



2023:DHC:7331



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

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**Reserved on: 25<sup>th</sup> September, 2023****Pronounced on: 09<sup>th</sup> October, 2023**

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**ARB.P. 1466/2022, I.A.Nos.9140/2023, 9145/2023****VALPLAST TECHNOLOGIES PRIVATE LIMITED**

..... Petitioner

Through: Mr.H.L.Tiku, Senior Advocate with  
Mr.Rakesh Kumar, Ms.Yashmeet  
Kaur, Advocates.

versus

**GAMMON ENGINEERS AND  
CONTRACTORS PRIVATE LIMITED**

..... Respondent

Through: Ms.Awantika Manohar, Ms.Parul  
Dhurvey, Advocates.

**CORAM:****HON'BLE MR. JUSTICE YOGESH KHANNA****YOGESH KHANNA, J.**

1. This petition is filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996. The brief facts are the petitioner is engaged in the business of civil constructions like water proofing of underground structures, tunnels, deponies (disposal site), landfill, water proofing of civil works, thermoplastic lining systems, spray applied membrane etc.

2. M/s.Marti India Private Limited, (referred to as the "MIPL") which stood amalgamated with the petitioner submitted its offer to the respondent for a part of a larger project as a sub contractor, which was accepted, at a contract Price of Rs.203,48,20,974/-[Rupees Two Hundred Three Crore



Forty Eight Lakhs Twenty Thousand Nine Hundred Seventy Four Only]. The respondent was the contractor and M/s.Mangdechhu Hydroelectric Project Authority (MHPA), the Employer. M/s.Mangdechhu Hydroelectric Project Authority (MHPA) approved Marti India Private Limited (MIPL) as sub contractor. Consequently, Gammon India Limited respondent herein and Marti India Private Limited (amalgamated with the petitioner) entered into an Agreement on May 11, 2012 for execution of the project/works.

3. M/s.Marti India Private Limited worked on the project at project site but certain difficulties were faced by Marti India Private Ltd due to the geology which was found to be entirely different than was provided in the Geotechnical Appraisal report, hindrances and impediments in execution of project at site, due to which M/s.Marti India Private Ltd requested for variation in the cost. After detailed deliberations M/s.Marti India Private Limited and respondent mutually agreed to terminate the contract. Consequently, Termination and Release Agreement dated 19.12.2013 was executed between them. There were certain claims of M/s.Marti India Private Limited nomenclatured as "Pass-through Claim", which the respondent was to co-operate and assist in obtaining including refund of Bhutan sales tax, customs duties and excise duty from MHPA. The total amount of the said claims was Rs.65,39,45,761 as more particularly detailed in Schedule 4 of the Termination and Release Agreement dated 19.12.2013.

4. The respondent has only paid a sum of Rs. 1.4 crores and the balance amount is still outstanding. Since the respondent had not paid the amounts as such the petitioner vide its notice dated 25.10.2022 invoked Sub Clause-18.2 of Clause-18 with heading "Governing Law and Dispute Resolution" of the Termination and Release Agreement dated 19.12.2013, and while



nominating its arbitrator requested the Respondent to nominate its Arbitrator. Despite receipt of the notice, the Respondent did not appoint its arbitrator, hence the present Petition.

5. The learned senior counsel for the petitioner has referred to certain clauses of Termination and Release Agreement dated 19.12.2013, as under:

*“(C) MCL has, by a letter dated March 16, 2012 addressed to GIL (the "Comfort Letter"), undertaken to provide technical and financial support to MIPL and to take responsibility for the successful completion by MIPL of specified works awarded to it by GIL;*

**2. GIL ACTIONS ON PAYMENT DATE**

**2.1** *On the Payment Date, GIL shall do the following and/or the following shall occur:*

*(a) Deliver to MIPL the original version of the Comfort Letter if such original version is available with GIL. GIL will not be required to deliver the original version of the Comfort Letter to MIPL. If such original version has been lost, and GIL's failure to deliver such original version will be deemed to constitute a confirmation of such loss. Notwithstanding the foregoing, pursuant to this Agreement, GIL hereby automatically releases MCL from all obligations and liabilities under the Comfort Letter and confirms the termination of the Comfort Letter and undertakes not to make or pursue any claim under the Comfort Letter.*

