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IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Shekhar B. Saraf

AP 312 of 2021

M/S. ZILLON INFRAPROJECTS PVT. LTD.

VS

BHARAT HEAVY ELECTRICALS LIMITED

For the Petitioner : Mr. Sumit Kumar, Adv.
Mr. Soumen Das, Adv
Mr. Altamash Alim, Adv

For the Respondent : Mr. Anirudh Bhattacharya, Adv.

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Last heard on: March 23, 2023

Judgment on: March 29, 2023

Shekhar B. Saraf, J.:

1. The petitioner M/s Zillion Infraprojects Pvt. Ltd. has filed this application under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') praying for appointment of a sole arbitrator to adjudicate the disputes which have arisen between the parties in relation to the Letter of Intent dated May

26, 2011. The registered office of the petitioner is located at 5th Floor, Anushka Shopping Mall, Plot No. 2, Gar Trade Centre, Sector 11, Rohini, New Delhi – 110085.

2. The respondent is Bharat Heavy Electricals Limited having its registered office at BHEL House, Siri Fort, New Delhi – 110049 and having its local office PSER Office at DJ-9/1, Sector II, Salt Lake City, Kolkata 700091.

Relevant Facts

3. The respondent had awarded the petitioner a contract worth INR 39,82,66,061/- vide Letter of Intent ('LOI') No. PSER:SCT:ABJ-B1183:10:LOI:2371 dated September 21, 2010, and work order contract dated October 28, 2010 for erection, testing, commissioning, trial run, and handing over of Boiler etc., ESP, rotating aux piping, insulation, painting etc. (Part I) along with structural steel works, transfer points, conveyer galleries, connecting platforms, etc. (Part II) for Package A of 4 x 270 MW Unit – 1, Phase – I, Chandwa Thermal Power Plant, Jharkhand. The completion period for Part I was within a period of 26 months from the date of start of work, and within a period of 15 months from the date of start of work for Part II.

4. Similarly, the respondent had awarded the petitioner a contract worth INR 44,40,00,000/- vide Letter of Intent ('LOI') No. PSER:SCT:ABJ-B1183:11:PKG-B:LOI:2419 dated May 26, 2011

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and work order contract dated August 03, 2011 for erection, testing, commissioning, trial run, and handing over of Boiler etc., ESP, rotating aux piping, insulation, painting etc. (Part I) along with structural steel works, transfer points, conveyer galleries, connecting platforms, etc. (Part II) for Package B of 4 x 270 MW Unit – 1, Phase – II, Chandwa Thermal Power Plant, Jharkhand. The completion period for Part I was within a period of 26 months from the date of start of work, and within a period of 15 months from the date of start of work for Part II.

5. Even though both LOIs and contracts were with independent scope of work, they were part of the same site and work was carried on simultaneously on locations adjacent to each other. Therefore, the communications as well as billing for the two sites were done together. The first milestone activity related to the project was completed on December 21, 2011.

6. The present arbitration petition is concerned with the Phase I LOI wherein disputes arose between the parties with regard to, among other causes, execution of the project and contractual obligations of the parties.

7. The respondent was irregular in payments of bills since October 2012 onwards and the petitioner vide emails dated January 17, 2013 and January 18, 2013 informed the respondent about the

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stage of the work and asked for clear instructions on whether the respondent wanted them to stop the work or temporarily demobilise the site. The petitioner also requested for payment of long standing dues against the bills raised.

8. However, the respondent vides email dated January 18, 2013 put the project on 'Hold' and further informed the petitioner that the contractual period of completion of project cannot be extended. It also asked the petitioner to submit final bills and to take immediate action to reconcile the issued materials.

9. On December 12, 2014, the petitioner wrote an email to the respondent, and explained the whole situation of the project since the inception and claimed Rs. 12,61,33,305/- as costs against idling of resources as well as expenses incurred by it till November 30, 2014 for execution of the contract. The said email was followed by a letter dated December 15, 2014. The respondent, however, failed to make any such payment.

10. Post the aforesaid letter, the petitioner wrote to the respondent on May 12, 2015 and requested for release of the performance bank guarantee on the ground that the project is on 'Hold' and that there have been no further communications from the respondent's side.

