

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

ARBITRATION APPLICATION NO.20 OF 2019

O R D E R

This application is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying to appoint a sole arbitrator to adjudicate the disputes and differences between the applicant and the respondents in respect of the sub-contract agreement dated 09.03.2011 for the work namely 'Thotapally Barrage Project – Vizianagaram District – earth work excavation, formation of embankment and construction of CM and CD works, including investigation, designing and estimation of Gajapthinagaram branch canal taking off at Km 97.700 of Right Main Canal of Thotapalli Barrage Project with its distribution system and field channels (including cut and cover from Km1.65 to Km 3.25) after crossing of Gandigedda to irrigate an ayacut of 15000 acres (ID)".

The case of the applicant, as per the averments made in the arbitration application, is that the erstwhile Government of Andhra Pradesh awarded contract of the subject works to the 1st respondent and agreement No.2SE/2010-11 dated 30.12.2010 was entered into between the parties. The 1st respondent is the company and it is represented by its Managing Director, the 2nd respondent herein. The 1st respondent, after thorough enquiry and satisfying with the works so far executed by the applicant, sub-let the contract to the applicant and a sub-contract agreement was entered on 09.03.2011.

In the application, the applicant has narrated the difficulties faced by him by virtue of the delay in handing over the lands for commencement of work after execution of agreement, and also other difficulties with regard to increased quantity of work, increased rates on labour and material etc.,

It is stated that as per Clause 4 of the sub-contract, the payments have to be made within seven days of receipt of payment of running account bills from the Government. Vide letter dated 09.07.2014, the applicant brought the above

difficulties faced by him, to the notice of the respondents, and sought for providing additional financial assistance in accordance with the increased quantity of work, increased rates on labour and material. Though the said letter was received by the respondents, there was no response and the case of the applicant, is that, the respondents have orally instructed him to suspend the work.

It is further stated that as there was no response from the respondents in pursuance of letter dated 09.07.2014, applicant vide another letter dated 11.09.2014, brought to the notice of the respondents about the suspension of work as per their instructions, and the hardships faced by him, and sought for closure of contract and for settlement of accounts on 'as is where is basis'.

The grievance of the applicant is that when the contract was existing, no settlement of accounts was made, and resuming the work with other contractor, is detrimental to his interest. Therefore, vide letter dated 24.09.2015, he brought the above facts to the notice of the respondents, and called the respondents to resolve the dispute. As there was no response, the applicant got issued legal notice dated 09.01.2016, calling upon the respondents to settle the issues arising out the sub-contract agreement dated 09.03.2011. Again as there was no response, the applicant issued a detailed notice dated 01.10.2018 raising all the claims and in case no settlement is arrived at, to resolve the dispute by referring the matter to arbitration.

It is stated that on receipt of the said letter, the respondent vide letter dated 29.10.2018, instructed the applicant to attend their office with all the supporting documents giving two days prior notice and that upon failing of the conciliation, a sole arbitrator would be appointed by mutual consent. On receipt of the said letter, the applicant vide letter dated 09.11.2018, informed the respondents about his visit on 14.11.2018 and also stated that all the original documents pertaining to the above works are in the custody of the respondents,

as the applicant is only a sub contractor. On 14.11.2018, the applicant approached the respondent and made a request to produce all the documents, which are admittedly in their custody. The director of the 1st respondent – company by name B.S.N.Reddy (Technical), upon the applicant's request, assured to verify all the documents and to consider his claims in true spirit. But the respondents, without considering the documents, which are in their custody, unilaterally rejected all the claims of the applicant vide letter dated 02.01.2019. As the respondents failed to consider the claim of the applicant, and also failed to nominate the arbitrator to adjudicate the disputes between the parties, the applicant filed the present application under Section 11(6) of the Act.

The 1st respondent filed counter affidavit and mainly raised three grounds. It is stated that the Government awarded the contract to the 1st respondent for the subject works and accordingly agreement was entered into on 30.12.2010. As per Clause 4.1 of the said contract, sub-contracting of work above 50% is not permissible. Therefore, the sub-contract agreement dated 09.03.2011 entered into between the parties is void *ab initio*. It is stated that the 2nd respondent, who is the director of the company is not a party to the sub-contract agreement dated 09.03.2011 and hence the arbitration application is filed with mis-joinder of parties, and hence the application is liable to be dismissed. It is further stated that as per the case of the applicant, the cause of action arose for the applicant, when he is stated to have addressed letters dated 09.07.2014 and 11.09.2014 and, therefore, the notice dated 1.10.2018 invoking the arbitration clause in the sub-contract agreement, was beyond the period of three years from the date of accrual of cause of action, and hence the claim of the applicant is barred by limitation. With these averments, *inter alia*, the arbitration application was sought to be dismissed.

Heard the learned counsel for the applicant and the respondents, who reiterated the above averments made in the arbitration application and in the counter affidavit respectively.

