

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

ARBITRATION APPLICATION Nos.154, 155 and 156 of 2013

ORDER :

Heard Sri Keerthi Prabhakar, learned counsel for applicant and Sri K.R. Koteswara Rao, learned counsel for respondent in all the three applications.

The case of the applicant:

2. These applications have been filed under Sections 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for short “the Act”) seeking appointment of an Arbitrator to resolve the disputes between the applicant and the respondent in respect of three contracts i.e.,

(i). 1st Contract: Contract for maintenance and repair to main roads (widening) with centralized HMP and Paver in the Secunderabad Cantonment for 2000-2001 bearing No.CBR No.1(15) dt.23.09.2000;

(ii). 2nd Contract: Annual Term Contract for maintenance and repairs to main roads in Secunderabad Cantonment for 2001-02 bearing No.CBR No.1(37/1) dt.27.09.2001; and

(iii). 3rd Contract: Annual Term Contract for Maintenance and Repairs to internal roads in Secunderabad Cantonment for 2001-02 bearing No.CBR No.1 (37/2) dt.17.09.2001.

3. Applicant is a registered partnership firm and had been awarded the above three contracts which are worth Rs.1.59 crores, Rs.1.50 crores and Rs.2.40 crores respectively.

4. In regard to the 1st contract, the contention of the applicant is that though all the works were completed on 31.03.2002 itself, the respondent did not pay the final bill; that the respondent also failed to make payment of 'Re-imbursement/refund on variation in price' in terms of the contract; that on 08.09.2003, claim was put forth by the applicant to pay price escalation as per clause 2.2.46 of General Conditions of Contract/part of the agreement between the parties; that several letters were addressed by the applicant to the respondent on 07.11.2006, 13.01.2007, 25.08.2007, 12.12.2007, 08.04.2008, 03.06.2008, 26.12.2008 and 21.03.2009; that clause 17 of the agreement between the parties contains an Arbitration Clause providing for reference of disputes to a sole arbitrator appointed by the President, Cantonment Board, Secunderabad; the notice dt.07.11.2006 issued by the applicant to the respondent contained a request for appointment of an arbitrator, which was reiterated in the letter dt.21.03.2009 and 30.01.2010 by the applicant, but only for the first time on 16.02.2010, a reply notice was issued by counsel for respondent stating that there is no dispute to be adjudicated by an arbitrator and that if still the applicant insists on the same, the matter will be placed before the President, Cantonment Board, Headquarters,

Andhra Sub-area, who is the appointing authority of a sole arbitrator to take decision in that regard.

5. The applicant insisted on appointment of arbitrator by letter dt.30.09.2010, but it was informed by the respondent on 10.11.2010 that the President of the Cantonment Board had rejected applicant's request for appointment of an arbitrator. Therefore arbitration application No.155 of 2013 came to be filed.

6. In regard to the 2nd contract and 3rd contract, the applicant contended that works were completed to the fullest satisfaction of the respondent on 31.03.2003; that by letter dt.08.09.2003, applicant put forth its claims for 'Re-imbursement/refund on variation in price' to the respondent in terms of clause 2.2.46 of the General Conditions of Contract/part of the agreement between the parties and requested to make final bill payment; and that respondent failed to do so. The applicant contended that letters dt.13.01.2007, 25.08.2007, 12.12.2007, 08.04.2008, 03.06.2008, 26.12.2008 and 21.03.2009 were addressed by the applicant to the respondent making claims under the above clause of the contract; in the letter dt.07.11.2006 as also in the letters dt.13.01.2007, 21.03.2009 and 30.01.2010 applicant also sought for appointment of arbitrator as per clause 17 of the Agreement between the parties; and for the first time on 16.02.2010, counsel for the respondent replied to the applicant that there was no dispute to be adjudicated and if the applicant insists, matter will be placed before the President, Cantonment Board, Headquarters, Andhra Sub-area,

who is the appointing authority for a sole arbitrator, to take a decision in that regard. The applicant contended that it had insisted on 20.03.2010 and 30.09.2010 for appointment of an arbitrator again, and only on 10.11.2010, the respondent informed the applicant that the President of the Cantonment Board had rejected its request for appointing an arbitrator. Therefore arbitration application No.155 and 156 of 2013 came to be filed.

