
(2022) 12 BOM CK 0019

In the Bombay High Court

Case No : Miscellaneous Civil Application (Arbitration) No. 291 Of 2020

M/S. B.K. Infratech Pvt. Ltd

APPELLANT

Vs

National Thermal Power Corporation Ltd And Others

RESPONDENT

Date of Decision : 01-12-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 16

Citation : (2022) 12 BOM CK 0019

Hon'ble Judges : Vinay Joshi, J

Bench : Single Bench

Advocate : V.P. Kukday, N.R. Nebhani, A.S. Jaiswal, Tushar Darda

Judgement

Vinay Joshi, J

1. Heard. ADMIT.

2. By consent of both the learned Counsel appearing for the parties, the matter is taken up for final hearing.

3. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of an Arbitrator in terms of Section 11 of the Act. In pursuance of arbitration clause contained in the contract by notice dated 31.12.2019 applicant called upon non-applicants to give their concurrence on the name of proposed Arbitrator, which was refused. In consequence the applicant has approached to this Court for appointment of Arbitrator.

4. The applicant is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Mumbai. The non-applicant is a National Thermal Power Corporation Limited (NTPC) a government undertaking company. The applicant has entered into a contract with non-applicants for construction of Road, Drain and Gate Complex including internal electrification at township at Mouda STPP, District Nagpur. The said contract was entered on 26.07.2010 incorporating general conditions of contract for civil work. General

conditions of contract contains Clause No.56 pertaining to resolution of dispute by way of appointment of sole specified Arbitrator.

5. Since the dispute arose the applicant has invoked arbitration clause earlier on which specified arbitrator namely Shri V. Thangapadian, the then Group General Manager, was appointed in the year 2013. However, he could not continue the arbitration due to his transfer from Mouda. In consequence, Shri A.K. Nanda posted as a Group General Manager at Mouda plant, has been substituted as a sole Arbitrator. The Arbitrator has signed and delivered arbitral Award on 24.11.2017, which is under challenge.

6. It is the applicant's contention that though he has invoked arbitration clause in the year 2013, however the work continued. There were several lapses on the part of the non-applicants. The Site was not handed over to the applicant for executing the work. The joint measurement was not timely taken, therefore, final bill was not settled. The applicant's machinery was illegally retained by the non-applicants. Besides that bank guarantees have been illegally invoked by the non-applicants.

7. Since the contract was continued after first arbitral proceeding, the dispute continued. The claim has arisen subsequently, which was not the part of first arbitral proceeding. Particularly, the final bill was not settled and therefore, the applicant by invoking arbitral clause vide notice dated 31.12.2019 sought concurrence on the name of Arbitrator, which was denied by the non-applicants.

8. The non-applicants/ NTPC resisted the application by filing reply affidavit. The maintainability of the application itself is challenged on the ground of principle of constructive res judicata and bar of limitation. It is contended that the applicant vide letter dated 28.03.2013 has invoked arbitration in terms of condition No.56 of General Contract. The sole Arbitrator was appointed to whom the applicant has submitted the statement of claim on 16.05.2014. The defense statement was also filed on 29.12.2014 and counter claim on 13.01.2015. In the meantime, the applicant has filed various applications seeking termination of mandate of arbitrator, which were either withdrawn or rejected. The sole Arbitrator has passed an Award on 24.11.2017 which the applicant has challenged.

9. It is contended that vide letter dated 30.05.2015 the Contract was terminated by calling the applicant for final measurement. Accordingly, the applicant deputed his representative for joint measurement, which were carried on 02.07.2015. It is primely contended that the applicant has not amended his claim during the pendency of first arbitral proceeding. The contract was terminated long back in the year 2015 and thus, invocation of arbitration clause on 31.12.2019, is totally time barred. Moreover, it is contended that the second claim on the same ground is not admissible. With these contentions the application is prayed to be rejected.

10. There is no dispute that a general conditions of Contract bears dispute resolution mechanism by way of appointment of an Arbitrator. It is a matter of

record that in the year 2013, the applicant has earlier invoked arbitration clause on which the Arbitrator was appointed who has delivered the Award on 24.11.2017. Moreover, it is not in dispute that after the year 2013 Contract continued, which came to be terminated on 30.05.2015. It is also admitted that the final measurement was taken on 03.07.2015, however, according to the applicant final bills have not been prepared and paid.

