

HIGH COURT OF MADHYA PRADESH: JABALPUR

(Single Bench : Hon'ble Shri Justice Hemant Gupta, Chief Justice)

Arbitration Case No. 56/2016

M/s Uttarakhand Purv Sainik Kalyan Nigam Limited Petitioner

- V/s -

Northern Coal Field Limited Respondent

Present:

Shri Vinod Kumar Dubey, Advocate for the petitioner.

Shri Greeshm Jain, Advocate for the respondent.

Whether Approved for Reporting : Yes

Law Laid Down:

* Section 21 of the Arbitration and Conciliation Act, 1996 deals with the appointment of Arbitrator without the intervention of the Court whereas appointment with the intervention of the Court is contemplated under Section 11(6) of the Arbitration Act.

* The limitation for filing a petition under Section 11(6) of the Arbitration Act is contemplated by the Limitation Act particularly Article 137 of the Schedule-I of the Limitation Act, 1963. The limitation does not start from the notice but from the date cause of action arises, which is prior to serving of a notice.

* The period of notice is to be excluded for computing the period of limitation in terms of Section 15(2) of the Limitation Act, 1963.

Significant Paragraph Nos.: 13, 14, 16, 17 and 18

ORDER (Oral)
(11-01-2018)

The petitioner seeks appointment of an Arbitrator to refer the dispute arising out of the agreement Annexure P-1.

2. The date of agreement is said to be 18th August, 2010 by the petitioner but in the reply filed, the stand of the respondent is that the said agreement

is dated 21st December, 2010. The nature of the said agreement is that of principal letter of allotment under which many agreements were executed by many other parties, but in respect of the petitioner, an agreement was executed on 21st December, 2010 and the petitioner was to execute contract of security coverage at NCL HQ, Nigahi, Khadia, Jayant, Krishnashila and IWSS upto 30th June, 2011.

3. The petitioner served a notice of demand on 29th May, 2013 to seek an appointment of an Arbitrator in terms of agreement between the parties. The Arbitrator was not appointed but the petitioner sought invocation of jurisdiction of this Court by filing the present petition on 20th September, 2016.

4. Mr. Jain, learned counsel appearing for the respondent raised an objection that the present application filed by the petitioner is barred by limitation. It is argued that in terms of Section 43 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the Act'), the Limitation Act, 1963 apply to Arbitration proceedings as it applies to proceedings in Court, therefore, it is argued that in terms of Article 137 of Schedule I of the Limitation Act, 1963 (for short 'the Limitation Act'), an application before this Court could be filed only within a period of three years of the date to apply arises, excluding the period of notice required for raising a dispute. Since the petitioner has invoked the jurisdiction of this Court on 20th September, 2016, therefore, the application filed by the petitioner is barred by limitation.

5. On the other hand, learned counsel for the petitioner relies upon Section 21 read with sub-section (2) of Section 43 of the Act to contend that

arbitration proceedings will commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. It is, thus, argued that since the petitioner has raised the dispute on 29.05.2013, therefore, the present petition would be deemed to be within the period of limitation.

6. Before the respective arguments of the learned counsel for the parties are examined, certain provisions of the Act are required to be extracted.

Thus, the provisions of Section 21 and 43 of the Act read as under:-

“**21. Commencement of arbitral proceedings** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

xxx

xxx

“**43. Limitations.** — (1) The Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.”

7. The provisions of the Limitation Act as are relevant for the purposes

4.A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See *Law of Arbitration* by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.”

10. In Panchu Gopal Bose vs. Board of Trustees for Port of Calcutta (1993) 4 SCC 338, it has been held that the provisions of Limitation Act would apply to the arbitrations and cause of arbitration for the purposes of limitation shall be deemed to have accrued to the party in respect of any such matter at the time it should have been accrued, but for the contract. It was held to the following effect:

“7. It would, therefore, be clear that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator....

9. In Pegler v. Railway Executive 1948 AC 332, House of Lords held that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued. While accepting the

interpretation put up by Atkinson, J. as he then was in the judgment under appeal, learned Law Lords accepted the conclusion of Atkinson, J. in the language thus: “the cause of arbitration” corresponding to “the cause of action” in litigation “treating a cause of arbitration in the same way as a cause of action would be treated if the proceeding were in a court of law”.

11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.”

11. In **State of Orissa and another vs. Damodar Das, (1996) 2 SCC 216**, Article 137 of the Schedule to the Limitation Act has been applied in relation to an application under Section 20 of the Arbitration Act, 1940 and it was held, thus:

“6. In *Law of Arbitration* by Justice Bachawat at p.549, commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) ‘action’ and “cause of arbitration” should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that

right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.”

