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

\+ **<u>O.M.P. (COMM) 27/2018</u>**

Date of decision : 27th November, 2018

SHRI K.R. ANAND ..... Petitioner

Through: Mr.Harish Malhotra, Sr. Adv. with Mr.Rajender Agarwal, Adv.

versus

NAVAYUGA ENGINEERING CO LTD ..... Respondent

Through: Mr.Pranay Agarwala, Mr.Sarthak Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

<u>NAVIN CHAWLA, J. (Oral)</u>

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Award dated 16.11.2017 by which the Sole Arbitrator has dismissed the claims filed by the petitioner on the ground of the same being barred by the Law of Limitation.

2. The disputes between the parties had arisen out of the Sub Contract Agreement dated 10.12.2004 executed between the parties. The respondent had been awarded a Contract by the Public Works

Department (PWD), Delhi for construction of "bridge across river Yamuna" near Geeta Colony, Delhi.

3. The respondent entered into the above mentioned Sub Contract with the petitioner on back to back basis awarding certain portion of the work under the Contract to the petitioner. The work was to be completed within a period of 36 months. The work was eventually completed by the petitioner on 22.12.2008. In the meantime, certain disputes arose between the respondent and the PWD and the respondent invoked the Arbitration Agreement on 04.06.2008 and 16.04.2009 against the PWD.

4. The petitioner raised three final bills dated 15.03.2010/17.03.2010 on the respondent. Upon receipt of the payment, the petitioner also issued certificates of receipt of the amount of the bills. The said payment was made by the respondent to the petitioner on 17.03.2010.

5. The arbitration proceedings between the respondent and the PWD resulted in an Arbitral Award dated 26.12.2011. The said Award was challenged by the PWD before this Court by way of OMP No. 420/2012. The said petition was allowed by this Court vide its judgment dated 31.03.2014. However, on an appeal filed by the respondent, being FAO (OS) No. 264/2014, the judgment passed by the Single Judge was partially modified by the Division Bench, allowing certain claims of the respondent against the PWD. The respondent as also the PWD challenged the said order before the Supreme Court by way of their respective Special Leave Petitions. It is

at this stage that the petitioner, relying upon the Arbitral Award, raised the claims against the respondent.

6. The respondent in its Statement of Defence took a plea of the claims being barred by limitation. The respondent separately filed an application under Section 16 of the Act contending that as the Award has not gained finality, being a matter of challenge before the Supreme Court, the Arbitrator should adjourn the arbitration proceedings to await the outcome of the Special Leave Petitions filed by the respondent as also by the PWD.

7. The Arbitrator by his Impugned Award has accepted the plea of the respondent that the claims of the petitioner were barred by the Law of Limitation. The Arbitrator has held that the petitioner having issued a certificate of receipt of the full and final settlement of its bills, cannot turn around and claim further amount from the respondent. The Arbitrator further holds as under:-

> *"18. The facts of the present case are not in dispute with the main contract between the Respondent and the PWD was executed in 2004. The sub contract between the Respondent and the Claimant was executed on 10th December, 2004. The work was to be completed till 2008. It was done timely by the Claimant in the year 2008, the running bills were paid to the Claimant as and when raised till the time the final bill was raised in 2010, which were paid to the Claimant, in as much as the Claimant himself has issued three different certificates with regard to the receipt of full and final payment of the entire bill without any restoration. It may be worthwhile to reproduce herein, the language of one of the bills, where the factum of full and final settlement in the certificate is recorded which reads as under:*

" K.R ANAND ENGINEERS & CONTRACTORS
A 1/175, JANAKPURI, NEW DELHI 110058

TO WHOMSOEVER IT MAY CONCERN

We have received an amount of Rs.1,58,14,768/- (Rupees one crore fifty eight lakhs fourteen thousand seven hundred sixty eight only) from M/s Navayuga Engineering Company Limited through cheque no.549687 dated 17.03.2010 of ICICI Bank Ltd ***against our full & final bill of the project****, namely Bridge Across River Yamuna near Geeta Colony, Delhi*

Sd /- forK R Anand"

"K R ANAND ENGINEERS & CONTRACTORS
A 1/175, JANAKPURI, NEW DELHI 110058

TO WHOMSOEVER IT MAY CONCERN

We have received an amount of Rs.9,13,954/- (Rupees nine lakhs thirteen thousands nine hundred fifty four only) from M/ s Navayuga Engineering Company Limited through cheque no.549682 dated 17.03.2010 of ICICI Bank Ltd ***against our full & final bill of the project****, namely Bridge Across River Yamuna near Geeta Colony (Road portion) Section II, Guide Bund Approach & Embankment (Labour contract for Staging , shuttering & Reinforcement)*

