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

+ ARB.P. 216/2010

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Judgment dated 22.05.2012

ARUN K TANDON

..... Petitioner

Through : Mr.Santosh Kumar Singh, Mr.Anuj
Kumar Ranjan and Mr.Firoz Alam,
Advs.

versus

VICE CHANCELLOR OF DELHI UNIVERSITY & ANR Respondent

Through : Mr.Mohinder J.S.Rupal, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI J, (ORAL)

1. Present petition has been filed by petitioner under Section 11(6) of Arbitration and Conciliation Act, 1996, seeking appointment of an Arbitrator.
2. Mr.Mohinder J.S. Rupal, learned counsel for the respondents, has raised a preliminary objection that the claim of the petitioner is not a live claim and the petition is thus liable to be rejected as being hopelessly barred by limitation.
3. Facts of the present case, as set out in the present petition, are that respondent no.2 by a communication dated 6.8.1997 awarded the work of construction of rooms at the second floor and partitions in the existing hall of the Evening Classes Block of Shaheed Bhagat Singh College to the petitioner. The total value of the said work was Rs.9,52,958.30. Vide communication dated 3.9.1997 respondent no.2 requested the petitioner to

construct a small room for placing the photocopier near the security guard's room. The petitioner submitted the first running bill of Rs.3,65,486/-, however, the payment was made in piecemeal that too with certain delays. The petitioner thereafter on 10.12.1997 submitted the second running bill for Rs.2,24,859/- to respondent no.2. As no payments were made by respondent no.2 till 13.1.1998, the petitioner requested the respondents to release the payment. Despite delay in releasing the payment and other failures on the part of respondent no.2, the petitioner continued to execute the work and submitted third running bill of Rs.4,31,838/- vide communication dated 18.2.1998. The petitioner also requested the respondents to release the balance amount of the second bill. Respondent no.2 instead of releasing the payment to the petitioner, requested the petitioner to submit a final bill. The petitioner vide communication dated 7.7.1999 submitted the fourth bill of Rs.1,41,554/- to respondent no.2 and also requested to release the payment, however, the same was not settled by the respondents. Admittedly, the work was completed by the petitioner in the year 1998.

4. Learned counsel for the petitioner submits that the petitioner had executed the entire work in the presence of the architect of the college and the work was executed to the satisfaction of all concerned. Counsel further submits that the petitioner has made various requests to the respondents to clear the outstanding dues, however, the respondents failed to clear the outstanding dues.
5. Learned counsel for the petitioner submits that in response to the communication addressed to respondent no.2 by the petitioner, respondent no.2 on 2.5.2001 issued the following reply:

“Dear Sirs,

Please refer to your representation dated 29 March 2001 regarding payment of your outstanding dues.

Audit of our Capital Fund account which has been pending for a long time is currently on and a clear picture of our liabilities will emerge only after it is finalised and completed.

However, your claim has been referred to the Auditor and we shall be able to proceed further in the matter only after he is able to determine out liability towards you.

You are, therefore, requested to bear with us till then.

Yours faithfully,

(R.R. CHAUDHRY)
ACTING PRINCIPAL”

6. Counsel further submits that respondent no.2 by a communication dated 11.8.2004 also called upon the petitioner to submit a copy of the lay out plan of second floor of the Administrative Block of the Evening College from the Architect to take necessary action in the matter. Relevant portion of the communication dated 11.8.2004 reads as under:

“Sub: Regarding payment for the various works executed in the College Administrative Block of the Evening College.

Dear Sir,

Kindly refer to your letter dated 26.7.2004 on the subject cited above. In this connection, may we request you to kindly arrange to procure a copy of the Layout Plan of second floor of the Administrative Block of the Evening College from M/s Suresh Goel & Associates, College Architect, to enable us to take further necessary action in the matter.

