

AP/675/2022

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION

M/S. MANOJIT DAS & CO.
VERSUS
UNION OF INDIA & ORS.

BEFORE:
THE HON'BLE CHIEF JUSTICE PRAKASH SHRIVASTAVA
DATE : 8TH DECEMBER, 2022.

APPEARANCE:

Mr. Partha Sarati Bhattacharyya, Advocate
Mr. Ashok Kumar Jena, Advocate
Mr. Raju Bhattacharyya, Advocate
Mr. Arunava Maiti, Advocate
.....for the applicant.

Mr. Indrajeet Dasgupta, Advocate
Ms. Puspita Bhowmick, Advocate
Ms. Rima Biswas, Advocate
..for respondents

The Court: This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed for appointment of the arbitrator to resolve the disputes between the parties.

The Arbitration Agreement No.86/EE(CE)/2009-10, Annexure-B to the AP, is not in dispute between the parties. The following arbitration clause is also undisputed:-

“CLAUSE 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work

or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

- (i) *If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.*

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

- (ii) *Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor."*

Learned counsel for the applicant has pointed out that since the dispute had arisen between the parties in respect of non-payment of certain dues, therefore, the applicant had served the notice dated 01.01.2022 upon the respondents in terms of Section 21 of the Arbitration and Conciliation Act making a request to the Chief Engineer to appoint the sole arbitrator in terms of Clause 25(ii), but in spite of service of notice, the arbitrator was not appointed and the reply dated 24.01.2022 was given to get the decision of the Engineer-in-Charge for settlement of dispute.

Learned counsel for the respondents has raised a preliminary objection that the claim of the applicant is barred by time and has placed reliance upon the judgement of the Hon'ble Supreme Court in the matter of *Secunderabad Cantonment Board vs. B. Ramachandraiah & Sons*, reported in (2021) 5 SCC 705 and the documents on record in support of his submission that the claim of the applicant is time barred.

Having examined the records, it is noticed that though the respondents are relying upon the communications dated 12th September, 2016 and 14th May, 2019 in support of their submission that the claim is time barred, but learned counsel for the applicant has pointed out that by communication dated 27th February, 2020, Annexure-G to the AP, the Statement of Claim was submitted before the Executive Engineer and that the Executive Engineer had examined the Statement of Claim and by detailed communication dated 12th March, 2020 had rejected the same. He has also pointed out that the respondents by sending the communication dated 24.01.2022 had ignored the decision of the Executive Engineer and again required the applicant to approach the Engineer-in-Charge.

Having regard to the material, which is pointed out by learned counsel for the applicant, I am of the opinion that the claim of the applicant is not a dead claim. The issue relating to limitation is a mixed question of fact and law which can more appropriately be decided by the arbitrator by

permitting the parties to adduce evidence in support of their respective claims. So far as the judgment in the matter of *Secunderabad Cantonment Board (supra)* relied upon by the learned counsel for the respondents is concerned, in that case, the claim was ex facie time barred, therefore, the Hon'ble Supreme Court had set aside the order of the High Court allowing the application under Section 11 of the Act. Since the present case stands on a different factual footing, therefore, the benefit of the said judgement cannot be extended to the respondents.

In the aforesaid circumstances, I am of the opinion that a case for appointment of sole arbitrator to resolve the dispute between the parties is made out and accordingly, AP is allowed and Mr. Kundan Kumai, retired District Judge at Siliguri is appointed as sole arbitrator, subject to submission of declaration by the arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.

Let this order be conveyed to the arbitrator by the Registrar, Original Side forthwith.

Accordingly, AP is disposed of.

(PRAKASH SHRIVASTAVA, C.J.)