11. Instead, the respondent vide its email dated May 16, 2015 intimated the petitioner of the short closure of the contract.

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Thereafter, over the course of next two years, the petitioner wrote several emails and letters to the respondent reiterating the above-stated requests along with the prayer for return of the performance bank guarantee, and finally, served a legal notice dated March 22, 2017.

12. On receipt of the said legal notice, the respondent on March 27, 2017 returned the performance bank guarantee without addressing the issue of compensation for delays by the 'Hold' imposed on the petitioner. It is to be noted here that the petitioner had kept on renewing the said performance bank guarantee despite the project being on 'Hold'.

13. Thereafter, on April 18, 2017 and April 19, 2017, the respondent called a meeting at its Kolkata office with the petitioner to discuss and sort out the issues between the parties.

14. On January 16, 2019, the petitioner invoked arbitration in terms of Section 21 of the Act and clause 2.21 of the General Conditions of Contract whereby it requested the respondent to nominate a sole arbitrator within 15 days of receipt of the notice. It is to be noted here that the said clause provides for the disputes to be referred to a sole arbitrator appointed by BHEL/In Charge(Region), and provides the venue of the arbitration to be the place from where the contract was issued or such other place as the

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arbitrator at his discretion may determine. The said clause does not provide for seat of the arbitration.

15. On receipt of the afore-mentioned legal notice, the respondent again called for a meeting on March 06, 2019 with the petitioner at its regional office in Kolkata. Subsequent to this meeting, the petitioner submitted its claim on March 16, 2019 with all its requisite documents. On March 28, 2019, the respondent, on its part, acknowledged the receipt of the claim with a request to withdraw the arbitration notice dated January 16, 2019.

16. On failure on the part of the respondent to make any headway with the claims and possible amicable settlement, the petitioner wrote on September 15, 2019 communicating its intent to initiate the arbitration proceedings. In reply, the respondent vide its email dated September 26, 2019 asked the petitioner to submit work order wise bifurcation of the claims without which assessment of the claims are not possible, and the petitioner responded immediately with reasons of its inability to do so.

17. The respondent vide email dated September 27, 2019, reiterated the efforts on their part to amicably settle the disputes, and stated that the documents of the petitioner were under scrutiny. The respondent specifically mentioned that its intention is to solely assess the petitioner's claim and to amicable resolve the matter.

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18. As a last chance, the petitioner again wrote to the respondent on October 14, 2019 and explained the reasons for non-bifurcation of the claims. It stated that the respondent is not keen on settling the matter amicably and is intentionally trying to delay the process of settlement with an object to frustrate the same. The respondent wrote to the petitioner vide emails dated October 24, 2019, November 20, 2019 and January 01, 2020 and requested the petitioner to submit requisite bills complete in all respects as per contract for payment.

19. The petitioner filed an Arbitration Petition before the Delhi High Court and subsequently withdrew it with the liberty to approach this Court. On July 28, 2021, an arbitration petition seeking appropriate directions under Section 11 was filed before this Court.

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Observation & Analysis

20. I have heard the counsel appearing on behalf of the parties and perused the materials on record.

21. Before delving into other issues plaguing the present application, I will proceed first with the appointment procedure of the sole arbitrator as laid down by clause 2.21 of the contract between the parties.

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22. In the light of the apex court's pronouncements in ***Perkins Eastman Architects DPC & Another -v- HSCC (India) Ltd.*** reported in ***[2019] 17 S.C.R. 275*** and ***TRF Ltd. -v- Energo Engineering Projects Ltd.*** reported in ***[2017] 7 S.C.R. 409,*** it is crystal clear that unilateral appointment of an arbitrator by a party who has some sort of interest in the final outcome or decision is not permissible. The cardinal importance of the independence and neutrality of the arbitral tribunal has been reiterated by the Supreme Court on multiple occasions. For arbitration to be seen as a viable dispute resolution mechanism and as an alternate recourse to litigation, the independence of arbitration process outside the purview of undue influence and favor needs to be ensured in both letter and spirit. And in case of non-adherence to such principles, the courts must step in. If one takes a careful look, the very basic essence of the principle laid down in the above-mentioned case laws is the natural justice principle of *nemo judex in causa sua* that is 'no one should be made a judge in his own case'. For arbitration decisions to be respected and accepted as decrees of the court, a similar level of integrity in the appointment of arbitrators must be ensured.

