

Court No. - 19

Case :- CIVIL MISC. ARBITRATION APPLICATION No. - 45 of 2020

Applicant :- M/S Ehssas Foundation Vasant Kunj New Delhi

Opposite Party :- State Project Director Vidya Bhawan Upefa Lucknow

Counsel for Applicant :- Ashok Kumar Mishra Baled, Rakesh Kumar Singh

Counsel for Opposite Party :- Sarvesh Kumar Dubey

Hon'ble Jaspreet Singh, J.

Heard Sri Rakesh Kumar Singh, learned counsel for the petitioner.

The instant petition had been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 which was dismissed on 04.08.2023 for want of prosecution. Thereafter the petitioner had moved an application bearing I.A. No. 9 of 2023.

The Court has heard the learned counsel for the petitioner and finds that the grounds as mentioned therein in the application are found sufficient, accordingly, the order dated 04.08.2023 is recalled and the petition shall stand to its original number.

The Court has thereafter heard the learned counsel for the petitioner on merits.

The instant petition had been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an independent Arbitrator.

The submission of learned counsel for the petitioner is that an agreement was entered between the petitioner and the respondent for conducting a survey and providing the necessary data to the respondents. The said agreement dated 27.02.2009 contained a payment schedule indicating that on the signing of the contract 40% of the agreed price would be paid and on submission of the acceptable final data, 40% would be paid and the remaining 20% would be paid on the submission of the acceptable final report.

It is further stated that Clause 11 of the agreement contained an arbitration clause that in case of any dispute or difference which may arise between the parties claiming or touching or arising

out of in respect of the contract, the same shall be referred to a sole Arbitrator to be appointed by the Uttar Pradesh Education Board for all project Board.

It is the case of the petitioner that the petitioner was granted only the first installment and though they had completed their work, the remaining amount was not paid which gave rise to the disputes between the parties.

It is also stated that initially the petitioner had preferred a writ petition before a Division Bench of this Court bearing W.P. No. 12771 (MB) of 2016 which came to be dismissed for want of prosecution on 26.07.2018. Thereafter the petitioner by means of its notice dated 19.11.2019 had invoked the arbitration clause and despite the notice being served on the respondents, no response came forward as such the Arbitral Tribunal could not be formed. The petitioner had also file an Arbitration Application No. 6 of 2020 which was permitted to be withdrawn with liberty to file fresh and it is thereafter that the instant petition has been preferred.

Upon issuance of notice, Sri Sarvesh Kumar Dubey, learned counsel for the respondents had put in appearance and had raised a preliminary objection regarding the maintainability of the petition on the ground that this Court while exercising powers under Section 11(6) of the Act of 1996 is not required to refer a matter which is completely time barred and is nothing but a dead-wood.

In support of his submissions, Sri Dubey, learned counsel has relied upon a decision of the Apex Court in ***Bharat Sanchar Nigam Ltd. and Another Vs. Nortel Networks India Pvt. Ltd. ; 2021 (5) SCC 738.***

It is in view thereof the learned counsel for the petitioner had sought time on 17.11.2023 to reply the issue of limitation raised by the respondent as explained in the decision of the Apex Court as he wanted to cite certain judgments. In furtherance of his submissions, the learned counsel for the petitioner submits that the case of Nortel (Supra) is not applicable to the instant facts and circumstances, inasmuch, in the said case there was termination of contract whereas in the instant case, there has been no termination and therefore there is continuing cause of action.

Having heard the learned counsel for the parties and from perusal of the material on record, what this Court finds is that admittedly the agreement dated 27.02.2009 was executed between the parties and the said agreement also contained an

arbitration clause.

It is also not disputed by the petitioner that he had received some part of the money in terms of the agreement on 30th July, 2009 and thereafter no payment was made. The petitioner having completed the work in the year 2009 itself was repeatedly representing the with the respondents regarding release of the remaining sum.

Having not met any success in persuading the respondents to release the outstanding dues, the petitioner invoked the writ-jurisdiction of this Court in the year 2016 and needless to say that the said petition was dismissed for want of prosecution on 26.07.2018. Thereafter on 19.11.2019, the petitioner has invoked the arbitration clause.

Another significant aspect of the matter is that while sending the notice dated 19.11.2019, it was admitted to the petitioner that the disputes had erupted between the parties since last ten years. In the aforesaid backdrop of undisputed facts the issue that requires consideration is that as to whether the claim of the petitioner is barred and it can be treated as dead-wood to dissuade this Court from referring the matter for arbitration.

If the material on record is seen in the aforesaid context, it would be found that the contract had been completed in the year 2010. This apparently was the first point in time for the commencement of limitation as the petitioner was entitled to 40% on the submission of the acceptable final data and 20% on the submission of the final report which have been submitted by the petitioner in the year 2010, though, there are several representations made by the petitioner raising the aforesaid issue regarding release of payment, however, there has been no response from the respondents to pay. Certain inquiries were setup, details were sought to which the petitioner cooperated but despite the same no amount was released in favour of the petitioner.

Since the amount was not paid since 2010 and the petitioner was engaged in exchange of correspondence, it is in the aforesaid backdrop that the petitioner had invoked the writ jurisdiction which has already noticed above was dismissed for want of prosecution on 26.07.2018. The notice for invoking the arbitration was made on 19.11.2019. The record clearly indicates that the petitioner was aware of the fact of his cause of action having accrued prior to 2016 which prompted the petitioner to file the writ petition in the year 2016. The petitioner knew well that work stood completed and he was making demands to which there was no response. The very fact

that the petitioner invoked the writ jurisdiction was clear enough that the limitation was running and once the petition was filed which was dismissed without grant of any leave cannot be treated as a fresh grant of limitation.

In view of the aforesaid, this Court does not find that the cause of action as stated by the petitioner can be treated to be a continuing cause of action, inasmuch as, all final submission obligations relating to the petitioner stood completed upon of date was made in the year 2010. Since no response was given from the respondents, the petitioner had ample opportunity to invoke the arbitration clause, having not done that the dictum of the Apex Court in Nortel (Supra) is clearly applicable and this Court finds that the claim of the petitioner is prima facie time barred, accordingly, the reference to the Arbitration can not be made. Consequent, the petition is ***dismissed***. Costs are made easy.

Order Date :- 20.11.2023

Asheesh