

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

% Order delivered on : 31st May, 2016

+ **ARB.P. 533/2015**

ARORA CONSTRUCTION CO. (P) LTD. Petitioner
Through Ms.Anusuya Salwan, Adv.

Versus

UNION OF INDIARespondent
Through Mr.P.C.Yadav, Adv (CGSE) with
Mr.Gaurav Rohilla, Adv. (GP)

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. The petitioner has filed the abovementioned petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator.
2. The petitioner is a Private Limited Company engaged in the work of Civil Construction.
3. The petitioner was awarded the work of Up-gradation, Renovation and new construction for Commonwealth Games 2010 in J.N. Stadium Sports Complex, New Delhi. SH: C/o of Boundary Wall of Stadium Complex vide Agreement No.02/EE/CWG/BW/2008-09 on 1st January, 2009.
4. As per petitioner it started the work in a right earnest however, there were substantial variation in the scope of work, which led to increase in the contractual amount to Rs.14,39,78,680/- as against the original tendered amount of Rs.6,17,45,920/-.

5. It is the case of the petitioner there were breaches on the part of the respondent. The respondent failed to provide all working drawings and site for execution of the work on the award of work. The petitioner had to incur overhead expenses towards tools & plants, escalation in costs of material & labour etc. The work was completed to the entire satisfaction of the respondent and the site was handed over to the respondent. As per the terms of the agreement, the petitioner was entitled to payment under Clause 10C and the statement for claim under Clause 10C was submitted to the Executive Engineer vide letter dated 21st July, 2011.

6. The final bill was passed on 19th November, 2011 and the respondent certified the payments under Clause 10(C) from the XI to XIII Running Accounts Bills.

7. The disputes arose between the parties with respect to additional payments, compensations and the petitioner invoked the Arbitration Clause by which the parties were governed. The Chief Engineer of the respondent appointed the Sole Arbitrator on 2nd/ 7th August, 2012 to adjudicate the disputes between the parties. The Chief Engineer referred five claims of the petitioner to the Sole Arbitrator.

8. The appointment of the Sole Arbitrator Sh.V.K. Malik was challenged by filing a petition under Section-12 of the Arbitration & Conciliation Act, 1996 and the Ld. Sole Arbitrator vide letter dated 27th September, 2013 resigned as Arbitrator.

9. Thereafter on 11th February, 2014, the respondent appointed Mr.G.C. Kabi as the Sole Arbitrator to adjudicate the disputes between the parties. The respondent referred the Counter Claims to the Sole Arbitrator for adjudication for an amount of Rs.6,03,7501-.

10. On 30th June, 2014, the petitioner requested the Chief Engineer to refer to Additional Claims relating to interest and cost which were referred to the Sole Arbitrator vide letter dated 19th November, 2014. After some time, the claimant on 7th March, 2015 requested for reference of the Additional Claims towards 10 C to the Sole Arbitrator as the arbitration proceedings.

11. The respondent in April, 2015 did not agree and opposed the request of the petitioner and declined to refer the claim for payment under Clause 10 C on the ground that the request for reference of the said claim was an afterthought whereas the parties under the contract were governed by Clause 10 C by virtue of which the petitioner was entitled to payment towards escalation in labour and petitioner already submitted all what was required to make the claim towards Clause 10 C.

12. As the respondent did not refer the Additional Claim No.3 to the Sole Arbitrator, the petitioner has filed the abovementioned petition requesting that the additional claims may also be referred to the same sole Arbitrator to consider the said claim while exercising the power under Section-23 of the Arbitration & Conciliation Act, 1996.

13. In reply, the objection is raised by the respondent that the two types of claims were made by the petitioner namely claim under clause IOCA and 10C. It is submitted that former related to the construction material such as cement, steel and the later was related to the labour component. The required payment against 10CA has already been effected.

14. It is stated that the work had been executed as per agreement conditions and the petitioner never protested during the work, as is

evident from the fact that no written complaint or any correspondence was ever made to higher authorities. As per clause 6A of agreement the petitioner itself had prepared the bill and when it was passed by the department the petitioner has accepted the bill.

