$~29

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

\+ O.M.P. (COMM) 232/2019

Date of Decision : 29th May, 2019

NCC LTD (FORMERLY KNOWN AS NAGARJUNA CONSTRUCTION COMPANY LTD.) ..... Petitioner

Through: Ms.Priya Kumar, Mr.Adhish Srivastava, Mr.Tejas Chhabra and Mr.Anand Chichra, Advs.

versus

SOM DATT BUILDERS PVT. LTD. ..... Respondent

Through: Ms.Kiran Suri, Sr. Adv. with Ms.Anushuya Salwan and Ms.Aishwarya Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 8114/2019 (Exemption)

Allowed, subject to all just exceptions.

OMP(Comm.) 232/2019 & IA 8115/2019 (Stay)

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 26.02.2019 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Joint Venture Agreement (JVA) dated 08.03.2001, executed between the petitioner, the respondent and Navyuga Engineering Company Ltd. for carrying

out the work of Contract Package II-B, Kanpur Project awarded by the National Highway Authority of India (NHAI) in favour of the Joint Venture (JV) on 23.02.2002. An Agreement was also executed for the same on 27.03.2002.

2. After the award of contract, the parties herein, executed a Memorandum of Understanding (MOA) dated 15.03.2002, wherein *inter alia* it was agreed as under:-

> *"That all payments other than mobilisation advance and equipment advance to be received from NHAI shall be deposited in the JV Account No.2 to be opened at site which will be operated exclusively by SOM DATT BUILDERS's authorised signatories. SOM DATT BUILDERS hereby agrees and undertakes to pay NCC 2% (Two percent) of the gross value of the contract works (exclusive of the value of work being executed by NEC as per the Memorandum of Agreement dated 14th December, 2001) towards their share of profit (net of tax) through the J.V. Account. This amount shall be paid prorata from the Interim Payment Bills and Final Bill (excluding the gross amount of Interim Payment Bills and Final Bill for the work pertaining to NEC). The aforesaid payment shall be paid to NCC within 7 days from the date of receipt of Interim Payment Bills and Final Bill. The amount against net payment due to NEC for their portion of work shall be transferred from JV Account No.2 to JV Account No.3, which will be operated exclusively by NEC. NCC hereby agrees and confirm that they will not be entitled to any*

other payments either towards profit or on any other account from the Joint Venture other than the aforesaid payment of 2%. After accounting for the aforesaid payment of 2% all the balance amounts of payments received from NHAI for the work executed excluding NEC's share shall be SOM DATT BUILDERS's share."

3. The parties herein, also entered into a Deed of Modification on 15.03.2002 itself, *inter alia* providing as under:-

> *"SOM DATT BUILDERS also hereby agrees that in addition to the payment of 2% of the gross value of the contract works (exclusive of NEC's scope of work) as stipulated in Memorandum of Agreement dated 15th March, 2002. NCC shall be paid Rs. 177091800 towards technical and professional fee and other bills submitted by NCC, which payment shall be subject to Deduction of Tax at Source as applicable as per the following schedule.*
>
> *a. (Rs.20000000/- Rs. Two crores) immediately after receiving the Mobilisation advance from NHAI*
>
> *b. (Rs.10000000/- Rs. One Crore) immediately after receiving the 1st Machinery Advance.*
>
> *c. The balance in 18 equal installments of Rs.8171766/-each (Rupees Eighty one lacs seventy one thousand seven hundred sixty six only) commencing from July, 2002."*

4. On 25.08.2005, the parties entered into an Addendum fixing the schedule for the payment of Rs. 14.77 crores by the respondent to the petitioner, in the following words:-

> *"M/s Som Datt Builders Private Limited agreed to make balance payment of Rs. 14.77 Crores (Rupees Fourteen Crores Seventy Seven Only) inclusive of all applicable taxes such as Service Tax etc. towards Technical and Professional Fee and other Bills to be submitted by M/s Nagarjuna Construction Company Limited, which shall be subject to deduction of Tax at Source and or any other applicable taxes as per the following schedule:-*
>
> 1. *6 (Six) monthly installments of Rs. 50.00 Lacs (Rupees Fifty Lacs Only) each commencing from the 1st October, 2005.*
> 2. *Next 15 (Fifteen) monthly installments of Rs. 75.00 Lacs (Rupees Seventy Five Lacs Only) each and balance amount of Rs. 52.00 Lacs thereafter."*

5. The petitioner claiming that the respondent had not honoured the terms of the above Agreements, issued a notice dated 01.09.2009 under Section 433 and 434 of the Companies Act, 1956 threatening winding up of the respondent on account of non-payment of outstanding amount of Rs. 1326.92 lakhs in relation to the abovementioned Agreements. This notice was replied to by the respondent on 18.09.2009 *inter alia* contending that as far as the 2% payment agreed to in the MOA is concerned, the same stands duly paid. As far as the other fee as contained in Deed of Modification and the Addendum is concerned, the respondent contended that it had paid an amount of Rs. 14.77 crores to the petitioner though neither any

technical nor professional services were rendered by the petitioner nor machineries etc. were provided by the petitioner to the JV. The respondent, therefore, refuted the entire claim of the petitioner.

6. The petitioner, thereafter, by a letter dated 13.10.2014 reiterated its demand of pending dues of Rs. 14.30 crores. This was again refuted by the respondent by its letter dated 29.12.2014.

