

HIGH COURT OF JUDICATURE AT ALLAHABAD

Arbitration & Conciliation App. U/s 11(4) No. 1 of 2020

Pronounced on: January 25, 2023

M/s R.B.T. Industries Ltd. and another

... Applicant

Through:- Mr. Udai Karan Saxena, Senior Advocate
with Mr. Saurabh Shukla, Advocate

v/s

Jaswant Rai and others

... Respondents

Through:- Mr. Rajnish Kumar Rai, Advocate

Coram: HON'BLE RAJESH BINDAL, CHIEF JUSTICE

ORDER

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") praying for appointment of an Arbitrator for resolution of dispute between the parties.

2. The fact, in brief, are that a tender was invited for the work-supplying, fabrication, erection and fixing of 3000 nos. steel channel sleepers on bridge no. 11 on MGS-BSB Section under DRM Northern Railway, Lucknow, wherein applicants also participated. The

rates of the applicants were found lowest as a result whereof the work was awarded to the applicants vide letter of acceptance dated January 15, 2008.

3. Learned counsel for the applicant submitted that the original work allotted to the applicants was completed within time. However, certain additional work was assigned. In execution thereof, there was delay for the reason that required drawing was not handed-over by the respondents, despite repeated request made by the applicants.

4. He further submitted that there is an arbitration clause in the General Conditions of contract for Railways. The applicant had issued notice on August 10, 2018 seeking appointment of an arbitrator. However, arbitrator was not appointed.

5. On the other hand, learned counsel for the respondents, submitted that the applicants had only executed about 88 per cent of the work. There was no fault on the part of the respondents; the delay was at the end of the applicants. Number of extensions were granted to the applicants to complete the project. Last extension was granted on November 20, 2010 but the project was not completed. Ultimately, vide communication dated August, 19, 2013 the contract was terminated. It was specifically mentioned in the letter that on account of non fulfillment of contract, the Railways reserve the right to claim damages under clause 62 of the General Conditions of Contract. He further submitted that the contract having been terminated on August 19, 2013, any notice seeking appointment of arbitrator with reference to the work, which was awarded to the applicants vide letter dated January 15, 2008 and was to be completed within the extended period, is highly belated and the claim is time barred. Even after issuance of notice dated August 10, 2018 seeking appointment of an arbitrator, the present applicant was filed

more than one year later in this Court. The claim of the applicant being time barred, the appointment of Arbitrator is to be an exercise in futility. It was further submitted that this aspect can be gone into by this Court even at the stage of the appointment of Arbitrator as held by Hon'ble Supreme Court in **Insurance Company Ltd. Vs. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267**, wherein referring to the earlier authority on the issue in **SBP and Company Vs. Patel Engineering Limited and another (2005) 8 SCC 618**, the Court identified and segregated the issues that may be raised in an application under Section 11 of the Act into three categories, second category whereof includes the aspect, "whether the claim is a dead (long-barred) claim or a live claim?"

6. Heard learned counsel for parties and perused the paper book.

7. In the case in hand, the contract was awarded to the applicants vide letter dated January 15, 2008 which was to be completed within a period of six months. The stand taken by the applicants is that certain additional work was assigned to be executed, which was delayed as the applicants were not furnished the drawings thereof. It is not in dispute that extensions were also granted to the applicant which last expired on November 20, 2010.

8. The stand of the respondents is that any delay in completion of project is not attributable to the respondents. It was only on the part of the applicants. Waiting for quite some time, when despite reminders dated October 26, 2012, August 12, 2013 and August 19, 2013 the applicants failed to complete the project, the contract itself was terminated vide letter dated August, 19, 2013, reserving the right of Railways to claim damages. Nothing was suggested that the Railways proceeded to claim damages against the applicants. However, the fact remains that applicants issued notice

seeking appointment of Arbitrator on August 10, 2018, i.e., more than five years after the contract was terminated. Any action initiated more than five years after termination of contract seeking appointment of arbitrator for resolution of dispute is highly belated and would be time barred as even a civil suit may not be maintainable at this stage. At the stage of consideration of application under Section 11(6) of the Act, the issue as to whether a claim, which is ex facie time barred, can be referred to arbitration, has been examined by Hon'ble the Supreme Court in **Bharat Sanchar Nigam Limited and others Vs. Nortel Networks India Pvt. Ltd. (2021) 5 SCC 738**, wherein it was held as under:

“... where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.”

9. Once the claim is found to be ex facie time barred, in my considered opinion, the appointment of the Arbitrator for resolution of dispute would be a futile exercise and, therefore, no arbitrator need be appointed in the case in hand.

10. For the reasons mentioned above, there is no merits in the present application. The same is, accordingly, dismissed.

(Rajesh Bindal)
Chief Justice

Allahabad
January 25, 2023
P.Sri.

Whether the order is speaking : Yes/No
Whether the order is reportable : Yes