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

+ O.M.P. (COMM) 53/2019

Date of Decision : 4th February, 2019

BKFC & COMPANY ENGINEERS & CONTRACTOR

..... Petitioner

Through: Mr.Sandeep Sharma, Mr.Kushagra
Bansal, Mr.Aman Dhayani, Ms.Kanchan
Semwal, Advs.

versus

**COMMERCIAL ENGINEERS & BODY BUILDERS CO.
LTD**

..... Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 1646/2019

Exemption allowed subject to all just exceptions.

IA 1647/2019(delay of 46 days in re-filing the petition)

For the reasons stated in the application, the delay is
condoned and the application stands allowed.

OMP(Comm.) 53/2019

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 Arbitral Award

dated 21.08.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the acceptance of tenders for various works in Phase-I of the factory premises of the respondent at Gram Imlai, Deori, Post Panagar, District Jabalpur, Madhya Pradesh, accepted by the respondent by issuance of Letter of Intent dated 03.11.2010 along with the Bill of Quantities dated 26.10.2010 and 27.10.2010. Some additional work regarding Phase-1 in relation to the road construction and miscellaneous works was also entrusted to the petitioner. Further, the petitioner was also awarded the work of Phase II by the respondent vide Work Order dated 10.11.2011.

2. The petitioner claiming that the respondent had not paid the due amount under the above Work Orders, invoked the Arbitration Agreement by notice dated 08.08.2016 and finally filed a petition under Section 11 of the Act, being Arbitration Petition no.61/2017, before this Court seeking appointment of an Arbitrator.

3. The said petition was dismissed as withdrawn as the counsel for the respondent raised an objection on the territorial jurisdiction of this Court contending that the Work Order in relation to the Phase II contained a jurisdiction clause whereby the Courts at Jabalpur have exclusive jurisdiction over the subject matter.

4. The petitioner, thereafter, again invoked the Arbitration Agreement vide its notice dated 04.07.2017 and filed a fresh petition before this Court, being Arb. Pet. No.768/2017. The said petition was disposed of by this Court vide order dated 10.01.2018 appointing the Sole Arbitrator. This Court further observed as under:-

“As far as the plea of the respondent that the claims raised by the petitioner would fall under the Work Order dated 10.11.2011 is concerned, this issue has to be decided by the Arbitrator once the Statement of Claim is filed before the Arbitrator by the petitioner. At present, the statement made by the learned counsel for the petitioner that no claim under the said Work Order will be raised before the Arbitrator should suffice, making it clear that if any claim is raised with respect to the said Work Order, the same would be beyond the terms of the reference and liable to be rejected.”

5. The Arbitrator by the Impugned Award has dismissed Claim nos.1 and 3 raised by the petitioner as being barred by limitation. Claim Nos.2 and 4 were for interest on amounts claimed under Claim Nos.1 and 3 and therefore, the same were also dismissed. Claim Nos.5 to 10 were held to be pertaining to the Work Order dated 10.11.2011 regarding Phase II and therefore, were not covered by the Arbitration Agreement in question before the Arbitrator. The Arbitrator therefore, held that any observation made by him regarding Claim Nos.5 to 10 of the petitioner in the Impugned Order/Award are tentative as

these claims are beyond the terms of reference and as such not triable by the Sole Arbitrator.

6. Counsel for the petitioner submits that the finding of the Arbitrator in so far as Claim Nos.1 and 3 being barred by limitation is concerned is incorrect. He submits that the Arbitrator has failed to consider that 19.11.2016 was the first time when the respondent refused to make payment of the due amount to the petitioner. Therefore, the cause of action would arise only from 19.11.2016.

7. I may first note that this is a totally a new case being urged by the petitioner before this Court. Before the Arbitrator, the letter dated 19.11.2016 was relied upon by the petitioner as an acknowledgement of debt.