*(b) Deliver to MIPL a performance certificate certifying the completion by MIPL of its obligations under the Contract Agreement (specifying that such obligations stand reduced to the Contract Works actually performed by the Cut-off Date) and specifying the closed value of such Contract Works performed.*

**7. PASS-THROUGH CLAIMS**

**7.1** *During the performance of the Contract Works, MIPL, had raised certain claims listed in Schedule 4 against MHPA (the "Passthrough Claim") for payment over and above the Contract Agreement price of Bhutanese Ngultrums Two Billion Thirty Four Million Eight Hundred and Twenty Thousand Nine Hundred and Seventy Four (Nu. 2,034,820,974) with respect to Contract Works performed by MIPL on or prior to the Cut-off Date, GIL hereby agrees to jointly act with MIPL and to cooperate in good faith and assist MIPL, (including by executing any documents required, providing any information or documents necessary and complying with other requests of MIPL for actions to be taken for recovery of such amounts) in pursuing such Pass-through Claims and recovering the Pass-through Claim Amount from MHPA, including pursuant to proceedings before the dispute adjudication board (or any other dispute resolution forum) or in arbitration or court proceedings, MIPL shall be entitled to determine the strategy and direct the*



*manner in which the Pass-through Claims will be pursued against MHPA. All reasonable and documented costs and expenses incurred by GIL in consultation with MIPL in pursuing the Pass-through Claims against MHPA (including expenses incurred in respect of proceedings before the dispute adjudication board or arbitral or court proceedings to pursue the Pass-through Claims) shall be borne by MIPL.*

*7.2 Gil will promptly pay to MIPL, any part of the Pass-through Claim Amount received by GIL from MHPA (after deducting seven per cent (7%) of such amount subject to and in accordance with Schedule 4) within seven (7) days of its receipt, failing which GIL will be liable to pay interest on such amount at the Prime Lending Rate of the State Bank of India Prevailing on the date of receipt, until payment in full to NIPL. Any such Tax amount withheld by GIL shall be promptly paid by GIL to the applicable Tax authorities in accordance with applicable laws.*

#### **18. GOVERNING LAW AND DISPUTE RESOLUTION**

*18.1 This Agreement shall be governed by and construed in accordance with the laws of India.*

*18.2 Any dispute, controversy or claim that arise out of or in connection with this Agreement, including any question regarding its existence, validity or termination (a "Dispute") and which a Party wishes to have resolved shall be referred upon the application of any Party to and finally settled through arbitration pursuant to the Arbitration and Conciliation Act, 1996 and in accordance with the ICC Rules of Arbitration and the award made in pursuance thereof shall be binding on the Parties. The arbitration shall be conducted by a panel of three (3) arbitrators, with the Marti Entities appointing one arbitrator, GIL appointing one arbitrator and the arbitrators so appointed jointly appointing the third arbitrator, who will preside as chairman. No officer, director, shareholder, employees, representative, or relative of any Party may be nominated or appointed as an arbitrator. The seat of the arbitration shall be New Delhi. The language of this arbitration shall be English and any document not in English submitted by any Party shall be accompanied by an English translation. A written transcript of the proceedings shall be made and furnished to the Parties. For the avoidance of doubt, the dispute resolution provisions in the Contract Agreement shall no longer apply to Dispute between the Parties"*

6. The learned senior counsel for the petitioner has also referred to a letter dated 25.08.2020 sent by the petitioner to the original owner requesting to make payment of pass-through claims and return of equipment/machinery etc. The relevant portion of the letter is as under:

*"In connection with termination of contract agreement a Termination and Release Agreement signed between GIL and MIPL, wherein MIPL agreed to*



*transfer its equipment's, machines, vehicles and tools & installations (purchased by MIPL) of the value Rs. 630 Million to GIL and also paid Rs. 270 Million to GIL for its part of obligation, GIL agreed to pay MIPL pass through claims of Rs. 590 Million after deduction 7% from passthrough claims received by GIP from MHPA on the terms and subject to the conditions set out in the said termination and release agreement.*

*As the Gammon India Ltd., has not paid us pass through claims and breached the terms and conditions of agreements, rather has committed fraud upon the MIPL (now RIPL) therefore your good office is requested to instruct GIL to pay or withhold GIL payments of our passthrough claims of Rs. 576 Million and return equipment, machines, tools and installations in the same condition handed over to GIL and equipment, the charges for the period commenced from the date of completion of MHEP project upto the date of this letter or made payment of Rs. 630 Million in lieu of the said equipment's machines, tools & installations and hire charges mentioned above."*

