

SCHLUMBERGER ASIA SERVICES LTD.
v.
OIL & NATURAL GAS CORPORATION LTD.
ARBITRATION PETITION NO.6 OF 2013

MAY 09, 2013

[SURINDER SINGH NIJJAR, J.]

Arbitration and Conciliation Act, 1996 – s.11(6) – Petition under – For appointment of nominee Arbitrator on behalf of respondent and also appointment of third Arbitrator (Presiding Arbitrator) in Arbitral Tribunal to adjudicate disputes between the parties – Maintainability – Whether arbitration petition liable to be dismissed on ground of limitation as it raises dead claims or the matter ought to be left to be decided by the Arbitral Tribunal – Held: The Chief Justice or the designated Judge can also decide whether the claim was dead one or a long-barred claim – But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold – It can be left to be decided by the Arbitral Tribunal – In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received – There are further disputes (even if the notices were received by respondent-ONGC) as to whether they were actually received in the correct section of respondent-ONGC – These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal – It would be appropriate for Supreme Court to constitute the entire Arbitral Tribunal in exercise of powers u/s.11(6).

The instant arbitration petition was filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking direction from this Court for appointment of the nominee Arbitrator on behalf of the respondent and also appointment of third Arbitrator (Presiding Arbitrator) in

A the Arbitral Tribunal to adjudicate the disputes between the parties.

B The respondent raised preliminary objection to the maintainability of the arbitration petition contending that the petitioner had filed the present case only to bring unnecessary litigation; that the arbitration petition was an abuse of process of law and that the claims made were barred by a long period of time and were, therefore, dead claims.

C Per contra, the petitioner submitted that the limitation stops running from the date mentioned in the notice invoking arbitration and in the present case, the notice invoking arbitration was sent on 14th November, 2008; that in any event, the petitioner had sent the final notice on 9th January, 2012 and the respondent had denied the claim through its letter dated 29th February, 2012, thus, the disputes clearly arose only w.e.f. 29th February, 2012 and therefore, the preliminary objection raised by the respondent deserves to be rejected.

E The question which arose for consideration was whether the arbitration petition is liable to be dismissed on the ground of limitation as it raises dead claims and it would not be necessary for this Court to leave the matter to be decided by the Arbitral Tribunal.

F Allowing the Arbitration Petition, the Court

G HELD: 1. A bare perusal of the observations made by this Court in the judgment in *SBP & Co.* case makes it clear that the Chief Justice or the designated Judge can also decide whether the claim was dead one or a long-barred claim. But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold. It can be left to be decided by the Arbitral Tribunal. The observations made in *SBP & Co.* case were explained by

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this Court in *Indian Oil Co. Ltd. Case*. These observations make it clear that it is optional for the Chief Justice or his designate to decide whether the claim is dead (long-barred). It is also made clear by this Court that the Chief Justice or his designate would do so only when the claim is *evidently* and *patently* a long time-barred claim. The claim could be said to be patently long time-barred, if the contractor makes it a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law. On the other hand, if the contractor makes a claim, which is slightly beyond the period of three years of completing the work say within five years of completion, the Court will not enter into disputed questions of fact as to whether the claim was barred by limitation or not. The judgment further makes it clear that there is no need for any detailed consideration of evidence. [Paras 16] [569-G-H; 570-A; 571-B-D]

SBP & Co. Vs. Patel Engineering Ltd. & Anr. (2005) 8 SCC 618; 2005 (4) Suppl. SCR 688; and *Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.* (2011) 3 SCC 507; 2011 (2) SCR 512 – relied on.

2. In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received. There are further disputes (even if the notices were received by ONGC) as to whether they were actually received in the correct section of ONGC. These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal. [Para 17] [571-E-F]

3. It would be appropriate for this Court to constitute the entire Arbitral Tribunal in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996. [Para 18] [571-G]

A Case Law Reference:

2005 (4) Suppl. SCR 688 relied on **Para 12, 15, 16**

2011 (2) SCR 512 relied on **Para 15, 16**

B CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 6 of 2013.

