

**IN THE HIGH COURT OF ANDHRA PRADESH: AMARAVATI**

**HON'BLE Mr. JUSTICE PRASHANT KUMAR MISHRA, CHIEF JUSTICE**

**ARBITRATION APPLICATION No.22 of 2022**

M/s. Brave Lions India Security Services, rep. by its Proprietor, an Ex-serviceman S.A. Naidu, S/o. Brahmademudu, aged 68 years, R/o.D.No.7-60, Kotturu, Anakapalli, Visakhapatnam District

... Applicant

Versus

The Chief Executive of Central Marketing Organisation, Steel Authority of India Limited, Ispat Bhavan, Lodi Road, New Delhi, and another

... Respondents

**ORDER**

**Dt.28.04.2023**

In this application under Section 11 (5) & (6) of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"), the applicant prays for appointment of an arbitrator for adjudication of disputes between the parties arising out of work order dated 06.11.2011 issued to the applicant by the respondents. The nature of work under the said work order was to eliminate pilferage of imported coking coal / coke during transit from stockyards at Visakhapatnam Port Trust and Gangavaram Port Trust to Bokaro Steel Plant (BSL), Durgapur Steel Plant (DSP), Rourkela Steel Plant (RSP), Bhilai Steel Plant (BSP), ISP Steel Plant (ISP) and Durgapur Projects Limited (DPL).

2. According to the applicant, problem started during execution of the contract when the respondents stopped paying the bills raised by the applicant and despite request, respondents did not make payment, constraining it to file O.S.No.847 of 2014 on the file of the Metropolitan Sessions Judge-cum-I Additional District Judge, Visakhapatnam for recovery of the bill amounts, for which the respondents raised objection as to the maintainability referring to the arbitration clause in the work order. The District Judge passed an order on 17.10.2016 in I.A.No.405 of 2015 referring the parties to arbitration. However, despite representation, respondents did not take steps for appointment of an arbitrator and lastly the respondents addressed letter dated 15.12.2021 to the applicant stating that payments have already been settled in terms of the contract. The applicant, thereafter, issued a notice on 15.12.2021 invoking the arbitration clause, to which the respondents issued a reply on 10.01.2022 informing the applicant that if he furnishes no-objection certificate, his security amount will be released.

3. In the above backdrop, the applicant prays for appointment of an arbitrator by this court in exercise of powers under Section 11 (5) & (6) of the 1996 Act.

4. The respondents would challenge the applicant's application and request for appointment of an arbitrator on the pleadings that the work order was issued on 23.12.2009 and in the course of the work order, the applicant committed breach of contract causing huge loss to the respondents by way of transit losses of coking coal and made attempts to cover up the lapses. The applicant raised false claims by addressing letter dated 03.04.2011 and, again, sent a letter on 14.05.2011 stating that he cannot continue the contract unless the bills are cleared. The respondents would refer to series of exchange of letters between the parties and raised a specific plea of the application being barred by limitation. It is stated that the applicant sent legal notice on 05.09.2011 demanding payment of Rs.1,35,23,000/- together with damages to the tune of Rs.25 lakh, to which the respondents sent a reply on 13.02.2012 denying the claim. The applicant, thereafter, filed O.S.No.847 of 2014 on the file of the V Additional District Judge, Visakhapatnam for recovery of amount with specific averment that the cause of action arose on 14.05.2011 when the contract was terminated. When objection was raised under Section 8 of the 1996 Act, objecting to the maintainability of the suit, the District Court allowed the application on 17.10.2016 referring the matter to arbitration. However, the applicant did not take any steps seeking appointment of arbitrator.

5. The applicant issued a notice on 15.12.2021 after six years seeking appointment of an arbitrator and, thereafter, the present application is filed on 30.06.2022.

