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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1169 OF 2010

Pluto Shipping Limited ... Petitioner

Vs

Dharti Dredging & Infrastructure Ltd. ... Respondent

Mr. S.C. Naidu i/b C.R. Naidu & Co. for the Petitioner.

Mr. Deepak Sharma for the Respondent.

CORAM : S.J. VAZIFDAR, J.

TUESDAY, 23RD AUGUST, 2011.

P.C. :

1. This is a petition under section 43(3) of the Arbitration & Conciliation Act, 1996.

2. The petitioner seeks a condonation of the delay in issuing the notice to the respondent to nominate its arbitrator and for an extension of time to perform the obligation under clause 41 of the agreement.

3. The Goa Shipyard Limited had awarded a contract of dredging to the respondent. The respondent, in turn, sub-contracted the work to the petitioner on the terms and conditions contained in an agreement dated 4th September, 2007. It is not necessary to refer to the disputes and differences between the parties. Suffice it to state that the petitioner has a monetary claim against the respondent. According to the petitioner, the respondent made only part payment of its invoice, disputing the quantity of the work done. The petitioner raised it's final bill on 17th June, 2008. The respondent, by a letter dated 10th July, 2008, disputed the same and, in fact, contended that it had a claim against the petitioner. The petitioner addressed several reminders/requests for payment of the balance amount.

4. It is relevant to note that admittedly thereafter, meetings were held between the parties. A meeting was held on 14th October, 2008, between the directors of both the parties. I will ignore the assertion in the petition that at the meeting the parties had more or less concluded the exact quantity dredged. Similarly, a meeting was held on 4th December, 2008, whereat the issues were discussed. In respect of this meeting, I will ignore the assertion in the petition that issues in respect

of the exact quantity dredged were concluded and that the respondent's director assured the petitioner's director that their accounts office would compute and communicate the exact amount payable to the petitioner. A meeting was also held on 13th November, 2009, between the directors of the parties. I will ignore the petitioner's contention that the respondent's director expressed certain financial difficulties, but promised that the payment would be released soon. The petitioner alleges that it accordingly refrained from adopting legal proceedings until it became apparent that the respondent was not going to make payment.

5. Although the averments regarding what transpired at the meeting on merits must await proof at the appropriate stage, it is important to note that the fact that meetings were held between the parties after the dispute arose is not denied. It is reasonable to presume, therefore, that negotiations ensued at the meetings at which various aspects of the matter were discussed and the petitioner presented it's case and that, therefore, the petitioner refrained from adopting legal proceedings or proceeding further in the matter immediately.

6. As I mentioned earlier, the disputes are not relevant to this application. What is relevant, however, is the fact that the respondent, by it's letter dated 10th July, 2008, rejected the petitioner's demand for payment as per its final bill dated 17th July, 2008 and that thereafter, meetings were held between the parties, including on 14th October, 2008, 4th December, 2008 and 13th November, 2009. The present petition was filed on 29th July, 2010. The petition was, therefore, filed within three years of the final bill and the rejection thereof by the respondent.

7. The only question that falls for consideration is whether I ought to exercise my discretion under section 43(3) of the said Act in the petitioner's favour by extending the time for the petitioner to comply with clause 41. Clauses 41and 42 of the agreement read as under :-

> *"**41. Arbitration***
>
> *(a) All disputes or difference arising out of or in connection with the present contract including the ones connected with the validity if the present Contract or any part thereof shall be settled by bilateral discussions.*

The dredger of the contractor shall not be detained during the pendency of the dispute. The client shall issue No Dues certificate & Port clearance.

(b) Any dispute, disagreement of questions arising out of or relating to this Contract or relating to construction or performance (except as to any matter the decision or determination whereof is provided for by these conditions), which cannot be settled amicable (sic amicably), shall within sixty (60) days or such longer period as may be mutually agreed upon, from the date on which either party informs the other in writing by a notice that such dispute, disagreement or questions exists, will be referred to the Arbitration Tribunal consisting of three arbitrators.

(c) Within sixty (60) days of the receipt of the said Notice, CONTRACTOR shall nominate one arbitrator in writing and CLIENT / PORT TRUST shall nominate one arbitrator.

