IN THE HIGH COURT OF ANDHRA PRADESH

***

Arbitration Application No.102 of 2015

BETWEEN:

Rashtriya Ispat Nigam Limited
Rep. by its Deputy General Manager (Projects)
CRMP Construction,
Visakhapatnam Steel Plant,
Visakhapatnam.

…. Applicant

AND

$ M/s. SENCON Systems Private Limited,
Rep. by its Managing Director,
F – 46, D – Block, Auto Nagar,
Visakhapatnam – 530012.

... Respondent

Date of Judgment pronounced on : 02.05.2023

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether The Lordship wishes to see the fair copy Of the Judgment? : Yes/No

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

***HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO**

+ Arbitration Application No.102 of 2015

% Dated: 02.05.2023

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... Respondent

! Counsel for Applicant : Sri K. Sarvabhouma Rao

^Counsel for Respondent : Sri Ramachandra Rao Gurram

<GIST:

>HEAD NOTE:

? Cases referred:

1. (2009) 1 SCC 267
2. (2011) 12 SCC 349
3. (2017) 9 SCC 729
4. (2019) 8 SCC 714.
5. (2021) 2 SCC 1
6. (2021) 5 SCC 738
7. (2008) 7 SCC 169
8. 2023 LiveLaw (SC) 287

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

Arbitration Application No.102 of 2015

ORDER:

The applicant had entrusted a work relating to structural steel work for calcining and refractory material plant – CRMP – Zone 5 to the respondent on 31.03.2007. A formal agreement was executed on 21.06.2007. The work was to be completed by 23.09.2008. The work was not completed by that day and extensions were given from time to time. The applicant, by a notice dated 24.02.2010, terminated a part of the work. Subsequently, the entire contract was terminated on 23.08.2010 by the applicant.

2. The respondent, invoked the arbitration clause, available in the agreement, for reference of certain disputes to the arbitral tribunal. After the claims of the respondent had filed, the applicant had filed a counter claim on 13.07.2011. The applicant sought an award of Rs.3,75,661/- towards the value of estimated dismantled structural steel and sheeting, which was not handed over to the applicant and a sum of Rs.7,42,418/- towards the value of fabricated steel structures which had not yet been arected and which had not been handed over to the respondent. Apart from this, the applicant also stated that a further sum of Rs.9,64,293/- is due towards structural sheeting work and the value of the unfinished work was estimated approximately and sought o set out exact amount claimed after the figures could be clarified.

3. After raising the said counter claim, the applicant had filed a Memo, dated 02.03.2012, withdrawing the counter claim with liberty to pursue it later. This Memo was recorded by the tribunal non 02.03.2012.

4. The arbitral tribunal had then passed an award on 01.05.2012. In this award, the tribunal recorded that the termination of the contract by the applicant was unjustified, arbitrary and not tenable. The arbitral tribunal, after holding that the termination was not tenable, had gone into the validity of the counter claim of the applicant and had held that the "risk and cost" clause, under which the applicant was raising a counter claim was not applicable as the termination itself is unjustified and arbitrary.

5. Aggrieved by this award, the applicant had filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), which was dismissed by the District Court after modifying the interest payable by the applicant. This order was not challenged by the applicant and has become final against the applicant. However, an appeal is said to have been filed by the respondent for restoration of the original interest awarded by the arbitral tribunal, and the same is still pending.

6. The applicant, by notice dated 02.02.2013 invoked the arbitration clause and made a demand for payment of Rs.72,73,899/- under the heads, which had already been raised earlier in the counter claim by the applicant.

7. The respondent replied to this notice of arbitration by a reply notice dated 08.03.2013. In the said reply notice, the respondent took the stand that the applicant cannot invoke arbitration again as all the issues raised by the applicant, had been considered by the arbitral tribunal, in the earlier round of arbitration, and as such there was no dispute to be referred for arbitration.

8. The applicant, in view of the refusal of the respondent to nominate its arbitrator, under the procedure contemplated in the arbitration clause, had approached this Court, invoking Section 11(6) of the Act.

9. The applicant contends, in the arbitration application that the applicant is entitled to move a fresh claim as the applicant had withdrawn the counter claim before the arbitral tribunal.

10. The stand of the respondent is that this application is not maintainable on two grounds. Firstly, the application is hopelessly barred by the limitation. Secondly, the earlier decision of the arbitral tribunal that the applicant would not be entitled to any compensation under the heads raised by the applicant, as the termination of the contract by the applicant is untenable, would preclude the applicant from filing any fresh claim.

