$~27 (Original)

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

\+ O.M.P. (COMM) 351/2021, I.A. 15661/2021 (Section 36 for Stay), I.A. 15662/2021 (Section 151 CPC for exemption), I.A. 15663/2021 (Section 151 CPC for exemption), I.A. 15664/2021 (Section 151 CPC for exemption), I.A. 15665/2021 (Section 151 CPC for Addl. documents) and I.A. 16125/2021 (Section 151 CPC for Addl. documents)

ALSTOM SYSTEMS INDIA PVT LTD ..... Petitioner
Through Mr. Dinesh Pardasani, Mr. Aishwary Kumar and Ms. Shania Elias, Advs.

versus

ZILLION INFRAPROJECTS PVT LTD ..... Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% J U D G M E N T
31.01.2022
(By video conference on account of COVID-19)

OMP (COMM) 351/2021

1. The petitioner assails, by means of this petition, preferred under Section 34 of the Arbitration and Conciliation Act, 1996 ("1996 Act"), order dated 29th October 2021, passed by a learned three member Arbitral Tribunal, presently *in seisin* of the dispute between the petitioner and the respondent.

The impugned order

2. The impugned order came to be passed on an application by the petitioner, as the respondent before the learned Arbitral Tribunal, under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC), seeking dismissal of the respondent's case as being barred by time. To support this request, the petitioner furnished, to the learned Arbitral Tribunal the following tabular statement of dates, reproduced verbatim from para 2 of the impugned order:

24.09.2015	Claimant and Respondent entered into a sub-contract.
16.09.2016	The Respondent terminated the sub-contract.
21.09.2016	Termination letter was delivered to the Claimant.
21.09.2016	The Claimant raised a dispute stating that termination is illegal.
07.10.2016	Invocation of Bank Guarantees by the Respondent.
07.02.2017	Bank Guarantees encashed and money transferred to Respondent's Account.
24.03.2021	Date of commencement of arbitration under Article 4(2) of the ICC Rules 2017.

3. Premised on the afore-extracted table, the petitioner contended that the cause of action, for the respondent to initiate the arbitral process, arose on 21st September, 2016. Reckoned from the said date,

and applying Articles 55[1] and 58[2] of the Limitation Act, 1963, which envisaged a limitation period of three years from the date of arising of the cause of action, the petitioner contended that the claims were barred by time.

4. Responding to the above assertion of the petitioner, the respondent, as the claimant before the learned Arbitral Tribunal, relied on Clause 29 of the Subcontract Agreement between the petitioner and the respondent, which contemplated resolution of disputes by arbitration, and read thus:

> "***29 APPLICABLE LAW - SETTLEMENT OF DISPUTES***
>
> *29.1 This Subcontract Agreement shall be governed by the laws of [India] with courts at [Delhi] having exclusive jurisdiction to adjudicate on all dispute/matters arising out of this Sub-Contract.*
>
> *29.2 Reference to Mediation*
>
> *29.2.1 In the event of any dispute or difference between the Contractor and the Subcontractor, whether arising during the execution or after the completion or abandonment of the Subcontract Works or after the determination of the employment of the Subcontractor under this Subcontract (whether by breach or in any other manner}, m regard to any matter or thing of whatsoever nature arising out of this Subcontract or in connection therewith, then either Party shall give to the other notice in writing of such dispute*

Description of suit	Period of limitation	Time from which period begins to run
[1]55. For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
[2]58. To obtain any other declaration.	Three years	When the right to sue first accrues.

or difference and such dispute or difference shall be and is hereby referred to mediation. A Party who receives a notice for mediation from the other Party shall consent and participate in the mediation process and shall make all reasonable efforts to resolve the same through mediation in accordance with the mediation rules of the International Chamber of Commerce- Alternate Dispute Resolution- ICC ADR

29.2.2 Notwithstanding anything in this Subcontract, in the event of any dispute or difference arising out of or relating to this Subcontract, or the breach thereof, no Party shall proceed to arbitration UNLESS the Parties have made reasonable efforts to resolve the same through mediation as provided in Clause 29.2.1 above.