15. The Final bill for the above noted work including bill for reimbursement under Clause 10C was submitted by the petitioner dated 21st July, 2011 received in the office of the respondent on 8th August, 2011. In which the petitioner had claimed reimbursement under clause 10C which was scrutinized and examined and found that the required accounts to substantiate the actual payment made to labour was not attached. This account is necessary as per provisions of clause 10C. Consequently the agency was directed by the department vide letter no.54(5)/EE/CWGDVII/2011-12/80E Dated 21st September, 2011 to submit the necessary documents so that the reimbursement can be made. But the agency did not submit the papers and as per clause 6a prepared the final bill on 11th November, 2011 and accepted the payment on 15th November, 2011 without protest. Even otherwise the same are now barred by limitation.

16. The term of the agreement that parties were governed under Clause 10CA and 10C. The final bill was partly paid on 19th November, 2011, but in the said bill the respondent made some deductions & reductions and did not make payments towards various claims as alleged by the petitioner, therefore the said bill cannot be termed as a final bill as alleged.

17. The agreement has provided for payment of escalation towards labour and material in terms of the escalation clause namely Clause 10C of the agreement. It is stated by the petitioner that the bill

towards Clause 10C was submitted from time to time including in the final bill and the final bill was passed on 19th November, 2011 and in the said final bill the respondent certified the payments under Clause 10C from the 11th to 13th running account bills. It is contended by the petitioner that the contention of the respondent that the details were not attached is incorrect as along with the letter dated 22nd November, 2011 the petitioner had filed the relevant notifications of minimum wages in Delhi which required. Moreover as per the certificate issued by the office of the Labour Welfare Commissioner, CPWD at page 26 of the document filed, the petitioner was granted the following certificate:

"This is to certify that there is no complaint pertaining to non payment/ less payment of wages pending in respect of the above work as per the records of this office till date".

18. The contention of the respondent therefore that only on acceptance of the final bill no further payment is to be made is completely contrary to the settled law that mere acceptance of the final payment does not bar further claims to be raised.

19. The letter dated 23rd April, 2015 issued by the respondent rejecting the reference of the said dispute to arbitration was contrary to law as the arbitration proceedings are pending and the dispute as to payment under Clause 10C was yet to be adjudicated between the parties. It is submitted that the respondent have made payment under Clause 10C of the running account bill and stopped making payment thereafter and therefore there was no reason for non-payment under the agreed terms of agreement.

20. The effect of Clause 10C has to be seen by the Arbitrator and not the respondent. As regards the chart with respect to the dates, it

is submitted that under Section 23 of the Arbitration & Conciliation Act the petitioner have a right to make amendments and submit additional claims for adjudication. The petitioner has been agitating the reference of Claim 10C but the said reference has been declined by the respondent.

21. Pertaining to the objection of limitation, in view of the facts of the present case it is a continuous action as decided in ***Rashtriya Ispat Nigam Ltd. v. M/s Prathyusha Resources and Infra Private Ltd.***, AIR 2016 SCC 861. The extract of para 5 and 6 are reproduced:

"5. We shall now consider the settled law on the subject. This Court in a catena of judgments has laid down that the cause of action arises when the real dispute arises i.e. when one party asserts and the other party denies any right. The cause of action in the present case is the claim of the respondent/claimant to the determination of base year for the purposes of escalation and the calculation made thereon, and the refusal of the appellant to pay as per the calculations.

6. We find that the view taken by the High Court is correct as to when the real dispute arose between the parties to be adjudicated by the Arbitrator. It is nobody's case that the contract came to an end on 23.10.1997, but the difference on determination of base year first arose in the letter dated 15.7.1996. The said letter is already controverted as the service of the same was seriously contested before in Arbitration. However, the said letter was there even before completion of the work and prior to that the respondent/claimant had reserved his right to claim money later since the contract was still subsisting then. In light of the above reservation by the respondent/claimant, bills were raised in 1998 vide letter dated Page 5 5 4.9.1998, which actually resulted into exchange of letters which formed the base of dispute between the parties. It is an admitted fact that the bills were not finalized as could

be seen from the letters dated 7.2.2000 and 9.5.2000. Therefore, we find that the findings of the learned Arbitrator and concurrently affirmed by the High Court are correct on the point that the cause of action arose on or after 4.9.1998. Hence, the said letter by the respondent/claimant to the appellant to initiate arbitration was not barred by the law of limitation."

22. At this stage no final conclusion be drawn in view of many objections raised by the respondent. The same have to be decided on merit. The respondent is always at liberty to raise the same before the Arbitral Tribunal who without any influence of this order would decide the same on merit.

23. Under these circumstances, the prayer is allowed. The additional claims are also referred to the same arbitrator.

24. No cost.

MAY 31, 2016

**(MANMOHAN SINGH)
JUDGE**