

LAW & POLICY UPDATE

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Mere negotiations will not postpone cause of action for the purpose of limitation

In the recent case of *B and T AG v. Ministry of Defence*¹, the Supreme Court held that limitation period of 3 years for filing an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) would initiate from the date of the cause of action and mere negotiations will not result in postponement of the date of limitation.

Background

- B and T AG (**Petitioner**) had approached the Supreme Court of India under Section 11(6) of the Arbitration Act praying for appointment of an Arbitrator for the adjudication of disputes and claims arising out of a contract dated March 27, 2012 executed with the Government of India through its Ministry of Defence (**Respondent**). The Petitioner had bid for an urgent tender for procurement of 1,568 sub machine guns under a fast-track procedure, and disputes arose between the parties in relation to the alleged wrongful encashment of warranty bond by the Respondent.
- The Respondent vide its letter dated February 16, 2016 directed the Joint Chief Executive Officer, State Bank of India, Frankfurt Branch, Germany to encash WBG No. 12/380 for its full value i.e., INR 18,100,672.65 (**Bank Guarantee**) and remit the amount through direct bank transfer to the Principal Controller of Defence Account (PCDA, Government Account), whilst also imposing liquidated damages to the tune of INR 357,920,053.70 (**LD**).
- The parties continued to engage in bilateral discussions in order to resolve their disputes regarding the imposition of LDs and encashment of the bank guarantee by the Respondent. However, the disputes could not be resolved and on November 08, 2021 the Petitioner issued notice invoking arbitration.
- The parties were unable to appoint an Arbitrator and the Petitioner filed the present petition for appointment of an Arbitrator under Section 11(6) of the Arbitration Act.

Issues at hand

- Whether the time barred claims can be considered live claims referable to arbitration by virtue of negotiation between the parties?
- What would amount to 'breaking point' of negotiation between the parties?

Submissions

- The Respondent's contention was that the Petitioner's claim in relation to the wrongful invocation of Bank Guarantee was time barred given that the cause of action had arisen back in 2016 at the time of invocation of Bank Guarantee, however, the notice invoking arbitration had only been issued in 2021, way beyond the limitation period of 3 years.

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¹ Arbitration Petition (C) No. 13 of 2023; 2023 SCC OnLine SC 657



- The Petitioner relied on the decision of the Apex Court in the case of **Geo Miller & Company Pvt Ltd v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd**² (**Geo Miller**) and submitted that the time spent in pre-arbitration negotiations, held in good faith, may be excluded for the purpose of computation of the period of limitation. The Geo Miller decision states that *'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 counsel for the Petitioner submitted the 'breaking point' was sometime in September, 2019 and not February 16, 2016 i.e., date of encashment of the Bank Guarantee. Further, the Petitioner argued that as such, the issue of limitation, being a mixed question of law and fact, ought to be decided by the Arbitrator and cannot be gone into at the stage of a Section 11 application.

Findings of the Court

- The Supreme Court while relying on **Bharat Sanchar Nigam Ltd & Anr v. Nortel Networks India Pvt Ltd**³, noted that in cases where claims are ex facie time barred, the Court may refuse to make reference under Section 11 of the 1996 Act.
- The Supreme Court while placing reliance on its decision in **Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority**⁴, was of the opinion that a dispute arises when there is a claim/assertion by one side and denial/repudiation of the same by the other and such accrual of cause of action cannot be delayed or postponed by indefinite discussions/negotiations.
- While drawing reference from Geo Miller, the Supreme Court observed that although time spent in *bona fide* negotiations may be excluded for the purposes of computing limitation for reference of disputes to arbitration, it is necessary for the Court to go into the entire history of negotiations between the parties. *'61.The entire history of the negotiation between the parties must be specifically pleaded and placed on record. It is only after the entire history of negotiation is pleaded and placed on record that the Court would be in a position to consider such history so as to 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.'*⁵
- In the present case, the Supreme Court observed that disputes arose between the parties in 2014, leading the Petitioner to put forth its representation to the Respondent. Upon consideration of the Petitioner's submissions, the Respondent then proceeded to encash the Bank Guarantee and deduct the LD in 2016. The Supreme Court was of the view the 'breaking point' between the parties in this case is the date of encashment of the Bank Guarantee and that is the day on which the cause of action arose for reference of disputes to arbitration.
- The Supreme Court held that 'breaking point', in the current scenario is when Bank Guarantee came to be encashed in the year 2016 and the requisite amount stood transferred to the Government Account. Mere negotiations will not postpone the 'cause of action' for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating.⁶

The Apex Court has specified and defined a key condition for the invocation of the arbitration proceedings, that is the 'breaking point' where the differences between parties is evident and when the cause of action can arise. A party cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders. 'Bilateral discussions' for an indefinite period of time would not save the situation so far as the accrual of cause of action and the right to apply for appointment of Arbitrator is concerned.

² (2020) 14 SCC 643

³ (2021) 5 SCC 738

⁴ AIR 1988 SC 1887

⁵ See Paragraph 61

⁶ See Paragraph 63

