

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.195 OF 2014

ORDER:

Heard learned counsel for the applicant and the learned counsel for the respondent.

2. It is not in dispute that the applicant and the respondent are parties to a contract in furtherance of which Annexure-5 Work Order, dated 20.01.2007 was issued. Clause 20 of that Work Order provides for arbitration. This application is instituted by contending that there are disputes which are to be resolved, as is discernible from the series of correspondence, which are produced along with this application. It appears that there were suggestions as between the parties as to who may be the Arbitrator. The parties could not agree on the identity of the person to be appointed as Arbitrator. This application is, therefore, filed on the strength of clause 20 of the Work Order, which provides for arbitration. That clause does not contain any particular procedure for appointment of Arbitrator, but states that the arbitration shall be as per "the Indian Arbitration Act, 1996", meaning thereby, the Arbitration and Conciliation Act, 1996; "for short, the A&C Act".

3. The respondent has contested the application by pleading that the claims raised are not sustainable in view of the terms of the Work Order and that the applicant has concurred to the concluded decision as regards the total amounts payable and had received the amounts due to the applicant under the Work Order. Annexure-R2 is placed on record to show that amounts covered thereby is finally settled and paid by the respondent to the applicant under due receipt. It is also pleaded that the claims have become time barred in

view of the fact that the bill was finalized on 31.05.2009 and payment was received by the applicant on 31.08.2009.

4. The learned counsel for the applicant making reference to the Judgment of the apex Court in **National Insurance Company Limited vs. Boghara Polyfab Private Limited**¹ argued for the position that discharge of a contract by performance cannot be assumed on the facts and circumstances of the case in hand, particularly when the so-called full and final settlement of claims does not really amount to such settlement and payment of all amounts due to the applicant from the respondent. The learned counsel for the applicant further argued that the question of limitation sought to be raised by the respondent is essentially a question which is not a pure question of law on the admitted facts and therefore, such issue is also a matter that may be left for decision by the Arbitrator.

5. The question whether time is of the essence of the contract between the parties is essentially a mixed question of fact and law. This can be easily be noticed from the fact that even as per Annexure-R1, the respondent's request to the applicant was to put its best efforts and complete the balance work at the earliest so as to enable the respondent to view the grievance of the applicant favourably. That letter was in response to the claim of the applicant for a price escalation and for payment for supply of Geogrid Materials. As is discernible even from Annexure-R2, the description of the works as 'RE Blocks Production, Arrangement of Fortrac Geogrids at Site, Erection of RE Wall at Site" etc., is essentially

¹ (2009) 1 SCC 267

indicative of the fact that they are part of construction activity and the type of contract may be a relevant factor to decide whether the claims of the applicant have become barred by limitation.

6. The plea of the respondent that as to full and final settlement and the further plea that, following Annexure-R.2, the accounts were finally settled do not call for adjudication in this application in view of the fact that such questions are justiciable for adjudication, be it in civil Court or before the Arbitrator. There is no clinching material to hold that the contract between the parties has resulted in such discharge by performance so as to exclude any further adjudication.

7. For the aforesaid reasons, it is held that this application is entitled to succeed since the parties have not agreed to the appointment of any person as Arbitrator as a requisite measure is required to be taken in terms of Section 11(6) of the A&C Act. This application is, hence, allowed.

8. In the result, this Arbitration Application is allowed appointing an Arbitrator.

9. Accordingly, Sri Justice A.Ramalingeswara Rao, a former Judge of this Court is appointed as Arbitrator to arbitrate on the disputes between the applicant and the respondent, including the claims and counter claims of both sides. The said Arbitrator shall enter on reference and proceed with, as enjoined by the A&C Act. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

14.09.2018
pln