29.3 Reference to Arbitration

29.3.1 In the event that mediation is unsuccessful, the dispute or difference between the Parties shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed m accordance with said Rules The place of arbitration shall be New Delhi and the language of the proceedings shall be in English.

29.3.2 The commencement of any arbitration proceedings shall in no way affect the continuous performance of the obligations of the Subcontractor under this Subcontract."

5. The respondent also relied, before the learned Arbitral Tribunal, on the following chronology of events, to support its stand that the claims were not barred by time.

22.09.2016	The Claimant initiated mediation.
10.10.2016	ICC International Centre for ADR acknowledged the receipt of the request of the Claimant and assigned reference No. ADR/249.

24.10.2016	Counsel for the Respondent sent reply to ICC International Centre for ADR proposing the name of Sriram Panchu, Senior Advocate as a Mediator.
27.12.2016	In the meantime, parties explored the possibility of amicable settlement between themselves and held several discussions over phone and a joint meeting was also held on 27.12.2016.
16.01.2017	Claimant submitted details of compensation along with documents to the Respondent.
18.01.2017	Respondent acknowledged receipt of these documents.
09.02.2017	During the pendency of the Settlement talks, Respondent encashed the Bank Guarantees.
02.03.2017	Claimant sent reminder to the Respondent about the minutes of the meeting dated 27.12.2016 for amicable settlement.
17.03.2017	Claimant requested the Respondent for making joint request to Delhi High Court Arbitration Centre or the Indian Council of Arbitration for appointment of Arbitrator.
06.04.2017	Respondent rejected the aforesaid request of the Claimant.
18.09.2017	Communication by Claimant's counsel to ICC stating that Claimant could not pursue the request for mediation and was eager to continue the mediation process.
10.09.2019	Reply of ICC informing the Claimant that mediation proceedings have been terminated and the case closed administratively. In order to have another mediation, the Claimant could submit a fresh request.
07.12.2019	Request submitted by Claimant with ICC along with requisite fee.
12.12.2019	Communication of the ICC registering the request by giving Reference No. ADR/353 and asked the parties to take further steps by issuing various instructions in this behalf.
07.09.2020	Mediation proceedings started but ended in failure which was communicated by the ICC (on the basis of Mediator's Report vide its mail dated 07.09.2020).

24.03.2021	Arbitration invoked.

6. Predicated on the above tabular statement, the respondent contended that, as Clause 29 proscribed reference of dispute to arbitration till the efforts at mediation failed, and failure of mediation took place on 7th September, 2020, the initiation of arbitration by the notice issued by the respondent under Section 21 of the 1996 Act on 24th March, 2021, could not be regarded as barred by time.

7. The learned Arbitral Tribunal, in para 25 of the impugned order, correctly noted that the moot question that arose for consideration, in view of rival stands of the parties before it, was the date on which the cause of action, for computation of limitation for approaching the Arbitral Tribunal, could be said to arise. Paras 26 to 33 of the impugned order set out the basis on which the learned Arbitral Tribunal has come to hold that the claims were not barred by time. Eschewing the reference, in the said paragraphs, to judicial authorities, these paragraphs may be reproduced thus:

> "*26. It is a matter of record that when the Subcontract was terminated by the Respondent on 16.09.2016 and termination letter was delivered to the Claimant on 21.09.2016, within few days thereof, i.e., on 22.09.2019, the Claimant had requested ICC International Centre for ADR, for mediation as the dispute had arisen. Thus, the Claimant invoked the dispute resolution mechanism for redressal of its grievance immediately after the termination of the Subcontract.*
>
> *27. At that stage, the Claimant could invoke the machinery of mediation only and could not have made a request for arbitration straightaway. Clause 29 provides that it is mandatory to go through the process of mediation in the first*

instance. A party can invoke arbitration proceedings in case mediation fails.

