agreement. Thereupon the applicant approached this Court by filing this application under Section 11(5) and (6) of the Arbitration Act.

7. Learned Senior Counsel for the applicant submitted that Section 11 of the Arbitration Act confines the jurisdiction of the Court for examination of the existence of arbitration agreement and the applicant is only required to furnish *prima facie* proof of existence of arbitration

agreement. It is further submitted that Section 16 of the Arbitration Act in an inclusive provision which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. It is contended that the issue of limitation is a jurisdictional issue and requires to be decided by Arbitral Tribunal. In support of the aforesaid submissions, reliance is placed on the decision rendered in **In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899**<sup>1</sup>.

8. On the other hand, learned Senior Counsel for the respondent submitted that the agreement executed between the parties on 06.02.2008 was a time bound contract which expired on 06.03.2020. It is contended that the arbitration clause subsisted only during the period of main agreement/contract and cease to subsist after the expiry of the period of contract by efflux of time i.e., on 06.03.2020. It is submitted that the judgment in **In Re: Interplay between Arbitration Agreements under the**

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<sup>1</sup> 2023 SCC OnLine SC 1666

**Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899** (supra) does not apply to the facts of the case as subsistence of an arbitration clause is the primary requirement for exercise of jurisdiction under Section 11(6) of the Arbitration Act. It is urged that the claims of the applicant are dishonest and time barred. It is argued that the dispute resolution mechanism in the form of an arbitration clause is not a permanent feature between the parties. In support of his submissions, reliance is placed on **Vidya Drolia vs. Durga Trading Corporation**<sup>2</sup> and **Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited**<sup>3</sup>.

9. I have considered the submissions made on both sides and have perused the record.

10. Clause 16.2 of Article 16 of the Agreement, which is an arbitration clause, is extracted below for the facility of reference:

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<sup>2</sup> (2021) 2 SCC 1

<sup>3</sup> (2021) 5 SCC 738

**16.2. Arbitration**

In the event of any dispute or difference arising out of relating to, under or in respect of this Contract between the parties, the same shall be referred at the written request of either party to the arbitration of a Board of three Arbitrators comprising one nominee each of UCIL and the Contractor and the third to be appointed by the two arbitrators by mutual agreement in writing before entering upon the reference. Such arbitration shall be subject to and in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (No. 26 of 1996) and the Rules made thereunder and any statutory modification or re-enactment thereof. The venue of arbitration proceedings shall be Hyderabad, Andhra Pradesh, India. Any Arbitration award made in such arbitration proceedings shall be final and binding on the parties and shall be enforceable in any court of competent jurisdiction. The arbitrators shall give a reasoned and speaking award.

During the course of arbitration proceedings, the parties hereto shall continue to execute their respective obligations hereunder except the obligations in respect of such matters as are referred to arbitration.

The requirement of appointing Arbitrator to settle the dispute is not binding on the insurance company and it is free to take legal proceedings for realization of its claim against the Contractor, if any.

Both parties agree that any ex-employee of UCIL, or the Contractor shall not be nominated as Arbitrator and/or Umpire.

Contractor shall submit the final bill covering all his claims, on any account whatsoever, including the extra work arising out of or relating to or under the contract. Once the final bill has been submitted, it shall be deemed, that contractor has no other claims of any kind or nature whatsoever under or arising out of or relating to the contract or the work or extra work done pursuant thereto, and that the contract including the arbitration agreement contained therein stands terminated and determined by mutual agreement of the parties. Claims and disputes, if any, after the date of discharge letter shall only be settled by suit in court of law and not through arbitration.

The above arbitration provision will stand determined/ terminated as soon as Letter Discharge is submitted by the Contractor.

11. In a proceeding under Section 11(6) of the Arbitration Act, this Court has to satisfy itself whether underlying contract contains an arbitration agreement which provides for arbitration pertaining to disputes which have arisen between the parties. It is pertinent to note that the respondent has not disputed the execution of the Agreement dated 06.02.2008 which contains an arbitration clause. It is trite law that an arbitration clause which forms part of the contract shall be treated as an agreement



independent of other terms of contract and the arbitration clause survives notwithstanding expiry of the agreement (see **Reva Electric Car Company Private Limited vs. Freen Mobil**<sup>4</sup>, **A.Ayyasamy vs. A.Paramasivam**<sup>5</sup> and **Vidya Drolia** (supra)).

