

* IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 422/2009

ANWAR HUSSAIN

..... Petitioner

Through Mr. Hari Kishan, Advocate.

versus

M/S ERICSSON INDIA PVT LTD

..... Respondent

Through Mr. Kapil Kher with

Mr. Ankur Bansal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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01.02.2012

1. This is petition under Section 11 of the Arbitration & Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the parties.

2. The Petitioner, who is the proprietor of M/s. Triveni Construction Company, states that an agreement was entered into between the Petitioner and the Respondent M/s. Ericsson India Private Limited on 13th April 2005 for supply of material and services on turnkey basis. According to the Petitioner, the Respondent made the last payment in the sum of Rs. 2,97,453.50 on 1st October 2008. After the reconciling of the accounts, a sum of Rs. 51,34,560/- was still owing to the Petitioner from the Respondent. The Petitioner states that since the Respondent, despite service

of notices dated 12th May and 10th August 2009, failed to repay the said amount, the present petition has been filed.

3. There are several objections raised by learned counsel for the Respondent regarding maintainability of the present petition. It is first submitted that the Respondent never received either of the notices dated 12th May or 10th August 2009. Secondly, the notice was not sent to the Petitioner at the address mentioned in Clause 33.1 of the Agreement. Thirdly, even assuming that the notice dated 10th August 2009 was received, it did not specifically invoke the arbitration clause. Fourthly, no part of cause of action has arisen within the territorial jurisdiction of this Court. Fifthly, there is no arbitrable dispute since the Petitioner has failed to produce documents to even *prima facie* show that there are amounts owing by the Respondent to the Petitioner.

4. As regards the notice dated 10th August 2009 the Petitioner has placed on record a copy of the UPC and postal receipt which, according to the Petitioner, was inadvertently filed in another suit, CS (OS) No. 2247 of 2009 in this Court. A certified copy of the said document has been obtained from the record of the said suit and filed in this petition. A perusal of the said postal receipt indicates that the letter was dispatched by registered post

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on 10th August 2009 to the Respondent at its Karol Bagh address. While Clause 33.1 of the Agreement requires notices on the Respondent to be served at its office in Gurgaon, the Agreement itself shows that the Respondent has its registered office at Karol Bagh, New Delhi. This is confirmed by learned counsel for the Respondent. As long as the Petitioner has been able to produce a copy of the postal receipt showing dispatch by registered post of the letter dated 10th August 2009 to the Respondent at its registered office, it matters little that the said notice was not served on the Respondent at its Gurgaon address. Further, the notice dated 10th August 2009 calls upon the Respondent to pay the balance sum, failing which the Petitioner would be left with “no alternative except to initiate appropriate legal proceedings” through the competent court of law in Delhi. Although the above notice does not specifically invoke the arbitration clause, the expression “appropriate legal proceedings” is broad enough to encompass arbitral proceedings.

5. The claim by the Petitioner is only for money and not in relation to any property. As long as the Respondent has its registered office at Delhi it can certainly be proceeded against in a Court in Delhi for recovery of money.

6. The last objection is as regards the existence of an arbitrable dispute. The Petitioner has placed on record a statement of accounts in terms of which

the aforementioned balance amount is claimed from the Respondent. For the purposes of the present petition under Section 11 of the Act it is not necessary for the Petitioner to produce all the documents at this stage in support of his claims against the Respondent. The Petitioner is required only to demonstrate *prima facie* the existence of an arbitrable dispute. The documents produced by the Petitioner *prima facie* indicate the existence of an arbitrable dispute.

7. For all the aforementioned reasons, the objections of the Respondent to this petition are rejected.

8. This Court appoints Mr. Justice H.R. Malhotra, retired Judge of this Court r/o 109, Anupam Gardens, Post Office, IGNOU, New Delhi - 110 068 (Mobile No. 9818000400) as an Arbitrator to adjudicate the disputes including claims and counter claims of the parties. The parties have agreed that the arbitration proceedings be conducted under the aegis of and in accordance with the rules of the Delhi High Court Arbitration Centre ('DHCAC'). It is ordered accordingly. The fees of the learned Arbitrator will be in terms of the DHCAC (Arbitrators' Fees) Rules.

9. The petition is disposed of. Order be given dasti.

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10. A copy of this order be communicated to the learned Arbitrator forthwith.