Thanking you,

Yours faithfully,

(Dr. SATVIR SINGH)
Principal”

7. Learned counsel for the petitioner submits that the respondents neither rejected the claim of the petitioner nor cleared the same which led to the issuance of the communication dated 19.1.2006 for appointment of an Arbitrator. Even at that stage, respondent no.2 did not dispute the claim of the petitioner nor appointed an Arbitrator. Counsel further submits that as the respondents failed to appoint an Arbitrator or clear the outstanding dues, the petitioner sent a legal notice dated 20.2.2010 to the respondents to either clear his dues or appoint an independent Arbitrator in terms of Clause 52 of the Agreement. Clause 52 of the Agreement reads as under:

“52. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality or workmanship or materials used on the work or as to any other question, claim, right matter or the thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution of failure to execute the same whether arising during the progress of the work or after the completion of abandonment thereof shall be referred to the Sole Arbitration of the person appointed by the Vice-Chancellor: Delhi University. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason at the time of such transfer, vacation office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.”

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It is also a term of the contract that if the Contractor(s) do/does not

make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Owner that the bill is ready for payment the claim of the Contractor(s) will be deemed to have been waived and absolutely barred and the Society shall be discharged and released of all liabilities under the contract in respect of these claims.”

8. Counsel for the petitioner submits that since the claim of the petitioner was not rejected by the respondents the question with regard to limitation can only be decided by the Arbitrator. Mr. Kumar also contends that in a petition under Section 11 of Arbitration and Conciliation Act 1996 it is not necessary for the petitioner to place all necessary documents and raise all pleas in support of grounds of limitation learned counsel for the petitioner has relied upon *Indian Oil Corporation Limited v SPS Engineering Limited*, reported at 2011 (3) SCC 507, more particularly, paras 14 to 16 and 24, which read as under:

“ 14. To find out whether a claim is barred by res judicata, or whether a claim is "mala fide", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under section 11 of the Act is whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under section 11 of the Act. The Chief Justice or his Designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: if the contractor makes a claim a decade or so after completion of the work without referring to any

acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his Designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under section 11 of the Act.

15. An application under section 11 of the Act is expected to contain pleadings about the existence of a dispute and the existence of an arbitration agreement to decide such dispute. The applicant is not expected to justify the claim or plead exhaustively in regard to limitation or produce documents to demonstrate that the claim is within time in a proceedings under section 11 of the Act. That issue should normally be left to the Arbitral Tribunal. If the Chief Justice or his designate is of the view that in addition to examining whether there is an arbitration agreement between the parties, he should consider the issue whether the claim is a dead one (long time barred) or whether there has been satisfaction of mutual rights and obligation under the contract, he should record his intention to do so and give an opportunity to the parties to place their materials on such issue. Unless parties are put on notice that such an issue will be examined, they will be under the impression that only questions of jurisdiction and existence of arbitration agreement between the parties will be considered in such proceedings.

16. The question whether a claim is barred by res judicata, does not arise for consideration in a proceedings under section 11 of the Act. Such an issue will have to be examined by the arbitral tribunal. A decision on

res judicata requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. The limited scope of section 11 of the Act does not permit such examination of the maintainability or tenability of a claim either on facts or in law. It is for the arbitral tribunal to examine and decide whether the claim was barred by res judicata. There can be no threshold consideration and rejection of a claim on the ground of res judicata, while considering an application under section 11 of the Act.

24. We may refer to some of the findings of fact recorded by the Designate, which were wholly unwarranted in a proceeding under section 11 of the Act and the fallacy in such findings :

(i) Finding : The appellant did not state anywhere in the petition the date which the final bill was settled and did not produce any document containing such information. The appellant was not expected or required to give such information in a petition under section 11 of the Act or produce the documents showing the settlement of final bill along with the said petition. Therefore, the appellant could not be found fault for such omission. In fact, the Designate noticed that the work was completed on 29.12.2007. The claim was in time with reference to the date on which the work completed (29.12.2007) by the alternative agency.

(ii) Finding : As the work was completed on 29.12.2007 and as the award was made only on 27.10.2008, the appellant ought to have crystalised the extra cost and claimed it in the first arbitration proceedings. The assumption that the appellant ought to have made the claim for extra cost which arose after the commencement of the arbitration proceedings, in the pending proceedings by way of amendment, has no basis either in law or in contract. If the cause of action arose after the completion of pleadings and commencement of hearing in the first round of arbitration, nothing prevented the appellant from making a separate claim by initiating a second arbitration.

