CMR University Journal for Dispute Settlement and Arbitration
Vol. 3 (01), June 2024, PP. 188-195

Bharat Sanchar Nigam Ltd. & Anr. v. Nortel Networks India Pvt. Ltd.

Civil Appeal Nos. 843-844 of 2021

Girisankar S*

Introduction

In the recent judgement in Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited, the Supreme Court seized the opportunity to address the question of the limitation time for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996. The Supreme Court declared that a specific court may refuse a referral to proceedings in arbitration if the claims happen to be time-barred, and it also noted that the limitation term shall be three years from the day when the failure to select an arbitrator occurs.

Facts

Bharat Sanchar Nigam Ltd. contracted with Nortel Networks India Private Ltd. to carry out a number of tasks in accordance with the terms of a purchase order. Following completion, Bharat Sanchar Nigam Ltd., commonly known as BSNL, subtracted liquidated damages and additional charges from the final payment owed to Nortel. On August 4, 2014, BSNL denied Nortel's request to reimburse the money it had withheld.

On April 29, 2020, Nortel served an arbitration notice to BSNL in order to have an arbitrator appointed as per the terms of the arbitration provision in the purchase order. In its response to

* *Student of VIII Semester, B.A., LL.B. (Hons.), CMR University*

Nortel, dated June 9, 2020, BSNL denied the charges made by the latter and argued that the purchase order's arbitration notification had expired.

Nortel moved forward to the High Court of Kerala and filed an application under Section 11 of the Arbitration and Conciliation Act, 1996, requesting for the appointment of an arbitrator. The Kerala High Court sent the case to arbitration in a ruling dated October 13, 2020. BSNL appealed the High Court's decision, but the High Court dismissed the appeal on January 14, 2021. BSNL, disappointed by the outcome, immediately filed a Special Leave Petition with India's highest court.

Issues

1. What was the limitation period for filing of an application under Section 11 of the Arbitration and Conciliation Act, 1996?

2. Whether the court dismiss a referral under Section 11 of the Arbitration and Conciliation Act, 1996 if the claims are ex-facie time barred?

Contentions

BSNL argued that the arbitration was warranted because of its rejection of Nortel's claim over five and a half years ago. It claimed that Nortel should have known that BSNL had rejected its claim before sending the notice of arbitration. No significant actions were taken by Nortel at this time. As a result, BSNL claimed that the notification seeking arbitration was untimely, invalid, and unenforceable under the law. It argued that the High Court's decision to send the parties to arbitration under Section 11 was based on an invalid presumption since it was based on the "mere existence" of an arbitration agreement.

The High Court did not examine whether the presence of a "live" dispute was "inextricably connected" to the arbitration agreement. Furthermore, BSNL argued that the court must necessarily reject the application made under Section 11 in circumstances where the invocation of the

arbitration agreement is prima facie time-barred, even though problems of limitation are typically to be addressed by a tribunal. BSNL also maintained that while Section 11(6A) of the Act (inserted by the 2015 amendment) contains the words "examination of the existence of an arbitration", the authority provided on the court is not a 'formal exercise', but needs a "certain degree of examination before making the reference."

Contrarily, Nortel maintained that following the 2015 change to Section 11 of the Act, the scope of investigation at the pre-reference stage is reduced and further constrained to evaluating the 'presence' of an arbitration agreement under Sub-section 6A of Section 11. Further, under the theory of kompetenz-kompetenz, the arbitral panel might look into the time-barred claims issue. Nortel also argued that the 2015 amendment eliminated the distinction between the time limits for filing an application under Section 11 and the time limits for the underlying claims, and that the role of judicial authorities was reduced to merely determining the "existence" of an arbitration agreement. It further claimed that the limitation period should begin counting down thirty days after it sent the "notice of arbitration," not when BSNL rejected its claim for payment of the sum for completion of the tender work. Therefore, it argued that the judgement of the High Court was correct in referring the issue to arbitration and limiting its inquiry to the presence of the arbitration agreement at the pre-reference stage.