6. Learned counsel for the respondent vehemently argued that this application is not maintainable as the same has been preferred after more than 3 years of accrual of cause of action on 14.05.2011, when the contract was terminated. According to him, in any case, the V Additional District Judge, Visakhapatnam, having allowed the respondent's application under Section 8 of the 1996 Act on 17.10.2016, referring the parties to arbitration, the applicant has still not preferred application within three years thereafter. It is the specific contention of the respondent that as per Article 137 of the Limitation Act, 1963 read with Section 43 of the 1996, the present application, having been filed after 11 years from the date of termination of contract and, in any case, after 6 years from the date of the order passed by the trial court under Section 8 of the 1996 Act, is hopelessly barred by limitation.

7. Learned counsel for the applicant would submit that the present is a case of recurring cause of action; therefore, when the last notice was issued on 15.12.2021, to which the respondent replied on 10.01.2022 denying the claim, the application has been

preferred within three years thereafter; therefore, it is well within limitation.

8. This court shall first deal with the issue as to whether the present application has been preferred within the period of limitation and if not whether the application deserves to be considered.

9. Article 137 of the Limitation Act 1963, provides for the period of three years of limitation for filing an application under Section 11(6) of the 1996 Act. The question as to when the period of limitation for appointment of arbitrator commences, has been settled by the Hon'ble Supreme Court in *State of Orissa v. Damodar Das - (1996) 2 SCC* and *Panchu Gopal Bose v. Port of Calcutta - (1993) 4 SCC 338*. Referring to these decisions, the Hon'ble Supreme Court in *Geo Miller & Co. v. Rajasthan Vidyut Utpadan Nigam Ltd - (2020) 14 SCC 643*, which, again, has been referred in *Secunderabad Cantonment Board v. B. Ramachandraiah and Sons - (2021) 5 SCC 705*, in the following words in paragraph 14:

“14. Having heard the learned counsel appearing for both parties, it is first necessary to refer to the recent judgment of this Court in *Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd. [Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643]*, which extracts passages from all the

earlier relevant judgments, and then lays down as to when time begins to run for the purpose of filing an application under Section 11 of the Arbitration Act. This Court, after referring to the relevant statutory provisions, held: (SCC pp. 649-52, paras 15, 21, 23-24 & 29)

“15. In *Damodar Das* [*State of Orissa v. Damodar Das*, (1996) 2 SCC 216], this Court observed, relying upon *Russell on Arbitration* by Anthony Walton (19th Edn.) at pp. 4-5 and an earlier decision of a two-Judge Bench in *Panchu Gopal Bose v. Port of Calcutta* [*Panchu Gopal Bose v. Port of Calcutta*, (1993) 4 SCC 338], that the period of limitation for an application for appointment of arbitrator under Sections 8 and 20 of the 1940 Act commences on the date on which the “cause of arbitration” accrued i.e. from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned.

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21. Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court [*Geo Miller & Co. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, 2007 SCC OnLine Raj 97 : (2008) 1 RLW 429] that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7-10-1979 and 4-4-1980 arose on 8-2-1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum

period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8-2-1986. Similarly, with respect to Arbitration Application No. 28/2003 relating to the work order dated 3-5-1985, the respondent has stated that final bill was handed over and became due on 10-8-1989. This has not been disputed by the appellant. Hence the limitation period ended on 10-8-1992. Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a court only by the end of 2003, his claim is clearly barred by limitation.

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23. Turning to the other decisions, it is true that in *Inder Singh Rekhi* [*Inder Singh Rekhi v. DDA*, (1988) 2 SCC 338], this Court observed that the existence of a dispute is essential for appointment of an arbitrator. A dispute arises when a claim is asserted by one party and denied by the other. The term “dispute” entails a positive element and mere inaction to pay does not lead to the inference that dispute exists. In that case, since the respondent failed to finalise the bills due to the applicant, this Court held that cause of action would be treated as arising not from the date on which the payment became due, but on the date when the applicant first wrote to the respondent requesting finalisation of the bills. However, the Court also expressly observed that ‘*a party cannot postpone the accrual of cause of action by writing reminders or sending reminders*’.

