

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

% **Judgment Reserved on: 8th March, 2016**
Judgment Pronounced on: 9th May, 2016

+ **Arb. P. No.130/2015**

HYDEL CONSTRUCTIONS PRIVATE LIMITED Petitioner
Through Ms.Pooja Saigal, Adv. with
Mr.Akshay Gupta, Adv.

versus

NHPC LIMITED Respondent
Through Mr.Narender Pal Singh, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for the appointment of an Arbitrator for the adjudication of disputes having arisen between the parties.

2. Brief facts of the case as per the petition are that the petitioner was awarded a contract pursuant to bids invited by the respondent for the work of construction of Concrete Dam, Coffer Dam and Slide Zone Treatment on Right Bank of Dam Axis at Rangit Hydro-Electric Project at Sikkim.

2.1 The petitioner made its claims before the respondent under various heads for outstanding payment after the completion of the contract work in the year 2000. However, despite various intimations, both written and by personal meetings, the respondent failed to process the claims of the petitioner.

2.2 After a delay of almost 13 years, the respondent rejected the claim of the petitioner vide its letter dated 3rd September, 2014.

2.3 The petitioner thereafter invoked the Arbitration Agreement between the parties vide its letter dated 4th November, 2014, but the respondent by its letter dated 2nd January, 2015 refused to appoint an arbitrator alleging that the claim of the petitioner is time barred.

2.4 Aggrieved by the refusal of the respondent in appointing the arbitrators, the petitioner has preferred the present petition for the appointment of an Arbitrator.

3. It is stated that the respondent is a Company incorporated under the Companies Act, 1956 and a Mini Ratna Category-I Enterprise of the Government of India having its registered office at NHPC Office Complex, Sector 33, Faridabad, Haryana-121003 and is involved in generation of Hydro Electric power.

4. It is not denied by the respondent that the work for construction of the Concrete Dam, Cofferdam and Slide Zone treatment on right bank of Dam Axis at Rangit HE Project (Sikkim) was awarded to the petitioner vide Agreement No.NH/CONTRACTS/CC/RGT-004 dated 4th November, 1991 with contract sum of Rs.20,04,43,950/-.

5. The scheduled period for completion of the work was admittedly up to 24th March, 1994 but the work could be completed on 31st May, 2000 after obtaining approval of final time extension.

6. It is contended by the respondent that the pre-final bill was prepared on 16th January, 2002 and balance amount of Rs.36,21,709/- was paid to the petitioner. The same was accepted by the petitioner in the measurement book without any objections or protests.

7. The petitioner had submitted the Final Bill on 3rd May, 2002 in continuation with claims submitted on 7th November, 2001. The

respondent, however, in response to the same replied vide Letter No.NH:RGT:CE: 130:2776 dated 26th December, 2001 conveying the status of the claims.

8. The petitioner, thereafter, submitted a letter in respect of deviation in quantities on 15th September, 2005 i.e. after more than 4 years. In the said letter, the petitioner had stated that they would approach the Court to appoint the sole Arbitrator under Section 11(6) of the Act.

9. After approximately two years, the petitioner vide letter No.HC/5-NHPC/RGT/1237 dated 28th February, 2007 again informed the respondent to invoke arbitration proceedings under the relevant clause of the contract. The respondent finalized the Rate Analysis and informed the petitioner for their consent vide letter No.NH/RPS/M(C)/1486 dated 4th October, 2013. The petitioner responded vide letter No.HC/5-NHP/RGT/561-562 dated 8th October, 2013. However, the petitioner never showed any interest about their claims and no communication were made by the petitioner from 28th February, 2007 to 8th October, 2013.

10. Admittedly, the respondent finalized their final bills and informed the petitioner vide letter No.NH/RPS/M (C)/2014-15/60 dated 7th April, 2014 to deposit Rs. 21,80,247 as a recovery amount.

11. After lapse of time, the petitioner submitted a notice to appoint sole Arbitrator vide letter No.HC/5/NHPC/657-658 dated 4th November, 2014. In reply, it was informed to the petitioner that their claims are barred in terms of Clause 55.5 of the contract as well as barred by limitation and the request of the petitioner was denied regarding appointment of Arbitrator. The said intimation was sent to the petitioner vide Letter No.NH/RPS/ M(C)/2014-15/2617 dated 2nd

January, 2015 in which it was also mentioned that the petitioner has filed frivolous application with the sole intention of extorting money from the respondent.

12. Having gone through the facts of the case and the material placed on record, it appears to the Court that the petition is not maintainable as request of the petitioner for appointment of an Arbitrator is at a very belated stage and is time barred in terms of the provision of Clause 55 of the Contract as well as the Limitation Act, 1963.

13. The present petition suffers from principle of waiver and acquiescence and the same is also barred by laws of limitation and it has been filed by the petitioner with an ulterior motive of wrongful gain from the respondent. There is no cause of action for the petitioner for filing the present petition at this belated stage.