7. Clause 2.2.46 of the GCC on the basis of which the applicant claims escalation states:

“Re-imburement/refund on variation in price:-

The contractor shall, for the purpose of this condition keep such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorized representative of Board and further shall, at the request of the CEO furnish, verified in such a manner as the AO may require any documents kept and such other information as the AO may require.

The contractor shall within a reasonable time of his becoming aware of any alteration to the prices of any such material and/or wages of labour, give written notice thereof to the AO stating that the same is given pursuant to this condition together with all information relating thereto which he may be in a position to supply.”

8. Clause 17 of the Agreements between the parties which contains the arbitration clause states:

“Law Governing the Contract: The contract shall be governed by the Indian Laws. All disputes between the parties to this contract for being out of or relating to the contract, other than those for which the decision of the accepting officer is final and conclusive shall after the written

notice given by either party to the other be referred to the sole arbitrator as appointed by the President, Cantonment Board, Secunderabad. The award of the Arbitrator shall be final, conclusive and binding on both parties to the contract.”

The case of the respondent:

9. Identical counter affidavits have been filed in these three applications by the respondent.

10. The respondent admitted that the three contracts were awarded to the applicant and also admitted that works were executed by the applicant within the stipulated time. It is contended that bills for the works executed were cleared on submission of final bills way back in 2002-03; that applicant received payment by adhering to clause 5 of the contract between the parties; and that since final payments were made for the works executed, the files were closed.

11. It is contended that after conclusion of the contract and after receipt of final payment, applicant started addressing letters making additional claim towards reimbursement on variation in prices, though there was no such clause in the agreements entered into between the parties.

12. It is contended that the contract period in the three contracts was only one year and they came to an end by end of 2001 and 2002 respectively; but applicant had issued notice only on 30.01.2010 seeking appointment of an arbitrator though no dispute is subsisting

between the parties and though applicant's claim is barred under the law of limitation.

13. Reference is also made to W.P. No.9642 of 2003 filed by the applicant for release of Work Order for balance amount of Rs.85.09 lakhs in relation to the first contract and it is pointed out that the said Writ petition was dismissed on 11.12.2003 permitting the applicant to invoke the arbitration clause; and also so to W.A. No.108 of 2004 filed by the applicant against it which was also dismissed on 29.01.2004 granting leave and liberty to the applicant to work out remedies in accordance with law.

14. It is contended that thereafter applicant did not choose to initiate any legal proceedings except addressing letters to the respondent one after the other. It is contended that the letters addressed were not acknowledged as admission on the part of the respondent, that they did not extend period of limitation; and so since the claims of the applicant are barred by limitation, no arbitrator can be appointed under Section 11 of the Act.

15. It is specifically contended that applicant has no legal right to raise the disputes after full and final settlement of the bills in 2002.

16. It is also contended that the demand of the applicant seeking appointment of an arbitrator was not considered as there are no arbitral issues subsisting between the applicant and the respondent.

17. In para 9 of the counter, reference is made by the applicant to the extension of time granted for execution of works under the three contracts upto 31.12.2002 also. It is contended that the question of reimbursement on variation in prices as claimed by the applicant does not arise.

18. Lastly, it is contended that as per clause 5 of the Agreement, final bill amounts were to be released on submitting no claim certificate stating that there is no claim from the respondent on account of the work undertaken and completed by the applicant, and that no claim thereafter shall be entertained. It is contended that applicant received final bill amount and there are no issues to be adjudicated by an arbitrator.