(Reference has been made, at this juncture, to the judgments of this Court in ***Sushil Kumar Bhardwaj v. U.O.I.***[3]***, L&T v. P.W.D.***[4] *and of the High Court of Madras in* ***IJM-SCL JV v. NHAI***[5]*)*

28. It is clear from the principles of law laid down in the aforesaid judgments that the Claimant could not have invoked the arbitration by bypassing the mediation route. On that basis, it can be safely said that cause of action for invocation of arbitration arose only after the conclusion of mediation process. Once the Tribunal keeps in mind this principle, most of the submissions highlighted and argued by the Respondent become redundant and irrelevant for deciding the question of limitation. The argument as to whether time period spent in Mediation can be excluded or not for computing limitation is premised on the ground that that cause of action for initiating arbitration started on the termination of the contract and the Mediation is to be looked into from the angle as to whether time spent therein is to be excluded or not. Once the Tribunal has arrived at a finding that Arbitration could not be initiated without availing the remedy of Mediation, the edifice of the entire argument made by the Respondent crumbles. Same would be the position with respect to 'Without Prejudice Meeting' arguments raised by the Respondent.

29. In taking the aforesaid view, the Tribunal also has in mind the ethos and spirit behind Section 89 of the Code of Civil Procedure which provides for amicable settlement of the dispute between the parties. The legislative intent behind this provision is crystal clear viz., parties to dispute should endeavor to settle their disputes by amicable means and one such means is settlement through mediation, potency whereof is acknowledged. No doubt, such a process is voluntary. In the instant case, the parties have themselves voluntarily chosen this mode of settlement and agreed that without attempting mediation in the first instance, there will not be any arbitration. The aforesaid judgments also law down this

[3] **2009 SCC OnLine DEL 4355**
[4] **2020 SCC OnLine DEL 33**
[5] **2020 SCC OnLine Mad 6679**

very principle.

30. Once we proceed on the basis that it was necessary to exhaust the process of mediation, another question which arises is as to whether the Claimant can take benefit of second mediation that was invoked by it. From the facts noted above, it can be seen that the Claimant had made a request to ICC for initiating the process of mediation on 26.09.2016, it was registered and assigned Reference No. ADR/249. However, this mediation was terminated on 07.03.2017 for some reasons without even holding any mediation proceedings. More than two years thereafter, i.e., on 18.09.2019, the Claimant requested the ICC to continue the mediation process. In response, the Claimant was informed by the ICC to send fresh request which the Claimant did and on that basis, mediation proceedings started and failed on 07.09.2020.

31. On the basis of the aforesaid sequence of events, Mr. Rao has submitted that in any case, limitation period of three years should start from this date and when reckoned on this basis, the invocation of arbitration is still time barred. This argument may appear to be attractive in the first blush. However, it is to be borne in mind that the first mediation was a non-starter. Moreover, there are two significant intervening factors which can't be overlooked. First, the request of the Claimant to initiate the mediation process, albeit afresh, was accepted and the mediation proceedings commenced in which the Respondent also participated. Therefore, the parties understood that this mediation is by virtue of Clause 29 of the Sub-Contract Agreement. During arguments, section 77 was relied upon by the counsel of the Claimant. It is submitted that section 77 is relevant only for conciliation process and in the present case, the entire case revolves around the mandatory mediation process. Hence, the reliance placed on section 77 is misplaced. Secondly, even between 2017 and 2019, the Claimant was attempting to have negotiations with the Respondent and also making an effort to settle the matter amicably. Therefore, the Tribunal is of the opinion that the Claimant could make a request for arbitration only after the mediation failed on 07.09.2020. More importantly, these events noted above show that the Claimant was continuously pursuing its case in one form or the other and had never

given up its claim. It is therefore not a case where the Claimant had slept over its rights but wanted resolution of dispute and pursued the same in all earnestness.

32. Article 10.2 of the ICC Mediation Rules relied upon by the Respondent starts with "Unless all of the parties have agreed otherwise in writing or unless prohibited by applicable law…". In the present case, parties are prohibited to start the arbitration process unless the mediation process results in a failure of settlement. The aforesaid clause works in favor of the Claimant as mediation process was a pre-requisite in terms of clause 29.2 and both the parties agreed to it. In other words, due to clause 29.2, it was incumbent upon the parties to fully exhaust the mediation process prior to start of arbitral proceedings.