14. It appears that the petitioner had raised the claims in dispute for the first time during the execution of contract through various letters and thereafter in his letter No.HC/501/RGT/4106-08 dated 7th November, 2001. The respondent had been denying his above said claim for long time even prior to this letter. The respondent vide letter No.NH:RGT:CE:130:2776 dated 26th December, 2001 informed the petitioner that he would be informed about the status regarding his payment of dues within a month. The petitioner thereafter never approached the respondent for the above said claims. The petitioner again approached the respondent for his claims only on 15th September, 2005 after the lapse of the limitation period.

15. The petitioner invoked the arbitration clause in the letter dated 15th September, 2005 and gave a notice of 30 days for sending a panel of 3 persons failing which request shall be made to the competent

Court to appoint sole Arbitrator under Section 11(6) of the Act, however, the petitioner never acted upon such invocation of Arbitration. Further, during the intervening period, the respondent never admitted petitioner's claims at any stage as per correspondence available on record. The present petition has been filed in February, 2015. In case earlier the petitioner admittedly has invoked the arbitration on 15th September, 2005 which is not denied by the petitioner, thus, the petitioner is estopped from filing the present petition before Court under Section 11 of the Act. As there is no admission or acknowledgement of the claim(s) by the respondent (which are now raised by the petitioner), the question of benefit of limitation period does not arise. The petitioner has not been able to show any material to the effect that their claims are admitted by the respondent or any assurance was given to pay the amount against them.

16. The payment in respect of Poly Grouting was made and intimated accordingly to the petitioner vide letter NH:RGT:M(C):DAM-31:701-04 dated 24th January, 2001. The security deposit was also released on 6th February, 2002 and balance amount on different heads was finalised on 7th April, 2014 and the petitioner was informed vide letter dated 7th April, 2014 that an amount of Rs.21,80,247/- is recoverable from him by the respondent. It is also a matter of fact that by letter No.NH/RGT/CE/130/2776 dated 26th December, 2001, the status of outstanding claims was informed to the petitioner. Despite of that, no further written communication was received in this regard from the petitioner. Now, raising the same and other claims on the pretext of exchange of correspondence does not help the case of the petitioner in the absence of admission of claim or any acknowledgement of dues.

17. The petitioner approached the respondent for his claims only on 15th September, 2005 after the lapse of limitation period. The petitioner invoked the arbitration clause in the letter dated 15th September, 2005 and gave a notice of 30 days for sending a panel of 03 persons failing which request shall be made to the competent Court to appoint sole Arbitrator under Section 11 (6) of the Act but the petitioner never acted upon such invocation of arbitration. It is also pertinent to mention that the petitioner by letter dated 28th February, 2007 reiterated about invocation of arbitration clause but the petitioner never acted upon such invocation of Arbitration. It was denied by the respondent that the petitioner was called for several personal meetings by the respondent. The respondent from the day one has been denying his above said claims for long time even prior to this letter. The respondent by letter No.NH/RGT/CE/130/2776 dated 26th December, 2001 informed the petitioner that he would be informed about the status regarding his payment of dues within a month. Further, the petitioner, thereafter never approached the respondent for the above said claims.

18. It is settled law that if a petition is *ex facie* barred by limitation, such claims are time barred. Reliance is placed on ***National Insurance Company Limited v. Boghara Polyfab Private Limited***, (2009) 1 SCC 267 (paras 22, 22.1, 22.2), ***Shri Satender Kumar v. Municipal Corporation of Delhi***, (2010) 168 DLT 15(Del.), ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority***, 1988(2) SCC 338 and ***Union of India v. L.K.Ahuja & Co.***, 1988 (3) SCC 76.

In the case of ***Shri Satender Kumar*** (supra), it was held as under:-

"13. The conclusion with respect to the issue of limitation therefore is that there is a separate limitation for filing of a petition seeking reference of disputes to Arbitration and which is separate from a decision on merits whether the claims are within limitation or not. The latter aspect is not seen, ordinarily, at the time of passing of an order referring the disputes to arbitration, however, if the claims which are sought to be referred are clearly barred by time on the date of filing of the petition for referring of the disputes to arbitration, then, a petition seeking reference of the disputes to arbitration is dismissed. When I say that the disputes are barred by limitation on the date of filing of the petition, what I mean, and what was meant by the learned Single Judge in the case of Progressive Construction (supra) and the Hon'ble Supreme court in L.K.Ahuja's case, is that ex facie the claims are barred by limitation i.e., from the admitted facts, it can be made out that the claims are barred by limitation. If, however, there is a disputed question of fact to decide the issue whether the claims are time barred or not, then, this issue is left open for decision in the arbitration proceedings."

19. Thus, in view of the above, the petition is barred by limitation. It is a misconceived one. The same is accordingly dismissed, with a cost of Rs.20,000/- which shall be deposited by the petitioner with the Prime Minister's National Relief Fund, within four weeks from today.

(MANMOHAN SINGH)
JUDGE

MAY 09, 2016