23. Keeping the aforesaid principles in mind, this Court is of the firm opinion that the appointment procedure as per clause 2.21 of the contract cannot be sustained as it is in direct contravention to the afore-cited judicial pronouncements and legal principles.

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24. Now, before proceeding ahead with the appointment of a sole arbitrator, the arguments advanced by Mr. Bhattacharya, counsel for the respondent, cannot be overlooked and needs to be adjudicated upon by this Court. He argued on the point of limitation and stated that the claims are hopelessly time-barred and the same would entail this Court to decline referring the matter to arbitration at the first instance. Mr. Kumar, counsel for the petitioner relied upon ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. -v- Northern Coal Field Ltd.*** reported in ***2020 2 SCC 455*** to argue that limitation is a mixed question of facts and law which can be decided by the arbitrator in exercise of power under Section 16 of the Act.

25. At this juncture, it would be prudent on my part to discuss the law on the subject. After careful consideration of the Supreme Court's pronouncements in ***Vidya Drolia and Ors -v- Durga Trading Corporation*** reported in ***[2020] 11 S.C.R. 1001, DLF Home Developers Limited -v- Rajapura Homes Pvt. Ltd. & Anr.*** in ***Arbitration Petition (Civil) No. 16 of 2020,*** and ***Bharat Sanchar Nigam Ltd. & Anr. -v- M/S Nortel Networks India Pvt. Ltd.*** reported in ***[2021] 2 S.C.R. 644,*** I had the occasion to hold in ***B.K. Consortium -v- IIM, Calcutta*** reported in ***2023 SCC OnLine Cal 124*** that in a Section 11 application, the Court is not supposed to undertake a meager cosmetic exercise to examine the existence and/or validity of the arbitration agreement, and then

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simply refer the matter to arbitration just because the arbitration clause is valid.

26. This Court further went on to hold that the question of limitation is not a challenge to the arbitrator's jurisdiction under Section 16 of the Act but rather it is a challenge to the admissibility of the claims itself. Therefore, if it is manifestly evident on the face of it that the issues purported to be referred to arbitration are hopelessly time-barred, the courts can intervene beyond the bare existence of an arbitration clause to cut the deadwood and decline reference to arbitration in such cases.

Hence, the argument put forth by Mr. Kumar, counsel appearing on behalf of the petitioner is rejected.

27. Now, the question before me is whether the claims here are *ex-facie time barred,* and therefore, fall under the restrictive category of *deadwood*. It is a settle principle of law that the limitation period in a Section 11 application is governed by Article 137 of the Limitation Act, 1963 which provides for three years from the date when the right to apply first accrues.

28. Mr. Bhattacharya, counsel appearing on behalf of the respondent cited the decision of the Supreme Court in ***Geo Miller & Company Private Ltd. -v- Rajasthan Vidyut Utpadan Nigam Ltd.,*** reported in ***2019 SCC OnLine SC 1137*** to argue that the limitation period in the present case had already expired and that

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the petitioner cannot justify the unreasonable delay in invocation of arbitration by taking refuge in the purported settlement discussions. The relevant portion of the judgment has been extracted below :-

> *"28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim."*

Therefore, in order to determine whether the claims are time barred, it would be judicious on my part to revisit the entire negotiation history between the parties starting with the day when the cause of action first arose, and thus, attempt to ascertain the 'breaking point', if any, in the settlement discussions.

29. From the facts in hand, it is palpably evident that the cause of action first arose on March 18, 2013 when the project was kept on

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'Hold' by the respondent. Subsequently, on May 16, 2015, a fresh cause of action arose when the respondent informed the petitioner about short closure of the contract. Post issuance of legal notice dated March 22, 2017 by the petitioner, the respondent called for meetings between the parties to sort out the issues. The said meetings were held in April 2017, and on perusal of the minutes of the meetings, I am of the view that the discussions between the parties were exhaustive wherein both the sides made certain specific commitments in relation to the pending work at site and bill payments. Therefore, even though the respondent had unilaterally short closed the contract, the resolution recorded in the said meetings indicated their intent to have the pending work completed with set timelines.

