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

Date of Decision: 4th December, 2018

+ **O.M.P. (COMM) 50/2017**

RANJIT SINGH

..... Petitioner

Through: Mr. Sanjeev Kumar, Mr. H. K. Naik,
Mr. Deepak Singh, Mr. Rajnish, Mr.
Sanjay Kumar, Mr. Ajay Amritraj,
Mr. Sudhansu Palo and Ms. Padma
Choudhary, Advocates.
(M:9810261109 & 7503500238)

versus

MANOJ GUPTA

..... Respondent

Through: Respondent in person.
(M:9210159946)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. Present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*) has been filed challenging the award dated 15th February, 2010 passed by the learned Sole Arbitrator. Vide the impugned award, the learned Sole Arbitrator has rejected the claims filed by the Petitioner/Claimant on the ground that the same are barred by limitation.

The operative portion of the award reads as under:

“22. A perusal of the judgment in the case of SBP & Co. (Supra) would show that the Court was considering the nature of the order made by the Chief Justice while deciding a matter under Sec 11(6) of the Arbitration and Conciliation Act, 1996. In this context it was observed that since the Chief Justice has to decide certain contention between the parties the order is a

judicial order and not an administrative order. It was held that the Chief Justice is bound to decide if the petitioner has approached the Court having jurisdiction in the matter. There is a valid arbitration agreement in terms of section 7. The person before him is a party to the arbitration agreement and there is a valid dispute in terms of the arbitration agreement capable of being decided through arbitration. The existence of dispute referred to in this judgment has to be seen in the context of the agreement as opposed to extinguishment of the rights of the parties to approach the Court by limitation. The law of limitation does not destroy the rights of the parties. It is only a law of procedure enacted to remove the uncertainty regarding initiation of proceedings as the law expects the law expects the person aggrieved to commence action for redressal of grievances within a specified time. The Limitation Act does not extinguish a right but only bars the remedy. The plea of limitation has to be raised before the arbitral tribunal and decided by it.

23. A perusal of the order dated 07.08.2009 passed in arbitration petition No.79/08 would show that the respondent did not appear and contest the application U/s 11 (6) of the Arbitration and Conciliation Act. The question of limitation was never heard or decided by the Court. The mere fact that the court appointed the arbitrator would not mean that the Court considered the question of limitation and decided the same. It appears that the question of limitation was never considered by the Hon'ble High Court and arose for the first time before this Tribunal. This Tribunal thus has the jurisdiction to decide the question of limitation. I therefore find that the claim of the claimants is barred by limitation.”

2. In brief the case of the Petitioner is that they entered into a collaboration agreement dated 25th June, 1997 (hereinafter ‘agreement’)

with the Respondent Shri Manoj Gupta. The Petitioner before this Court is Shri Ranjit Singh, who is brother of Shri Attar Singh, who was one of the parties to the collaboration agreement. As per the said agreement, the Respondent was to develop property bearing No.229 in Khasra No.378, situated at Masjid Moth Village, New Delhi, admeasuring 300 Sq. Yards. The Respondent was to construct and give to the owners five flats on the second floor and five flats on the third floor of the property along with a sum of Rs.25 lakhs. The Petitioner does not dispute the fact that the flats, as per the agreement, have been given. However, it is Petitioner's claim that Rs.15 lakhs remained unpaid. Notice dated 12th December, 2008 was issued by the Petitioner invoking the arbitration clause in the agreement, which reads as under:

"9. That in case of any dispute in between the parties in respect to the said agreement of any matter incidental thereto, the matter will be referred to a mutually appointed arbitrator, whose decision in the matter will be final and binding in between the parties and no party will have the right to challenge such decision of the arbitrator in any court of law."

3. No reply was received to the notice invoking arbitration and, accordingly, the Petitioner preferred a petition under Section 11 of the Act being ARB.P.79/2009. The same was disposed of vide order dated 7th August, 2009 in the following terms.

"I have heard learned counsel appearing for the petitioner. The respondent is absent despite service. The Collaboration Agreement between the parties contains an arbitration clause being Clause 9 which reads as follows:

"That in case of any dispute between the parties in

respect to the said agreement of any matter incidental thereto, the matter will be referred to a mutually appointed arbitrator whose decision in the matter will be final and binding in between the parties and no party will have the right to challenge such decision of the arbitrator in any court of law."

