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

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Date of Decision: 27.3.2019

+ **O.M.P. (COMM) 443/2016**

GUPTA & CO.

..... Petitioner

Through:

Mr. S.K. Jain with Manisha Tyagi, Ms. Stuti Jain and Mr. Akshu Jain, Advs.

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Through:

Mr. Pawan Mathur, Standing Counsel for DDA.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (Oral)

1. The impugned award which is dated 9.6.2016 has rejected the claims filed by the petitioner solely on the ground of limitation. Strangely, an application under Section 3 of the Limitation Act, 1963 (in short "Limitation Act") was filed and not under Section 16 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act") as one would have ordinarily expected. But then, since Section 3 of Limitation Act does give a litigant the right to seek dismissal of an action on the ground of limitation even if it is not pleaded, I would not rest the decision in the matter solely on this basis.

2. Mr. Jain, who, appears for the petitioner, says that in terms of the Agreement dated 11.3.1986 (hereafter referred to as "Agreement"), the petitioner was required to construct flats at the subject site qua which the scheduled date for completion was fixed as 19.3.1987. Learned counsel,

though, concedes that the work in respect of the flats was completed by the petitioner only on 21.8.1989, which is, according to him, the date upto which extension was granted by the respondent/DDA.

2.1 There is also an admission by the counsel for the petitioner that no notice of completion of work was served on the respondent/DDA. Counsel for the petitioner also admits that the petitioner had not prepared the final bill as required under the aforesaid agreement obtaining between the parties.

2.2 Mr. Jain, however, contends, which is the main plank of his argument, that since the respondent/DDA prepared the final bill, after taking measurements, the starting point of limitation would be that date and not the date when the work was completed.

2.3 In respect of this submission, learned counsel for the petitioner relies upon the letter dated 17.1.2011 issued by the Executive Engineer of the respondent/DDA. Mr. Jain states, and qua which there is no dispute, that prior to issuance of the aforementioned letter, the petitioner had approached the Public Grievance Department of the respondent/DDA. Mr. Jain, in this behalf, draws my attention to the letter dated 5.1.2011 addressed by the Executive Engineer of the respondent/DDA to the Assistant Engineer (see Annexure P-17 at Pg.29 of the Documents filed).

2.4 Mr. Jain further submits that upon recommendations being made by the Committee constituted by the Executive Engineer, DDA, payment to the tune of Rs.1,64,000/- was made by the respondent/DDA. According to the learned counsel, since the recommendations made by the Committee in its entirety were not accepted by the respondent/DDA, it propelled the petitioner to trigger the arbitration proceedings.

3. Notably, the learned Arbitrator in the impugned award has returned

certain findings of fact, which are contained in the following paragraphs of the award:

"10. In its statement of facts, the claimants have neither stated the actual date of completion of work nor the date when for the first time it had raised the demand nor the date when for the first time the respondent had declined its request nor the claimants have filed on record any document to prove its assertion that it had continuously been writing the respondents to clear its bill. However, the claimants have admitted that the stipulated date of completion of work was 19.3.1987 whereas the actual date of completion of work was 21-8-1989 as stated by SE/CC-10/DDA while granting the EOT vide its letter dated 12-12-1990 (exhibit R-2) as well, returned the EOT proforma part I & II whereas, proforma part-I is supposed to be filled by the agency.

11. The claimants have also not challenged the original letter dated 24.10.1997 filed as Annexure R- 3 by the respondent which was written by the claimant to the respondent and in which the claimant has referred to its earlier letter dated 4.5.1996 and has requested for clearing its dues.

12. Although respondents has disputed the identity of the claimants, however, it cannot be denied that the work was executed by M/s Gupta & Company and since the claimants alleges that it only is the real M/s Gupta & Company who had executed the work and since, till this stage respondents could not produce any document to the contrary, therefore, it has to be presume that the work was awarded to the claimants and it had successfully completed the same.

13. It is an admitted fact that the arbitration clause has been invoked on 20.7.2011 (refer C-13) i.e. after 22 years of the actual date of completion. Therefore, when the claimant says that since the completion of the work it had been requesting the respondents for clearing its dues it become mandatory for it to clearly specify the date when it had actually completed the work and when for the first time it had requested the respondent

for clearing its dues and why had it not taken any action against the respondents for such a long period of time and claimants failed to submit any documentary evidence that it had been continuously requesting the respondents for its progress.

14. As per Clause 6 of the Agreement claimants was responsible for issuing notice of completion within 10 days of its completion to the Engineer-in-Charge and as per Clause 7, it alone was responsible for preparing and submitting the final bill. Admittedly, claimants had neither issued the notice of completion nor submitted the final bill, therefore, it had breached the terms of the Agreement."