Sanjiv Puri, Aditya Chhibber, B.K. Satija for the Petitioner.

C Siddharth Luthra, ASG, Gaurav Agrawal, Shankar Narayanan, Arjun Diwan for the Respondent.

The Judgment of the Court was delivered by

D SURINDER SINGH NIJJAR, J. 1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeks a direction from this Court for appointment of the nominee Arbitrator on behalf of the respondent and also appointment of third Arbitrator (Presiding Arbitrator) in the Arbitral Tribunal to adjudicate the disputes arises between the parties.

F 2. The petitioner is a Company incorporated and registered under the law of Hong Kong having its project office in India and one of the base offices at Mumbai. The respondent is a Corporation registered under the Companies Act, 1956 having its registered office at Jivan Bharti Tower-2, 124, Circus New Delhi.

G 3. In its counter-affidavit, the respondent has raised a preliminary objection to the maintainability of the petition. It is submitted by the respondent that the petitioner has filed the present case only to bring unnecessary litigation. The arbitration petition is an abuse of process of law and the claims made are barred by a long period of time and are, therefore, dead claims.

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4. In order to decide the preliminary objection, it would be necessary to take note of certain relevant events. A

5. The petitioner and the respondent had entered into and executed a contract dated 7th December, 2004 (effective from the date of issue of the firm order dated 6th August, 2004). The contract under Clause 27 provides for arbitration as the mechanism for resolution of any dispute that may arise between the petitioner and the respondent. The arbitration clause reads as under: B

"27 ARBITRATION C

27.1 Except as otherwise provided elsewhere in the CONTRACT if any dispute, difference, question or disagreement arises, at any time before or after completion or abandonment of work, between the parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning, operation, effect, interpretation or out of the CONTRACT or breach thereof the same shall be decided by an Arbitral Tribunal consisting of three Arbitrators. Each party shall appoint one Arbitrator and the Arbitrators so appointed shall appoint the third Arbitrator who will act as Presiding Arbitrator. D E

The party desiring the settlement of dispute shall give notice of its intention to go for arbitration clearly stating all disputes to be decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days. In case a party fails to appoint an arbitrator within 30 days from the receipt of the request to do so by the other party or the two Arbitrators so appointed fail to agree on the appointment of third Arbitrator within 30 days from the date of their appointment, upon request of a party, the Chief Justice of India or any person or institution designated by him (in case of International Commercial Arbitration) shall appoint F G H

A the Arbitrators/Presiding Arbitrator. In case of domestic
Contracts, the Chief Justice of the High Court or any person
or institution designated by him within whose jurisdiction
the subject purchase order/CONTRACT has been placed/
made, shall appoint the arbitrator/Presiding Arbitrator upon
B request of one of the parties.

If any of the Arbitrators so appointed dies, resigns,
incapacitated or withdraws for any reason from the
proceedings, it shall be lawful for the concerned party/
C arbitrators to appoint another person in his place in the
same manner as aforesaid. Such person shall proceed
with the reference from the stage where his predecessor
had left if both parties consent for the same; otherwise, he
shall proceed de novo.

D It is a term of the CONTRACT that the party invoking
arbitration shall specify all disputes to be referred to
arbitration at the time of invocation of arbitration and not
thereafter.

E It is also a term of the CONTRACT that neither party to the
CONTRACT shall be entitled for any ante-lite (pre-
reference) or pendent-lite interest on the amount of the
award.

F The Arbitral Tribunal shall give reasoned award and the
same shall be final, conclusive and binding on the parties.

The venue of the arbitration shall be at Mumbai, India.

G It is a term of the CONTRACT that the cost of the
arbitration will be borne by the parties in equal shares.

H Subject to as aforesaid the provisions of the Arbitration
and Conciliation Act, 1996 and any statutory modifications
or re-enactment in lieu thereof shall apply to the arbitration
proceedings under this clause."