S. MURALIDHAR, J

FEBRUARY 01, 2012
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From 1A 669/14 - clarification
670/14 - Exemption

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

+ **ARB P. No. 422 of 2009**

ANWAR HUSSAIN Appellant
Through: Mr. Lovkesh Sawhney with
Mr. Hari Kishan, Advocate.

versus

ERICSSON INDIA PVT. LTD. Respondent
Through: Mr. Anil K. Kher, Sr. Adv. with
Mr. Rishi Manchanda, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
% **28.03.2014**

IA No. 669/2014

1. This is an application filed by the Petitioner seeking clarification of the order passed by this Court on 1st February 2012 in Arbitration Petition No. 422 of 2009 for referring the disputes between the parties to arbitration.

2. Pursuant to the said order, the arbitration proceedings commenced and a claim was filed by the Petitioner before the Arbitrator. A question arose whether the claims filed by the Petitioner were inconsistent with the order passed by this Court on 1st February 2012. The case of the Petitioner was that the reference of disputes between the parties

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pertained not only to the Agreement dated 13th April 2005 as referred to in the Section 11 application, but also the disputes arising out of another Agreement dated 27th October 2005 as well as the amendment to the main Agreement dated 12th April 2006. Since there was a dispute as regards the scope of arbitration proceedings, the learned Arbitrator by an order dated 27th November 2013, in the application filed by the Respondent herein under Section 16 of the Arbitration & Conciliation Act 1996 (Act), desired that the parties should seek clarification from this Court. Hence, this application.

3. Mr. Sawhney points out that the Agreement dated 12th April 2006, copy of which has been annexed to the Application, clearly states that it is by way of an amendment to the main Agreement dated 13th April 2005 and therefore it has to be read in continuation of the main Agreement itself. As regards the other Agreement dated 27th October 2005, he states that along with the petition under Section 11 of the Act, the Petitioner also filed a Statement of Accounts which contained entries pertaining not only to the Agreement dated 13th April 2005, as amended by the supplementary Agreement dated 12th April 2006, but also the Agreement dated 27th October 2005. He further points out that

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the sum claimed in the notice invoking arbitration issued to the Respondent, which is also the sum mentioned in the application under Section 11 of the Act, is referable to the statement of accounts which contained the entries pertaining to all three Agreements. As regards the amount claim filed before the Arbitrator, it is submitted that it can be higher than the amount claimed in the application under Section 11 of the Act. Mr. Sawhney refers to the decision of the Supreme Court in *State of Goa v. Praveen Enterprises, (2012) 12 SCC 581* and submits that it is possible that the parties may not be able to quantify the precise sum to be claimed at the time of invoking the arbitration clause or while filing the application under Section 11 of the Act. He submits that the order passed by this Court on 1st February 2012 envisages all disputes arising between the parties arising out of the three agreements being referred to arbitration.

4. Mr. Anil K. Kher, learned Senior counsel for the Respondent, on the other hand, opposes the prayer in this application by pointing out that the application under Section 11 of the Act as originally filed referred only to the Agreement dated 13th April 2005. Secondly, he submits that there is no invocation of the arbitration proceedings in terms of Section

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21 of the Act as far as disputes arising out of the Agreement dated 27th October 2005 are concerned. He points out that there is no reference to the Agreement dated 27th October 2005 either in the notice or in the application under Section 11 of the Act or in the order passed by this Court, therefore, the said Agreement now cannot be introduced at this stage by way of clarification. According to him, in any event any new claim arising therefrom sought to be raised at this stage would be time barred. He further submits that even in the legal notice issued to the Respondent as well as in application under Section 11 of the Act, the Petitioner had quantified its claim as Rs. 51,34,560 together with interest @18% p.a., whereas before the learned Arbitrator, it raised a claim of more than Rs.1 crore. This was impermissible in law.

5. This Court notices that in the legal notice issued by the Petitioner to the Respondent first on 12th May 2009 and later on 10th August 2009, reference was made to the disputes between the parties without referring to any particular Agreement between the parties. The notices spoke of a claim for a sum of Rs.51,34,560, together with interest @18% per annum. The notices stated that the said amount was arrived at as per the accounts of the transactions between the parties.