Reply affidavits of the applicant:

19. The applicant contended that its grievance is that respondent has not made all legitimate payments due in terms of the contract following the terms scrupulously. According to the applicant, the respondent had made payment only with regard to the works recorded as per schedule of quantities and has not reimbursed price variation bill or refuted or rejected the said claim at any point of time. It is stated that final bill was submitted *along with* price variation bill, but the respondent cleared only final bill but failed to make payment of variation bill. It is contended that applicant's claim is not with regard

to works executed by it, but only for claims made under clause 2.2.46 of the GCC through the price variation bill.

20. It is alleged that when the price variation bill payment is not made to the applicant inspite of demand made by it, the respondent cannot close the files and refuse to furnish copies of the files sought by the applicant.

21. It is contended that there were statutory increases of labour wages and other components at the relevant point of time for which the applicant is entitled to reimbursement in terms of clause 2.2.46 and other MES terms and conditions.

22. It is also contended that rejection of the request of the applicant for appointment of arbitrator is arbitrary and the plea of the respondent that nothing is pending, cannot be countenanced.

23. It is alleged that there is a live subsisting dispute between the parties and the claims of the applicant are not barred by law of limitation. It is contended that applicant made the claim well in advance immediately on completion of the entrusted works and since then there is no denial or adjudication of the same as per the contract, the applicant is entitled to invoke the jurisdiction of this court seeking appointment of an arbitrator.

24. It is contended that though final bill payment was made, it was received under protest and that the claim of the applicant for

reimbursement of variation in prices in terms of the contract has to be adjudicated.

The Consideration by the Court

25. From the facts narrated above, it is clear that the claim of the applicant under the three contracts is with regard to *reimbursement / refund on variation in price of raw materials / wages of labour* etc. covered by clause 2.2.46 of the General Terms and Conditions of Contract which under Clause 19 of the Agreements *inter-partes* also forms part of the said Agreements.

26. It is also not in dispute that on 08.09.2003 itself such a claim was specifically raised by the applicant in relation to all the three Agreements / Contracts in the following terms :

“1. Condition 2.2.46 of general conditions of contracts caters of re-imbursement on variation in prices. However there was no formula given in the agreement for the working out these variation.

2. We are herewith submitting our claims against variation in prices of material, labour and fuel. This has been worked out as per the formulae being adopted by other Government departments. The same may be admitted as per above mentioned condition and necessary payment may be made at the earliest.”

27. This claim was reiterated by the applicant in relation to all three contracts on 24.07.2004, 12.10.2004, 07.11.2006, 13.01.2007 21.03.2009 and 30.01.2010.

28. For the first time, reply thereto was given on 16.02.2010 by the counsel for the respondent claiming that there are no issues to be

adjudicated by an arbitrator. The Counsel for the respondent denied that there is any specific clause under which the applicant is entitled to reimbursement on variation of prices. It was then stated that if the applicant continues to insist on the appointment of an arbitrator, the matter will be placed before the President of the Cantonment Board, who is the Appointing Authority for a sole arbitrator, to take a decision in that regard.

29. When applicant insisted for appointment of an arbitrator by legal notices dated 20.03.2010 and 30.09.2010, then the respondent sent a letter dt.10.11.2010 to the applicant stating that the President of the Cantonment Board had rejected applicant's request for appointment of an arbitrator.

30. On 06.11.2013, within three years from the 10.11.2010 letter of the respondent, the applicant has filed these three applications. In my opinion, these three applications cannot, therefore, be said to be barred by limitation and as per Article 137 of the Limitation Act, 1963, and they are well within time.

31. It is the case of the applicant that price variation bills *as well as* final bills were submitted at the same time to the respondent, but the former were not paid though payments for the works recorded as per Schedule of quantities were paid.

32. As regards plea of bar of limitation raised by the respondent with regard to the claim for reimbursement on variation in prices

pursuant to Clause 2.2.46 is concerned, there is no evidence that the said payment was either made or was specifically denied after 08.09.2003 till 10.11.2010.