11. Sri K. Sarvabhouma Rao, learned counsel appearing for the applicant would contends that the scope of enquiry before this Court, under an application under Section 11(6) of the Act, is restricted to an

enqiry as to the existence of an arbitral agreement and all other issues would have to be referred for a decision to the arbitral tribunal itself. He relies upon the judgement of the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited and Anr., vs. Nortel Networks India Private Limited.**

12. Sri Ramchander Rao Gurram, appearing for the respondent would also rely upon the same judgement to support his contentions mentioned above.

Consideration of the Court:

13. The power of the Court to appoint an arbitrator is traced to Section 11 of the Act. Section 11(5), 11(6) and 11(6A), which are relevant, are extracted below.

> **Section 11(*5*)** – Failing any agreement referred to in sub-section (*2*), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.
>
> **(6)** Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or
>
> (*b*) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
>
> (*c*) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

> a party may request 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court]to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
>
> **(*6A*)** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (*4*) or sub-section (*5*) or sub-section (*6*), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

14. It must be noted that Section 11(6A) was introduced in 2015 by way of an Amendment Act. Prior to this insertion, the Hon'ble Supreme Court in the seven bench judgment **of SBP & Co. vs. Patel Engineering Ltd.**,[1] had held that the Court while considering an application under Section 11 of the Act, would have to go into the questions of whether an arbitration clause exists; the party seeking arbitration is a party to the arbitration agreement; whether the claim was a dead one; whether the claim relates to concluded transactions recording satisfaction of the mutual rights or by receiving final payment without objection. It was also left open to the Court to take evidence if necessary to decide these issues. These guidelines were further elaborated by the Hon'ble Supreme Court in **National Insurance Co.Ltd., vs. Boghara Palyfab (p) Ltd.,[2] and Union of India vs. Master Construction Co**.,[3]

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[1] (2005) 8 SCC 618
[2] (2009) 1 SCC 267
[3] (2011) 12 SCC 349

15. Subsequent to these judgments, the Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015, which introduced sub-section (6A). The effect of this judgment was considered by the Hon'ble Supreme Court in **Duro Felguera, S.A. vs. Gangavaram Port Ltd**.,[4]. The Hon'ble Supreme Court had held that the said amendment legislatively overruled the earlier judgments mentioned above and encapsulated the law with the statement "after the amendment, all that the Courts need to see is whether an arbitration agreement exists – nothing more, nothing less". This decision was followed in **Mayavati Trading (P) Ltd., vs. Pradyuat Deb Burman**[5].

16. The scope of enquiry under Section 11(6A) was again considered by the Hon'ble Supreme Court in **Vidya Drolia vs. Durga Trading Corporation.**,[6]. This judgment was followed in **Bharat Sanchar Nigam Limited and Anr., vs. Nortel Networks India Private Limited**,[7].

17. In **Vidya Drolia vs. Durga Trading Corporation**., the Hon'ble Supreme Court, while considering the scope of power under Section 8 and Section 11 of the Act, had held that the Court would be entitled to interfere when it is "manifestly and ex-facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-

[4] (2017) 9 SCC 729
[5] (2019) 8 SCC 714.
[6] (2021) 2 SCC 1
[7] (2021) 5 SCC 738

arbitrable" . The Hon'ble Supreme Court held that the Court would have to exercise a prima facie test to screen out and knock down ex-facie meritless, frivolous and dishonest litigation. This ex-facie exercise must be to see whether it is manifest that the claims are ex-facie time barred or dead or there is no subsisting dispute.

18. The Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited and Anr., vs. Nortel Networks India Private Limited**, while following the judgment in **Vidya Drolia vs. Durga Trading Corporation**., had further elucidated that there was a fine distinction between the jurisdiction of the tribunal and admissibility of a claim before the arbitral tribunal and this distinction would permit the Court, under Section 11(6) and (6A), to weed out claims which are not admissible either on account of the claims being ex-facie time barred and dead or on account of the fact that there are no subsisting disputes.

Limitation:

19. The respondent contends that the claim of the applicant is ex-facie time barred and as such the application would have to be rejected.

20. The question of limitation was considered by the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited and Anr., vs. Nortel Networks India Private Limited**. The principles laid down by the Hon'ble Supreme Court can be summarised as follows:

1. The question of limitation, in an arbitral claim, would consist of two parts. The first part would be on the question of limitation relating to the claim itself and the second part would be the period of limitation within which an application for appointment of arbitral tribunal can be moved under Section 11.

2. Section 21 of the Act states that an arbitration is said to have commenced upon notice of arbitration, for the disputes to be referred to Arbitration, is received by the respondent.