8. Even otherwise, in the legal notice dated 25.03.2016, which preceded the request for arbitration, the petitioner had made the following submission:

“3. Our clients have been submitting R.A. Bills regularly and a total of 12 RA Bills amounting to Rs. 12,80,17,7999.09 have been submitted to you. Against this the total bill payment made to our client is Rs. 12,28,68,002.09. Thus a total amount of Rs.51,49,797/- is still pending due and payable by you. Towards the latest stages of the work, over and above the BOQ and PO quantities, you also asked our Clients to carry out road repair for which the cost came to Rs. 2,50,000/-. Furthermore, my clients were asked to lay the pipeline the cost of which came to Rs. 5 lakhs. A

bore well was asked to be dug which cost Rs. 5 lakhs. In addition our client had to pay rental charges for the labour hutment during the prolongation of the contract amounting to Rs. 5 lakhs. Our clients also suffered expenditure for idle labour amounting to Rs.10 lakhs. Our clients also paid royalty, amounting to Rs.1.50 lakhs, which is recoverable from you.

4. Keeping the above in view the net amount due from you is Rs.81,06,890.84 (Rupees Eighty One Lakh Six thousand Eight Hundred and Ninety and Paise Eighty Four only). A consolidated list showing the pending due's along with items as enumerated above was given to you. In order to settle the outstanding amount, a meeting was held in your site / office on 11.6.2013 which was attended by Mr. S.Gopandey who has also signed the settlement memo on behalf of your company. On behalf of our client, the proceedings were signed by M.Satyajit Goely. A copy of this has also been forwarded to M/s Aashrey Consultants. Our clients have been repeatedly contacting your officers, personally as well as telephonically, over the period of years. In addition, e-mail was also sent to you on 20.7.2013. This was replied by Mr. Gopandey on 30.8.2013 stating that he was leaving your company. By another mail dated 25.12.2014, our clients had asked you to release the payment due. A copy of letter dated 25.12.2014 was also forwarded to the Architect Mr. L.A. Murthy. In spite of all these repeated efforts you have failed and neglected in making payment of the balance dues to our client. Every time our clients have been advised that you had problems with the commencement of production but kept assuring that the accounts will be settled at the earliest. Unfortunately, none of these assurances has materialized."

9. In the letter dated 19.11.2016, the respondent had refused the claim of the petitioner and contended that Rs.41,00,000/-had to be deposited on behalf of the petitioner as service tax dues. The respondent also contended that it was not liable to pay any amount to the petitioner.

10. In the notice date 04.07.2017 invoking arbitration, the petitioner made the following assertion:

*“5. Taking into Keeping the above in view the net amount due to the **Contractor** from the **Company** amounts to Rs.81,06,890.84/- (Rupees Eighty One Lakhs Six Thousand Eight Hundred and Ninety and Paise Eight Four Only). A consolidated list showing the pending dues along with items as enumerated above was given to the Company. In order to settle the outstanding amount, a meeting was held at site/office on 11.06.2013 which was attended by Mr.S.Gopandy, on behalf of the **Company**. The **Company** was only agreeable to settle for an amount of Rs.71,94,078.00 (Rupees Seventy One Lakhs Ninety Four Thousand Seventy Eight only), which though manifestly unfair, was accepted by the **Contractor** under compulsion, as the amount was long outstanding, but on the clear understanding that the amount will be released shortly. A copy of this is attached as **Annexure C2**. The proceedings were signed by Mr.S.Gopandy on behalf of the Company and M.Satyajit Goely on behalf of the **Contractor**. A copy of this was also forwarded to the **Architect’s office**.*

*6. The **Contractor** has been repeatedly contacting the officers/ officers of the **Company**, personally as well as telephonically, over the period of years. In addition, e-mail was also sent to the **Company** on 20.7.2013. This was replied by Mr.Gopandey on 30.8.2013 stating that he was leaving the **Company**. By another mail dated*

