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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Arb. P.No.50/2009

February 2, 2010

M/S. MITRA GUHA BUILDERS (INDIA) CO.

...Petitioner

Through: Mr. Rishi Manchanda, Advocate.

VERSUS

DELHI EPDP CGHS LTD.

....Respondent

Through: Ms. Anju Bhattacharya, Advocate
with Mr. Elgin Matt John,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996, demonstrates, and if I can say so, the heights of mala fides and greed of a builder for claiming amounts for alleged disputes which are ex facie no longer live claims. Further, reference of the disputes is being sought although seeking reference thereof is grossly barred by limitation.

2. The undisputed facts of this case are that the petitioner as a contractor built flats for respondent cooperative society. This work which was allotted to the petitioner was admittedly completed by the petitioner on

4.9.2001. This admission is recorded in the letter dated 13.12.2004 sent by the petitioner to the respondent. The fact that work has been completed on 4.9.2001 is also clear from para 7(vii) of the petition itself which also re-affirms the fact that the work was completed on 4.9.2001. Another admitted fact is that the final bill for the payment as regards work remaining unpaid for was in fact raised by the present petitioner amounting to Rs.32,44,835/- in 2001 and the same was thereafter approved by the consultant for a sum of Rs.28,97,771/-. As per the respondent, from this amount of Rs.28,97,771/-, the petitioner gave a discount of Rs.7,50,000/- and a minor deduction was to be made of Rs.25,000/- and therefore a sum of Rs.21,22,271 became payable to the petitioner. To this amount, the respondent added certain amounts towards escalation, services and security amounts and thereby the amount increased from Rs.21,22,271/- to Rs.31,57,518/-. After deducting the TDS and the advance payment of Rs.5,00,000/-, the net amount which became payable to the petitioner came to Rs.25,93,105/-. Admittedly, this amount of Rs.25,93,105/- has been paid to the petitioner by the respondent by means of cheques dated 11.10.2001, 11.11.2001 and 11.12.2001 and all of which have been encashed on the respective dates.

3. It is not the case of the petitioner that at the time of encashing of these cheques or accepting these amounts under the final bill, the petitioner disputed these amounts in any manner whatsoever or it took up any stand that such amount is not in satisfaction of payment of the final bill. No contemporaneous correspondence exists with regard to any dispute or claim

raised by the petitioner/contractor that the amounts which have been received by the petitioner are not in terms of the final bill or that any disputes survive with respect to the final bill even after encashing of the cheques totalling Rs.25,93,105/-. It is, therefore, quite clear that in this case that not only the contract was completed way back in September, 2001 but the same received a quietus in December, 2001 when the last cheque for Rs.7,50,000/-, being last part of the balance amount of Rs.25,93,105/-, was encashed by the petitioner.

I therefore hold that there are no live claims of any nature whatsoever, as regards the final bill, remaining to be adjudicated in any forum, including arbitration, after December, 2004 (i.e. expiry of three years after December, 2001), and much less by a petition filed in the year 2009.

4. The only other amount which remained with the respondent was the retention amount, and which amount the respondent was entitled to withhold for rectification of defects during the warranty period. On this aspect of the amount payable of the retention monies of approximately Rs. 26.11 lacs and the disputes surviving for reference to arbitration, the counsel for the petitioner has relied upon the Minutes of the Meeting dated 26.11.2004 of the respondent society to urge that such amount was an admitted amount. The counsel for the petitioner, relying upon these Minutes of Meeting, therefore urged that petitioner was entitled to receive such balance payment of Rs.26.11 lacs, which was withheld by the respondent for rectification of the defects during the

warranty period. He also relied upon the said document dated 26.11.2004 to urge that disputes survived qua the final bill also.

5. A reading of these Minutes of Meeting dated 26.11.2004, in my opinion, does not at all refer to anything qua the final bill which was paid by December, 2001. So far as the retention money issue being allegedly admitted is concerned, in fact these Minutes of Meeting show, how defective/shoddy work was done by the petitioner and consequently as defects cropped up, there were a large number of complaints of the members of the society for rectification of these defects. It is clear from these Minutes of Meeting that the withheld amount was being utilized for rectification of the defective works left behind by the petitioner. I, therefore, do not understand as to how it can be canvassed on the basis of this document dated 26.11.2004 that any amount was payable, either with respect to the final bill or even for the balance withheld amount of Rs.26.11 lacs, allegedly on account of a supposed admission of liability to pay the same.

6. The counsel for the respondent, so as to show that no dispute ever remained qua the final bill, has drawn my attention to the petitioner's letter dated 13.12.2004, already referred by me earlier in another context, in which the petitioner only claimed the retention amount of Rs.26,11,604.96/- and there is no reference therein of any issue pending qua the final bill or of any pending payment thereunder. A reading of this letter shows that the contention of the counsel for the respondent is correct. Of course, this letter of the petitioner,

which is a self-serving document, does mention some alleged settlement, however, neither that alleged settlement is on record and nor are the terms of that alleged settlement in any manner clear from this letter dated 13.12.04 and further there is no date of that alleged settlement. Not only are the terms of the alleged settlement not clear, but also in my opinion, the writing of a letter by the petitioner on 13.12.2004 after having encashed all the cheques by December, 2001 with respect to the payments under the final bill, surely, cannot mean that these thereby results a reopening of the issues which had received a satisfactory quietus in December, 2001. Such an attempt to reopen settled matters cannot be termed as anything except a mala fide, misconceived, mischievous and most unfortunate attempt to reopen the issues which were closed to the satisfaction of all concerned.

