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

Date of Decision: 27th July, 2021

+ ARB.P. 377/2020

M/S BD RAIZADA PROJECTS LTD

..... Petitioner

Through: Mr. Vineet Kumar Wadhwa and
Mr. Praveen Chauhan, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Nirvikar Verma, Advocate for
R-1.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') seeks appointment of a Sole Arbitrator for adjudication of disputes arising out of and in relation to Contract No. C.A No. CEDZ- 02/2008-09 (in short 'the Contract') awarding to the Petitioner construction work of Engine Repair and Construction of Fully Automatic Computer Controlled Three Engine Test House and Effluent Drainage System at 505 ABW At Delhi Cantt-10. The arbitration clause (Clause 70) is contained in the General Conditions of Contract ('GCC'), incorporated by reference in the Contract.

2. The Contract and the arbitration clause are not in dispute. The Respondent is objecting to appointment of the Arbitrator primarily on the ground of limitation.

3. Few essential facts are required to be noted for deciding the objection raised by the Respondent. The Petitioner who is the contractor, raised the final bill on 18th January 2014, which was eventually settled by the Respondent on 13th January, 2018. According to the Petitioner, there is short payment and *inter-alia* a dispute has arisen with respect to reduction of payment of the final bill.

4. To seek resolution of disputes, on 9th September, 2018, the Petitioner invoked arbitration and called upon the Respondent to appoint an Arbitrator within thirty days of the receipt of the letter. In response thereto, the Respondent *vide* communication dated 9th October, 2018, sought the Petitioner's consent for appointment of a Departmental Arbitrator, followed by a reminder on 23rd October, 2018; the Petitioner did not agree. Resultantly, the Arbitral Tribunal has not been constituted till date.

5. Mr. Nirvikar Verma, learned counsel for the Respondent contends that the final bill was submitted by the Petitioner on 18th January, 2014 and on the same date, "No further claim certificate" and "Nil disputed part of final bill certificate" were signed by the Petitioner. These certificates were without any protest and after submission of the final bill, to the satisfaction of the Engineer-in-Charge as per condition 65 of IAFW-2249 General Condition, forming part of Contract Agreement. After examination of the final bill,

escalation amount accounted for by the Petitioner was disallowed and this fact was known to the Petitioner at the time of signing of, “No further claim certificate” and “Nil disputed part of final bill certificate”. In these circumstances, Mr. Verma, relying upon the judgment of the Supreme Court in *Union of India v. M/s Momin Construction*¹, argues that claims of the Petitioner are barred by limitation. Further, reliance is placed on the judgment in *BSNL v. Nortel*² to argue that the Supreme Court has held that limitation for filing a petition under Section 11 of the Act would be governed by Article 137 of the Limitation Act, 1963. In view thereof, since disputes had arisen in 2014, invocation thereof in 2018, would be *ex-facie* barred by limitation and hence the present petition is not maintainable.

6. Controverting the contentions of the Respondent, Mr. Praveen Chauhan, learned counsel for the Petitioner has argued that the petition has been filed within the time period prescribed under the Limitation Act, 1963. The disputes arose on account of short payment on settlement of the final bill in January, 2018. The Petitioner thereafter invoked arbitration within three years and called upon the Respondent to appoint an arbitrator. Since the Respondent has failed to make an appointment, they have lost their right to do so and the Petitioner is entitled to seek appointment of an arbitrator by this Court.

7. The Court has heard the counsel for the parties. The question of limitation is ordinarily left for adjudication by the Arbitral Tribunal. Only in certain

¹ AIR 1995 SC 1927.

² Civil Appeal Nos. 843-844/2021.

exceptional cases where *ex-facie* the claim is found to be barred by limitation, the Court can decline to appoint an Arbitrator. This is also the view held by the Supreme Court in *Nortel* (supra). In fact, in *Nortel* (supra) it has also been held that if there is even the slightest doubt, the rule is to refer the disputes to Arbitration, otherwise it would constitute encroachment upon the domain of the Arbitral Tribunal.

8. Keeping the afore-noted principle in mind, Court has examined the factual circumstances of the case. The final bill submitted on 18th January, 2014, was kept pending by the Respondent. The parties had communicated with each other in the interregnum. On 9th February, 2015, the Petitioner had intimated that they had signed the final bill under protest and raised certain claims. Be that as it may, there is no denying that the payment against the final bill came to be made only in January, 2018. At that time, the Petitioner realized that it has been short-paid, therefore invocation of arbitration on 9th September 2018 *prima facie* cannot be said to be time barred. Although, the Respondent contends that “No further claim certificate” and “Nil disputed part of final bill certificate” brings a finality to the issue, however the Court can only observe that the position in law on this aspect is to the contrary. However, this question is left open for adjudication by the Arbitral Tribunal.

9. The judgment in *Momin Construction* (supra) relied upon by the Respondent is not applicable and is distinguishable on facts as that was a case where the Respondent therein did not initiate arbitration proceedings for a period of 6 years after the final bill was passed, unlike the present case wherein the Respondent made the short payment, as per the Petitioner, after

almost 4 years from the date of the final bill being submitted. Therefore, *prima facie*, the limitation would start to run from 13th January, 2018, being the date of short payment and when the disputes actually arose between the parties. In this regard, reliance may be placed on the judgment of the Supreme Court in ***Inder Singh Rekhi v. Delhi Development Authority***³ wherein the Supreme Court held that there must be a dispute or differences between the parties to give rise to a cause of action. Thus, having regard to the totality of the circumstances in light of the correspondence exchanged between the parties and facts noted above, the Court does not find merit in the objection of the Respondent.

10. Since the existence of the Arbitration Agreement is not in dispute as noted above, Mr. Justice S.L. Bhayana, (Retd.), former Judge of this Court, [Contact No.: +91 9871300028] is appointed as the Sole Arbitrator to adjudicate disputes between the parties arising out of and in relation to the Contract.

11. The parties are directed to appear before the learned Sole Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

12. The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the Act.

³ AIR 1988 SC 1007.

13. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open, including the question of limitation as urged by the Respondent. Both the parties shall be free to raise their claims/counter claims before the learned Arbitrator in accordance with law.

14. The present petition is allowed in the above terms.

JULY 27, 2021

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(corrected and released on 12th August, 2021)

SANJEEV NARULA, J