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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: 24th May, 2022

+ ARB.P. 685/2020 & CRL.M.A. 17662/2021, I.A. 14565/2021

JAG PARVESH SURA Petitioner

Through: Mr. Sameer Jain & Ms. Anu Sura,
Advocates.

versus

UPPAL ENGINEERING CO PVT LTD & ANR. Respondents

Through: Mr. Ritesh Khatri, Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

NEENA BANSAL KRISHNA, J. (ORAL)

I.A. 11891/2021 (U/s 148 read with Section 151 of CPC for condonation of delay in filing the amended memo of parties)

1. This application has been filed under Section 148 read with Section 151 of the Civil Procedure Code, 1908 by the petitioner seeking condonation of delay 42 days in filing the amended memo of parties.
2. For the reasons stated in the application, the delay of 42 days in filing the amended memo of parties is condoned.
3. Amended memo of parties has already been taken on record.
4. Application is disposed of.

ARB.P. 685/2020

1. A petition under Section 11 of the Arbitration & Conciliation Act,



1996 read with Section 151 of CPC has been filed on behalf of the petition seeking appointment of an Arbitrator.

2. In 2005 the respondent No.1 Uppal Engineering Co. Pvt. Ltd. was awarded a contract by Northern Railways in relation to "Earthwork in filling in embankment & cutting, provision of blanketing material, construction of minor bridges, major bridges with PSC Slab and other allied works between Samargopalpur (excluding)-Kinana (Excluding) Stations". The Respondent No.1 approached the petitioner for sub-contracting the works under the main contract awarded to it by Northern Railway. Accordingly, an Agreement dated 10th March, 2005 was entered into between the petitioner's erstwhile proprietorship firm M/s Sura Construction Co. with respondent no.2 (Director of the Respondent No.1/Company) on behalf of respondent No.1 Company for sub-contracting the work under the main contract awarded to respondent No.1.
3. The sub-contract Agreement required respondent No.1 to take up any dispute arising out of execution of Works including the payment in terms of "price variation clause" with the Employer. Further, since the work had been executed by the petitioner, the sub-contracting Agreement contained the provisions with respect to distribution of the claim amount in case of a successful outcome and contained a provision for settlement of disputes through arbitration.
4. The petitioner completed the work under the main contract as per the terms set out in the sub-contract Agreement to the satisfaction of the respondents and the Employer and final Bill under the main Contract was released in October, 2008 to respondent No.1.



5. The respondent No.1 around the same time was pursuing the claim against the Employer for payment under "price variation clause" under the main contract with respect to the works executed by the petitioner as per sub-contracting Agreement. The arbitration in respect of said claims was invoked some time in 2009. The said matter involving claims arising out of "price variation claim" PVC was finally taken out by Civil Court at Patiala House Courts as informed to the petitioner by respondent No.2.
6. At the time of settlement of amounts in 2008 an amount of Rs.12,00,000/- was due and payable by the petitioners to the respondent from the final bills. The respondent No.2, however, expresses his inability to pay and it was settled that the said amount will be paid to the petitioner as and possible and latest upon the completion of the "price variation claim" PVC claim proceedings initiated against the Employer. The petitioner agreed to the same and in good faith and in the light of amicable settlement between the parties.
7. The petitioner was informed about the matter having been decided in favour of the respondents and an amount of Rs.88,59,790.00 being released in favour of respondent No.1. The petitioner share of monies came to Rs.57,58,350.00 from the amount received by respondent No.2 which was 65% of Rs.88,59,790.00 and the balance amount of Rs.12,00,000.00 from the final bills.
8. A Legal Notice dated 15th June, 2020 was served upon the respondents seeking the amount but the respondent vide email dated 24th June, 2020 denied the petitioner's claim on the basis of limitation.