Judgement

Limitation Period for Claims Under Section 11 of The Arbitration And Conciliation Act, 1996

In its review of Section 11 of the Arbitration and Conciliation Act, 1996, the Hon'ble Supreme Court found that the statute of limitations for submitting an application for appointment of arbitration was silent. According to Section 43 of the Arbitration and Conciliation Act of 1996, the Court has concluded that the Limitation Act of 1963 will apply in this case. Here, the Court

relied upon paragraph 45 of the judgement given in Consolidated Engineering V. Principal Secretary Irrigation[1].

The Supreme Court affirmed, citing precedents laid down in the cases of Deepdarshan Builders Pvt. Ltd. v. Saroj[2] and Leaf Biotech v. Municipal Corporation Nashik[3], that the limitation time for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 would be calculated in accordance with section 137 of the Limitation Act. Three years from the date of denial of appointment of an arbitrator or after the expiration of the 30-day time restriction from receipt of notification seeking appointment of an arbitrator was thus intended to be the term of limitation.

It was also made clear by the Supreme Court that the statute of limitations for bringing a Section 11 application under the Arbitration and Conciliation Act, 1996 should not be equated with the statute of limitations for the substantive claims made within the contract. The Supreme Court said that a three-year limitation period is too lengthy and counterproductive to the goal of speedy settlement of disputes. Accordingly, it concluded that the Parliament should amend Section 11 of the Arbitration and Conciliation Act, 1996 to provide for a defined limitation period for petitions submitted under that section.

When a Claim is Ex-Facie Time Barred – Reference to Arbitration Under Section 11 of The Arbitration And Conciliation Act of 1996.

First, the Supreme Court investigated how Section 11 of the 1996 Act came to be the way it is now. It looked at the 2015 cases of Duro Felguera SA v. Gangavaram Port Ltd.[4], Uttarakhand Purv Sainik Kalyan Nigam v. Northern Coal Field Limited[5], and Mayavati Trading Company Private Ltd. v. Pradyut Dev Burman[6] after the revisions were made in those cases. An arbitration

[1] Consolidated Engineering V. Principal Secretary Irrigation, (2008) 7 SCC 169.
[2] (2019) 1 AIR Bom R 249
[3] 2010 (6) MhLJ 316
[4] Duro Felguera SA v. Gangavaram Port Ltd, (2017) 9 SCC 729.
[5] Uttarakhand Purv Sainik Kalyan Nigam v. Northern Coal Field Limited, (2020) 2 SCC 455.
[6] Mayavati Trading Company Private Ltd. v. Pradyut Dev Burman, (2019) 8 SCC 714.

agreement's scope of examination in an application under Section 11 of the Arbitration and Conciliation Act, 1996 was then considered, with reference to earlier cases and provisions of the Arbitration and Conciliation (Amendment) Act, 2015.

The major purpose of the reforms that were proposed in 2015 was to decrease court participation at the appointment stage of an arbitrator. Courts are now only required to examine the existence of an arbitration agreement, and all other thresholds and preliminary issues are left for the arbitral tribunal to sort out under Section 16 of the Arbitration and Conciliation Act, 1996 in accordance to the "kompetenz-komptenz" principle. The arbitrator would have jurisdiction over the limitation period since it is a question of both fact and law. After looking into its ability to conduct an investigation under Section 11 of the Arbitration and Conciliation Act of 1996, the Supreme Court can choose to examine its authority to consider the 'jurisdictional' vs 'admissibility' difference.