33. In view of the above, arguments of the Respondent/Applicant predicated on the provisions of Section 9 of the Limitation Act or reliance on the provisions of Commercial Courts Act pale into insignificance. Therefore, it cannot be said that arbitration is time barred. For the aforesaid reasons, the application of the Respondent is dismissed."

8. The petitioner assails the above order of the learned Arbitral Tribunal.

Rival Submissions

9. Detailed submissions have been advanced on behalf of the petitioner by Mr. Sandeep Sethi, learned Senior Counsel and Mr. Dinesh Pardasani, Learned Counsel.

10. At the outset, the Court had drawn the attention of Mr. Sethi to the judgment of the Supreme Court in ***Geo Miller & Company Pvt.***

***Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.*[6],** para 28 of which appears to support the view taken by the learned Arbitral Tribunal. For ready reference, the said paragraph may be reproduced thus:

> "***28.*** *Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim."*
>
> *(Emphasis supplied)*

11. Mr. Sethi was requested to advance submissions on, why the Court should interfere with the decision of the learned Arbitral Tribunal, in view of para 28 of ***Geo Miller***[6].

12. Mr. Sethi advanced, in response to the said query, the following submissions:

[6] **(2020) 14 SCC 643**

(i) Once limitation began to run, it could not be halted merely because of the pendency of the attempts at mediation, nor could the efforts at mediation delay or postpone the accrual of the cause of action. The cause of action having arisen on 21st September 2016, ran, inexorably, for three years, at the expiry of which the respondent's right to initiate arbitration stood extinguished. The learned Arbitral Tribunal, therefore, erred in postponing the accrual of cause of action to 7th September 2020 when mediation failed.

(ii) ***Geo Miller***[6] did not hold to the contrary. Mr. Sethi sought, in this context, to read paras 28 and 29 of ***Geo Miller***[6] in conjunction. He emphasized the fact that, in the opening sentence of para 29, the decision in ***Geo Miller***[6] held that once there was a denial of the claim of the parties, who subsequently sought to take recourse to arbitration, by the opposite party, the cause of action started to run and, thereafter, it would not be open to the claimant to wait for an unreasonably long period before referring the dispute to arbitration, merely on the ground that the attempts at settlement were in progress.

(iii) ***Geo Miller***[6] had, moreover, been noticed and explained by the subsequent decision of the Supreme Court in ***BSNL v. Nortel Networks India Pvt. Ltd.***[7] Mr. Sethi emphasized, in this context, paras 13.1, 14, 16 and 51 of the report in ***BSNL***[7], which read thus:

[7] **(2021) 5 SCC 738**

"13.1. *Section 11 does not prescribe any time period for filing an application under sub-section (6) for appointment of an arbitrator. Since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Limitation Act, 1963, as per Section 43 of the Arbitration Act, which provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in court:*

> *43.* ***Limitations****. – (1) The Limitation Act, 1963 (36 of 1963) shall apply to arbitrations, as it applies to proceedings in court."*

14. *Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of an arbitrator under Section 11, it would be covered by the residual provision Article 137 of the Limitation Act, 1963. Article 137 of the Limitation Act, 1963 provides:*

"THIRD DIVISION – APPLICATIONS			
	Description of application	Period of limitation	Time from which period begins to run
137	Any other application for which no period of limitation is provided elsewhere in this Division	Three years	When the right to apply accrues."

