GEO MILLER & CO. PVT. LTD. V. RAJASTHAN VIDYUT UTPADAN NIGAM LTD. 2019 SCC ONLINE SC 1137

Supreme Court of India; 3-judge bench, N. V. Ramana, **Mohan M. Shantanagourdar** & Ajay Rastogi JJ, decided on 03 September 2019

Limitation for filing an application under Section 11 or referring dispute to arbitration; When does right to apply accrue; Effect on limitation of time spent on settlement talks; Standard of Pleading to get the benefit of settlement talks period in the computation of limitation

To get payment for final bills raised in 1983 and 1989, Geo Miller invoked arbitration in 2002 and, since the respondent did not appoint its nominee arbitrator, filed an application under Section 11 (6) of the ACA. The High Court dismissed the application as time-barred. The Supreme Court confirmed the High Court's decision and dismissed the special leave petition.

The questions considered and answered were the following.

(A) WHICH ENACTMENT APPLIED—THE ARBITRATION ACT, 1940 OR THE ACA?

The Arbitration Act, 1940 would apply only if notice of arbitration was sent before 25 January 1996, which is the cut-off date [citing to *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.* (2001) 6 SCC 356 and 3rd edition of O.P. Malhotra's commentary on arbitration, page 1915]. Here, the notice was sent later. The court had jurisdiction to entertain application under Section 11 ACA.

(B) IS THE LIMITATION TO FILE AN APPLICATION UNDER SECTION 11 ACA THREE YEARS?

It is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises. Limitation was/is governed:

a. In the Arbitration Act, 1940 by Sections 37 (1) and (4)

b. In the ACA of 1996 by the similarly worded Sections 43 (1) and (3).[9]

Article 137 of the First Schedule to the Limitation Act, 1963[10] applies both to the Arbitration Act, 1940 [per *State of Orissa* v. *Damodar Das* (1996) 2 SCC 216] and to the ACA [per *Grasim Industries Limited* v. *State of Kerala* (2018) 14 SCC 265].

(C) WHEN DOES THE RIGHT TO APPLY ACCRUE UNDER ARTICLE 137 OF THE LIMITATION ACT? MEANING OF 'DISPUTE'.

The court held that in this case, it arose on the date when final bills were raised (in 1983 and 1989). It distinguished *Inder Singh Rekhi* v. *DDA*, (1988) 2 SCC 338 on facts, but cited it on principle and held that the claim in *Inder Singh* was delayed because the bills were not finalized. It was held that the existence of a dispute is essential (for the right to apply to accrue). 'Dispute' entails a positive element, and mere inaction to pay does not lead to the inference that dispute exists. Where a party does not finalize the bills, cause of action arises not from the date on which the payment became due, but on the date when the first communication was made requesting finalization.

Moreover, the court said, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted claim and the respondent fails to respond, such failure will be treated as denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. Merely writing representations and reminders do not extend limitation.

(D) WHAT IS THE EFFECT OF PERIOD OF SETTLEMENT TALKS ON LIMITATION? STANDARD OF PLEADING TO GET THE BENEFIT OF SETTLEMENT TALKS IN THE COMPUTATION OF LIMITATION

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9 Section 43 (1) makes the Limitation Act, 1963 applicable to arbitrations and sub-section (3) bars a claim unless some step to commence arbitration has been taken in time contractually fixed. The bar is subject to court's discretion to extend the limitation as the justice of the case may require.

10 Residuary clause. Limitation of three years from when the right to apply accrues.

The court concluded that on a certain set of facts and circumstances, the period during which parties *bonafidely* negotiated a settlement may be excluded when computing limitation [citing to but distinguishing *Hari Shankar Singhania* v. *Gaur Hari Singhania* (2006) 4 SCC 658 and *Shree Ram Mills* v. *Utility Premises* (2007) 4 SCC 599].

However, in such cases, the entire negotiation history 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 referring the dispute to arbitration.

This 'breaking point,' the court said, would be the date on which the cause of action arises. The threshold for determining when the 'breaking point' will be lower in commercial disputes (where the party's primary interest is in securing the payment due) than in family disputes (where it may be said that parties have a greater stake in settling the dispute amicably).

The court finally concluded that in this case, the pleading requirements are not met. They were silent on the specific actions taken for several years to recover the payments. The court also applied Section 114(g) of the Indian Evidence Act, 1872 under which "this court can presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."