OCD 9

ORDER SHEET
AP-COM/94/2025
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

KALPATARU PROJECTS INTERNATIONAL LIMITED
VS
BHARAT HEAVY ELECTRICALS LIMITED (BHEL)

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 17th February, 2025.

Appearance:
Mr. Amit Kumar Nag, Adv.
Ms. Pritha Bhaumik, Adv.
…for the petitioner

Mr. Aniruddha Bhattacharya, Adv.
Mr. Arnab Roy, Adv.
…for the respondent

The Court: This is an application for appointment of an Arbitrator in terms of Clause 43.1 of the Work Order issued to the predecessor-in-interest of the petitioner. The predecessor-in-interest of the petitioner along with Simplex Projects Limited formed a consortium and participated in the tender floated by the respondent. Subsequently, the petitioner amalgamated with the predecessor company and the work was continued by the petitioner in consortium with Simplex Projects Limited. The petitioner submitted a bill in July, 2020 which remained unpaid. The petitioner raised certain disputes, the petitioner was asked by the respondent to appear before the concerned authority for an amicable settlement. The specific contention of Ms. Bhaumik, is that, although an

amicable settlement was attempted, no further progress was made and accordingly, the petitioner invoked arbitration by issuing a notice under Section 21 of the Arbitration and Conciliation Act dated 24th November, 2023.

Mr. Bhattacharya, learned advocate for the respondent has raised two objections. First objection is that the claim as also the application before this court are barred by limitation. The second objection is that, although the predecessor of the petitioner participated in the tender in consortium with Simplex Projects Limited, Simplex Projects Limited has not been impleaded as a respondent in this present proceeding. On the point of limitation, Mr. Bhattacharya submits that the claim as per the records, was of July, 2020. After the first invocation, amicable settlement was resorted to, but the time spent during such amicable settlement should not be counted to exclude the limitation. It is next submitted that Article 137 of the Limitation Act would be applicable from the date when the right to sue accrued, which means that, the application under Section 11 of the Arbitration and Conciliation Act should have been filed within three years from July, 2020. With regard to non-joinder of parties, it is specifically urged that the work order, letter of intent etc, were addressed to the predecessor of the petitioner, but it was made clear that the work was being awarded to the consortium.

Mr. Bhattacharya has relied on the following decisions on the issue of limitation: 1) ***B.K. CONSORTIUM ENGINEERS PRIVATE LIMITED VS. INDIAN INSTITUTE OF MANAGEMENT***, reported in ***2023 SCC OnLine Cal 124***; and *2)* ***GEO MILLER AND COMPANY PRIVATE LIMITED VS. CHAIRMAN, RAJASTHAN VIDYUT UTPADAN NIGAM LIMITED*** reported in ***(2020) 14 SCC 643***.

Admittedly, the arbitration clause is not in dispute. The notice invoking arbitration is also not in dispute. The respondent does not raise any objection with regard to the notices. It is submitted that irrespective of the failure of the attempts at amicable settlement, this application should have been made within three years from July, 2020.

JMC Projects (India) Limited had amalgamated with Kalpataru Power Transmission Limited, by way of a merger, pursuant to an order dated December 21, 2022 passed Company Law Tribunal, Ahmedabad Bench. A scheme of amalgamation was approved. The name of Kalpataru Power Transmission Limited was changed to Kalpataru Projects International Limited, i.e., the petitioner with effect from May 22, 2023.

The erstwhile JMC entered into a tie up agreement with Simplex Projects Limited on November 24, 2011 and decided to constitute a consortium. It was agreed between the consortium members that the erstwhile JMC will be the lead member/leader and will be responsible for execution of the works as mentioned in the consortium agreement. The consortium agreement provided that the first party, i.e., JMC shall undertake the works detailed in the NIT, except the piling work, whereas, the second party, i.e., the Simplex Projects Limited would undertake piling works.

As the lead member/leader, the petitioner which had stepped into the shoes of the first party, approached the respondents to pay up the dues and accordingly invoked the arbitration clause. The application has also been filed by the first party. The tie-up agreement discloses that works with regard to piling etc. were to be done by Simplex Projects, whereas the first party was supposed to execute the other works in terms of the notice-inviting tender. The dispute is with

regard to the final bill and other charges for price valuation, additional works etc. Under such circumstances, in my prima facie view, this application is maintainable at the instance of the first party/lead member/leader of the consortium. All communications were also made by the respondents with the petitioner-company or JMC. The amicable settlement was done with the petitioner and payment was released. Thus, the objection with regard to non-joinder of parties, can be raised before the learned Arbitrator.

With regard to the issue of limitation, this Court finds that the allegation of the petitioner is that, the respondent did not fulfil its reciprocal promise by providing the drawings, free materials, handing over of the site on time etc. The work was ultimately completed on February 25, 2020 with a delay of 71 months. As the respondent was responsible for the delay, the extension of time upto the actual date of completion had been granted by the respondent, that is, upto February 25, 2020 without imposing any liquidated damages. The petitioner has referred to a letter dated December 2, 2020 in this regard.

The petitioner contends that the respondents failed to make payments of the final bill, price variation bills, running account bills etc. Accordingly, by letters dated September 16, 2021 and reminder letter dated December 8, 2021, demands were made. The respondent failed to respond to the petitioner's claim. By a letter dated January 12, 2020, the petitioner issued a notice of dispute resolution and called upon the respondent to resolve the dispute amicably. Pursuant to the said demand, a meeting for amicable settlement was conducted between the parties on January 31, 2022 and the petitioner was called upon by the respondent to attend such meeting. After due deliberation, a sum of

Rs.25,14,445/- was released against the allegedly the claim of Rs.5.52 crores. As a result of which, dispute resolution by way of amicable settlement failed.