Clause 26 of the Contract further provides as under: A

“26 JURISDICTION AND APPLICABLE LAW:

This agreement including all matter connected with this Agreement, shall be governed by the laws of India (both substantive and procedural) for the time being in force and shall be subject to exclusive jurisdiction of the Indian Court at Mumbai. Foreign Companies, operating in Indian or entering into Joint ventures in India, shall have to obey the law of the Land and there shall be no compromise or excuse for the ignorance of the Indian legal system in any way.” B C

6. The petitioner together with its affiliates is a leading oilfield service provider. It is trusted to deliver superior results and improved E&P performance for oil and gas companies around the world, including India. Through its well site operations, research and engineering facilities, it is working to develop products, services and solutions that optimize customer performance in a safe and environmentally sound manner. It employs over 113,000 people of more than 140 nationalities working in 85 countries, including India. D E

7. The respondent was desirous of hiring four sets of Measurement While Drilling (MWD) and one set of Gyro Equipment & Services (Gyro) collectively referred to as “Equipments” for carrying out its operation. Accordingly, the respondent issued a tender No.MR/DS/MAT/CT/MWD/142(390) 2003-04/P46KC04002. The petitioner had the necessary experience of carrying out operation as stated in the tender and submitted a bid on 8th June, 2004 under offer No.SASL/D&M/ONGC 4002/2002-02 for providing the required services against the respondent’s tender in accordance with the terms and conditions set-forth therein. The respondent accepted the bid of the petitioner and placed a firm order dated 6th August, 2004 under No.MR/DS/MAT/CT/MWD/142(390)2003-04/DY8DF0301/ 9010002261. Accordingly, on H

A 7th December, 2004, the parties entered into and duly executed a contract effective from the date of issue of the firm order i.e. 6th August, 2004. The petitioner agreed to perform a work defined in Appendix-III of the Contract. The respondent in consideration thereto promised to pay the amounts set out in
 B Appendix-IV of the Contract at the time and in the manner prescribed in the contract. The duration of the contract was initially for a period of 2 years from the date of receipt of “Equipments” at Nhava base. The respondent had the option of extending the contract by one more year in two equal
 C installments of six months each at the same rate, terms and conditions. The contract was automatically extendable for completion of jobs in ongoing wells, at the same rates, terms and conditions. The petitioner claims that as it was providing excellent services to the respondent, the contract was extended
 D from 16th October, 2006 to 15th April, 2007 for the first installment of six months. Thereafter, it was extended from 16th April, 2007 to 15th October, 2007 for the second installment of six months on the same rates, terms and conditions as contained in Clause 2.0 of the Special Terms and Conditions of the Contract.

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 8. The petitioner further claims that it performed the work in terms of the contract and raised invoices for the work performed from time to time. However, invoices amounting to USD 481,252.65 and INR 9,565,616 were either short paid or
 F not paid despite the work under the contract was satisfactorily performed by the petitioner. The details of the invoices raised by the petitioner are as under:

	Invoice No.	Period	Amount (USD)
G	800001820	March 2006	128,630.00
	800001821	March 2006	89,149.00
	800001828B	March 2006	31,053.00
H	800001829B	March 2006	41,406.00

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800002119	September 2006	192,169.00	A
800002120B	September 2006	63,729.00	
800002860	September 2007	71,304.00	
800002861B	September 2007	96.00	B
800002862B	September 2007	49,487.00	
	Total	667,023.00	

9. The petitioner further claims that the respondent has refused to make payment against the aforesaid invoices. The respondent totally rejected the various Lost in Hole (LIH) claims of the petitioner. According to the petitioner, in the event of "Equipments" are lost, destroyed or damaged in the site well, the respondent is liable to pay the depreciated replacement value of the "Equipments" stuck/lost in the hole subject to a limit of 50% calculated from the date of first use of such "Equipments" in India. Furthermore, in terms of the Clause 17 of the Contract, the respondent was under an obligation to make an attempt to recover or retrieve the said tools but the respondent failed to discharge this obligation also.