Jurisdictional issues are primarily objections regarding the authority of an arbitral tribunal to hear and decide a case. The issues are mostly regarding (a) lack of consent to arbitrate, (b)presence, scope and validity of an arbitration agreement, (c) the scope of the arbitration agreement. Most challenges to the admissibility of a claim concern its character, such as whether or not the claimant violated a requirement to participate in mediation prior to arbitration. The Supreme Court, relying on the cases of Swisborough Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho[7] and BBA v. BAZ[8] determined that "tribunal versus claim" questions look into whether an issue refers to the power of the arbitral tribunal to hear the claim or the propriety of the claim to be heard by the tribunal. The Court held that it should only be made applicable in issues related to admissibility or to jurisdiction. Because of its importance in determining whether or not a claim may go to trial, limitation is always a question for the presiding judge.

To remove "manifestly ex facie non-existent and invalid arbitration agreements or non-arbitrable disputes," the Court must conduct a primary review, as stated in the decision in Vidya Drolia v. Durga Trading Corporation[9], and only then will it intervene. The Supreme Court further made it

[7] Swisborough Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho, (2019) 1 SLR 263.
[8] BBA v. BAZ, [2020] SGCA 53.
[9] Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1.

clear that the law established in Mayavati Trading and Duro Felgura was confirmed by the Vidya Drolia judgement. Courts should only refuse to enforce a referral to arbitration under Section 11 if the claims are statute-barred and if the issue cannot be arbitrated.

Since the cause of action arose when BSNL rejected Nortel's claims, the Supreme Court concluded that Nortel's argument that the limitation period should be extended in light of the parties' discussions about the disagreement was not legitimate. Nortel did not put forth any piece of evidence later and that is the reason why arbitration notification delivered after five and half years was determined to be time-barred. As a result, the appeal was granted, and the two prior rulings from the Kerala High Court (dated 13 October 2020 and 14 January 2021) were reversed.

Analysis

With this ruling, the Supreme Court has made it clear that the time limit for filing an application for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 is distinct from the time limit for filing claims in the underlying dispute. Clarifying the high bar set for denial of appointment of arbitrators in an application under Section 11 of the Arbitration and Conciliation Act, 1996, the Supreme Court has provided guidance to the lower courts. By setting a high bar, the Supreme Court has shown that it understands the legislature's desire to limit judicial involvement in the appointment process. Only in very unusual circumstances, such as where the claim is ex-facie time-barred or there is no existence of a dispute, would a "refusal of appointment" be appropriate. If there is even a shred of uncertainty about an issue that is supposed to be determined by the tribunal, the case should be sent to arbitration. The verdicts in Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd.[10] and Vidya Drolia provides room for a stubborn person to experiment with the terminology. Therefore, a clear explanation from a broader Supreme Court bench is necessary. It should also be said that the statute of limitations of three years goes against the very purpose of the Act. On the other hand, it should not be forgotten that people often take unfair advantage of longer statutes of limitation.

[10] Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd., 2021 SCC ONLINE SC 190.

Conclusion

This is yet another decision that advances the aim of expediency and minimal judicial interference in arbitration proceedings. Nonetheless, the Court has adopted a realistic and balanced approach by declining to hear cases that appear to be time barred on their face, and it is clear that the claim is dead. In the absence of such a strategy, the process will simply get more expensive and time-consuming. The Court discovered a vacuum in Section 11 and resolved the matter for the time being. Concurrently, the Court has urged that Parliament alter the clause to provide for a shorter term of limitation, bearing in mind the aim of efficiency and expediency in the process. Moreover, the Court may have overlooked a recent United States Supreme Court decision in Henry Schein v. Archer & White Sales[11]. The 9-judge bench unanimously ruled that if the parties have explicitly delegated the jurisdiction to decide arbitrability to an arbitrator, the court must honour this delegation, even if the case for arbitration looks frivolous or entirely baseless. However, it should be observed that the term "may" was inserted in Section 11 to allow the court to exercise some discretion. This might be done in order to respect kompetenz-kompetenz and party autonomy. As a result, the Section 11 court has sufficient leeway to respect valid delegations, as in Henry Schein.

[11] 2019 U.S. LEXIS 566