11. It is the applicant's contention that the invocation of arbitration clause second time on the same contract, is not barred. It is his principal contention that the claims raised by the notice dated 31. 12.2019 was not part of earlier arbitral proceeding. He would submit that after commencement of first arbitration, still the contract continued and therefore, the subsequent claims including final bill were not settled. On the other hand, learned Senior Counsel appearing for the non-applicants by placing reliance on the decision of the Supreme Court in case of M/s Tantia Constructors Limited vs. Union of India 2022 LiveLaw (SC) 624 would submit that there cannot be two arbitration proceedings with respect to the same contract/transaction. He has also produced a copy of decision of the Calcutta High Court which was subject matter of challenge before the Supreme Court. It reveals that, the second claim is held untenable on the ground that the issue sought to be resolved in second claim was already been adjudicated. Thus, the said decision was based on the facts of that case. Herein, the applicant comes with a specific case that the dispute sought to be claimed has arisen subsequent to the appointment of first Arbitrator and it was not the part of earlier proceeding. In response to the submission that the applicant could have amended earlier statement of claim, it has been stated that since final bills were not prepared, he was not in a position to amend the claim.

12. The applicant sought to resolve total five claims. It is his contention that the non-applicant has restricted his entry and therefore, he was unable to prepare final bill of the work. Secondly, it is contended that the non-applicants have illegally retained the applicant's plant, machinery, material which caused him losses. Moreover, non-applicants have illegally encashed the bank guarantees and unlawfully deducted running advance bills.

13. The non-applicants have stated that the applicant was well informed about the release of vehicle in the year 2015 of which communication has been tendered. It is stated that bank guarantee was revoked long back in the year 2015, and therefore, after lapse of time, said grievance cannot be raised. Moreover, it is the non-applicants' contention that the amount was deducted from running bill since there was deficiency in work. It is apparent that there appears to be serious dispute in between the parties. Admittedly, after appointment of first Arbitrator, the Contract continued for next two years. It is not denied that final bills have not been prepared. It is applicant's very contention that his entry was restricted, therefore, bills were not prepared. According to the applicant, it was responsibility of the non-applicants to prepare final bill, which he did not.

14. On the point of limitation, the applicant's learned Counsel would submit that since final bills were not prepared, there is no question of bar of limitation. Moreover, he would submit that the issue of limitation is to be decided by the Arbitrator under Section 16 of the Act. In support of said contention, he relied on the decision of the Supreme Court in case of Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coalfields Limited 2019 (6)Arb.LR 237 (SC).

15. Learned Senior Counsel appearing for the non-applicants would submit that, at the stage of deciding the application under Section 11 of the Act, the Court can go into the question of limitation for which he relied on the decision of the Supreme Court in case of Bharat Sanchar Nigam Limited and anr. vs. Nortel Networks India Private Limited (2021) 5 SCC 738. In said case, it has been observed that the limitation for deciding the underlying substantive dispute is distinct from that of filing of application for appointment of an Arbitrator. It is held that ordinarily 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. However, while exercising jurisdiction under Section 11 of the Act, the Court may exercise the prima facie test to screen the material. At the referral stage, the Court can interfere 'only' when it is 'manifest' that the claims are ex facie time barred.

16. The issue of limitation is a mixed question of fact and law and would lie within the domain of the arbitral Tribunal. The non-applicants have not pointed out that the claims raised by the applicant were either part and parcel of earlier proceeding or in absence of final bill the applicant was in a position to raise the same. It is apparent that contract continued after first arbitral proceeding and yet final bills have not been prepared. All these factual questions need adjudication by the Forum which is chosen by the parties. It is apparent that there exists arbitral dispute and admittedly there was arbitration clause. In view of that, the applicant has made out a case for appointment of an Arbitrator.

17. At his juncture, learned Counsel appearing for the parties are requested to suggest the name of an Arbitrator, however, there is consensus on the name of Arbitrator. In view of above, former Justice Shri V.M. Deshpande, is appointed as an Arbitrator, in the matter. All the objections sought to be raised by the non-applicants are kept open to be raised before the learned Arbitrator. The Registry is directed to request the learned Arbitrator for consent letter and for disclosure statement as per the provisions of the Act.

18. At this stage, learned Counsel for the non-applicants prayed to keep this order in abeyance for a period of six weeks as they intend to challenge. Having regard to the request, the actual work of arbitration shall not commence for a period of six weeks from today. In the meantime, rest of the formalities shall be completed.