30. Now, on failure of the parties to act in adherence to their previously held discussions and to resolve the extant issues, a Section 21 legal notice dated January 16, 2019 invoking arbitration was issued by the petitioner. In fact, with the issuance of the aforesaid notice, it would be appropriate to state that the petitioner sensed the 'breaking point', that is, the futility of settlement talks with the respondent, and like a reasonable party abandoned its efforts in arriving at the same.

31. Nonetheless, on receipt of the aforesaid notice, the respondent again called for meeting between the parties to discuss the matter

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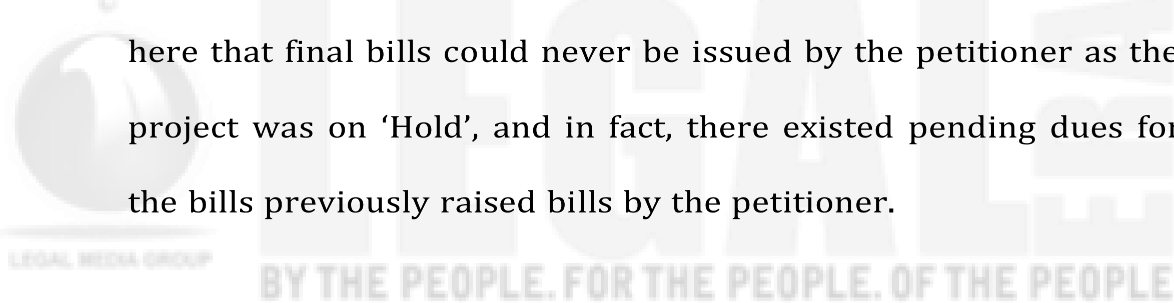
and the said meeting was held on March 06, 2019. The written claims were submitted by the petitioner later that month, and the same was duly acknowledged by the respondent with a request to withdraw the said legal notice. Once again the discussion between the parties did not lead to any success. In my opinion, the final breakdown of any chances of amicable settlement happened vide respondent's email dated October 24, 2019 wherein the petitioner was asked to bifurcate its claims despite petitioner's earlier communication dated October 14, 2019 elaborating its inability to do so. The ensuing emails by the respondent were merely reminders of its email dated October 24, 2019. It is to be noted here that final bills could never be issued by the petitioner as the project was on 'Hold', and in fact, there existed pending dues for the bills previously raised bills by the petitioner.



32. Therefore, after a careful perusal of the aforesaid facts, it would not be incorrect to state that the cause of action herein has been of a 'continuous' nature. The claims of the petitioner never attained finality, and remained a 'live claim' as the parties were in mutual discussion to resolve the disputes between them. The arbitration petition was filed on July 28, 2021 that is within a period of one and half years from the respondent's last communication vide email dated January 09, 2020, and within a period of two and half years from the issuance of Section 21 notice dated January 16, 2019.

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33. In any case, the petitioner company is undergoing CIRP proceedings before the Ld. NCLT, Principal Bench, New Delhi wherein an order of moratorium was passed on February 05, 2019 in C.P. No. IB-694(PB)/2018. As per Section 60(6) of the Insolvency and Bankruptcy Code, 2016, the entire moratorium period will be excluded in computing limitation in respect of proceedings at the hand of a corporate debtor. Reliance can be placed upon the decision of the Supreme Court in ***NDMC -v- Minosha (India) Ltd.*** reported in ***2022 8 SCC 384,*** the relevant paragraphs of which have been reproduced below :-

> *"34. In other words, notwithstanding the period of limitation under the Limitation Act, the law giver has thought it fit to provide that in respect of a corporate debtor if there has been an order of moratorium made in Part II, the period during which such moratorium was in place shall be excluded. "For which an order of moratorium" cannot bear the interpretation which is sought to be placed by the appellant. The interpretation placed by the appellant is clearly against the plain meaning of the words which have been used. We have already undertaken the task of understanding the purport of the Code and the context in which Section 60(6) has been put in place. This Court cannot possibly sit in judgment over the wisdom of the law giver. The period of limitation is provided under the Limitation Act. The law giver has contemplated that when a moratorium has been put in place, the said period must be excluded. We cannot overlook also the employment of words "any suit or application". This is apart, no doubt, from the words "by a corporate debtor". Interpreting the statute in the manner which the appellant seeks would result in our denying the benefit of extending the period of limitation to the corporate debtor, a result, which we think,*