Sd/- forK R Anand"

"K R ANAND ENGINEERS & CONTRACTORS

A 1/175, JANAKPURI, NEW DELHI 110058

TO WHOMSOEVER IT MAY CONCERN

We have received an amount of Rs.7,79,625/- (Rupees six lakhs seventy nine thousands six hundred twenty five only) from M/s Navayuga Engineering Company Limited through cheque no.549683 dated 17.03.2010 of ICICI Bank Ltd ***against our full & final bill of the project****, namely Bridge Across River Yamuna near Geeta Colony, (Road portion) section II Guide Bund, Appraoch & Enbankment (work order for earthwork in excavation for roads)*

Sd/- for K R Anand "

21. The aforesaid facts clearly show as the Claimant has issued a certificate that it has recevied full and final payment towards settlement of final bill, labour contract, staging and shuttering and for earth work of excavation in the year 2010 itself. Having done so, it is not open for the Claimant in the year 2015- 2016 turn around and claim that it is entitled to increase labour and material charges. Even if it is assumed that Claimant was entitled to raise a dispute regarding payment of enhanced rates or escalation because it has erroneously issued the certificate (which is not its case), it ought to have done within 3 years from the date when the last payment was received or when the certificate of final settlement was issued. Even this period would end in 2013. This clearly indicates that the Claimant was not entitled to any amount due or payable. Even for the sake of argument if it is assumed that the said certificate was issued by the Claimant to the Respondent under erroneous impression, still at best, the cause of action is deemed to have been accrued to the Claimant in the year 2010 and the suit for recovery of the amount which according to the Claimant was due and payable ought to have been initiated either in a civil court by way of Arbitral Tribunal within a period of three years from the date of such an accrual. This has not been done and therefore, ex-facie the claim of the Claimant is not sustainable in the eyes of law and even if it is contended and evidence taken, arguments *heard, it has ultimately failed because of the aforesaid reason. The contention of the Ld.Senior Counsel for the Claimant that the arbitration was invoked by the Respondent with the PWD before the final payment to the Claimant, therefore the question of limitation will not apply to it is untenable in law. The question is not when the Respondent invoked the arbitration but the question is whether the claim of the Claimant was within limitation from the date of accrual of cause of action. Similarly, the contention of the Ld. Senior Counsel that whatever escalated amount is received by the Respondent cannot be appropriated by it alone. It was to be given to the Claimant in respect of the work executed by it. This is absolutely correct proposition on ground of morality but not in law. Law of limitation only bars remedy but does extingush the right of the respondent wants to pay any money to the Claimant of its own freewill as and when it gets, it may do so but the Claimant cannot force the Respondent to pay the same by restoring processes to law which includes present arbitration proceedings.*

22. In addition to this, the respondent is also stopped now to change his stand after having chosen to issue the certificate to the respondent towards the satisfaction of full and final settlement of claim. This cannot be permitted to be done. The Claimant has frequently referred to the word 'assurance' was given by the respondent, it would give the increased or enhanced rate proportionally once it succeeds in the arbitration proceedings with the PWD. Assurance cannot put the law of limitation in abeyance. What is barred by law of limitation to be recovered in civil court cannot be received in an arbitration proceedings. Only the forum changes but the law remains the same. This is despite the fact I have not referred to cause of action having accrued to the Claimant in the year 2008, when the work was completed. Even if it is given a liberal meaning to assume that cause of action arose in the year 2010, even then it is barred by limitation because proceedings for arbitration *having been started in the year 2015 or 2016. The purpose of the arbitration proceedings is to have expeditious resolution of disputes and not to subject one of the parties to undue harrasment."*

8. The learned senior counsel for the petitioner submits that the Contract in question was a back to back Contract. Relying upon Clauses 9 and 14 of the Agreement, he submits that the petitioner was entitled to raise a claim for escalation only upon the receipt of the amount by the respondent from the PWD. Therefore, it is only upon passing of the Award in favour of the respondent in the arbitration proceedings between the respondent and PWD, that the cause of action arose in favour of the petitioner.

9. He further submits that the abstract of the bills relied upon by the respondent were not complete as the complete copy bore an endorsement of the petitioner to the effect that the petitioner would raise its bills of escalation after the Award in the arbitration proceedings between the respondent and the PWD becomes enforceable.