(iii) Finding : Once a risk and cost tender is issued at the risk and cost of a person, then, the amount which is to be claimed from the person who is guilty of breach..... becomes crystallized when the risk purchase tender at a higher cost is awarded. This may be true as a general proposition. But it may not apply if there is a specific provision in the contract (like clause 7.0.9.0) which requires that the employer should claim as extra cost, only the difference between the "amounts as would have been payable to the contractor in respect of the work" and "the amount actually expended by the owner for completion of the entire work".”

9. Mr.Rupal, counsel for the respondents, submits that the present petition cannot be entertained as the same is barred by limitation.
10. I have heard learned counsel for the parties and also perused the present petition. The Basic facts are not in dispute that respondent no.2 by a communication dated 6.8.1997 awarded the work in favour of the petitioner for carrying out the construction of rooms at the second floor and partitions in the existing hall of the Evening Classes Block of Shaheed Bhagat Singh College. The total value of the said work was Rs.9,52,958.30. Admittedly the work was completed in the year 1998. Despite submission of bills by the petitioner, the payments were not released to the petitioner.
11. Learned counsel for the petitioner, submits that after submission of the final bill it was the respondents who were to clear the same or if not rejected the same which has not been done till date.
12. In the case of ***National Insurance Company Limited v. Boghara Polyfab Private Limited***, reported in (2009) 1 SCC 267, more particularly paras 22 and 23, the Apex Court has culled out the preliminary issues to be considered by a Court while dealing with an application under Section 11 of Arbitration and Conciliation Act. The Apex Court has formulated

broadly three categories in relation to issues to be considered by the Court. While the issues categorized in category 1 are mandatory to be decided by the Court issues relating to categories 2 and 3 may be decided by the Court or may be left open for the Arbitrator to decide. Para 22 and 23 reads as under:

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co. v. Patel Engg. Ltd.*, reported at (2005) 8 SCC 618. This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22. The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.

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.

22.3 The issues (third category) which the Chief Justice/his

designate should leave exclusively to the arbitral tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

23. It is clear from the scheme of the Act as explained by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under section 11 of the Act, the Chief Justice/his designate may decide them, if necessary by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice of his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such 21 issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.”

13. The arbitration clause has not been denied by the respondents. It is also not in dispute that the petitioner has carried out the work, as awarded by the respondents. Having regard to the communications placed on record, *prima facie*, it shows that the petitioner has been repeatedly calling upon the respondents to clear the outstanding bills, which the respondents have failed to do so. It is also noteworthy that in response to the communication of the petitioner respondent no.2 on 2.5.2001 had informed the petitioner that audit of their capital fund account had been pending for a long time and a clear picture would emerge only after the same has been finalized. The respondents, at no point of time, rejected the bill of the petitioner. There is also force in the submission of learned

counsel for the petitioner that the question of limitation may be kept open for the Arbitrator to decide the same.

14. Having regard to the facts of this case, the nature of dispute between the parties and the observations made by the Apex Court in the case of *National Insurance Company Limited* (supra), I deem it appropriate to keep the question of limitation open to be decided by the Arbitrator.
15. Mr.Santosh Kumar, learned counsel for the petitioner, submits that having regard to the nature of claim and the amount involved, let the Vice-Chancellor, Delhi University, appoint an Arbitrator within two weeks to adjudicate upon all disputes and differences including claims and counter claims arising between the parties.
16. Accordingly, present petition is allowed. The Vice-Chancellor, Delhi University, shall appoint an Arbitrator within two weeks from the date of receipt of this order to enable the Arbitrator to adjudicate upon all disputes and differences including claims and counter claims between the parties. It will be open for the respondent to raise the plea of limitation before the Arbitrator who will decide the same in accordance with law unaffected by any observation made by this Court in the order passed today.
17. Petition stands disposed of in view of above. DASTI.

G.S.SISTANI, J

MAY 22, 2012

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