*Since disputes arose between the parties, the petitioner invoked the arbitration clause vide notice dated 12.12.2008. The respondent has not cared to reply to the notice, nor has filed the appearance in the present proceedings. I appoint **Mr. Dinesh Dayal, District Judge (Retd.)** as the sole arbitrator to adjudicate upon the disputes between the parties. The fees of the arbitrator is fixed at Rupees One Lakh to be shared equally by both the parties."*

4. After the Sole Arbitrator was appointed by this Court, the Petitioner filed its claim statement before the learned Arbitrator. The Respondent initially did not appear in the matter but at the time when the final arguments were heard on 5th February, 2010, the Respondent appeared and filed an application under Section 16 of the Arbitration and Conciliation Act, 1996, challenging the jurisdiction of the arbitrator. Respondent also submitted that he is not in a position to engage counsel or pay even half of the Arbitrator's fee.

5. Learned Arbitrator thereafter, went into the claims and held that the claims are barred by limitation. Paragraph 19 of the award is relevant and extracted herein below:

"19. The limitation for filing the suit for recovery of balance amount due on contract is governed by Article 113 of the schedule to the Limitation Act, 1963. This Article provides that the limitation for filing any suit for which no period of limitation is provided elsewhere

in this schedule is three years from the date when right to sue accrues. Apparently, arbitration proceedings were commenced by the claimants almost 10 years after the right to sue accrued to the claimants. Claim is thus barred by limitation and is not maintainable.”

6. It is submitted by Mr. Sanjeev Kumar, learned counsel appearing for Petitioner that the learned Arbitrator had no jurisdiction to hold that the claims are barred by limitation, inasmuch as the question whether a claim is dead or alive is to be decided only by the Court. It is submitted that the Court, while making reference, is deemed to have considered the live nature of the claim. He relies upon the judgments of the Supreme Court in ***SBP & Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618*** and ***National Insurance Company Limited v. Boghara Polyfab Private Limited, (2009) 1 SCC 267***.

7. The Respondent on the other hand submits that the Petitioner has no locus either to be a party to the arbitration proceedings or to maintain a challenge to the award as he is not a party to the arbitration agreement or the collaboration agreement. He further submits that the learned Arbitrator had no jurisdiction to entertain the claims as the same were time barred.

8. This Court has first seen the locus of the Petitioner. It is claimed by the Petitioner that he is the brother of Shri Attar Singh, who was party no.1 in the collaboration agreement. It is submitted by learned counsel that Shri Attar Singh has passed away and even in the arbitration proceedings the Petitioner Shri Ranjit Singh was a party.

9. Since the Petitioner Shri Ranjit Singh had impleaded himself before the Arbitrator and had also filed the claim petition before the learned Arbitrator, this Court is not going behind the same.

10. Coming to the question of limitation and whether the learned Arbitrator can decide the same, the observations of the Supreme Court in ***Patel Engineering case (supra)*** are that the Chief Justice, under 11(6) usually pronounces on the jurisdiction of the Arbitrator, whether there is an arbitration agreement and whether there is a live and subsisting dispute. Once the learned Arbitrator is appointed, the Arbitral Tribunal has to decide the disputes on merits. The observations in ***Patel Engineering case (supra)*** are relevant and set out herein below:

“32. Moreover, in a case where the objection to jurisdiction or the existence of an arbitration agreement is overruled by the Arbitral Tribunal, the party has to participate in the arbitration proceedings extending over a period of time by incurring substantial expenditure and then to come to court with an application under Section 34 of the Arbitration Act seeking the setting aside of the award on the ground that there was no arbitration agreement or that there was nothing to be arbitrated upon when the Tribunal was constituted. Though this may avoid intervention by court until the award is pronounced, it does mean considerable expenditure and time spent by the party before the Arbitral Tribunal. On the other hand, if even at the initial stage, the Chief Justice judicially pronounces that he has jurisdiction to appoint an arbitrator, that there is an arbitration agreement between the parties, that there was a live and subsisting dispute for being referred to arbitration and constitutes the Tribunal as envisaged, on being satisfied of the existence of the conditions for the exercise of his power, ensuring that the arbitrator is a qualified arbitrator, that will put an end to a host of disputes between the parties, leaving the party aggrieved with a remedy of approaching this Court under Article 136 of the Constitution. That would give