12. In **SBP & Co. vs. Patel Engineering Ltd. and another, (2005) 8 SCC 618**, the Supreme Court held that the power exercised by the Chief Justice or his designate is a judicial power. An application to the Chief Justice is an application to the Civil Court. Such application is governed by the provisions of Code of Civil Procedure.

13. The appointment of an Arbitrator under Section 8 of the Arbitration Act, 1940 is without intervention of Court under Chapter-II thereof whereas reference to arbitration and appointment of an Arbitrator under Chapter-III is through the intervention of the Court. On the other hand, Section 11 of the Act is amalgamation of both the Chapters in respect of appointment of Arbitrators. The intervention of the Court is not envisaged under the Act if the parties adhere to the terms of agreement. It is only in the event of failure to appoint an Arbitrator in terms of the agreement the aggrieved party seeks redressal under Section 11 of the Act.

14. In my opinion, provisions of Section 21 are in relation to arbitration without the intervention of the Court. But, if intervention of the Court is necessitated, such petition has to be filed within the period of limitation. It has been held in the aforesaid judgments that the period of limitation is for all applications filed before the Civil Court. Since there is no specific period of limitation prescribed for such like application under Section 11 of the Act, therefore, as per Article 137, the period of limitation is three years from the date right to apply accrues.

15. The argument that only notice is required to be served when the cause of arbitration arises and subsequently such aggrieved party can seek intervention of the Court for appointment of an Arbitrator at any point of time is not tenable. The cause of action if once arisen cannot be interrupted and give rise to another period of limitation. Once limitation begins to run, it cannot be stopped. Therefore, once the cause of arbitration has accrued to a party, such party must invoke the jurisdiction of the Court to seek appointment of an Arbitrator within three years, but by excluding 30 days' notice period as warranted under Section 15(2) of the Limitation Act.

16. The right to apply accrues when the cause of action accrues. To constitute a cause of action, firstly there has to be existence of right and secondly its infringement or threat of infringement. The cause of action denotes and determines the starting point of limitation. Such cause of action in relation to arbitration proceedings is said to be cause of arbitration as held in **Panchu Gopal Bose's** case (*supra*). The question as to when right to sue accrues depends on the facts of each case, as when the right is asserted or denied or when the right to claim ascertained amount arises.

17. The cause of action to seek appointment of an arbitrator does not accrue with the issue of the notice. To seek appointment of an Arbitrator, the notice is required to be served in terms of sub clause (4) of Section 11 of the Act. It is step in aid to seek appointment of an arbitrator. The right to apply for cause of arbitration will accrue prior thereto and in pursuance of such right, a notice is required to be served. Therefore, the starting period of limitation in terms of Article 137 of the Limitation Act would be prior to the

servicing of notice. It is from the said date, the aggrieved party has to seek intervention of the Court within three years. Since, the right to apply to the Court in terms of sub-section (6) arises only after expiry of 30 days of servicing of a notice, therefore, such 30 days are required to be excluded while determining the period of limitation in terms of Section 15(2) of the Limitation Act. Such interpretation is by harmonious construction of Section 21, Section 43 and Section 11 of the Act.

18. It would be matter of determination as to when cause to seek appointment of an arbitrator would arise. It would be cause of action to invoke the jurisdiction of the civil court under Section 11 of the Act, which would be relevant to determine the period during which, the aggrieved party can approach High Court in terms of Section 11(6) of the Act. But to hold that there would be no period of limitation to invoke jurisdiction of civil court is not acceptable after servicing of notice contemplated under Section 11(4) of the Act. To say, there is no period of limitation to seek appointment of an arbitrator is not correct.

19. Keeping in view the aforesaid principle, the cause of arbitration arose to the petitioner in the present case in the year 2011 as according to the averments made by the respondents in their return in para 7, the work of the petitioner was completed in the year 2011 and all necessary payments were made to the petitioner including refund of security deposit in the year 2011 itself. The petitioner has not chosen to file any rejoinder to dispute the said fact. Thus, when final payment was made in the year 2011 and the right to dispute the balance claim, if any, arises on the said date but the petitioner

has chosen to file the present petition on 20th September, 2016. Such petition is much beyond the period of three years even by excluding 30 days period required to be excluded in terms of Section 15 of the Limitation Act.

20. In view of the above, the jurisdiction of the Court under Section 11(6) of the Act has to be invoked within a period of three years excluding the period of notice, failing which the dispute cannot be referred to an Arbitrator through the intervention of the Court.

21. In view of the said fact, I find that the dispute raised by the petitioner is beyond the period of limitation and thus, not arbitral at the instance of the petitioner.

Dismissed.

(Hemant Gupta)
Chief Justice