.....

42. Time limit for Reference to Arbitration.

(a) If no request in writing for arbitration is made by the contractor within a period of six months from the date of completion of the contract, all claims of the contractor under the contract shall be deemed to be waived and absolutely barred and the client, shall be

discharged and released of all his liabilities under the contract.

(b) The date of completion of the contract shall mean and include :

(c) In case where the contract is cancelled wholly or partly the date when the letter of cancellation is issued.

8. The respondent contends that the petitioner failed to inform the respondent in writing by a notice that the dispute, disagreement or questions would be referred to the arbitral tribunal within sixty days of the respondent's letter dated 10th July, 2008, rejecting payment as demanded by the petitioner's final bill dated 17th June, 2008. It is contended that the petitioner is not entitled to invoke the arbitration clause as it had accordingly failed and neglected to comply with the provisions of clause 41(b) of the agreement. It is further contended that as the petitioner had not requested in writing for arbitration within sixty days from the date of completion of the contract, it's claims are deemed to have been waived and absolutely barred and the respondent is deemed to have been discharged and released from it's liability under the contract in view of clause 42 of the agreement.

9. Admittedly, the petitioner has not made a request in writing to have the disputes referred to arbitration in accordance with clause 41 of the contract. The only question is whether I ought to exercise my discretion under section 43 and in particular sub-section (3) thereof. Section 43 reads as under :

> ***"43. Limitations.—****(1) The Limitation Act, 1963 (XXXVI of 1963), shall apply to arbitrations as it applies to proceedings in court.*
>
> *(2) For the purposes of this section and the Limitation Act, 1963 (XXXVI of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.*
>
> *(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such*

period as it thinks proper.

(4) .....”

10. The first question is whether in the facts of this case, it can be stated that a refusal to exercise discretion would lead to undue hardship to the petitioner. The answer to this question requires a consideration of the ambit of the phrase “under hardship”.

11. Section 37(4) of the Arbitration Act, 1940 is practically the same as section 43(3) of the 1996 Act and reads as under :-

“***Section 37 Limitation.****- (1)……..*

(2).....

(3)……..

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration, proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the

justice of the case may require, extend the time for such period as it thinks proper."

12. The changes in the 1996 Act are of no consequence while deciding the ambit of the expression "undue hardship". Mr. Naidu's reliance upon the judgment of the Supreme Court in *Sterling General Insurance Co. Ltd. v. Planters Airways (P) Ltd., (1975) 1 SCC 603***,** is therefore, well founded. The Supreme Court noted that section 16(6) of the English Arbitration Act, 1934 was practically the same as section 27 of the English Arbitration Act, 1950 which, in turn, was in *para materia* with section 37(4) of the 1940 Act and that, therefore, the interpretation placed by the English Courts have great pursuasive value. It was further noted that the English Courts originally took a very strict and narrow view of the words "undue hardship". The Supreme Court however endorsed the later, more liberal view. After referring to certain decisions which took such a narrow view, the judgment proceeded as follows :-

"***12.*** *In Stanhope Steamship Co. Ltd. v. British Phosphate Commissioners. Singleton, J., in delivering the judgment said:*

"What, then, is the meaning of 'undue hardship?'

'Undue', it is said by Mr MacCrindle, means something which is not merited by the conduct of the claimant. That may be right. If the result of claimant's being perhaps a day late is so oppressive, so burdensome, as to be altogether out of proportion to the fault, I am inclined to think that one may well say that there is undue hardship. Both the amount at stake and the reasons for the delay are material considerations."

13. *In Liberian Shipping v. A. King & Sons the facts were these. A vessel was lost on a voyage charterparty in Centrocon form containing an arbitration clause under which any claim had to be made in writing and the claimant's arbitrator had to be appointed within three months of final discharge. A fire occurred on board the vessel during loading. Both the owners and the charterers had claims against each other. The time limit was to expire on June 26, 1966. The parties were negotiating and, after considerable correspondence, a meeting between both parties was arranged for June 27, 1966, with a view to settlement. The meeting did not result in a settlement. The charterers first realised that time had expired when the owners sought an extension of it by consent, nine days after the expiry. The charterers had not contributed to the delay on the part of the owners in relation to the arbitration clause. The charterers did not consent to the time being*