4. A perusal of the aforesaid extracts from the award would show that the learned Arbitrator has neither dealt with the effect, if any, of the letter dated 17.1.2011 nor has he adverted to events preceding the issuance of this letter, that is, the constitution of the Committee by the Public Grievance Department/DDA and the consequent recommendations of the Committee so constituted.

5. Mr. Mathur, who, appears for the respondent/DDA, contends that the letter dated 17.1.2011 can have no effect as the limitation had already expired. According to Mr. Mathur, the cause of action under Article 18 of the Limitation Act for recovery of money, if any, claimed by the petitioner, would arise on the date when the work was actually completed. In other words, according to Mr. Mathur, limitation would commence from 21.8.1989 as this was the date even according to the petitioner when work was completed. It is, thus, his contention that since the letter dated 17.1.2011 and the preceding events i.e. the events of 2010 when the Committee was constituted by the Executive Engineer, DDA to examine the

grievance of the petitioner *vis.-a-vis* final bill, were events which happened after the period of limitation had expired, these circumstances by themselves would not help the cause of the petitioner. Similar stance was taken by Mr. Mathur with regard to payment of Rs.1,64,000 to the petitioner by the respondent/DDA. According to Mr. Mathur, once limitation had expired, these events or the factum of payment of Rs.1,64,000 would not extend the period of limitation. In support of this plea, reliance was placed by Mr. Mathur on Section 18 of the Limitation Act. Furthermore, there was a reference to the fact that the documents generated in 2011 and the payment made was a product of a criminal conspiracy entered into between the petitioner and the respondent's/DDA's employees. I was told that a criminal complaint had been filed in that behalf.

5.1 Insofar as this part of the case is concerned, neither I sitting in the jurisdiction which I do, nor could the Arbitrator have dealt with it. I am required to examine in this petition the tenability of the award based on what is placed before me and the findings which the learned Arbitrator has returned.

6. Let me thus turn to the impugned award. Clearly, a perusal of the award would show that there is no reference to the letter dated 17.1.2011. Since the letter is brief, the same is extracted hereafter:

*"OFFICE OF THE EXECUTIVE ENGINEER
EASTERN DIVISION-3/DDA
POCKET - 'I', DILSHAD GARDEN. DELHI-95*

No.F3(85) AEI/ED-3/DDA/2010-11/77

Dated: 17-1-11

To,

*M/s Gupta & Company
126, Supreme Enclave,*

*Mayur Vihar Phase-I
Delhi-110091*

*Subject: 160/816 houses of category II and category III
under SFS pocket 'E' at Trilokpuri (Mayur Vihar
Phase-11) New Delhi*

Agreement No. 29/EE/DD VII/85-86

Date of start : 20.03.86

Dear Sir(s),

The final bill for the above work has been prepared and lying in this office, ready for payment. You have not accepted the final bill till date. You are therefore requested to attend this office within 7 days after receipt of this letter so that further action in this matter to release your payment can be initiated.

Yours faithfully

Sd/-

Executive Engineer

Eastern Division-3/DDA

Copy to:

- 1. SE/CC-1 0 for kind information.*
- 2. AE(P)/ED-3 for information and necessary action.*
- 3. AE-1/ED-3 for information and necessary action.*
- 4. AAO/ED-3 for information and necessary action.*

Executive Engineer

Sd/-

Eastern Division-3/DDA."

(emphasis is mine)

7. To my mind, in order to ascertain as to whether the claims were barred by limitation or not, this letter had to be taken into account. The reason being that Clause 8 of the agreement dated 11.3.1986, *inter alia*, provides that in case, the contractor fails to submit a bill within the stipulated time, then, the Engineer-in-Charge can have the bill prepared after having the measurements taken. Since my attention was not drawn by

counsel to any other clause pertaining, specifically, to the final bill, I would take it that the same rigour as provided in Clause 8 *vis-a-vis* the monthly bill would apply to a final bill.

8. Clause 6, on the other hand, *inter alia*, provides for issuance of a Completion Certificate once notice of completion of work is given by the contractor. The Engineer-in-Charge, in terms of this provision is required to inspect the works on receiving such notices within 10 days. Thereupon, the Engineer-in-Charge either issues a Completion Certificate or, in a case where there are defects found, is empowered to issue a provisional completion certificate with the list of defects incorporated therein. In this particular case, the situation as encapsulated in Clause 6 did not arise.

8.1 Therefore, the respondent's Engineer-in-Charge in terms of Clause 8 was empowered to have a final bill prepared. Furthermore, the respondent via the Engineer-in-Charge could have for this purpose, under Clause 8 also carried out the exercise of ascertaining the extent to which the works in issue were completed

8.2 This exercise, for whatever reason, got done, as it appears, only in 2010-2011. The fact that this event happened and occurred only in 2010-2011 required the learned Arbitrator to examine in the very least as to whether this circumstance led to eruption of a cause or did it result in triggering a fresh cause of action in favour of the petitioner. As noted above, the learned Arbitrator failed to carry out this exercise. This was important as the petitioner's claims were dismissed on the ground that they were barred by limitation in view of the provisions of Article 18 of the Limitation Act.