24. In the present case, the appellant has not disputed the High Court's finding [*Geo Miller & Co. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, 2007 SCC OnLine Raj 97 : (2008) 1 RLW 429] that the appellant itself had handed over the final bill to the respondent on 8-2-1983. Hence, the holding in *Inder Singh Rekhi* [*Inder Singh Rekhi v. DDA*, (1988) 2 SCC 338] will not apply, as in that case, the applicant's claim was delayed on account of the respondent's failure to finalise the bills. Therefore the right to apply in the present case accrued from the date on which the final bill was raised (see *Union of India v. Momin Construction Co.* [*Union of India v. Momin Construction Co.*, (1997) 9 SCC 97] ).

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29. Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile.”

10. In *BSNL v. Nortel Networks (India) (P) Ltd.* - (2021) 5 SCC 738, the Hon'ble Supreme Court considered the legal question as to whether the court may refuse to make the reference under Section



11 of the 1996 Act, where the claims are ex facie barred by time. In this case, the Hon'ble Supreme Court also considered the issue concerning the period of limitation for filing an application under Section 11 of the 1996 Act.

11. The Hon'ble Supreme Court in ***Secunderabad Cantonment Board*** (supra), considered the issue at length to hold that while exercising jurisdiction under Section 11 of the 1996 Act, as the judicial forum the court may exercise the prime facie test to screen and knockdown ex face meritless, frivolous and dishonest litigation; limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage and can interfere only when it is manifest that the claims are ex facie time-barred and dead or there is no subsisting dispute. The Hon'ble Supreme Court, then, referred to para graph 148 of the judgment in ***Vidya Drolia v. Durga Trading Corpn. - (2021) 2 SCC 1***, which is reproduced hereunder:

“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. *The court at the referral stage can interfere only when it is manifest that the claims are ex facie*

*time-barred and dead, or there is no subsisting dispute.* All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in *Fili Shipping Co. Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 Bus LR 1719 : 2007 UKHL 40]* , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”

12. It is, thus, settled by the Hon’ble Supreme Court in ***Vidya Drolia*** (supra) and ***Secunderabad Cantonment Board*** (supra) that it is only in the very limited category of cases where there is not even a vestige of doubt that the claim is ex face time-barred or that the dispute has not been arbitrable, that the court may decline to make a reference. In ***Secunderabad Cantonment Board*** (supra), the Hon’ble Supreme Court set aside the judgment of the High Court appointing arbitrator on the reasoning that the application under Section 11 of the 1996 Act was barred by limitation as also the claim.

13. Applying the principle of law laid down by the Hon’ble Supreme Court in the aforementioned cases to the facts of the present case, it is to be seen that the contract was terminated on 14.05.2011 after which the applicant sent notices for satisfying his claim and then

preferred a suit bearing O.S.No.847 of 2014, on the file of the MSJ-cum-I ADJ, Visakhapatnam, which came to be dismissed on 17.10.2016 allowing the respondent's application under Section 8 of the 1996 Act and referring the parties to arbitration. However, the applicant neither challenged this order before the superior court nor moved an application under Section 11(5) and (6) of the 1996 Act, within three years thereafter. Thus, the first cause of action for invoking the arbitration clause arose on the date of termination of contract, i.e. 14.05.2011 and, thereafter, taking the best case of the applicant, on 17.10.2016, but the present application was preferred only after 5 ½ years thereafter, i.e. on 30.06.2022.

14. Thus, the application having been presented after more than three years after the accrual of cause of action, the same is barred by limitation and, thus, the matter cannot be referred for arbitration.

15. Accordingly, the application is dismissed being barred by limitation. No order as to costs. Pending miscellaneous applications, if any, shall stand closed.

*Sd/-*

PRASHANT KUMAR MISHRA, CJ

MRR