25.12.2014, the Contractor again asked the **Company** to release the payment due. A copy of letter dated 25.12.2014 was also forwarded to the **Architect's office**. In spite of all these repeated efforts the **Company** failed and neglected in making payment of the balance dues to the **Contractor**. Every time the **Contractor** was advised by the **Company** that there were problems with the commencement of production, accounting for the delay, but kept assuring that the accounts will be settled at the earliest. Unfortunately, none of these assurances have materialized till date. Under the circumstances, the **Contractor** is now no longer bound to accept the lower figure suggested by the **Company** but on the contrary is fully entitled to receive the full amount of Rs.81,06,890.84 (Rupees Eighty One Lakhs Six Thousand Eight Hundred and Ninety and Paise Eight Four Only), the demand for which was raised on the **Company** in the legal notice, alluded to in the text below.”

11. In the Statement of Claim, following assertion was made by the petitioner with regard to Claim no.1:

“CLAIM NO.1 FOR Rs.53,28,862/- ON ACCOUNT OF PAYMENT QUA WORK DONE IN RESPECT OF TENDER AND BOQ ITEMS:

26. Under this claim the respondent is liable for payment of Rs.53,28,862/- to the claimant in respect of the work executed by the claimant. As stated hereinabove after deploying the full resources. at site the work was started by the claimant. It is submitted that the claimant requested to complainant to provide all the drawings/ details and scope of work on priority basis. After receiving all the aforesaid documents, the claimant initiated the work and acted in a bonafide manner. The submission of the claimant is that there were hindrances on the part of the respondent in regard to the payment of running bills but even then the claimant to the extent possible executed the work. It is the submission of the

claimant is that the claimant had acted in most professional manner and performed its obligation as per agreed terms & conditions. It is submitted that right from the very beginning the progress of the work suffered very badly due to non-payment of the running bills as raised by the Claimant. The respondent assured the Claimant for the payment of the same on immediate basis. As a result thereof the claimant has suffered immensely due to the conduct of respondent. The claimant continued executing the work on the assurance of the respondent and further raised running bills (C-8) which were duly received by the Respondent. However, the respondent failed to make the payment against the same. The claimant submitted final bill for Rs.97,255,787/- against the awarded work. But the Respondent only made a payment of Rs.88,218,016/- and other deductions (TDs + WCT+ Building cess) of Rs 3,708,909/-. Because of respondent's failure to make the payment as per the requests made by the claimant via letters as well as telephonically requests but the respondent did not pay any heed to the request of the Claimant. It is submitted that the claimant had executed the work from time to time as per the assurances of the respondent that the respondent would make timely payments against the invoices raised by the claimant. In doing so the claimant exhausted all its resources. It is also pertinent to point out that non payment itself amounts to breach of the contract by the respondent which is accepted by them. Thus the submission of the claimant is that under this claim respondent is liable for payment of the claimed amount which is in respect of work done despite repeated requests. Thus the claimant prays for the award of this amount."

12. As far as Claim no.3, the petitioner made the following assertion:

“CLAIM NO.3 FOR RS. 26,73,665/- ON ACCOUNT OF PAYMENT QUA WORK DONE IN RESPECT OF COST FOR ROAD REPAIR:

28. That the claimant submits that after the initiation of the work as per the LOI (C-4), the respondent further assigned work in respect to be road construction. The claimant duly accepted the same and performed its duties any technical glitches and faults. Thereafter, the claimant duly raised extra bill dated 01.07.2011 which was served upon the respondent. However, the Respondent clearly failed to make the payment against the same till date. Thus the submission of the claimant is that under this claim respondent is liable for payment of the claimed amount which is in respect of work done. Thus the claimant prays for the award of this amount.”

13. A reading of the above paragraphs would clearly show that as per the petitioner, the amounts under Claim nos.1 and 3 had become due and payable on submission of the final bill by the petitioner and on submission of the bill for extra work. These bills were submitted by the petitioner with the respondent in form of twelve Running Account Bills, as claimed by the petitioner in its notice dated 25.03.2016 or in form of Final Bill as claimed by the petitioner in its Statement of Claim. These bills were ending in the year 2011. As far as the bill for extra work is concerned, the same was submitted on 24.09.2011.