Before adverting to the rival contentions, it is necessary to consider relevant provisions under clauses (a) and (d) of sub-section 1 of Section 2, sub-section 6 of Section 11 and Section 16 of the Act, which are extracted as under:

2. Definitions (1) In this part, unless the context other requires:

- (a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;
.....
- (d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

11. Appointment of arbitrators:

(1). . .

. . .

(6) Where, under an appointment procedure agreed upon by the parties,

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fails to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such court to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

16. Competence of arbitral tribunal to rule on its jurisdiction:

(1) The arbitral tribunal may rule its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

. . .

Clauses (a) and (d) of sub section 1 of Section 2 of the Act, defines the terms 'arbitration' and 'arbitral tribunal'.

A reading of the provision under sub-section 6 (a) Section 11, it is clear that where the parties agree for appointment procedure, and any party fails to act

as required under that procedure, then the other party may request the Supreme Court, or the High Court, as the case may be, to take necessary measures for appointment of arbitrator, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 16 of the Act empowers the arbitral tribunal to rule on its own jurisdiction, including the ruling on any objections with respect to the existence, or validity of the arbitration agreement. Under clause (a) of sub-section 1 of Section 16, the arbitration clause which forms part of a contract, shall be treated as an agreement, independent of other terms of the contract, and under clause (b) of the said provision, the decision by the arbitral tribunal that the contract is null and void, shall not entail by *ipso jure* i.e., by operation of law, the invalidity of the arbitration clause.

Coming to the facts of the present, the 1st respondent was the principal contractor and he was awarded the contract and he entered into the sub-contract dated 09.03.2011 with the applicant for execution of works. The said sub-contract provides for arbitration clause, which reads as follows:

“28. DISPUTES: In the event of any dispute arising out of this Sub Contract, the parties thereto agree that the matter shall be referred to the Sole Arbitrator, who is the officer of M/s UANMAX INFRA LIMITED (other than concerned with this Sub Contract), nominated by Managing Director of UANMAX INFRA LIMITED. The award of the Arbitrator so nominated shall be final conclusive and binding on all parties to the dispute. The venue of Arbitrator is at Hyderabad. All the expenses of Arbitration shall be borne by the party who has invoked the Arbitration.”

As per the above clause, for resolution of any dispute, the parties have agreed to refer the matter to sole arbitrator, who shall be the officer of the 1st respondent – company, who is not concerned with the present sub-contract, and such officer shall be nominated by the Managing Director. As disputes arose with regard to denial of the claim of the applicant, he filed the present application.

The contention of the counsel for the respondents is that as principal contract prohibits sub-contracting of more than 50% of works, and as the total

work is sub-contracted to the applicant under the agreement dated 09.03.2011, the same is void *ab initio*, and hit by Section 20 of the Indian Contract Act, 1872, and hence the arbitration clause in the said sub-contract, is of no avail to the applicant. In support of this contention, learned counsel for the respondents relied on the judgment of the High Court of Madras in **S.M.KANNIAPPA NADAR vs. K.K.KARUPPIAH NADAR**¹.

The above contention of the learned counsel for the respondents, cannot be accepted in view of clause (b) of sub-section 1 of Section 16 of the Act. As per the said provision, even if the contract is held to be null and void, it shall not invalidate the arbitration clause. Considering Section 16 of the Act, the Apex Court in **REVA ELECTRIC CAR CO. (P) LTD. v. GREEN MOBIL**², held as under:

“54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void.”

A learned Single Judge of the erstwhile High Court of Andhra Pradesh in **SURENDER SINGH BAJAJ vs. HARMEET SINGH SETHI**³, considering Section 16 of the Act, held as under:

“20. The contention of the respondents that inasmuch as the alleged agreement creates a benami transaction, the same is void, invalid and unenforceable, and consequently, the arbitration clause contained therein, also cannot be looked into for the purpose of maintaining the present application, for the reason that the same runs contrary to the provisions of the [Parliamentary Act](#) and is opposed to public policy, cannot be accepted. In this context, it would be apposite to refer to the relevant provisions of [Section 16](#) of the Arbitration and [Conciliation Act](#), 1996, which reads thus:

...

21. A bare reading of the above provision would disclose that the arbitral Tribunal, apart from being clothed with the power of ruling on its own jurisdiction, is

¹ AIR 1962 Mad 240

² (2012)2 SCC 93

³ 2004(1) ALD 91

also clothed with the power to rule on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose under Clause (a) of Sub-section (1) of [Section 16](#), the arbitration clause in the agreement is treated as an agreement independent of the terms of the contract, and under Clause (b) of Sub-section (1) of [Section 16](#), a decision by the arbitral Tribunal that the contract is null and void, would not entail *ipso jure*, the invalidity of the arbitration clause. Inasmuch as [Section 16\(1\)\(b\)](#) of the Arbitration and [Conciliation Act](#), 1996, itself clothes the Arbitrator with the power to go into the question of the validity or otherwise of the arbitration agreement or the arbitration clause contained in the agreement, the contention of the respondents that the alleged agreement being void and invalid, the arbitration clause contained therein cannot be looked into for invoking the arbitration clause, cannot be accepted, and as such, the decisions relied upon by the learned Counsel for the respondents in support of his arguments, do not help him in any manner.. ”

As there is arbitration clause in the agreement and in view of Section 16(1)(b) of the Act, even if, for the sake of argument, the same is taken as invalid, then also, the arbitration clause survives.