7. The counsel for the respondent, has further referred to a letter of the respondent society dated 29.12.2008, copy of which has been filed by the petitioner itself in this Court, wherein the respondent society in 2008 in response to a letter of the petitioner once again reiterated the details of payment of the final bill and deprecated the tendency of the petitioner to keep on building pressure to make out a claim which does not survive. I agree.

8. In view of the above, it is quite clear that no live disputes remain so far as any amount whatsoever for the work done i.e either for issues qua the final bill which was cleared by December, 2001 or for retention moneys. The Supreme Court recently in the case of *National Insurance Company Vs.*

Boghara Polyfab (P) Ltd.(2009) 1 SCC 267 . has held that once claims become time barred, they no longer remain live claims. Para 22.2 of the said judgment which holds so reads as under:-

“22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

- (a) Whether the claim is a dead (long-barred) claim or a live claim.
- (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection”.

As regards the prayer for reference of the disputes of retention moneys to arbitration, I also hold that the petition is not filed within limitation qua these retention moneys because this petition was filed very late in the year 2009 and retention moneys had become payable in 2004 on completion of the warranty period.

9. While on this issue of the petition being time barred for the aspect of the retention moneys, I would be failing in doing justice to the counsel for the petitioner in not referring to the letter dated 14.8.07 to which attention has been drawn of this Court for the purpose of asserting that claims both as regards final bill and retention amount is within limitation. By relying upon this letter, counsel for the petitioner sought to contend that since by this date reference was sought to arbitration, running of the limitation stops thereafter. Let us examine this argument. Even if we take the stopping of the limitation period by sending of this letter dated 14.8.07, even then, I find that on this date the claims which were sought to be raised on the basis of the letter dated 14.8.07, were hopelessly

barred by limitation even on that date. This is for the reason that the work was admittedly completed in September, 2001 and payment under the final bill was cleared in December, 2001. If any disputes for the final bill had to be raised, they had to be raised by December, 2004. This letter is admittedly not of December, 2004 but of 14.8.2007 i.e. much later. Clearly, this was a desperate attempt by the builder to extract money from the members of the respondent cooperative society. The malafides of the builder stares us in the face. So far as the issue, whether this letter can bring within limitation the claim of the amount of Rs.26.11 lacs, being the amount which was withheld by the respondent society for rectification of defects, I find that even in this regard the claim for balance payment is ex facie barred by time as I have already held. The defect liability period under the contract in question, as per the counsel for the petitioner was effective from 1.10.2001 to 30.9.2002 and which was extended upto 31.3.2003 (and for which purpose the counsel for the petitioner drew my attention to the paras IX and X of the reply filed by the respondent) and he accordingly contended that the limitation period therefore would commence only from 1.4.2003. Even if, I accept this contention as correct, the limitation period for the balance amount withheld of Rs.26.11 lacs which was retained by the respondent for rectification of defects which are revealed during the warranty period, then, as the period of three years will commence from 1.4.2003 the same will end on 31.3.2006, and whereas this letter which is relied upon by

the counsel for the petitioner is dated 14.8.2007, that is beyond the period of three years.

10. I have already adverted to the misconceived and mala fide nature of this petition and I have also observed that by means of entering into correspondence and filing of this petition, an attempt is made to extract money from the members of the respondent society. The counsel for the respondent has vehemently opposed the petition as being a gross abuse of the process of law and has buttressed her arguments by relying upon the contents of the documents/letters which have already been referred to hereinabove. I may, at this stage, note that the counsel for the respondent states that it becomes very difficult for a society when stale claims are raised, to defend the same in a Court of law inasmuch as many documents by long passage are lost/not traceable. This argument in my opinion contains one of the basic principles behind the enactment of the Limitation Act 1963, that if claims are preferred after a long time, there is gross injustice in such claims, as the person who has to defend the false claims, would not have evidence to substantiate its defence which is lost on account of lapse of a long period of time. The application of this principle is more acute in the present case, where the respondent is not an individual person who would be having a sort of personal interest to maintain documents but it is a society which is represented at different points of time by different office bearers who have custody of the papers and the documents. The counsel for the respondent has also contended that the society consists of middle class members

and this attempt on the part of the petitioner must be visited with appropriate compensatory and also penal costs. I accept this contention of the counsel for the respondent.

11. The Supreme Court in its judgment reported as *Salem Advocate Bar Association Vs. Union of India 2006(5)SCC 344*, in para 37, has said that it is now high time that actual costs should be imposed. Considering the financial position of the petitioner, which is a rich builder, I feel that in the facts and circumstances of this case, it will be most appropriate that not only compensatory costs are awarded to the respondent, which I quantify and grant at Rs.1 lac, I also feel that penal costs must be imposed on the petitioner and which penal costs, I quantify at Rs.50,000/-.

12. Accordingly, this petition is dismissed with total costs quantified at Rs.1,50,000/-. In case, the costs are not paid within a period of four weeks from today, then, interest thereon shall be payable @ 18% per annum till the date of the actual payment. It has been recently held by the Supreme Court in the case of *U.P.Cooperative Federation Vs. Three Circles, 2009 10 SCC 374*, that Court is entitled to impose interest on the costs awarded. I have accordingly, in view of the facts of this case, awarded interest on costs.

13. With the aforesaid observations, the present petition stands disposed of.

VALMIKI J.MEHTA, J

February 2, 2010/Ne