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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P. 512/2023

SAHAMAL SINGH

..... Petitioner

Through: Mr. Vikas Sethi, Ms. Sarvodaya
Lakshmi, Advs. (VC).

versus

CONTAINER CORPORATION OF INDIA LIMITED

..... Respondent

Through: Mr. Arun Kumar, Mr. Abhinav
Kumar, Advs.

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Date of Decision: 09.05.2024.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. By way of the present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the 'A&C Act'), the petitioner seeks appointment of Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes between the parties.
2. Learned counsel for the petitioner submits that the dispute has arisen out of the work order dated 12.10.2015 awarded by the respondent to the petitioner. The agreement entered into between the parties for



Terminal Transportation of Loaded / Empty Containers Contractor For Container Corporation Of India Ltd at ICD/TKD.

3. The arbitration clause between the parties is not disputed.
4. Learned counsel for the petitioner has submitted that the petitioner was required to install GPS and VMTs in the trailers with suitable compatibility with the Respondent's CCLS System. Learned counsel for the petitioner submitted that since the petitioner was informed that MIS department officers of the respondent were in process of making changes / update in the Company's CCLS system and therefore, the delay took place.
5. Learned counsel submits that finally the VMTs with suitable compatibility with the Respondent's CCLS system were installed in the 50 trailers and after training of the staff of the respondent and the petitioner's staff, the installation was completed on 30.06.2016. learned counsel for the petitioner submitted that thereafter the dispute arose between the parties which was informed to the respondent vide email dated 26.02.2020, 10.06.2020 and 18.09.2020. The respondent was also called for conciliation process. However, no positive steps were taken by the respondent.
6. Learned counsel for the petitioner submits that vide letter dated 14.11.2019, extended the Contract for one year and arbitrarily directed the petitioner to remove the VMTs from all 50 trailers deployed by the petitioner and further directed to reduce the number of trailers by 10 and reduce the monthly hiring rates.



7. Learned counsel for the petitioner submitted that the VMTs were purchased for 5 years on a finance basis and the Petitioner is regularly paying the EMI's for such VMTs from the payment received from the Respondent against the bills raised. It has been submitted that the VMTs installed in the trailers cannot be used at any other company's project as the VMTs were specifically designed and developed as per the compatibility requirements of the Respondent.
8. Learned counsel for the petitioner submitted that in view of the same the petitioner demanded a sum of Rs. 6,67,33,174/- from the respondent on account of following heads:
 - a. Rs.60,54,952/- as 50% of total cost incurred by the Petitioner for purchase of VMTs installed in 50 trailers.
 - b. Rs.4,57,80,222/- as loss suffered due to reduction of trailers from 50 to 40.
 - c. Rs. 1,48,98,000/- as cost of salary for idle drivers employed for movement of trailers.
9. Learned counsel for the petitioner submitted that though the dispute started when the respondent started deducting unjustified amounts from our vendors bills on account of alleged delay in installation of Vehicle Miles Travelled (VMT) equipment in trailers amounting to Rs. 88,84,000/-. These amounts were deducted from the period 29.03.2016 to 13.07.2016.
10. Learned counsel for the petitioner submitted that during this period the parties were maintaining a running account. Learned counsel submits that petitioner vide a notice dated 12.11.2022 invoked the arbitration



clause raising a dispute of Rs.7,56,17,174/- (Rupees Seven Crore Fifty Six Lakhs Seventeen Thousand One Hundred Seventy Four Only), in view of Clause-21.1 of the agreement between the parties.

11. Learned counsel for the petitioner submitted that the clause provides the appointment of an Arbitrator by the respondent which is illegal in view of the judgment of the Supreme Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited* 2019 SCC OnLine SC 1517.
12. Learned counsel for the petitioner submits that since the respondent failed to respond, the present petition has been filed.
13. Respondent in its reply has denied all the averments and predominantly taken an objection that the present petition is barred by limitation as the petition being filed beyond the period of three years from the time when the right accrued to the petitioner.
14. Learned counsel submitted that the claim of the petitioner is stale which cannot be revived through the present petition. It has been submitted that the cause of action first arose on 29.03.2016 and lastly arose on 13.07.2016 when the last deduction was made. It has been submitted that the petitioner has not come to the court with clean hands and the notice dated 12.11.2022 has been issued only to cover up the lost period of limitation.
15. Learned counsel has relied upon *B and T AG vs. Ministry of Defence* 2023 SCC OnLine SC 657 and *M/s Arif Azim Co. Ltd. vs. M/s Aptech Ltd.* 2024 SCC OnLine SC 215.