10. Since no payment had been received, the petitioner sent a letter to the respondent on 11th July, 2008 demanding the payment of the outstanding amount. However, there was no response to the aforesaid communication. The petitioner, therefore, issued a legal notice dated 14th November, 2008 invoking arbitration under Clause 27 of the Contract. In the aforesaid notice, the petitioner detailed the disputes that have arisen between the parties. In the same notice, the petitioner informed the respondent that it has nominated the Arbitrator and called upon the respondent to nominate their Arbitrator within 30 days from the date of receipt of the notice, failing which the petitioner shall be constrained to initiate legal steps for appointment of Arbitrator on behalf of the respondent. According to the petitioner, the aforesaid notice was duly

A served upon the respondent but no steps were taken by them
for appointment of Arbitrator. Thereafter, the petitioner sent a
reminder letter on 21st May, 2009 calling upon the respondent
to nominate an Arbitrator within 30 days from the date of
receipt of the notice. The petitioner reiterated that in case the
B respondent still failed to nominate the Arbitrator, the petitioner
shall initiate proceedings for appointment of Arbitrator on behalf
of the respondent. Another reminder was issued by the
petitioner on 11th August, 2010 in the same terms as the earlier
notices and the reminders. Still there was no response from the
C respondent, which led the petitioner to send another notice on
9th January, 2012. Finally, on 29th February, 2012, the
respondent sent a reply to the petitioner denying that any
amount as claimed by the petitioner was due.

D 11. At this stage, the petitioner finally accepted that
disputes have arisen between the parties and filed the present
petition under Section 11(6) of the Arbitration and Conciliation
Act, 1996 seeking appointment of the nominee Arbitrator on
behalf of the respondent as well as the third Arbitrator
(Presiding Arbitrator).

E 12. I have heard the learned counsel for the parties. Mr.
Siddharth Luthra, learned senior counsel has submitted that: (1)
the petitioner had accepted the payment without demur in 2007.
The claims are, therefore, already settled.; (2) The contract had
F come to an end long time ago upon the petitioner accepting
payment in 2007.; (3) The cause of action, if any, arose in
2007, while the arbitration petition is filed in January, 2013.; (4)
According to Mr. Luthra, even on pleadings of the petitioner,
the cause of action arose to the petitioner for filing petition under
Section 11(6) of the Arbitration and Conciliation Act from 14th
G December, 2008 i.e. on expiry of 30 days from the first notice
dated 14th November, 2008 invoking arbitration. Learned
senior counsel submitted that the present petition ought to have
been filed within a maximum period of 3 years from the said
date, i.e., on or before 14th December, 2011 while the present

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petition has been filed on 11th January, 2013. Learned senior counsel emphasized that this Court would not entertain the present petition as it raises dead claims. The contract expired after the de-hiring of last unit on 21st October, 2007. The respondent had received the entire amount in the years 2006-07. Pointing out to the averments made in the counter-affidavit, Mr. Luthra submits that the letter dated 14th November, 2008, 21st May, 2009 and 11th August, 2010, which were written to ONGC, were not received in the concerned section of ONGC. The address in the contract for correspondence was given as ONGC Limited, Drilling Services, Mumbai Region, 3B, Vasundhara Bhavan, Bandra-East, Mumbai-51. This was changed to ONGC Limited, Drilling Services, Directional Drilling Section, Mumbai Region, 2nd Floor, 11-High, ONGC, Sion (W), Mumbai-400017 in October, 2005. This was known to the petitioner as it had submitted the invoices to ONGC at new address. However, notices dated 21st May, 2009 and 11th August, 2010 were still sent to the earlier address. In any event, notice dated 14th November, 2008 was never received by the respondent. Mr. Luthra submits that mere sending of subsequent show cause notice/letters would not extend the limitation as the date of cause of action was fixed on the expiry of 30 days from the first notice dated 14th November, 2008. Mr. Luthra points out that Section 43 of the Arbitration and Conciliation Act, 1996 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. Relying on Section 43(2) read with Section 21 of the aforesaid Act, the learned counsel submitted that the arbitration shall be deemed to have commenced on the date on which a request for that dispute referred to arbitration is received by the respondent. The petitioner having sent the first notice on 14th November, 2008, the arbitration petition ought to have been filed after the expiry of 30 days therefrom. Learned counsel relies on the Constitution Bench of this Court in *SBP & Co. Vs. Patel Engineering Ltd. & Anr.* (2005) 8 SCC 618, in support of the submission that the present petition is barred by

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A limitation. He relies on para 39 of the judgment, which reads as under:

B “39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. C *It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.*”

H 13. Relying on the aforesaid observations, the learned senior counsel has submitted that this Court would have to

decide as to whether the petition is liable to be dismissed on the ground of limitation as it raises dead claims. It would not be necessary for this Court to leave the matter to be decided by the Arbitral Tribunal.