The judgment relied on by the counsel for the respondents (1 supra), has not dealt with the provisions of the Arbitration and Conciliation Act, 1996, and it is delivered considering the provisions under the Central Excises and Salt Act (I of 1944). Hence, the said judgment cannot be made applicable to the facts of the present case.

The case of the applicant is that as disputes arose, he addressed letters dated 09.07.2014 and 11.09.2015 and also legal notice dated 09.03.2011 and a further detailed notice dated 01.10.2018, seeking the respondents to settle his claims within ten days. On receipt of notice dated 01.10.2018, the case of the applicant is that, respondents addressed letter dated 29.10.2018, the relevant portion of which is as under:

“We are in receipt in receipt of your letter by requesting us to settle the claims under 2nd cited. It is very surprised to us by seeing your huge claims after a long period of time, however it is invited you to attend our office before Mr.B.S.N.Reddy Director (Technical) for conciliation with all supporting documents pertaining to the alleged claim by giving 2 (two) days prior notice. It is further informed to you, in case, failing the conciliation we may go for appointment of a Sole Arbitrator upon mutual consent as per the Arbitration and Conciliation Act and subsequent amendments.

Therefore, it is requested you to kindly attend the office as cited supra by giving 2(two) days prior notice and oblige.”

Reading of the above letter addressed by the respondents to the applicant clearly goes to show that the applicant was invited to attend the office for

conciliation with all supporting documents, by giving two days prior notice and on failure of conciliations, it was informed to the applicant that the respondents would go for appointment of sole arbitrator upon mutual consent.

The case of the applicant is that in pursuance of the said letter dated 29.10.2018, he attend the office on 14.11.2018 and informed that all the original documents are with the respondent, and the further case of the applicant is that the Director of the 1st respondent – company by name Sri B.S.N.Reddy (Technical) assured the applicant that he shall verify all the documents and would consider the claims in its true spirit. The grievance of the applicant is that thereafter, the respondents did not consider the claim of the applicant and vide letter dated 02.01.2019 rejected the claim of the applicant unilaterally, and also failed to appoint the arbitrator to resolve the disputes. Therefore, he filed the present application under Section 11(6) of the Act, seeking for appointment of arbitrator.

As per sub sections 6 of Section 11 of the Act, which are extracted above, as the respondents failed to appointed an arbitrator as agreed under clause 28 of the sub-contract dated 09.03.2011, this court is inclined to appoint the arbitrator for resolution of the disputes between the parties.

With regard to aspect of limitation, a Full Bench of the Apex Court in ***M/S WEXFORD FINANCIAL INC. PANAMA vs. BHARAT HEAVY ELECTRICALS LTD⁴***, held as under:

“7. We have heard learned counsel for the parties at some length. The material facts are not in dispute. That a service provider agreement was executed between the parties is admitted. That Article 7 of the said agreement provides for settlement of the dispute in relation to the agreement by way of arbitration is also not in dispute. That disputes have actually arisen between the parties in relation to the agreement is also evident from the averments made in the pleadings. The only method for determination of such disputes is by way of arbitration. Whether or not the petitioner has provided the services engaged under the agreement and, if so, whether the said services were adequate and satisfactory are matters that can be examined only by the Arbitrator. ***So also the question whether the claim made by the petitioner is time barred cannot be examined in the present proceedings and shall have to be left open to be raised before the Arbitrator.*** There is, in that view, no gainsaying that the present petition under Sections 11(5) and 11(12) shall have to be allowed with appropriate directions, particularly when this court is concerned

⁴ (2016)8 SCC 267

primarily with the question whether an arbitration agreement exists between the parties and if so whether the disputes falling within the scope of the agreement have arisen for determination. Out answer to both these questions being in the affirmative, the petitioner has made out a case for appointment of an Arbitrator and for reference of the disputes for adjudication to him/her.”

(Emphasis added)

As per law laid down by Apex Court it is clear that the question whether the claim is barred by limitation cannot be examined by this court in the arbitration application, and the same is to be left open to be raised before the Arbitrator. In view of the same, it is open for the respondents to raise the issue with regard to limitation before the arbitrator.

In view of the above facts and circumstances, the present arbitration application is allowed and Sri Justice B.Sudershan Reddy, Former Judge of Supreme Court of India, is nominated as arbitrator to resolve the claims and disputes between the parties and pass award in accordance with law.

Interlocutory applications pending, if any, shall stand closed. No order as to costs.

A.RAJASHEKER REDDY,J

DATE:02—01—2020

AVS

Note:

Office to mark a copy to

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B/O
(AVS)