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

+ ARB.P. 330/2010

% *Judgment Delivered on: 24.02.2012*

CHET RAM SINGH

..... Petitioner

Through : Mr.B.L.Wali, Adv.

versus

MUNICIPAL CORPORATION OF DELHI Respondent

Through : Ms.Usha Saxena, Adv. for Mr.O.P.
Saxena, 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. Facts of the present case, as set out in the present petition, are that the respondent invited tenders on 30.9.2002 from public inviting private security agencies to supply security guards and Resident Care Takers for their Slum and JJ Department, Municipal Corporation of Delhi. The petitioner submitted his tender on 18.10.2002 and also produced necessary documents as required by the respondent. The respondent vide its letter dated 20.1.2003 awarded the work of engaging 43 security guards and 196 resident care takers for watch and ward of various assets of Slum and JJ Department to the petitioner. The petitioner was also directed to deposit Rs.25.00 lakhs, as security deposit, in cash/FDR in favour of Additional Commissionr (S&JJ), MCD, within seven days from the date of receipt of the said letter and execute the agreement with the Department. The petitioner deposited Rs.25.00 lakhs with the

respondent by way of two FDRs of Rs.20.00 lakhs and Rs.5.00 lakhs. The respondent vide its letter dated 19.2.2003 informed the petitioner about detailed number of employees and their respective place of deployment. Along with the said letter, the respondent also enclosed a list of engagement of security personal on various sites. An agreement was executed between the petitioner and respondent on 20.2.2003. This Agreement was admittedly extended upto 31.3.2005, which is evident from a communication dated 10.3.2005, a copy of which has been placed on record. After the agreement came to an end petitioner raised a final bill in accordance with the terms and conditions.

3. Learned counsel for the petitioner submits that since the petitioner executed the work assigned to him the contract was further extended upto 31.3.2005. Counsel further submits that bills submitted by the petitioner for the work done were cleared by the respondent for the period of 20.2.2003 to 31.1.2004. Counsel next submits that on the expiry of the extended period of agreement, the petitioner made a request to the respondent for refund of security deposit of Rs.25.00 lakhs deposited by him and also requested to make the payments for executing work for the extended period i.e. from 20.2.2004 to 31.3.2005, however, the said payments were not cleared by the respondent. Counsel also submits that vide communication dated 13.9.2005 the petitioner has brought to the notice of the respondent that in terms of Paragraph 27 of the Agreement there is a mandatory duty on the respondent to clear the final bills of the petitioner within 90 days upon the completion of the contract and further the security deposit had to be released consequent upon release of final payment. The petitioner by the said communication has also brought to the notice of the respondent that the bills raised by him were pending beyond the period of binding agreement and also requested the respondent

to clear the outstanding bills and release his security amount of Rs.25.00 lakhs.

4. Learned counsel for the petitioner submits that by a communication dated 29.5.2006, in addition to repeated request and reminders, the petitioner called upon the respondent to clear the final bill or else refer the matter to the sole arbitration, failing which he would approach the Court. Respondent by a communication dated 29.9.2006 informed the petitioner that payment cannot be released to the petitioner till the investigation by the Vigilance Department is finalized, however, the petitioner was assured that the Department will process the case of the petitioner as soon as the investigation is finalized by the Vigilance Department of the MCD. By another *inter se* communication dated 12.7.2007, addressed to the Deputy Commissioner, Slum and JJ Wing, by Director of Vigilance, Deputy Commissioner was informed that release of payment to the petitioner is to be dealt with by the Department, being an administrative matter, and the Vigilance has no role to play. A copy of this communication has been placed on record. Counsel further submits that since the respondent has failed to release the amount of Security Deposit of Rs.25.00 lakhs and also failed to clear the bills, the petitioner, on account of a wrong legal advice, filed a writ petition, being W.P.(C) 10578/2009, *inter alia*, praying appointment of an Arbitrator. However, the said writ petition filed by the petitioner was dismissed primarily on the ground of petitioner having raised disputed questions of fact. While dismissing the said writ petition, the Court also observed that it would be open for the petitioner to invoke the procedure for appointment of an Arbitrator. Counsel next submits that, at this stage, the petitioner would be entitled to the benefit of Section 14 and Section 19 of Limitation Act relying on the communications dated 23.11.2010 and 11.1.2011, by which the period of

limitation would in any case be extended in addition to the fact that in accordance with Clause 27 of the Agreement the onus was on the respondent to clear the final bill. The communications dated 23.11.2010 and 11.1.2011 read as under:

“

23.11.2010

Capt.Chet Ram Singh, M/s.Security-cum-Investigation Agency, A-74/1, SFS DDA Flats, Saket New Delhi attended this office on 21.10.2010 and met the undersigned in connection with the release of his security deposits amounting to Rs.25 lacs. pertaining to the security coverage contract with the S&J Deptt. The same was due to be released after expiry of his extended contract period i.e. 31.3.2005 and the salary bills of Security Guards and resident's caretakers for the period 1.02.2004 to 31.3.2005. In support of his contention he has submitted the photo copies of the relevant documents and requested for the release of his security deposits amounting to Rs.25 lacs and salary bills of Security Guards and resident's caretakers. He further informed to the undersigned that Vigilance Deptt. and Legal Cell has already given their clearance in connection with the release (sic.of) the security deposits as per request of Capt.Chet Ram Singh.