7. Further correspondences ensued between the parties.

8. In the meantime in the arbitration proceedings between the JV and NHAI an Arbitral Award was passed in favour of the JV. This was sought to be enforced by the JV by filing a petition under Section 36 of the Act. The petitioner, on 19.12.2014, filed an application in the said enforcement petition praying for a restrain on the respondent from withdrawing the amount deposited by NHAI in those proceedings. This application was dismissed by the Court by an order dated 22.12.2014, *inter alia* holding therein that the *inter se* disputes between the petitioner and the respondent cannot be decided in those proceedings. The amount deposited by the NHAI was thereafter released in favour of the JV.

9. On 22.12.2015, the petitioner filed yet another application, however, the same was again dismissed on the same day.

10. Thereafter, proceedings were filed under Section 9 of the Act by the petitioner and various orders were passed thereon.

11. It was on 19.12.2016 that the petitioner invoked the Arbitration Agreement contained in Clause 20 of the JVA and the MOA. However, instead of a three member Arbitral Tribunal, the petitioner proposed a Sole Arbitrator to be appointed. This was rejected by the respondent by its reply dated 17.01.2017, contending that the invocation was not in terms of the Arbitration Agreement. The petitioner, therefore, by a letter dated 03.02.2017 nominated its nominee Arbitrator finally leading up to the constitution of the Arbitral Tribunal in March, 2017.

12. The Arbitral Tribunal has rejected the claim of the petitioner on the ground of the same being barred by Law of Limitation. The Arbitral Tribunal has held that the cause of action in favour of the petitioner would have arisen in 2009, when the respondent refuted the claim of the petitioner. For a period of five years the petitioner did not take any action in spite of such rejection by the respondent. It is only thereafter, that the petitioner sought to intervene in the enforcement petition and even filed a petition under Section 9 of the Act against the respondent. The invocation of arbitration in any case, was in December 2016 and/or February 2017 by the above referred notices.

13. Counsel for the petitioner submits that the findings of the Arbitral Tribunal cannot be sustained inasmuch as the Arbitral Tribunal has completely ignored the effect of Clause 15 of the JVA which provides that on payment of all amounts to the JV and on receipt of proceeds of sale or other disposal of the assets of the JV, the accounts shall be settled and all outstanding obligations and liabilities

of the JV shall be finally settled. She submits that therefore, the cause of action cannot be said to have accrued in favour of the petitioner till the final settlement of accounts. She submits that this would be a case of continuing cause of action till that date. In support of her submission, she has relied upon the judgment of the Madras High Court in ***Samuel Nadar v. Thangayya Nadar***, MANU/TN/0130/1941. She submits that the JV is in the nature of a partnership and therefore, the cause of action would accrue till the partnership is finally dissolved, that is on the settlement of the final accounts.

14. Counsel for the petitioner further submits that there was, in fact, an admission of liability by the respondent in its statement of defence, wherein the respondent admitted that an amount of Rs.9.88 crores would become payable to the petitioner towards its claim of 2% of the gross value of the contract works as agreed to between the parties in the MOA. The respondent, however, claimed that this amount was adjusted against the entitlement of the respondent for the Gujarat and Bihar projects. The Arbitral Tribunal, however, has found that the disputes in relation to the Gujarat and Bihar Projects cannot be adjudicated in the present arbitration proceedings. Having held so, the amount of Rs.9.88 crores, therefore, became an admitted liability of the respondent.

15. I have considered the submissions made by the counsel for the petitioner, however, I find no merit in the same.

16. As far as the contention on the cause of action being a continuing one is concerned, the Arbitral Tribunal, in my opinion, has

rightly held that the cause of action is not a continuing one but arose on the rejection of the claim by the respondent by its reply/notice dated 18.09.2009. The petitioner did not take any action on such rejection till 2014, the claim therefore, has rightly been held to be barred by law of limitation.

17. Reliance of the petitioner on the judgment of the Madras High Court in ***Samuel Nadar*** (supra), is ill-founded inasmuch as, the claim of the petitioner had been crystallized in its notice dated 01.09.2009 and had been completely refuted by the reply dated 18.09.2009. It was, therefore, not a case of continuing cause of action. Similarly, reliance on Clause 15 of the JVA is ill-founded. As found by the Arbitral Tribunal, NHAI vide its letter dated 11.11.2009 informed the parties that the project stood completed in May 2008 and necessary certificates were also issued. Despite knowing that the purpose of the MOA was achieved, the petitioner never claimed finalization of the accounts. It is not as if the respondent had stopped payment to the petitioner on the ground that its claims with NHAI remained to be adjudicated. In fact, the respondent claimed that full amount in accordance with its agreements with the petitioner stood paid to the petitioner. The cause of action therefore, accrued to the petitioner with this communication from the respondent and was not dependent on Clause 15 of the JVA.

18. As far as the admission of liability in the Statement of Defence is concerned, again it was the case of the respondent that the amount due to the petitioner had been duly paid and this was recorded by the

respondent in its reply dated 18.09.2009. The pleading in the Statement of defence therefore, cannot amount to an admission of liability. The Arbitral Tribunal has rightly held that as far as further counter claims of the respondent based on the Gujarat and Bihar projects are concerned, they are not the subject matters of the arbitration proceedings and have to be adjudicated separately. The petitioner, however, cannot take advantage of this finding as far as its own claim is concerned.

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

NAVIN CHAWLA, J

MAY 29, 2019/*rv*