Thereafter, the petitioner invoked the arbitration in Clause 43.1 of the said work order by a letter dated October 27, 2023. Clause 43.1 of the work order provided that disputes or differences shall be referred to the sole arbitrator appointed by BHEL/In-charge(Region), and the provisions of Arbitration and Conciliation Act, 1996, would apply. However, in terms of the Arbitration and Conciliation Amendment Act, 2015 and various judgments of the Hon'ble Supreme Court, the above mechanism for appointment of an Arbitrator is no longer permissible. Under such circumstances, the petitioner approached this Court for appointment of an arbitrator.

The disputes are with regard to non-release of various bills on various accounts, and for refund of illegal deductions, interest and GST amounts, etc. The factum of the attempt at amicable settlement is available from the letter written by the respondent. The fact that part of the original claim was settled by paying Rs.25,14,445/- within the period of limitation, is not in dispute. The dispute is with regard to the remaining unpaid amount, from the total claim of Rs.5.52 crores.

The contention of the respondent that the petitioner should have filed the application under Section 11(6) of the Arbitration and Conciliation Act within three years from the last date of submission of the final bill, i.e., July 2020, is not accepted by the Court. It is well settled that the notice invoking arbitration should be issued within three years from the date of accrual of the cause of action. In the instant case, after the amicable settlement was entered into

between the parties and a meagre amount was released after the meeting held in January 2022, the petitioner invoked the arbitration clause on October 27, 2023.

The decision in ***B.K. Consortium Engineers Private Limited (supra)***, does not apply in the facts of this case. Here, the referral Court cannot hold that the dispute or the claim is ex facie time barred. In the decision cited, the limitation period, according to the learned Judge, started from March 11, 2016 and the notice invoking arbitration was issued on March 8, 2021. The notice, according to the learned Judge, was patently time barred as per Article 137 of the Limitation Act, 1963. The breaking point, according to the learned Judge, was the date when the final bill was submitted. ***Geo Miller & Co. Pvt. Ltd. (supra)*** also does not apply strictly in the facts of the case for this Court to hold that the claim is ex facie time barred.

The decision in ***Aslam Isamil Khan Deshmukh vs. ASAP Fluids Private Limited and anr.*** reported in ***(2025) 1 SCC 502,*** has clarified that, the referral court must only conduct a limited enquiry for the purpose of examining whether the application under Section 11(6) had been filed within the period of three years or not. Further, at this stage, it would not be proper for the referral court to indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner were time barred or not. Such determination should be left to the arbitrator. Courts, at the referral stage, can interfere only when it is manifest that the claims are expressly time barred and dead or when there are no subsisting disputes. In all other cases, the matter should be referred to the arbitral tribunal for decision on merits. In ***Arif Azeem Co. Ltd. vs. Aptech Ltd.*** reported in ***(2004) 5 SCC 313,*** it was observed that the period of limitation to file an application under Section 11(6) of the 1996 Act, would be covered by

Article 137 of the Limitation Act, 1963, which prescribed a period of three years from the date when the right to apply accrued. The limitation period for filing an application seeking appointment of an arbitrator was held to commence only after a valid notice invoking arbitration had been issued by one of the parties to the other party and there had been either a failure or refusal on the part of the other party to comply with the requirements of the said notice. Under such circumstances, my prima facie view is that the claim is not a deadwood. The notice invoking arbitration was issued on October 27, 2023.

Under such circumstances, this Court is of the view that issue of limitation can be raised before the learned Arbitrator at the appropriate stage. In the decision of ***SBI General Insurance Co. Ltd. vs. Krish Spinning*** reported in ***2024 SCC OnLine SC 1754,*** the Hon'ble Apex Court clarified the position of law that, the scope of enquiry at the stage of appointment of an arbitrator is limited to the scrutiny of, prima facie, existence of an arbitration agreement and nothing else. By referring the disputes to arbitration, the referral court upholds and gives effect to the original understanding of the contracting parties that, all disputes and differences shall be resolved by arbitration.

The Court also holds that the procedure prescribed under the dispute resolution clause with regard to appointment of an arbitrator by the officer of BHEL is no longer good law. Reference is made to the decision of the ***Central Organization for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*** reported in ***2024 SCC Online SC 3219***. Under such circumstances, the petitioner rightly applied before this Court for appointment of an arbitrator. The dispute resolution clause is quoted below:-

"**43.1.** In case amicable settlement is not reached in the event of any dispute or difference arising out of the execution of the Contract or the respective rights and liabilities of the parties or in relating to interpretation of any provision by you in any manner touching upon the Contract, such dispute or difference shall (except as to any matters, the decision of which is specifically provided for therein) be referred to the sole arbitration of the arbitrator appointed by BHEL/In-charge (Region).
The ward of the Arbitrator shall be biding upon the parties to the dispute.
Subject as aforesaid, the provisions of Arbitration and Reconciliation Act, 1996 (India) or statutory modifications or reenactments thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The venue of the arbitration shall be the place from which the contract is issued or such other place as the Arbitrator at his discretion may determine."

This Court appoints Hon'ble Justice Bhaskar Bhattacharya, former Chief Justice of the Gujarat High Court, as learned Arbitrator to arbitrate upon the disputes between the parties. This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

The learned Arbitrator shall fix his own remuneration as per the Schedule of the Act.

AP-COM/94/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

B.Pal/PA