33. In an application under Section 11 of the Arbitration and Conciliation Act, 1996 (prior to its amendment by Act 3 of 2016) the existence or otherwise of a live claim would have been gone into by the High Court.

34. In **S.B.P. and Co. vs. Patel Engineering Ltd.**¹, the Supreme Court held:

“47. (iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.”(emphasis supplied)

35. So, the Chief Justice or his designate can examine the question as to whether the claim which has been raised before him survives and needs to be adjudicated, while exercising power under Section 11 of the Act.

36. This was further explained in **Indian Oil Corporation Ltd. vs. S.P.S. Engineering Ltd.**² in the following terms :

¹ (2005) 8 S.C.C. 618

*“14. To find out whether a claim is barred by res judicata, or whether a claim is “mala fide”, it will be necessary to examine the facts and relevant documents. What is to be decided in an application under Section 11 of the Act is whether there is an arbitration agreement between the parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under Section 11 of the Act. **The Chief Justice or his designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived.** When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time-barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: if the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law, and the claim is patently long time-barred, the Chief Justice or his designate will examine whether the claim is a dead claim (that is, a long time-barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the Court will not enter into a disputed question whether the claim was barred by limitation or not. The Court will leave the matter to the decision of the Tribunal. **If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act.” (emphasis supplied)***

37. It also observed that an application under Section 11 of the Act is expected to contain pleading about the existence of a dispute, and

² (2011) 3 S.C.C. 507

the applicant is not expected to justify the claim or plead extensively in regard to limitation or produce documents to demonstrate that claim is within time in proceeding under Section 11, and that such an issue should normally be left to the arbitral tribunal.

38. This was reiterated in **Emm Enn Associates vs. Commander Works Engineer and others**³ and it was held therein that the Chief Justice *may choose* to hold a claim as a dead claim only when the claim is evidently and patently **long time**-barred claim and there is no need for any detailed consideration of evidence.

39. Proceedings dt.07.11.2003 filed by the respondent of Minutes of a Board meeting of the respondent no doubt show payment of Rs.14,06,580/- in addition to Rs.14,84,000/-, but this payment is not on account of claim under Clause 2.2.46 for reimbursement on variation in prices claimed by the applicant. It is a payment sanctioned for actual quantities of the various items of work which had increased, and so the same cannot be *prima-facie* construed as a payment towards the claim of the applicant under Clause 2.2.46.

40. Even the undertakings given by the applicant for grant of extension of time to complete the works up to 31.12.2002 are only with regard to imposition of penalty by the respondent, but there is no waiver by the applicant of its claims under Clause 2.2.46.

³ (2016) 13 S.C.C. 61

41. Though documents evidencing some payments made to the applicants by the respondent including letters permitting release of Bank guarantees have been filed, it is not possible to infer therefrom *prima facie* that the applicant had given up its claims under Clause 2.2.46.

42. The prolonged silence of the respondent from 08.09.2003 onwards regarding claims made by the applicant under Clause 2.2.46 without any emphatic rejection of the same, *prima facie* show that there appears to be a live issue in that regard between the parties.

43. Therefore, I hold that the applicant had made out a case for appointment of an arbitrator to adjudicate the disputes between the applicant and respondent under Section 11 of the Act.

44. Accordingly, these three applications are allowed and Sri Y.V.Ramakrishna, Retired District Judge, R/o.H.No.10-2-286, Flat No.202, SMR Ram residency, 5th Street, West Marredpally, Secunderabad – 500026 is appointed as the Arbitrator to adjudicate the disputes between the parties arising out of the above three contracts.

45. It is made clear that this Court has not expressed any final opinion on the aspect of bar of limitation of the claims made by the applicant and leaves it open to the arbitrator to consider the said plea and to decide it in accordance with law. No order as to costs.

46. As a sequel, miscellaneous applications pending if any in these Arbitration Applications, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 20.08.2019

MRKR/NDR