16. Learned counsel submits that it is a settled proposition that once the time has begun to run no subsequent disability or inability to institute suit or make an application can stop it. Learned counsel has relied upon Article 137 of the Limitation Act and has submitted that the present petition is without any cause of action and is liable to be dismissed.
17. The claim as raised by the petitioner has also been denied by the respondent.
18. In the present case, the agreement between the parties is not disputed and the arbitration clause has also not been disputed. The arbitration clause contains the provision that the respondent shall appoint a Sole Arbitration. However, the same is not permissible in the eyes of the law in view of the judgment of the Supreme Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited (Supra)*.
19. The question that now arises for consideration is whether the present petition is liable to be dismissed on the ground of limitation.
20. The law regarding the point of limitation is well settled that it is a mixed question of law and has been held in *Vedanta Limited through authorized sign Benecio Menezes vs. Prowess International Pvt Ltd* 2023 SCC OnLine Bom 2714. In *Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited* (2020) 2 SCC 455, the apex court inter-alia held as under:

“9.11. 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.....

9.12. In the present case, the issue of limitation was raised by the Respondent – Company to oppose the appointment of



*the arbitrator under Section 11 before the High Court. Limitation is a mixed question of fact and law. In ITW Signode India Ltd. v. Collector of Central Excise a three judge bench of this Court held that **the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.***

*Reliance is also placed on the judgment of this Court in NTPC v. Siemens Atkein Gesell Schaft, wherein it was held that **the arbitral tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award.** Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34.....”*

(Emphasis Supplied)

21. Thus the issue of limitation is to be adjudicated by the arbitrator is no more *res-integra*. The limitation being a mixed question of fact and the same is to be decided by the tribunal except in the cases, where the claim is patently or ex-facie time-barred.

22. However, there cannot be any doubt to the settled proposition as has been reiterated by the Apex Court in *M/s B and T AG v. Ministry of Defence* 2023 SCC OnLine SC 657 that a stale claim cannot be allowed to be raised by way of arbitration. In *M/s B and T AG (Supra)*, the Apex Court has inter alia held as under:

“31. Since a petition under Section 11(6) of the Act 1996 for seeking appointment of Arbitral Tribunal is required to be



filed before the High Court or the Supreme Court, as the case may be, Article 137 of the Schedule to the Act 1963 would apply.

32. Article 137 reads thus:

<i>“Description of Suit</i>	<i>Period of Limitation</i>	<i>Time from when period begins to run when the right to apply accrues”</i>
<i>137. Any other application for which no period of limitation is provided elsewhere in this Division.</i>	<i>Three years.</i>	

33. A plain reading of the aforesaid Article would indicate that the period of limitation in cases covered by Article 137 is three years and the said period would begin to run when the right to apply accrues.

34. The starting point of limitation under Article 137 according to third column of the Article is the date when 'the right to apply arises'. This being a residuary Article to be adopted to different classes of applications, the expression 'the right to apply' is an expression of a broad common law principle and should be interpreted according to the circumstances of each case. 'The right to apply' has been interpreted to mean 'the right to apply first arises'. (See: Meria Ramanna v. Nallaparaju, (1955) 2 SCR 938)



35. Further, it would be necessary to refer to Section 9 of the Act 1963 of the Act which reads thus:

"9. Continuous running of time. Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it:

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues."

(Emphasis supplied)"

23. The Apex court thereafter taking into account all the precedents inter alia held as under:

"65. On a conspectus of all the aforesaid decisions what is discernible is that there is a fine distinction between the plea that the claims raised are barred by limitation and the plea that the application for appointment of an arbitrator is barred by limitation.

66. Mookerjee, J. in Dwijendra Narain Roy v. Joges Chandra De, reported in AIR 1924 Cal 600 has explained the true test to determine when a cause of action could be said to have accrued observing as under:

"10.... The substance of the matter is that time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed; Coburn v. Colledge [(1897) 1 Q.B. 702]; Gelmani v. Morriggia [(1913) 2 K.B. 549]. The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief: Whalley v. Whalley [(1816) 1 M.R. 436]. The statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy



or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result....."