14. On the other hand, Mr. Sanjiv Puri, learned senior counsel appearing for the petitioner submits that the limitation stops running from the date mentioned in the notice invoking arbitration and in the present case, the notice invoking arbitration was sent on 14th November, 2008. Learned counsel also relied on Section 3 of the Arbitration and Conciliation Act, 1996 in support of the submission that the notice is deemed to have been received by respondent as it was delivered to the addresses mentioned in the contract. In any event, the learned counsel submitted that the petitioner had sent the final notice on 9th January, 2012 and the respondent had denied the claim through its letter dated 29th February, 2012. The disputes clearly arose only w.e.f. 29th February, 2012. Therefore, the preliminary objection raised by the respondent deserves to be rejected.

15. In any event, learned senior counsel submitted that this Court in the case of *Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.* (2011) 3 SCC 507 has considered and explained the observations made by the Constitution Bench in *SBP & Company's case* (supra). It is submitted that on the question of limitation, this Court had categorically held that the matter will be left to the decision of the Tribunal to decide whether the claim made is barred by limitation or not.

16. I have considered the submissions made by the learned counsel for the parties. A bare perusal of the observations made by this Court in paragraph 39 of the judgment in *SBP & Co.* (supra) makes it clear that the Chief Justice or the designated Judge can also decide whether the claim was dead one or a long-barred claim. But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold. It can be left to be decided by the

A Arbitral Tribunal. The observations made in *SBP & Co.* (supra) were explained by this Court in *Indian Oil Co. Ltd.* (supra), which are as under:

B “14. To find out whether a claim is barred by *res judicata*, or whether a claim is “*mala fide*”, it will be necessary to examine the facts and relevant documents. What is to be decided in an application under Section 11 of the Act is whether there is an arbitration agreement between the parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under Section 11 of the Act. *The Chief Justice or his designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time-barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: if the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law, and the claim is patently long time-barred, the Chief Justice or his designate will examine whether the claim is a dead claim (that is, a long time-barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the Court will not enter into a disputed question whether the claim was barred by limitation or not. The Court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious*

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dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act.

These observations make it clear that it is optional for the Chief Justice or his designate to decide whether the claim is dead (long-barred). It is also made clear by this Court that the Chief Justice or his designate would do so only when the claim is *evidently* and *patently* a long time-barred claim. The claim could be said to be patently long time-barred, if the contractor makes it a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law. On the other hand, if the contractor makes a claim, which is slightly beyond the period of three years of completing the work say within five years of completion, the Court will not enter into disputed questions of fact as to whether the claim was barred by limitation or not. The judgment further makes it clear that there is no need for any detailed consideration of evidence.

17. In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received. There are further disputes (even if the notices were received by ONGC) as to whether they were actually received in the correct section of ONGC. These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal.

18. In my opinion, it would be appropriate for this Court to constitute the entire Arbitral Tribunal in exercise of my powers under Section 11(6) of the Arbitration and Conciliation Act, 1996. In exercise of the aforesaid powers, I nominate Justice V.N. Khare, Former Chief Justice of India as the Chairman and Justice D.P. Wadhwa and Justice S.N. Variava, former Judges of this Court as Arbitrators to adjudicate the disputes that have arisen between the parties. The arbitrators shall fix their own remuneration in consultation with the parties.

A 19. The Registry is directed to communicate this order to the Chairman of the Arbitral Tribunal, as well as to the other Arbitrators, so that they can enter upon reference, as soon as possible.

B 20. With these observations, the Arbitration Petition is allowed with no order as to costs.

B.B.B.

Arbitration Petition allowed.