14. In terms of Article 18 of the Schedule to the Limitation Act, 1963, for a claim of price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment, the time for filing a claim would run from the date when the work is done and the period of limitation shall expire

three years therefrom. As the work was done in the year 2011, the limitation period would expire in 2014.

15. It is for this reason that the petitioner relied upon various correspondence exchanged between the parties as an acknowledgement of debt by the respondent. The Arbitrator discussed the correspondence exchanged between the parties at length and has held that even after granting the benefit of extension of period of limitation on the basis of the acknowledgement, the claim would still be barred by limitation. I may herein quote the relevant finding of the Arbitrator.

“22. Before proceeding to discuss the issues raised by the parties it would be important to consider the plea of acknowledgments raised by the Claimant to counter the plea of the Respondent that the Claims raised by the Claimant are barred by limitation. The law is well settled that an acknowledgment of the liability in terms of Section 18 of the Limitation Act must be within the limitation period in respect of the Claim which is sought to be protected by an acknowledgment under Section 18 of the Limitation Act. Acknowledgment, therefore, can be only in respect of a live Claim. Acknowledgment after the expiry of the limitation period when the Claim has already become stale does not help a Claimant. In this case the Claimant has first of all relied upon an acknowledgment dated 04.06.2012 made by the Respondent through an email in which the Ledger Account was acknowledged and assurance was given to pay on time but this acknowledgment, even if it was made by the Respondent, does not help the Claimant as the Claimant had not issued Notice under Section 21 of the A&C Act within 3 years of 04.06.2012. It was issued on 04.07.2017 only and as such the invocation of the

Arbitration was beyond the limitation period. Similarly the acknowledgment dated 27.11.2012 issued by the Architect on behalf of the Respondent also does not come to the rescue of the Claimant as the Arbitration was invoked after the expiry of 3 years period from this acknowledgment of 27.11.2012. The acknowledgment dated 11.06.2013 which was contained in the Minutes of the Meeting held on 10.06.2013 and conveyed to the Claimant vide email dated 11.06.2013 is also of no help to the Claimant as the Arbitration was not invoked within 3 years of this acknowledgment.

23. Ld. Counsel for the Claimant has relied upon the letters dated 13.11.2013 and 25.12.2014 to argue that these acknowledgments extended the limitation for raising the Claims against the Respondent and the Arbitration was invoked within 3 years of the letter dated 25.12.2014. However, it is found that both these letters were issued by the Claimant only demanding payments from the Respondent and as such these cannot be treated as acknowledgments made by the Respondent.

24. The Claimant relies upon a letter dated 19.11.2016 to the Claimant from the Respondent. In this letter the Respondent had not admitted its liability to pay the claimed amounts to the Claimant and rather it was stated that nothing was payable to the Claimant for the reason that the Respondent had been asked to deposit a sum of Rs.41 lacs against service tax due from the Claimant. In the last para of this letter it was clearly stated that under no circumstances the Respondent would be in a position to pay anything to the Claimant as whatever outstanding the Claimant has, would be paid against service tax dues. Therefore, this letter even is not any acknowledgment of the liability on the part of the Respondent. Even if this letter is taken as an acknowledgment of liability it was not within the limitation period so as to extend the limitation.”

16. I do not see any reason to interfere with the above finding of the Arbitrator. In any case, it is open for this Court to act as a Court of appeal to appreciate the same.

17. Counsel for the petitioner further contended that even the final certificate as contemplated in the letter of award has not been issued by the respondent. He submits that this, therefore, would extend the period of limitation as the work cannot be stated to have been completed till date. I again find this to be an ingenuous argument taken only before this Court at the stage of the present petition and not before the Arbitrator.

18. As noted above, the claim filed before the Arbitrator was against specific bills and a categorical case was pleaded that these bills had become due and payable in the year 2011. I therefore, find no merit in the present petition in the above submission.

19. The petition is dismissed, with no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 04, 2019
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