In view of above facts, kindly issue necessary directions to the concerned officer for early release of the above payments.

Thanking you

Yours truly

(Mool Chand Sharma)
Chairman

Law & General Purpose Committee”

“

11.01.2011

Kindly refer to this office Letter No.45/L&GPC/Ch/2010 dated 23.11.2010 and letter No.L&GPC/Ch/2010-50 dated 10.12.2010 wherein the request of one Shri.Chet Ram Singh, M/s Security-cum-Investigation Agency, A-74/1, SFS DDA Flats, Saket, New Delhi in connection with the release of his security

deposits amounting to Rs.25 lacs. Pertaining to the security coverage contract with the S&JJ Deptt. and the salary bills of Security Guards and resident's caretaker was sent to your good self and was requested to take necessary action in this regard under intimation to this office, but till date this office has not received any letter from your office. It is further requested that an Arbitrator be appointed for the early decision of the said matter.

You are, therefore, again requested to kindly take necessary action in this regard under intimation to this office.

Thanking you

Yours truly

(Mool Chand Sharma)
Chairman

Law & General Purpose Committee"

5. Counsel for the petitioner has also relied upon *Satya Prakash v. MCD & Anr.*, reported at 91 (2001) DLT 38, more particularly paras 4 to 8, wherein a Single Judge of this Court in similar circumstances had allowed the petition under Section 11 of Arbitration and Conciliation Act. Para 4 to 8 read as under:

"4. Thus objection is wholly groundless and without any substance as the limitation of 90 days will start running from date of intimation that the bill is ready for payment. The petitioner has not received the requisite intimation from the Corporation/respondent about the final bill till date. As per its own admission no such intimation has been sent to the petitioner and therefore question of petition being barred by time does not arise.

5. It is the duty of the respondent to finalise the account by preparation of final bill and not to expect and wait for the contractor to put forth his claim regarding dues in respect of work completed by him.

6. In *M/s.R.P. Souza & Co. & Ors. v. The Chief Engineer, Public Works Department & Ors.*, 2001 (1)RAJ 34 (Bom.), it was

held that cause of action for assessment of claim cannot arise unless either final bill is prepared or the respondent disputes or denies the right of the applicant for the dues payable in respect of the work done by the applicants for the respondents. It was further observed that it is not the duty of the contractor to raise a claim against the respondent on completion of the work.

7. Again the view was taken that no right vests in the petitioner to apply until there is a clear and unequivocal denial of the right by the respondent. Further that application under Section 20 of the Act of 1940 for appointment of the Arbitrator is also governed by Article 137 of the Schedule to the Limitation Act, 1963 and must also governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within three years from the date when the right to apply first accrues. Clause 25 of the Agreement cannot come to the rescue of the respondent.

8. Objections are not sustainable and are hereby dismissed. Application is allowed.

6. Learned counsel for the respondent has opposed the present petition primarily on the ground that the same is hopelessly barred by limitation. It is submitted by learned counsel for the respondent that the contract between the parties came to an end in the year 2004 while the present petition has been filed in the year 2010. Counsel for the respondent has also highlighted the fact that in the year 2009 petitioner had filed a writ petition claiming refund of Rs.25.00 lakhs and in the alternate for appointment of an Arbitrator, however, the said writ petition was dismissed primarily on the ground that it raises disputed questions of fact. Counsel further submits that the petitioner obtained the tender on the basis of forged and fabricated documents. Counsel next submits that the contract period expired in the year 2003 but it was later on extended upto 2005, however, the payments were released only upto 31.1.2004. Subsequently, the MCD received a complaint against the petitioner and thereafter the payment was not released to the petitioner. The case of the

petitioner was sent to the Chief Vigilance Officer, who in his minutes dated 12.12.2008 has advised that a Police complaint be lodged and necessary action be taken against the petitioner in terms of the agreement.

7. I have heard learned counsel for the parties. The Basic facts are not in dispute that MCD had invited tenders on 30.9.2002 for inviting private security agencies for supply of security guards and resident care takers for their Slum and JJ Department, MCD. The tender was awarded in favour of the petitioner and as per the reply of the respondent the petitioner deposited a security deposit of Rs.25.00 lakhs, which has since not been refunded to the petitioner. As per the reply of the respondent the payment was released in favour of the petitioner only upto 31.1.2004, however, on the basis of a complaint that the petitioner had deposited fabricated documents the payment and the security deposit were not released in favour of the petitioner as the case of the petitioner was sent to the Chief Vigilance Commissioner.
8. Learned counsel for the petitioner submits that the petitioner had submitted his last Bill which was to be cleared by the respondent as per Clause 27 of the Agreement, which reads as under:

“Final bill shall be paid within 90 days on the completion of the contract, on submission of the bill by the agency, the security deposit shall only be released after finalization of the final bill.”
9. While Mr.Wali, learned counsel for the petitioner, contends that after submission of the final bill onus was on the respondent to clear the same or if not rejected the same which has not been done till date. Mr.Wali has also placed copies of letters issued by petitioner to the respondent requesting the respondent for release of the security deposit. Postal receipts have also been placed on record. Mr.Wali has also relied upon various communications, including the communication addressed to the

Lieutenant Governor and the Commissioner, MCD. Counsel has also placed reliance on an inter office communication dated 8.12.2006 issued by MCD, Delhi, Vigilance Department, to the Additional Commissioner, S&JJ. The communication dated 8.12.2006 reads as under:

“ MUNICIPAL COPORATION OF DELHI
VIGILANCE DEPARTMENT

16, RAJPURA ROAD,
CIVIL LINES, DELHI – 110 054.