extended. The owners applied under Section 27 of the Arbitration Act, 1950, for an extension of time on the ground that "undue hardship" would otherwise be caused to them. Their claim amounted to about £ 33,000. The master granted an extension of time, but on appeal the judge refused it. On further appeal the Court by a majority said that if the time were not extended, undue hardship would be caused to the owners since they would be deprived what might be a valid claim for £ 33,000 by a delay of only a few days due to excusable inadvertence, that the charterers would not in any way be prejudiced by time being extended and so the Court would exercise the discretion conferred by Section 27 of the Arbitration Act, 1950, and would extend the time. In the course of his judgment Lord Denning, M.R. observed that in the past the courts had been inclined to emphasize the word "undue" and to say that if a man does not read the contract and is a day or two late, it is a "hardship"; but it is not an "undue hardship", because, it is his own fault but that the interpretation was narrow. He said that these time-limit clauses used to operate most unjustly on claimants for, they found their claim barred by some oversight and it was to avoid that injustice the legislature intervened so as to enable the courts to extend the time whenever "in the circumstances of the case undue hardship could otherwise be caused". He also said that the word "undue" in

the context simply means excessive hardship greater than the circumstances warrant and that even if a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault. He further stated that even if a claimant makes a mistake which is excusable, and is in consequence a few days out of time, then if there is no prejudice to the other side, it would be altogether too harsh to deprive him of all chance for ever of coming and making his claim and that is all the more so, if the mistake is contributed or shared by the other side. He then observed:

> *"It was said that this was a matter for the judge's discretion. True enough. We have, however, said time and again that we will interfere with a Judge's discretion if satisfied that the discretion was wrongly exercised. In any case the judge was not exercising an unfettered discretion. He felt himself fettered by the trend of the authorities to give the words 'undue hardship' a narrow meaning. I think that we should reverse that trend and give the words their ordinary meaning, as Parliament intended. It would be 'undue hardship' on the owners to hold them barred by the clause."*

In the same case, Salmon, L.J. said that the arbitration clause put it out of the power of the court to grant any

relief to a claimant who had allowed a few days to run beyond the period specified in the clause even although (sic) the delay could have caused no conceivable harm to the other side. He said that it would be hard and unjust if a man with a perfectly good claim for thousands of pounds worth of damage for breach of contract inadvertently allowed a day or two to go by was deprived of the right to be compensated for the loss which he had suffered, even though the other party had not been in any way affected by the delay and might perhaps have been guilty of a deliberate breach of contract and that it was to remedy this hardship and injustice that the legislature intervened to alter the law. He further said:

> *"This enactment was a beneficent reform, liberalising the law in an admittedly narrow sector of the commercial field. I have heard it said that when people have spent their lives in chains and the shackles are eventually struck off, they cannot believe that their claims are no longer there. They still feel bound by the shackles to which they have so long been accustomed. To my mind, that factor may explain the court's approach in some of the cases to the problem with which we are now faced."*

He then summed up his conclusion as follows:

> *"In considering this question the court must take all the relevant circumstances of the case into account; the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake, the length of the delay; whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances which I have mentioned, which do not arise here, it is obvious that normally the power would be exercised; but those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay. Of course, if there is such a possibility, it might be said that it is no undue hardship on the owners to refuse an extension of time because, if the hardship is lifted from their shoulders, some hardship will fall on the shoulders of the charterers, and, after*

all, the delay is the owner's fault."

> ***14.*** *Therefore, we will have to take a liberal view of the meaning of the words "undue hardship". "Undue" must mean something which is not merited by the conduct of the claimant, or is very much disproportionate to it."*

13. The judgment of the Supreme Court rendered in respect of section 37(4) of the 1940 Act applies with equal force to section 43(3) of the 1996 Act as the provisions are in *para materia*. The question whether undue hardship could be caused by refusing an application under section 43(3) must, therefore, depend upon the facts of each case. I do not suggest that merely because an application is made within the period of limitation, but beyond the period prescribed in the clause for invoking the arbitration, the discretion must be exercised in favour of the petitioner. If that was so, it would not have been necessary for the Legislature to enact section 43(3). There may well be cases where such a delay would prejudicially affect the rights of the other party. For instance, the other party may, due to the delay, have altered its position to its detriment in which case there would be

no warrant for extending the time stipulated by the parties.