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16. *The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for*

deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgement of this Court in ***J.C. Budhiraja v. Orissa Mining Corpn. Ltd.***[8] *wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgement reads as follows: (SCC p. 460)*

> *"26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 1-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking the period of limitation for making a claim. The decisions of this Court in* ***Inder Singh Rekhi v. DDA***[9]***, Panchu Goyal Bose v. Port of Calcutta***[10] *and* ***Utkal Commercial Corpn. V. Central Coal Fields Ltd.***[11] *also make this position clear."*

[8] **(2008) 2 SCC 444**
[9] **(1988) 2 SCC 338**
[10] **(1993) 4 SCC 338**

> ***51.*** *The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail."*

(iv) Reliance was also placed on Article 10 of the Mediation Rules of the International Chamber of Commerce (ICC), under whose aegis the arbitration was conducted. Sub articles 1, 2 and 10 of Article 10 of the ICC Mediation Rules, to which Mr. Sethi drew my attention read thus:

> "*1 Where, prior to the date of the entry into force of the Rules, the parties have agreed to refer their dispute to the ICC ADR Rules, they shall be deemed to have referred their dispute to the ICC Mediation Rules, unless any of the parties objects thereto, in which case the ICC ADR Rules shall apply.*
>
> *2 Unless all of the parties have agreed otherwise in writing or unless prohibited by applicable law, the parties may commence or continue any judicial, arbitral or similar proceedings in respect of the dispute, notwithstanding the Proceedings under the Rules.*
>
> *****

[11] **(1999) 2 SCC 571**

> *31 Where mediation takes place before arbitration (or litigation) proceedings have been commenced, the parties may agree that the expiry of limitation or prescription periods during the mediation process shall not prevent a party from initiating arbitration or litigation proceedings in relation to the dispute. Applicable law may also contain provisions to this effect or may provide that limitation periods will not expire whilst mediation proceedings are pending.*"

(v) Without prejudice these submissions, it was contended that, at best, the period of three years could be reckoned from the date when the first attempted mediation failed. In this context, my attention was invited to the fact that, on 22nd September, 2016, the petitioner had written to the respondent requesting for the dispute to be referred to mediation and that, on 17th March, 2017, the respondent had replied thus:

> "*With reference to the above it is earnestly stated that during the last few months since the termination f the above subjected sub contract agreement, there have been repeated attempts of conciliation and settlement which ultimately culminated in the signing of the MOM dated 27.12.2016, which failed as conveyed to us in our meeting at your office on 07.03.2017. Notwithstanding the fact that we are always willing and open to any such reasonable and just offer from your side. In these circumstances may we request that mediation in terms of clause 29.2 involving exorbitant cost and time be waived and a recourse to arbitration be taken.*
>
> *In line with the above submission may we further request, in the same interest of cost & time effectiveness and desirability in the present circumstances that for recourse to arbitration if mutual consent may be given, the arbitration proceedings can be conducted through the medium f the Delhi High Court Arbitration Centre established*

under aegis of the High Court of Delhi or the Indian Council of Arbitration in place of ICC, which are highly reputed in terms of impartiality, trustworthiness and certainly cost effectiveness. Therefore, if you may give consent to such modification and waiver as above in clause 29, 29.1 and 29.2.2, we can make a joint request to either the Delhi High Court Arbitration Centre or the Indian Council of Arbitration for appointment of Arbitrator/Arbitrators as agreed to by both of the parties and conducting of the proceedings as per their respective rules as the case maybe."

Analysis

13. Having heard learned counsel and keeping in mind the parameters of the jurisdiction vested in this Court under Section 34 of the 1996 Act, I am unable to find any such patent illegality as would justify interference, by this Court, with the impugned order.

14. The scope of Section 34 of the 1996 Act has been authoritatively delineated by the Supreme Court in its recent decision in ***Delhi Airport Metro Express (P) Ltd. v. DMRC***[12], which read thus:

> **"*29.*** *Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section*

[12] **(2022) 1 SCC 131**

34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

30. *Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression "public policy of India" and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.*

31. *In* ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213*** *, this Court held that the meaning of the expression "fundamental policy of Indian law" would be in accordance with the understanding of this Court in* ***Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644****. In* ***Renusagar****, this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the "national economic interest", and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant*

*with the fundamental policy of Indian law and neither can it be brought within the confines of "patent illegality" as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [**Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213**]*"

15. The present case is not one in which any dispute has arisen with respect to the interpretation of any covenant setting out the terms and conditions of the contract between the parties or the manner in which the contract was to be performed. The issue that has arisen is whether the view expressed by the learned Arbitral Tribunal, in the impugned order, the claims of the respondent could not be regarded as barred by time, merits interference, by this Court, in the exercise of its jurisdiction under Section 34 of the 1996 Act.