8.3 Article 18 of the Limitation Act applies where work is done by the

plaintiffs at the request of the defendant (in this case, the DDA) where no time has been fixed for payment. The period of limitation provided is three years, which commences when the work is done. The applicability of Article 18 was, thus, pivoted on the learned Arbitrator returning a finding that the subject Agreement was one where no time was fixed for payment and the price for the work done was either fixed or determined.

8.4 As would be apparent from the reading of Clause 6 and 8, a procedure was prescribed for payment of the bill raised against the work executed by a contractor, i.e., in this case, the petitioner.

8.5 The Agreement, as noted hereinabove, also provides for a situation where the contractor does not submit a bill. In terms of Clause 8, the respondent/DDA was empowered to get the work measured and thereafter prepare the final bill for payment. The facts obtaining in this case, to which I have already made reference above, show that this exercise was carried out by the respondent/DDA in 2010-2011 since the petitioner had not submitted a bill. Therefore, the learned Arbitrator, to my mind, ought to have touched on this issue, especially when the material was available in that behalf. The learned Arbitrator ought to have ruled as to whether or not the Agreement in issue was one where no time was fixed for payment and/or whether price had been fixed or determined. To my mind, only when determination was made qua these aspects could the Arbitrator have ruled that the matter fell within the scope and ambit of Article 18 of the Limitation Act. None of these aspects which, in my opinion, were germane were touched upon by the learned Arbitrator.

9 There is good authority for the proposition that Article 18 of the Limitation Act applies only when price is determined/fixed by the parties.

[See *Rahul Mahendru vs. Shiv Naresh Sport Pvt. Ltd.* judgment dated 5 October 2015, passed in CS(OS) No.296/2014.

9.1 There is also authority for the proposition that “work is done” only when it is inspected and/or measured. [See: *Paraganas Zila Parishad vs. Mercantile Engineering Co.*, AIR 1969 Cal.564 and *State of Rajasthan Vs. Ram Kishan*, AIR 1977 Raj 165 (FB)]. Both judgments have been rendered in the context of Article 56 of the Limitation Act, 1908 which is *pari materia* with Article 18 of the extant Limitation Act.

10 In this case, payment of money to the petitioner was dependant on a notice of completion being given by the petitioner, followed by an inspection by the Engineer-in-Charge within 10 days of receiving such notice. After the inspection, the Engineer-in-Charge is empowered to issue under Clause 6 a completion certification or, a provisional certificate if defects were found in the executed work. The defects, if found, are required to be incorporated in the provisional certificate. The Contractor, in this case the petitioner, did not submit a bill. Therefore, in terms of Clause 8, the respondent/DDA could have had the work measured and, then, proceed to prepare the bill; an exercise which was done only in 2011. The learned Arbitrator, however, as noticed above, does not seem to have examined the matter from this angle at all and simply relied upon the judgments cited before him on behalf of the respondent/DDA without appreciating their correct ratio.

10.1 For very same reason Section 18 of the limitation Act can have application.

11 As alluded to above, the claims made by the petitioner have not been dealt with on merits. The petitioner's claims were rejected on the ground

that these were woefully delayed and therefore, could not be sustained as the period of limitation had expired. In other words, the learned Arbitrator has rejected the claims based on a preliminary objection. The learned Arbitrator, in my opinion, should have examined, as noticed above, for whatever it was worth the effect of the letter dated 17.1.2011 and the preceding events of 2010. The length of delay cannot, solely, be determinative of the fact as to whether or not the claims of the petitioner were barred. I have made this observation because Mr. Mathur has repeatedly said that the petitioner commenced arbitration after expiry of 22 years. The learned Arbitrator was mandated by law to take into account every piece of material evidence which was vital in determining as to whether or not the claims filed by the petitioner were within the period of limitation. Limitation is an issue which, more often than not, requires examination of both facts and law.

12. Having regard to the foregoing, the award dated 9.6.2016 is set aside. The petitioner would be at liberty to take recourse to an appropriate remedy *albeit* in accordance with law. Needless to say, I have not examined the tenability of the petitioner's stand that the claim of the petitioner was within limitation. In case, the petitioner recommences the process of appointment of an arbitrator in the manner known to law, the respondent/DDA will have liberty to plead its defence to the claims, *inter alia*, on the ground that they are barred by limitation.

13. The captioned petition is, accordingly, disposed of.

RAJIV SHAKDHER, J

MARCH 27, 2019/pmc