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> *would not be warranted by the clear words used in the statute.*
>
> *35. Therefore, we are of the view that Section 60(6) IBC does contemplate exclusion of the entire period during which the moratorium was in force in respect of corporate debtor in regard to a proceeding as contemplated therein at the hands of the corporate debtor."*

Therefore, the limitation period will not be operative against the petitioner from February 05, 2019 onwards, and hence, the present petition is well within time and not barred by limitation. Another point which is required to be addressed is the distinguishable nature of the present case with the judgement delivered by me in ***B. K. Consortium (supra).*** In ***B. K. Consortium (supra),*** the respondent had categorically stated that no claim was existing after the settlement of the final bill. In that particular case the claimant/petitioner continuously issued notices, therefore, the respondent held meetings with the claimant without prejudice to their rights and contentions. The present case is distinguishable as is clear from the facts noted above wherein the respondent never denied the claim of the petitioner and kept calling the petitioner for amicable settlement talks. In light of the same the breaking point as discussed in the Supreme Court judgement in ***Geo Miller (supra)*** was never reached till January, 2019 when the Section 21 notice was issued by the petitioner. In fact, even after this date, meetings were held between the parties to try and sort out the issues but the same could not be done.

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Ergo, the Section 21 notice dated January 16, 2019 and the filling of the Section 11 petition on July 28, 2021 were not time barred. Accordingly, the present case would not fall under the "realm of *deadwood*" and is therefore required to be referred to arbitration.

34. Moving on, the argument put forth by Mr. Bhattacharya that the present petition is premature as amicable settlement talks are continuing ought to be rejected outrightly. The facts show that the present petition has been filed after issuance of Section 21 notice invoking arbitration clause in terms of the contract between the parties. Moreover, the amicable settlement talks between the parties has clearly broken down as they failed to make any further progress which is undeniably evident from the respondent's reminder emails dated November 20, 2019 and January 09, 2020. While the Court is appreciative of the parties and their efforts towards amicable settlement of disputes between them, it is natural that differences of opinion restrained the parties to be on the same page, and therefore, it is only logical for this Court to refer the matter to an arbitrator for expeditious adjudication of the said disputes. In fact, this alternative argument raised by the party with regard to amicable settlement talks taking place only reiterates the conclusion reached by me in the earlier paragraphs that the claim is not barred by limitation.

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35. Ultimately, the scope of judicial interference under section 11 finds its genesis in ***Vidya Drolia and Others -v- Durga Trading Corporation*** reported in ***(2019) 20 SCC 406***, which was further moulded by the Supreme Court ***in Bharat Broadband Network Ltd. -v- United Telecoms Ltd.*** reported in ***(2019) 5 SCC 755*** as extremely limited, and only in those cases, where no iota of doubt regarding a claim being ex-facie time-barred is present. If and when the Court is in doubt, it has to refer the matter to the arbitral tribunal for adjudication. I have extracted the relevant paragraphs below -

> *"46. The upshot of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 is affirmation of the position of law expounded in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714] , which continue to hold the field. It must be understood clearly that Vidya Drolia has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]*
>
> *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."*

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36. In light of the aforesaid findings, I appoint Justice Sahidullah Munshi, Former Judge, Calcutta High Court, as a sole arbitrator to arbitrate upon the disputes which have arisen between the parties. The learned arbitrator has already been appointed by me to resolve a similar dispute between the parties in AP No. 314 of 2021. The learned arbitrator will be guided by the Arbitration and Conciliation Act, 1996, and shall make all positive efforts to complete the arbitration proceedings expeditiously. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.

37. The Registry is directed to immediately send a copy of this order to the sole arbitrator. The learned counsels for the parties are also at liberty to bring it to the notice of the learned arbitrator.

38. In light of the above considerations, AP 312/2021 is accordingly disposed of. There shall be no order as to costs.

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39. An urgent photostat-certified copy of this judgment, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)

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