(Emphasis supplied)

67. *"Cause of action" means the whole bundle of material facts, which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. In delivering the judgment of the Board in Mussummat Chand Kour v. Partab Singh, reported in ILR (1889) 16 Cal 98, Lord Watson observed:*

"Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff it refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."

(Emphasis supplied)

68. *Cause of action becomes important for the purposes of calculating the limitation period for bringing an action. It is imperative that a party realises when a cause of action arises. If a party simply delays sending a notice seeking reference under the Act 1996 because they are unclear of when the cause of action arose, the claim can become time-barred even before the party realises the same.*

69. *Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, 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. 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.”

70. Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

71. In Law of Arbitration by Justice Bachawat at p. 549, commenting on Section 37, it is stated that subject to the 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 11 of the Act 1996 is governed by Article 137 of the Schedule to the 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.



- 72. Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to, the substance, rather than the form of the action. If an infringement of a right happens at a particular time, the whole cause of action will be said to have arisen then and there. In such a case, it is not open to a party to sit tight and not to file an application for settlement of dispute of his right, which had been infringed, within the time provided by the Limitation Act, and, allow his right to be extinguished by lapse of time, and thereafter, to wait for another cause of action and then file an application under Section 11 of the Act 1996 for establishment of his right which was not then alive, and, which had been long extinguished because, in such a case, such an application would mean an application for revival of a right, which had long been extinguished under the Act 1963 and is, therefore, dead for all purposes. Such proceedings would not be maintainable and would obviously be met by the plea of limitation under Article 137 of the Act 1963.”*
24. There cannot be any doubt to the proposition that the stale claim cannot be allowed to be raised by the petitioner by invoking the arbitration. The Apex Court has unambiguously enter as held that the claim as raised was hopelessly barred claim as the petitioner vide its conduct left its right unclaimed for more than five years.
25. Admittedly, the deductions which were allegedly made by the respondent in 2016 have become time barred and cannot be raised in the present arbitration. Thus this claim of the petitioner cannot be referred to the arbitration, in respect of the deductions. In view of the settled law as being laid by the Apex Court in *M/s B and T AG (Supra)*.



26. However, the claim which has been raised by the petitioner in the notice under Section 21 of the Arbitration and Conciliation Act as referred in para-10 of the notice which is as under:

“10. That CONCOR further issued a letter dated 14.11.2019 for extension of Contract for one year and arbitrarily directed our Client to remove VMTs from all 50 trailers deployed by our Client and further directed to reduce the number of trailers by 10 and reduce the monthly hiring rates. The VMTs were purchased for 5 years on a finance basis and our Client is regularly paying the EMI's for such VMTs from the payment received from CONCOR against the bills raised. Moreover, the VMTs installed in the trailers cannot be used at any other company's project as the VMTs were specifically designed and developed as per the compatibility requirements of CONCOR. In view of the above, our Client demands Rs. 6,67,33,174/- from CONCOR and the split is given below –

- *Rs.60,54,952/ as 50% of total cost incurred by our Client for purchase of VMTs installed in 50 trailers.*
- *Rs.4,57,80,222/- as loss suffered due to reduction of trailers from 50 to 40.*
- *Rs.1,48,98,000/- as cost of salary for idle drivers employed for movement of trailers.”*

27. I consider that only the dispute relating to this claim as referred in para-10 can be referred to the Arbitrator. Thus, the dispute as referred to in para-10 of the notice under section 21 is referred to the Sole Arbitrator.

28. In view of the above, the present petition is disposed of with the following directions:

- i) The disputes between the parties under the said agreement are referred to the arbitral tribunal. The arbitration will be held under



- the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the ‘DIAC’).
- ii) Hon’ble Dr. Justice Satish Chandra, former Judge of Allahabad High Court (Mobile No. 9452332992) is appointed as an arbitrator to adjudicate the disputes between the parties.
 - iii) The remuneration of the learned Arbitrator shall be in terms of fees Schedule of DIAC or as the parties may agree.
 - iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claims, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
 - vi) The parties shall approach the learned arbitrator within two weeks from today.

DINESH KUMAR SHARMA, J

MAY 9, 2024/AR..