10. He further submits that even the application of the respondent filed under Section 16 of the Act was for seeking postponement of the arbitration proceedings till the Supreme Court gives a decision on the appeals filed by the respondent and the PWD. Clearly, therefore, the Arbitrator could not have decided the issue of limitation without giving an opportunity to the petitioner to lead evidence in support of its claim.

11. I have considered the submissions made by the learned senior counsel for the petitioner, however, find no merit in the same. Curiously the Statement of Claim filed by the petitioner before the Arbitrator did not make any reference to the final bills raised by the petitioner on the respondent on 15.03.2010/17.03.2010. It did not even make any reference to the certificates of full and final payment received by it from the respondent. Such payments had been received by the petitioner on 17.03.2010. Between 2010 to 27.04.2016, when the petitioner raised demand for payment from respondent, there has been no correspondence or claim raised by the petitioner on the respondent for the amount of escalation.

12. The learned senior counsel for the petitioner submits that the fact of issuance of the full and final bills as also the certificates had been explained by the petitioner in its rejoinder filed before the Arbitrator. He further submits that between 2010 to 2016 claim could not be raised against the respondent as the Award passed in favour of the respondent had been challenged by the PWD before this Court and was therefore, not enforceable.

13. I do not find the above plea as sufficient justification for the failure of the petitioner to disclose the factum of the full and final settlement in its Statement of Claim or for it not raising any claim on the respondent between the period of 2010 to 2016. The Statement of Claim filed by the petitioner, after giving a summary of the facts, merely asserted the following as a justification for raising the disputes at a belated stage:-

"10. That since the principal contract was between the Respondent and Public Works Department, Govt of NCT only and since the Claimant could not have invoked the arbitration directly against Public Works Department, Govt of NCT, therefore, it was agreed between the Claimant and the Respondent that the Respondent will invoke arbitration and the Claimant would be paid for the work done by it as per the rates awarded from the amounts that may be awarded in arbitration and the Claimant would be paid the proportionate amount for damages and loss of profit and that the Claimant would also be entitle to claim interest for the delayed period, whatever may be awarded by the arbitrator."

14. It is also relevant to note that the order dated 21.12.2016 passed by this Court in OMP (I) (COMM) 463/2016 (petition filed by the petitioner herein under Section 9 of the Act), while appointing the arbitrator, had also recorded the submission of the respondent that the claims of the petitioner are barred by limitation. In spite of knowledge of this objection, the petitioner sought to wish away the same by making general and vague assertion as reproduced hereinabove in its Statement of Claim.

15. The learned Arbitrator in his Impugned Award has held that even if the above plea of the petitioner is to be accepted, mere assurance of the respondent cannot lead to the extension of the period of limitation; it was for the petitioner to have raised its bills for escalation in accordance with the terms of the Agreement during the relevant period. No fault can be found with this finding of the Arbitrator.

16. Clause 9 and Clause 14 of the Agreement between the petitioner and the respondent are reproduced hereinunder:-

> *"9. That Escalation Clause shall be as per main contract provisions, but shall be shared in proportion of actual quantities by KRA vis-à-vis total quantity.*
>
> *xxxxxx*
>
> *14. That the payment for the bills submitted by KRA, for their scope of work, shall be made immediately within 7 (seven) days from the date of receipt of payment from PWD, Delhi."*

17. The above said Clauses have to be read alongwith Clause 13 of the Agreement which requires the petitioner to raise the bills for the work done by it. The same are to be verified by the respondent and thereafter consolidated with the respondent's bills raised to the PWD. Admittedly, the petitioner had not raised any bill for the amount now being claimed by the petitioner. Clause 13 of the Agreement is reproduced hereinunder:-

> *"13. That KRA shall raise bills at contract rates, as a sub-contractor in accordance with contract provisions, for their scope of work on NEC, who after due verification and quality check, will consolidate the same with NEC's bill and submit the same to the Employer."*

18. It may be true that the respondent on its own raised the claim for even the items executed by the petitioner before the PWD, however, the same cannot extend the period of limitation for the petitioner. The respondent may or may not have been successful in its claims raised against the PWD, however, this was the call of the

respondent alone. The benefits and the disadvantages therefore would fall in the kitty of the respondent alone. Merely because the respondent eventually succeeded in its claim, the petitioner cannot wake up from its slumber and claim a part of that kitty.

19. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 27, 2018/*rv*