16. A bare reading of the impugned order reveals that the learned Arbitral Tribunal has reckoned 7th September 2020 as the date when the cause of action arose. This, it has done on the basis of Clause 29 of the Subcontract Agreement.

17. A bare reading of Clause 29 of the Subcontract Agreement reveals an expressed proscription, engrafted therein, to any arbitral

process being initiated till attempts at mediation, , in accordance with Clause 29.2.1, failed. It cannot, therefore, be disputed that no Section 21 notice could have been issued by the respondent to the petitioner till failure of mediation.

18. This is underscored, yet again, in Clause 29.3.1, which clarifies that "in the event that mediation is unsuccessful", the dispute or difference between the parties would be finally settled in accordance with the Rules of Arbitration of the ICC.

19. The finding of the learned Arbitral Tribunal, to the effect that, respondent was justified in waiting till 7th September 2020, before proceeding to initiate arbitration cannot, therefore, be said to suffer from patent illegality or perversity.

20. Para 28 of the judgment in ***Geo Miller***[6], on a holistic reading, holds that, where the parties were *bonafide* negotiating towards an amicable settlement, and the negotiation history was before the Court (in this case, the learned Arbitral Tribunal), the Court was required to find out the "breaking point" at which any reasonable party would have abandoned efforts in arriving at the settlement and contemplated referral of the dispute to arbitration. Once this "breaking point" is ascertained that date "*would then be treated as the date on which the cause of action arises for the purpose of limitation*".

21. No doubt, the opening sentence of para 28 in ***Geo Miller***[6] talks of exclusion of the period of negotiation, while computing the period

of limitation for the purposes of 1996 Act. Mr. Sethi had, with some justification, sought to capitalize on this observation to contend that, at best, the learned Arbitral Tribunal could only have excluded the period during which the petitioner and the respondent were negotiating. The learned Arbitral Tribunal could not, submits Mr. Sethi, have postponed the cause of action to 27th September 2020, when the efforts at mediation failed.

22. If one were to read the first sentence in para 28 of ***Geo Miller*** divorced from the rest of the paragraph, perhaps this submission might have merited consideration. It is, however, trite that the judgments of Court are not to be read like statutes[13]. Equally, words used by the Supreme Court, in its judgements, are all to be accorded due importance. A paragraph in a judgement is to be read as a whole, and not in a vivisected fashion, relying on one sentence and overlooking others. Para 28 of ***Geo Miller*** clearly goes on to hold that, once the "breaking point", being the date on which any reasonable party would have abandoned the efforts at settlement, is determined, *the cause of action would be deemed to arise from that date*, for referring the dispute to arbitration. These words are clear, unambiguous and unequivocal. They entirely support the view, expressed by the learned Arbitral Tribunal, that the cause of action, in the present case, would be deemed to arise on 7th September 2020, being the date on which efforts at mediation between the parties ultimately failed.

23. The submission of Mr. Sethi that the learned Arbitral Tribunal

[13] **Padma Sundara Rao v. State of T.N., (2002) 3 SCC 533**

could not have "postponed" the cause of action till 7th September 2020, cannot, therefore, in the wake of ***Geo Miller***[8], sustain.

24. Mr. Sethi also placed considerable emphasis on the judgment of the Supreme Court in ***BSNL***[7]. According to Mr. Sethi, it would be folly to read ***Geo Miller***[6] in isolation, as ***Geo Miller***[6] was noticed by the Supreme Court in ***BSNL***[7] and ***BSNL***[7] was categorical in holding that, once the cause of action started running, it could not be halted midway or postponed merely because efforts at settlement were underway.