6. The above submissions have been considered. Agreement dated 13th April 2005 pertains to civil works and the Agreement dated 27th October 2005 pertains to supply of electrical and communications systems pertaining to the same project. The statements of accounts have been placed on record along with the documents filed by the Petitioner in the application under Section 11 of the Act. The statements of accounts include entries pertaining to both the Agreements dated 13th April 2005 and 27th October 2005. It is not possible to conclusively hold that the amount claimed in the legal notice i.e. Rs. 51,34,560 pertains to the Agreement dated 13th April 2005 and that no part of it pertains to the Agreement dated 27th October 2005.

7. No doubt the application under Section 11 of the Act referred only to the Agreement dated 13th April 2005. However, that should not matter since the Agreement dated 12th April 2006 was only by way of an amendment to the main Agreement dated 13th April 2005 and therefore in continuation thereof and had to be read as such. The other factor that requires to be noticed is that both the Agreements dated 13th April 2005 and 27th October 2005 contain an arbitration clause. As regards the

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Agreement dated 27th October 2005, it is not in dispute that the statement of accounts filed along with the application contains entries pertaining to supplies under that agreement as well.

8. As regards the contention that any claim under the Agreement dated 27th October 2005 would be time barred, that is an issue to be decided by the learned Arbitrator. As regards the objection that the claim filed by the Petitioner before the learned Arbitrator is far in excess of the amount mentioned in the legal notice and the application under Section 11 of the Act, it appears to the Court that the following observations of the Supreme Court in *State of Goa v. Praveen Enterprise* is a complete answer:

“27. The respondent submitted that this Court in *SBP & Co. vs. Patel Engineering Ltd.* 2005 (8) SCC 618 and *National Insurance Co. Ltd. v. Boghara Polyfab Private Ltd.* 2009 (1) SCC 267, has observed that while deciding an application under section 11 of the Act, the Chief Justice or his designate can decide the question whether the claim was a dead one (long time barred) that was sought to be resurrected. According to appellant the logical inference from this observation is that an application under section 11 should sufficiently enumerate and describe the claims to demonstrate that they are within limitation. Extending

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the same logic, respondent contends that any counter claim by the respondent should also be described in his statement of objections with relevant particulars so that the Chief Justice or his designate could consider and pronounce whether such counter claim is barred by limitation. The respondent therefore argues that every claim unless specifically mentioned in the application under section 11 of the Act, and every counter claim unless specifically mentioned in the statement of objections, cannot be the subject matter of arbitration.

28. The aforesaid contention of the respondent is based on the erroneous premises that whenever an application is filed under section 11 of the Act, it is necessary for the Chief Justice or his Designate to consider and decide whether the claims or counter claims are barred by limitation or not. In *SBP & Co.* and *Boghara Polyfab*, this Court classified the questions that may be raised in an application under section 11 of the Act into three groups : (i) those which the Chief Justice/his designate shall have to decide; (ii) those which the Chief Justice/his designate may choose to decide or alternatively leave to the decision of the Arbitral Tribunal; and (iii) those which the Chief Justice/his designate should leave exclusively for the decision of the Arbitral Tribunal. This Court held that the issue whether a claim is dead claim (long barred claim) is an issue which the Chief Justice or his designate may choose to decide or leave for the decision of the Arbitral Tribunal. The difference between a dead/stale claim and a mere time barred claim was explained by

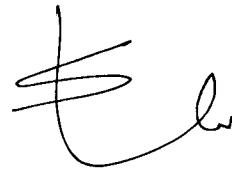
this Court in *Indian Oil Corporation Ltd. v. M/s SPS Engineering Ltd.* [2011 (2) SCALE 291] thus: When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time 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.”

9. Consequently, this Court finds no difficulty in acceding to the prayer

of the Petitioner and in clarifying that the order passed by this Court on 1st February 2012 should be construed as an order referring all the disputes between the parties arising from the Agreements dated 13th April 2005, 27th October 2005 and 12th April 2006 to arbitration. This Court would like to further add that since both the Agreements dated 13th April 2005 and 27th October 2005 contain an arbitration clause, the Respondent cannot be prejudiced by the referral of the disputes under the said Agreements to arbitration. It is reiterated that all the contentions of the Respondent including the one concerning time barred claims are left open to be decided by the learned Arbitrator.

10. The application is disposed of in the above terms.

11. Order *dasti*.



S. MURALIDHAR, J.

MARCH 28, 2014
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