this Court, an opportunity of scrutinizing the decision of the Chief Justice on merits and deciding whether it calls for interference in exercise of its plenary power. Once this Court declines to interfere with the adjudication of the Chief Justice to the extent it is made, it becomes final. This reasoning is also supported by sub-section (7) of Section 11, making final, the decision of the Chief Justice on the matters decided by him while constituting the Arbitral Tribunal. This will leave the Arbitral Tribunal to decide the dispute on merits unhampered by preliminary and technical objections. In the long run, especially in the context of the judicial system in our country, this would be more conducive to minimising judicial intervention in matters coming under the Act. This will also avert the situation where even the order of the Chief Justice of India could be challenged before a Single Judge of the High Court invoking the Article 226 of the Constitution of India or before an Arbitral Tribunal, consisting not necessarily of legally trained persons and their coming to a conclusion that their constitution by the Chief Justice was not warranted in the absence of an arbitration agreement or in the absence of a dispute in terms of the agreement.”

11. The judgment in ***Patel Engineering case (supra)*** has been subsequently considered in ***National Insurance case (supra)*** wherein the Supreme Court has categorised the various issues, which the Court has to rule upon in a section 11 petition. The three categories are set out in paragraph 22 of the said judgment and extracted herein below:

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three

categories, that is, (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

12. The question, as to whether the claim is dead or alive, falls in category no.2. In respect of this, the observation of the Supreme Court is as under:

“23. It is clear from the scheme of the Act as explained

by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.”

13. A perusal of the above observations of the Supreme Court shows that insofar the issues falling under the second category are concerned, the Chief Justice has the option to either decide the same in the section 11 petition or leave the issue open with a direction to the Tribunal to decide the same. The Supreme Court has clearly observed that the issue in respect of the dead or live nature of the claim would require evidence to be taken and hence the Chief Justice has the option to direct the Arbitrator to decide.

14. The issue of limitation clearly does not fall in category no.1. Coming to the facts of the present case, it is seen that in the order appointing the Arbitrator, the Respondent had not entered appearance. This is clear from the reading of the order dated 7th August, 2009. The said order records that the Respondent was absent despite service. The question of limitation, obviously at that stage, was not raised and was also not considered by the

Court. Under such circumstances, could the learned Arbitrator have considered the question of limitation and rejected the claims or is it to be presumed that the Chief Justice had, in fact, considered and rejected the objection as to limitation.

15. Limitation can be decided as a preliminary issue without going into merits, depending upon the facts and circumstances of a particular case. However, on most occasions, limitation is also a mixed issue of fact and law, which requires adducing of evidence by the parties. Clearly in the order dated 7th August, 2009 the question of limitation was neither raised nor considered. Limitation being an issue, which falls in category no.2 as per *National Insurance case (supra)*, the Chief Justice has the option of deciding it in the section 11 petition or leaving the issue to be decided by the Arbitral Tribunal. Since no question of limitation was raised at that stage, it has to be presumed that the said issue was left to be decided by the Arbitral Tribunal. It cannot be said, contrary to the express reading of the order dated 7th August, 2009, that the issue of limitation was decided by the Court at the time of appointing the Arbitrator.

16. Arbitrators and Arbitral Tribunals, have to decide the issue of limitation in different fact situations. There could be a situation where objection as to limitation may be raised in respect of some claims and not others. To hold that the Arbitral Tribunal cannot decide the issue of limitation, once a Court appoints the Arbitrator, would put shackles on the powers of the Arbitral Tribunal which the Act clearly does not intend.

17. Learned counsel for the Petitioner further submits that since there were no express directions by the Chief Justice at the time of appointment of the learned Arbitrator conferring the power on the Arbitral Tribunal to

decide the issue of limitation, the Tribunal could not have gone into the limitation issue. This contention, though appealing at first blush, would completely denude the powers of Arbitrators to a great extent, especially in cases like the present one where the learned Arbitrator was appointed without any contest. Thus, it cannot be held that the learned Arbitrator did not have the power to adjudicate on limitation. The learned Arbitrator had arrived at a decision that the agreement dated back to 1997 and the first notice for arbitration was itself given in 2008. More than 10 years having passed, no fault can be found in the findings of the learned Arbitrator that the claims are barred by limitation.

18. OMP is, accordingly, dismissed with no orders as to the costs.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 04, 2018/dk