25. That, however, would be reading ***BSNL***[7], in my opinion, out of context.

26. The issues in consideration before the Supreme Court in ***BSNL***[7] have thus been adumbrated, in para 1 of the report, which read thus:

> "*The present Appeals raise two important issues for our consideration: (1) the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"); and (ii) whether the Court may refuse to make the reference under Section 11 where the claims are ex facie time-barred?*"

27. ***BSNL***[7] involved a situation in which a purchase order has been placed by BSNL on Nortel Networks India Pvt Ltd (the respondent before the Supreme Court; referred to, hereinafter, as "Nortel"). Nortel alleged that BSNL had, without justification, deducted/withheld amounts payable to it under the purchase order. Nortel raised a claim

on BSNL *vide* communication dated 13th May 2014, which was rejected by BSNL on 4th August 2014. 5 ½ years thereafter, Nortel, *vide* letter dated 29th April 2020, invoked a provision for arbitration in its contract with BSNL and sought reference of the dispute for arbitration. BSNL, in its reply, contended, *inter alia*, that Nortel's claim was time barred.

28. Nortel approached the High Court of Kerala under Section 11 of the 1996 Act. The High Court referred the disputes to arbitration. BSNL sought review of the decision, which was dismissed. BSNL, therefore, approached the Supreme Court by way of SLP, which was converted into civil appeal, consequent to grant of leave.

29. Before the Supreme Court, BSNL contended that the cause of action for invoking arbitration, i.e., the cause of action for issuing the Section 21 notice, arose in Nortel's favor on 4th August 2014, when BSNL rejected Nortel's claim. Having slept over its rights for 5 ½ years, Nortel, contended BSNL, was not entitled, on 29th April 2020, to invoke arbitration by way of a Section 21 notice. The invocation of arbitration by Nortel was, therefore, contended BSNL, to be barred by time. Limitation for invoking arbitration was, according to BSNL, governed by Article 137 of the Schedule to the Limitation Act, which provided a limitation of three years from the date arising of the cause of action, to initiate legal proceedings.

30. The Supreme Court first examined the issue of whether the Section 11 petition of Nortel was barred by time. Paras 13 to 22 of the

report deal with this aspect. ***Geo Miller***[6] has been noticed in para 20. The Supreme Court has, however, adverted only to para 14 of the ***Geo Miller***[6], which reads thus:

> "*Sections 43(1) and (3) of the 1996 Act are in pari materia with Sections 37(1) and (4) of the 1940 Act. It is well settled that by virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a court under the 1940 Act (see* ***State of Orissa v. Damodar Das***[14]*) as well as the 1996 Act (see* ***Grasim Industries Ltd. v. State of Kerala***[15]*) is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises."'*

31. Prior thereto, in para 19 of the report, the Supreme Court has held thus, with respect to the first issue before it, i.e., the period of limitation for filing Section 11 petition:

> "*19. The reasoning in all these judgements seems to be that since an application under Section 11 is to be filed in a court of law and since no specific Article of the Limitation Act, 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application Under Section 11 is 3 years 'from the date of refusal to appoint the arbitrator, or on expiry of 30 days', whichever is earlier.*"

32. Para 23 *et seq* of the report proceeded to deal with the second issue before the Supreme Court, which was whether, where the claims were *ex facie* barred by time, the Court could refuse to make reference under Section 11. The Supreme Court has initially dealt at length, with the scope of jurisdiction of the High Court under Section 11, referring, in the process, to judgments Indian as well as foreign. Thereafter, on

[14] (1996) 2 SCC 216
[15] (2018) 14 SCC 265

this issue, the Supreme Court has held thus, in paras 47 to 49 of the report:

> "***47.*** *It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the Rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.*
>
> ***48.*** *Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time barred by over 5 ½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The notice of arbitration was invoked on 29.04.2020. There is not even an averment either in the notice of arbitration, or the petition filed Under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.*
>
> ***49.*** *The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 04.08.2014, when the claims made by Nortel were rejected by BSNL. The Respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the Final Bill by making deductions*."

