

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

ARBITRATION APPLICATION No.176 of 2024

ORDER:

Ms. Smriti Sahay, learned counsel represents Mr. K. Narsimha Reddy, learned counsel for the applicant.

Ms. Smriti Jaswal, learned counsel represents Ms. Sneha Bhogle, learned counsel for the respondent.

2. This application is filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the A&C Act") seeking appointment of an Arbitral Tribunal to adjudicate the claims and disputes between the parties.

3. Facts giving rise to filing of this application briefly stated are that the parties have entered into a purchase order and a service order on 04.11.2016. Clauses 15 and 19 of the purchase order and service order

respectively contains an arbitration clause, which are extracted below for the facility of reference:

“15. ARBITRATION, GOVERNING LAWS AND JURISDICTION:

15.1. Any dispute arising under or in connection with the order and GCC shall be referred to arbitration, which shall be conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996.

15.2. The arbitration shall be conducted by three (3) arbitrators, one each appointed by purchaser and supplier and third arbitrator shall be appointed by the arbitrators nominated by the parties.

15.3. The language of the proceeding shall be English and the seat of arbitration shall be Hyderabad. The award of the arbitral tribunal shall be final and binding on both the parties.

15.4. The Courts of Hyderabad shall have exclusive jurisdiction on all matters concerning the Order and GCC, including any matters arising out of arbitration proceedings or award therein.

15.5. The Order and GCC shall be governed and construed as per the laws in force in the Republic of India. In case of any litigation arising out of or in connection with the order, the Courts situated at Hyderabad shall have exclusive jurisdiction.

15.6. During the pendency of any dispute, the parties shall continue to perform their other obligations under the Order.”

“19. ARBITRATION:

19.1. All disputes or differences between the parties arising out of or in connection with this Agreement shall be first settled through mutual negotiation by the parties, within a period of 30 (Thirty) days from the date of notifying the dispute by the affected party.

19.2. In the event of the dispute could not be resolved pursuant to Clause 19.1 then such dispute shall be referred to arbitration in accordance with the provisions of Arbitration and Conciliation Act, 1996 including any modifications, amendments or re-enactments thereof and rules therein shall be applied to the extent that they are not repugnant to the Act.

19.3. The arbitration shall be conducted by three (3) arbitrators, one each appointed by purchaser and supplier and third arbitrator shall be appointed by the arbitrators nominated by the parties.

19.4. The language of the proceeding shall be English and the seat of arbitration shall be Hyderabad.

19.5. The award of the arbitral tribunal shall be final and binding on both the parties. During the pendency of any dispute, the parties shall continue to perform their other obligations under the Order.”

4. The applicant had filed an application on 02.03.2020 under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as “2006 Act”). The Council by an order dated 24.04.2023 dismissed the claim of the applicant on the ground that the same is not covered under the 2006 Act. The applicant thereafter issued a notice under Section 21 of the A&C Act on 15.10.2023 invoking the arbitration clause. The respondent submitted a reply to the aforesaid notice on 08.12.2023. Thereafter, this application has been filed on 16.07.2024.

5. Learned counsel for the applicant submitted that the purchase order and the service order contain arbitration clause and the dispute has arisen between the parties which is required to be resolved in the manner agreed to by the parties. It is further submitted that the applicant is entitled to the benefit contained under Section 14 of the Limitation Act, 1963 as the applicant is *bona fide* in prosecuting the proceedings

under the 2006 Act. In support of the aforesaid submission, reliance has been placed on the decision of the Delhi High Court dated 10.04.2024 in Arbitration Petition No.13 of 2024 (***M/s. Advance Stimul vs. Gail (India) Limited***).

6. On the other hand, learned counsel for the respondent submitted that in order to claim the benefit of Section 14 of the Limitation Act, 1963, the prior proceeding initiated has to be prosecuted with due diligence. It is further submitted that the applicant has failed to establish that the proceedings under the 2006 Act were being prosecuted with due diligence. Therefore, the applicant is not entitled to the benefit of Section 14 of the Limitation Act, 1963, and the claim of the applicant is barred by limitation. It is also contended that the claim of the applicant is not covered under the arbitration clause, namely, clauses 15 and 19 of the purchase order and the service order respectively. In support of her submission, learned counsel for the

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respondent has placed reliance on the decision of the Supreme Court in **Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others**¹.

7. I have considered the submissions made by the learned counsel for the parties and have perused the record.

8. In a proceeding under Section 11(6) of the A&C Act, this Court has to satisfy itself whether underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties.

9. The execution of purchase order and the service order is not in dispute. It is also not in dispute that the applicant has sent a notice under Section 21 of the A&C Act on 15.10.2023 to which a response was sent by the respondent on 08.12.2023.

¹ (2008) 7 SCC 169

10. The Supreme Court in **Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited**² while dealing with the issue of limitation in paragraphs 38 to 40, 44 and 47 has held as under:

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.

² (2021) 5 SCC 738

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.

11. Section 16(1) of the A&C Act provides that Arbitral Tribunal may rule on its own jurisdiction. In **Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited**³, a two-Judge Bench of Supreme Court held that the *doctrine of kompetenz-kompetenz* is intended to minimize judicial intervention, so that the arbitral process is

³ (2020) 2 SCC 455

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.

12. 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**⁴ 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.

⁴ 2023 SCC OnLine SC 1666

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.

13. In the backdrop of the aforesaid well settled legal principles, I may advert to the facts of the case in hand.

14. The claim of the applicant cannot be said to be *ex facie* time barred. The issue whether or not the applicant is entitled to claim the benefit of Section 14 of the Limitation Act, 1963, in the facts and circumstances of the case is a debatable issue which requires to be adjudicated by the Arbitral Tribunal.

15. At this stage, learned counsel for the parties submit that a former Judge of this Court be appointed as sole Arbitrator to adjudicate the disputes between the parties.

16. For the aforementioned reasons, Mr. Justice Challa Kodanda Ram (resident of Plot No.68, Road No.71, Phase III, Jubilee Hills, Hyderabad-34; Mobile No.8331010695), is appointed as sole arbitrator to adjudicate the disputes between the parties. It is clarified that this Court has not expressed any opinion with regard to the issue of limitation and it is open for the respondent to urge all contentions as are available to it in law before the arbitrator.

17. The parties undertake to appear before the sole arbitrator on 16.11.2024 at 11:00 a.m., along with a copy of this order.

18. Accordingly, the arbitration application is allowed.

Miscellaneous applications pending, if any, shall stand closed. No order as to costs.

ALOK ARADHE, CJ

Date: 25.10.2024
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