No.AD(Vig.)-III/BD/2006

Dated: 8-12-06

Sub: Refund of security deposits amounting to Rs.25 lacs deposited towards work performance guarantee vide FDs bearing No.D0121764 and D0121894 amounting to Rs.20 lacs and Rs.5 Lacs respectively.

Please refer to letter No.nil dated 29.9.2006 from Capt. Chet Ram Singh addressed to Addl. Commissioner (S & JJ) and CVO, Vig. Deptt., MCD. In this letter, he has requested for refund of security of Rs.25 lacs in total which was deposited in the shape of FDs as token of performance guarantee for undertaking the work of protection of properties belonging to Slum & JJ Deptt. of MCD, Delhi, by engaging 196 resident care takers and 43 security guards as per orders issued vide letter No.D-475/AD(CT)/S/2003 dated 19.2.2003.

It has also been mentioned in his letter the contract period has been concluded and the maturity period of FDs deposited as performance guarantee is also over security of Rs.25 lacs may be refunded as per rules.

You are requested that necessary instructions may be issued with regard to refund of security to the agency and this office may also be informed of the action ordered.

(Pradeep Srivastava)
Chief Vigilance Officer

Addl. Commissioner (S & JJ)”

10. By a communication dated 29.9.2006, the Joint Director (Administration) had informed the petitioner that the payment cannot be released to him till the investigation by the Vigilance Department is finalized. The communication dated 29.9.2006 reads as under:

“ MUNICIPAL COPORATION OF DELHI
VIGILANCE DEPARTMENT

Room No.1-6,
Vikas Kuteer,
I.P. Estate,
N.Delhi-110002.

No.D/156/AD(CT) /2006

Dated: 29-9-06

To

Capt. Chet Ram Singh,
M/s Security-cum-Investigation Agency,
A-74/1, SFS Marg No.3,
Near Anupam Cinema,
Saket,
New Delhi – 110017.

Subject: Payment of wages w.e.f. 01.02.2004 to 31.03.2005 in r/o deployed of 196 RCT & 43 Security Guards for watch & ward of slum assets.

Sir,

This has reference to your letters dt. 14.08.2006 addressed to Commissioner, MCD and copy endorsed to Addl. Commissioner (S&JJ) on the subject cited above.

In this connection, it is informed you that the matter relating to release of payment for the period 20.02.2003 to 31.01.2004 is being investigated by the Vigilance Department, MCD. Therefore, it is not possible for this department to release the payment for the period 01.02.2004 to 31.03.2005 till the investigation by the Vigilance Department is finalized. However, this department will process your case as soon as the investigation is finalized by the Vigilance Department MCD.

(KUNDAN LAL)
JR. DIRECTOR (ADMN.)”

11. 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.”

12. Having regard to the fact that the communications placed on record clearly suggests that the parties were in correspondence and the amounts, sought to be relied upon by the petitioner, were not being considered on

account of the matter pending with the Vigilance Department; petitioner has repeatedly called upon the respondent to release his security deposit (letters 13.5.2005 onwards have been placed on record); petitioner has filed a writ petition in the year 2009; counsel for the petitioner has strongly urged before the Court that the petitioner should be given benefit of Sections 14 and 19 of the Limitation Act as he was pursuing a wrong remedy and by the communications the respondents have accepted the amounts payable and extended the period of limitation, in my view having regard to the fact that in terms of Clause 27 it was the respondent who was to clear the final bill within 90 days, however, the respondent has neither rejected the claim of the petitioner nor made the payment. Further the communications placed on record show that the Vigilance Department was initially seized of the matter, however, there is nothing on record to show that the demand made for release of security deposit stands rejected. As far as the submission made by learned counsel for the petitioner that petitioner was pursuing a wrong remedy is concerned, it is of nature which would require evidence, although it cannot be said that the claim of the petitioner is patently beyond the period of limitation.

13. Accordingly, present petition is allowed. Mr.Ravi Gupta, Senior Advocate, (Cell No.9810006918) is appointed as an Arbitrator. The fee of the Arbitrator is fixed at Rs.1.00 lakh, to be shared equally by both the parties. It is made clear that it will be open for the respondent to raise the plea of limitation before the Arbitrator, who will consider the same in accordance with law unaffected by any observations made by this Court in the Order passed today. Petition stands disposed of in view of above.
14. Let a copy of this order be sent directly to learned Arbitrator.

G.S.SISTANI,J

FEBRUARY 24, 2012 msr