33. Para 52 of the report concludes thus:

> "*52. In the present case, the notice invoking arbitration was issued 5 ½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration is ex facie time barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case.*"

34. The decision in ***BSNL***[7], thus paraphrased, clearly does not deal, even obliquely, with the situation in which the agreement between the parties contains a covenant specifically proscribing resort to the arbitral process, till efforts at mediation failed. Nor as the Court ruled contrary to the enunciation of the law, in para 28 of ***Geo Miller***[6] to the effect that, where arbitration could not be resorted to until mediation failed, the date when mediation failed would constitute the "breaking point" and would, thereby, be the starting point of the cause of action.

35. Para 14 of ***BSNL***[7] specifically refers to Article 137 of the Limitation Act. The time from which the limitation would begin to run is envisaged, in the said Article, as the date "when the right to apply accrues". The impugned order of the learned Arbitral Tribunal has regarded the right to apply for reference of the dispute to arbitration as accruing to the respondent only on 7th September 2020, when mediation failed, in view of the express provision contained in Clause 29 of the Subcontract Agreement. Seen thus, the view of the learned Arbitral Tribunal does not militate, in any way, with para 51 of ***BSNL***[7], on which Mr. Sethi placed considerable emphasis. Para 51 invokes Section 9 of the Limitation Act, which ordains that "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it". Indeed, Mr. Sethi's repeated submission was that, as time has begun to run on the date when the petitioner rejected the respondent's claim, the subsequent recourse to mediation could not halt the inexorable march of limitation, in view of Section 9. The learned Arbitral Tribunal has,

however, regarded 7th September 2020, as the date from which time would begin to run, in view of Clause 29 of the Subcontract Agreement.

36. This view, at the very least, accords with what has been held in para 28 of ***Geo Miller***[6]. It cannot, therefore, be regarded as suffering from patent illegality or perversity, as to invite interference, by this Court, within the limited confines of Section 34 of the 1996 Act.

37. The provisions in the ICC Mediation Rules, to which Mr. Sethi drew my attention to, in my view, do not further the petitioner's case. Sub article (2) of Article 10 clearly states that "*unless all of the parties have agreed otherwise in writing* ... the parties may commence or continue any judicial, arbitral or similar proceedings in respect of the dispute…". Clause 29 of the Subcontract Agreement, and the stipulation therein, that till the efforts at mediation came to an end, neither party would seek recourse to arbitration operates, in my view, as an "agreement otherwise", between the petitioner and the respondent, within the meaning of Article 10(2) of the ICC Mediation Rules.

38. Article 10(31) of the ICC Mediation Rules is, in my view, of no consequence. This sub article clearly states that, where the agreement between the parties envisages mediation before arbitration, "the parties may agree that the expiry of limitation of restriction periods during the mediation process shall not prevent a party from initiating arbitration or litigation proceedings in relation to the dispute". The

provision can be of no aid to the petitioner for the simple reason that, applying Clause 29 read with the extent law in that regard, as enunciated in para 28 of ***Geo Miller***, the cause of action, for initiating the arbitral process would, in the present case, arise only on 7th September 2020. There is no question, therefore, of the exclusion of any period for reckoning of limitation or postponement of the date of commencement of the cause of action.

39. Indeed, accepting the stand canvassed by Mr. Sethi could result in piquant consequences where, for example, the process of mediation was to take more than three years. In such an event, the party would become entirely foreclosed from referring the dispute to arbitrations, if the disputes were to be referred within three years of failure of mediation, it would be contended that it is barred by time and if it were referred prior to failure of mediation, it would fly in the face of Clause 29. The principle that an interpretation, which would lead to absurd consequences in the given case, should at all costs be eschewed applies as much to contractual, as to statutory instruments.

Conclusion

40. In any event, given the limited parameters of the jurisdiction conferred on this Court by Section 34 of the 1996 Act, the impugned order of the learned Arbitral Tribunal cannot be treated as justifying interference.

41. The petition accordingly stands dismissed *in limine* with no

order as to costs. All the pending applications are also disposed of.

C.HARI SHANKAR, J

JANUARY 31, 2022
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