9. It is claimed that the aforesaid amounts became due and payable to the petitioner only towards the end of 2017 when the amounts were credited to the account of respondent No.1. The limitation started running only when it came to the knowledge of the petitioner that the payments have been made by Northern Railway in favour of respondent No.1. Thus, petitioner in terms of sub-contracting Agreement invoked arbitration against the respondent by issuing Notice dated 30th July, 2020. The respondent again refused to take the services of Arbitrator. Left with no option, the petitioner has filed the present petition under Section 11 of Arbitration & Conciliation Act, 1996 for appointment of an Arbitral Tribunal for adjudication of the disputes as mentioned herein.
10. The respondent has contested the application essentially on the three grounds :
- i) The first ground is that the Agreement dated 10th March, 2005 was entered into with petitioner's partnership firm and the respondent, as is evident from the Agreement dated 10th March, 2005, where the petitioner is so defined. Moreover, the Agreement has a stamp of the name of the petitioner wherein as well he is defined as the partner of M/s Sura Construction Co. The learned counsel has further referred to the Legal Notice dated 15th June, 2020 wherein also the petitioner has been described as "M/s Jag Parvesh Sura (*earlier sole proprietor now partner of the firm M/s Sura Construction Co.*)". Not only this, the description of the plaintiff has been given in the Notice dated 2nd July, 2020 invoking the arbitration Agreement. Also, in the email dated 19th July, 2020 written by the petitioner, similar description has



been given.

The documents of the petitioner show that it was a partnership firm which had entered into the Agreement, but the claim has been filed by Jag Parvesh Sura in his individual capacity with whom the respondent had no Agreement. It is submitted that the petitioner has no locus to file the present petition.

ii) The second ground agitated on behalf of the respondent is that the petition is barred by limitation. It is asserted that as per the submissions of the petitioner himself, the work under the contract was completed in the year 2008. However, the present petition has been filed in the year 2017 and the claim of the petitioner is barred by limitation.

iii) The third ground agitated by the respondent is that the Agreement was with the partnership firm in the name of M/s Jag Parvesh Sura Co. which was an unregistered partnership firm and the present petition by unregistered partnership firm is not maintainable.

11. The petitioner in his rejoinder has explained that M/s Sura Construction Co. was the sole proprietorship concern of the petitioner at the time of entering into the Agreement dated 10th March, 2005 which is further corroborated by the Bank Statement and the Income Tax Returns wherein M/s Sura Construction Co. has been described as sole proprietorship concern. The description of the petitioner as a partner in the Agreement dated 10th March, 2005 is an inadvertent error as can be made out from the documents filed by the petitioner. At the relevant time, the petitioner was a sole proprietorship Firm and thus, the petitioner has the locus to file the present suit.



12. In regard to the objections of claim being barred by limitation, it has been reasserted that the petitioner came to know about the outcome of "price variation clause" claim proceedings in the end of 2017 and the notice of Arbitration was issued in July, 2020 which is within the period of limitation. In view of the limited scope of the jurisdiction under Section 11 of the Arbitration & Conciliation Act, 1996, any preliminary question in regard to limitation has to be decided by the Arbitrator.
13. It is further stated that since the petitioner was the sole proprietor of M/s Sura Construction Co., the objections taken that it is an un-registered partnership Firm, is baseless and is misconceived in law.
14. It is thus, reasserted that the sole arbitrator may be appointed to adjudicate the disputes which have arisen out of the Agreement dated 10th March, 2005.
15. Submissions heard.
16. Learned counsel for the respondent had reasserted his three grounds for resisting the application under Section 11 of the Arbitration & Conciliation Act. However, after some arguments, it was conceded that the respondent shall be at liberty to raise these objections before the learned Arbitrator to be adjudicated by the learned Arbitrator.
17. There is a valid Arbitration Clause in the Agreement dated 10th March, 2005. Given the limited scope of examination under Section 11 of the Arbitration & Conciliation Act, 1996, this court considers it apposite to allow the present petition.
18. Accordingly, Mr. Anil Kher (Mob. No.9810072729), Advocate is appointed as the Sole Arbitrator to adjudicate the disputes between the



parties.

19. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the Arbitration & Conciliation Act and not being ineligible under Section 12(5) of the Arbitration & Conciliation Act.
20. The parties are at liberty to approach the learned Arbitrator for further proceedings.
21. It is clarified that all rights and contentions of the parties are reserved.
22. The petition is disposed of in the aforesaid terms. All pending applications, if any, also stand disposed of accordingly.

NEENA BANSAL KRISHNA, J

MAY 24, 2022

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