12. In the instant case, a notice was sent by the applicant on 08.06.2023 with regard to its claims, wherein the respondent was requested to settle the claims and it was further informed that in case the disputes are not settled amicably, the applicant reserves the right to initiate the arbitration proceedings. However, the aforesaid notice failed to evoke any response. Thereupon the applicant initiated the arbitration proceedings on 17.07.2023 and filed this application on 29.09.2023.

13. The Supreme Court in **Bharat Sanchar Nigam Limited** (supra) while dealing with the issue of limitation in paragraphs 38 to 40, 44 and 47 has held as under:

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<sup>4</sup> (2012) 2 SCC 93

<sup>5</sup> (2016) 10 SCC 386

***Issue of limitation***

**38.** Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of “jurisdiction” pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

**39.** Admissibility issues however relate to procedural requirements, such as a breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time-barred, or prohibited, until some precondition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.

**40.** The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the Arbitral Tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to

the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.

**44.** The issue of limitation which concerns the “admissibility” of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

**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 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.

14. Section 16(1) of the Arbitration Act provides that Arbitral Tribunal may rule on its own jurisdiction. In **Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited**, a two-Judge Bench of Supreme Court held that the *doctrine of kompetenz-kompetenz* is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by one of the parties. It was further held that Section 16 of the Arbitration Act is an inclusive provision of very wide ambit.

15. A seven-Judge Bench of Supreme Court in **In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899** (supra) has comprehensively dealt with the aforesaid issue and in paragraphs 131, 132 and 162 has held as under:

**131.** In **Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products** [(2018) 2 SCC 534], one of the issues before this Court was whether a decision on the issue of limitation would go to the root of the jurisdiction of the arbitral tribunal, and therefore be covered by Section 16 of the Arbitration Act. This Court referred to Section 16(1) to observe that “*the Arbitral Tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the Arbitral Tribunal may embark upon an inquiry into the issues raised by the parties to the dispute.*” In **Bhadra Products** (supra), it was held that the issue of limitation concerns the jurisdiction of the tribunal which tries the proceedings.

**132.** In **Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field** (supra), the issue before this Court was whether a referral court at the stage of appointment of arbitrators would be required to decide the issue of limitation or leave it to the arbitral tribunal. A Bench of two Judges of this Court held that the doctrine of competence-competence is “*intended to minimize judicial intervention, so that the*

*arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.”*

Moreover, this Court held that Section 16 is an inclusive provision of very wide ambit:

“7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. **Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, “including any objections” with respect to the existence or validity of the arbitration agreement. Section 16 is an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal.** The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.”

(emphasis supplied)

**162.** The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term “examination” in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of “existence” of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., [(2017) 9 SCC 729]* (supra), this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under

Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in **Vidya Drolia** (supra) in the context of Section 8 and Section 11 of the Arbitration Act.

16. Applying the aforesaid legal principles to obtaining factual matrix of the case, it cannot be said that the claims of the applicant fall in limited category of cases where the claim of the applicant can be said to be *ex facie* time barred. The issue whether the claims of the applicant are barred by limitation is the issue which requires to be adjudicated by the Arbitral Tribunal. It is clarified that no opinion has been expressed by this Court whether claims of the applicant are barred by limitation as aforesaid issue is required to be examined by the Arbitral Tribunal. The decision in **Bharat Sanchar Nigam Limited** (supra) is of no assistance to respondent as in the said decision the

cause of action accrued on 04.08.2014 and the notice invoking the arbitration clause was issued on 29.04.2020. In the aforesaid factual context, it was held by the Supreme Court the claim is *ex facie* barred by limitation.

17. The applicant has already appointed Mr. Justice A.K.Sikri, a former Judge of the Supreme Court as its nominee arbitrator. Mr. Justice V.Ramasubramanian, former Judge of the Supreme Court (resident of K-90 A, First Floor, Hauz Khas Enclave, Delhi – 110016; Mobile No.9318456789) is appointed as nominee arbitrator on behalf of respondent for adjudication of claims and disputes between the applicant and the respondent.

18. Accordingly, the arbitration application is allowed. There shall be no order as to costs.

Miscellaneous applications pending, if any, shall stand closed.

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**ALOK ARADHE, CJ**

05.03.2024  
Pln/vs