3. At this stage, the question that would arise is whether the said notice has been sent within the period of limitation prescribed, under the Limitation Act, for such claims. This is in accordance with Section 43 of the Act, which stipulates that the provisions of the Limitation Act would be applicable to arbitration proceedings.

4. The second stage of verifying limitation would arise in relation to the time period within which the party seeking arbitration would have to approach the Court under Section 11(5) or 11(6) of the Act.

21. It was earlier argued that the language of Section 43 restricts the applicability of the Limitation Act to only arbitral proceedings and it would not be applicable to applications being filed under Section 11 of the Act. This contention had been rejected by the Hon'ble Supreme Court in **Consolidated Engineering Enterprises vs. Irrigation**

Department[8] and it was held that the Limitation Act would apply to proceedings under the Arbitration Act, in Court and in arbitration, except to the extent expressly excluded by the Arbitration Act itself.

22. A perusal of the Limitation Act and the schedule annexed to the Limitation Act would show that there is no provision relating to an application under Section 11 of the Arbitration Act. Consequently, various High Courts had taken the view that Article 137 of the schedule which is the residuary article, would be applicable and a party would have three years for filing an application for appointment of an arbitrator under Section 11 from the expiry of 30 days after receipt of notice for appointment of arbitrator is received by the party, which refuses to appoint its arbitrator. This principle has now been approved by the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited and Anr., vs. Nortel Networks India Private Limited**.

23. In view of the law set out above, this Court would have to consider whether there is an ex-facie clear and undisputed bar of limitation. This would mean that this Court, without going into an elaborate exercise of fact finding, would have to decide whether there is ex-facie bar of limitation or whether such a question should also be referred to the arbitral tribunal.

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[8] (2008) 7 SCC 169

24. As mentioned above, the contract had been terminated on 23.08.2010 and the notice of the respondent to appoint arbitrator to consider the claim of the applicant was issued on 08.03.2013. Thereafter, the present arbitration application came to be filed on 03.07.2015, which is within three year period from the date of issue of notice dated 08.03.2013.

25. As far as the period of limitation relating to the claim itself is concerned, there is a gap of more than three years between the termination of contract and the request for reference of the dispute to arbitration. However, it is the case of the applicant that the claim could only be raised after the works have been executed by the contractors who had been appointed subsequently. In the circumstances, there is no ex-facie clear bar of limitation. As such, this Court while declining to go into this question, would have to leave it open for the arbitral tribunal to decide the issue. However, the said situation may not arise on account of the final order being passed in this application.

26. The law, as enunciated by the Hon'ble Supreme Court, is that this Court can reject an application for appointment of arbitrator under Section 11, if it is either ex-facie barred by the limitation, or there is no subsisting dispute. In the present case, the disputes that are sought to be raised by the applicant were raised in the counter claim filed in the earlier round of arbitration. These claims were rejected by the arbitral tribunal, on the ground that the claim under the "risks and costs" clause

would not be available to the applicant as the termination of the contract itself was irregular and not tenable. The applicant contends that the arbitral tribunal could not have gone into this issue as the applicant had withdrawn the counter claim and sought liberty to claim later and the arbitral tribunal could not have gone into this issue at all.

27. A comparison of the heads of claim considered by the arbitral tribunal in the award dated 01.05.2012 and the heads of claim raised by the applicant in the present application would show that they are the same heads of claim. The question of whether the arbitral tribunal could have gone into these issues after the applicant had withdrawn the counter claim, would be a matter to be raised before the Court under Section 34 of the Act in relation to the award dated 01.05.2012. The application filed under Section 34 of the Act, against the award dated 01.05.2012 has been dismissed and has become final as no appeal has been filed against the said decision. In such circumstances, the present claims are ex-facie not subsisting.

28. A learned Single Judge of the Hon'ble High Court of Calcutta in Tantia Construction Limited vs. Union of India[9], had, while considering a similar contention, held that there cannot be two arbitrations for the same claims and that once a dispute has already been adjudicated upon, it cannot be said to be a subsisting dispute that requires resolution. This

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order of the learned Single Judge was carried in appeal to the Hon'ble Supreme Court of India by way of Special Leave to Appeal (c) No.10722 of 2022. The Hon'ble Supreme Court had upheld the view of the learned Single Judge and dismissed the special leave application, on 15.07.2022.

29. In the circumstances, the claim raised by the applicant is not a subsisting dispute which can be referred to arbitration by appointing an arbitral tribunal.

30. Accordingly this Arbitration Application is dismissed. There shall be no order as to costs. As a sequel, pending miscellaneous petitions, if any, shall stand closed.

R. RAGHUNANDAN RAO, J.

2nd May, 2023
Js.

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

Arbitration Application No.102 of 2015

2nd May, 2023

Js.