14. If, however, a party is denied an opportunity of having it's claim adjudicated even when no prejudice is caused to the other party by the exercise by the Court of its discretion in favour of granting the extension, it must be presumed to cause him undue hardship.

The presumption is strong when the delay is caused on account of the other side. Indeed, in such a case, it would be difficult to refuse the application. The presumption is equally strong, where the delay is on account of negotiations between the parties to arrive at a settlement. Where the other party participates in such negotiations, it is not only reasonable but fair to presume that it thereby agreed to the extension of time stipulated for invoking the arbitration.

15. In this case, negotiations admittedly ensued between the parties at least till 13th November 2009. The petitioner's understandably did not file proceedings immediately thereafter. There is nothing to suggest that the respondent categorically rejected the claim at that meeting. I am inclined therefore to exercise my discretion under section 43(3) in the petitioner's favour.

16. It was then contended that the claim as on date is barred by limitation in two ways. Firstly, a bar contained in a contractual provision such as under clause 41(b) in this case constitutes a statutory bar under the Limitation Act in view of section 43(1) and (2). Secondly, in any event, the claim is barred by limitation, as on date under the Limitation Act itself as a notice under Section 21 has not been served.

17. Sub-sections (1) and (2) are independent of sub-section (3) of section 43. Sub-sections (1) and (2) deal with the statutory period of limitation in respect of the claim itself, whereas sub-section (3) deals with a contractual provision barring a claim unless a party takes certain steps within the time fixed. The contention, therefore, that failure to comply with clause 41(b) bars the claim under the Limitation Act, 1963, is not well founded. The contention is based on a misconception that in view of section 43(1) the question whether a claim is barred pursuant to a contractual provision is also governed by the statutory period of limitation which a Court cannot extend.

Indeed, a Court cannot extend the statutory period of limitation,

except, as provided by the Limitation Act or any other statute. Section 43(3) cannot be resorted to, to save the bar of limitation. However, section 43(3) entitles the Court to release a party from the rigors of a contractual provision limiting the time within which the arbitration agreement may be invoked in certain cases. The statute therefore expressly permits the Court to extend the period stipulated by the parties in appropriate cases. The validity of section 43(3) has, in any event, not been challenged.

The first contention regarding limitation is, therefore, rejected.

18. The next contention that the claim is even otherwise barred by limitation is equally unfounded. Firstly, in this case, the pleadings are not sufficient to decide whether the petitioner's claim is barred by the statutory period of limitation. The question, therefore, must be decided by the arbitral tribunal.

19. Further, an application under section 43(3) constitutes a request for the dispute to be referred to arbitration. Accordingly, if such an application is made within the statutory period of limitation, there is no question of the claim being barred by limitation. Section 21 of the

said Act reads as under :-

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

In view of the limitation of sixty days stipulated in clause 41(b), it was not possible for the petitioner to serve the notice required thereunder after the expiry of this period. The petitioner waited to invoke the proceedings in view of the said negotiations.

20. The filing of this petition itself constitutes a notice as contemplated by Section 21. The purpose of an application under Section 43(3) is to invoke an arbitration agreement. It can hardly be suggested otherwise. The application itself, therefore, serves as a request to the other side to refer the disputes to arbitration. In the present case, nothing more could have been done by the petitioner under clause 41(b) or (c) till the time to comply with clause 41(b) in the manner stipulated therein is extended. The delay caused on account of the Court being unable to dispose of the application

immediately cannot prejudice the applicant. If the application is allowed, it would relate back to the date of the application. Thus, if the application is filed within the statutory period of limitation, there can be no question of the claim being barred by limitation on account of the contractual provision being complied with pursuant to an order under section 43(3) after the statutory period of limitation.

21. The second contention regarding limitation is also, therefore, rejected.

22. In the circumstances, the petition is made absolute in terms of prayer (a). The time to comply with clause 41 is extended by sixty days from the date of receipt of a certified copy of this order. There shall be no order as to costs.