7. The respondent issued a letter dated 31.08.2020 to the owner wherein it never denied the claim of the petitioner. The relevant paragraphs are as under:

*"We hope to have your understanding and we request for early settlement of Final bill which shall help us in the objective of closure of contract with MHPA too beside settling of liabilities."*

8. It is submitted Marti has gone by the termination agreement, hence the dispute remains only qua the respondent. The notice dated 25.10.2022 was sent to the respondent for invoking arbitration was delivered on 27.10.2022.

9. The respondent on the other hand argued *a)* it was a contract dated 11.05.2012; terminated on 19.12.2013, hence claims are beyond limitation; *b)* there were three parties in the contract viz. the petitioner; MHPA and respondent herein but only two parties have been impleaded in the petition. It is submitted as per arrangement, the petitioner was to raise bills with the respondent and the respondent used to get payment from the original owner and by deducting 7% of the said amount the respondents were to release the



payment to the petitioner and whatever they had received they had given it to the respondent and now there is no claim left over. It is submitted the final bill was raised by the petitioner on 28.07.2013 and the payment was made by the respondent in the year 2016 but thereafter the petitioner had not taken any step either by filing of suit or by initiating of arbitration and thus the petition is hopelessly barred by time. The respondent relied upon *Adicon Infrastructure Pvt. Ltd. vs. Delhi Development Authority* 2023 SCC OnLine Delhi 1192, wherein the Court held:

**“53. Accordingly, we hold that:**

**xxxx**

**16.** *However, and as would be evident from the record, the Petitioner took no steps in that direction and invoked arbitration for the first time by way of a notice dated 19 June 2020. The aforesaid notice itself came to be issued more than seven years after the submission of the Final Bill on 27 July 2013. The Petitioner then waited for almost two more years till he ultimately filed the instant petition on or about 05 February 2022. As was aptly observed in BSNL, the march of limitation would not be paused by mere exchange of letters or settlement discussions. It is also pertinent to note that the Petitioner also does not refer to or rely upon any material or act of the Respondent which could have been construed as an acknowledgement of debt made within the period of limitation. The subsequent payments which appear to have been made by the Respondent voluntarily in 2022 also cannot be taken into consideration since they were clearly made years after the expiry of the three-year period when computed from the date when final payments were to be released by the Respondent.”*

10. Thus, the respondent in effect has raised two issues viz. **a)** The claim is barred by limitation as the agreement was dated 19.12.2013 and **b)** the petitioner has not joined M/s.Marti Contractors Limited, which is a necessary and proper party.

11. With respect to limitation, I may say the parties executed a Termination and Release Agreement dated 19.12.2013. There were certain claims of petitioner nomenclatured as “*Pass-through Claim*”, in the sum of



Rs.65,39,45,761, which the respondent was to pay to the petitioner after receiving the same from the Principal Employer of the Project namely Mangdechhu Hydroelectric Project Authority of Bhutan. Since the respondent had paid a sum of Rs. 1.4 crores only hence the balance amount is still outstanding. The following definitions and clauses of the Agreement are relevant in context of limitation:

***“a) Continuing Provisions***

*means the provisions of the Contract Agreement relating to invoicing and payment of invoices, variations in works, procedure for claims, price adjustments, resolution of disputes and other provisions necessary of MIPL to pursue the Pass-through Claims from MHPA and recover the Pass-through Claim Amount.*

***b) Repayment Date***

*means the date on which MIPL has recovered from GIL/ MHPA the pass through claim amount in full, together with any interest payable thereon.*

***c) Pass through Claims: xxxxxx***

***d) Pass through claim amount: xxxxxx***

***e) TERMINATION CLAUSE:***

*4. The Parties hereby agree that on the payment Date, the Transaction Documents (other than the Continuing Provision thereof) shall automatically terminate (without further action required from any party thereto) with effect on and from cut-off date. The continuing Provisions shall automatically terminate on the Repayment Date (without any further action required from any party thereto.)*

***f) RELEASE CLAUSE:***

*5.2. With effect on and from the Cut-off Date the Marti Entities, on behalf of themselves and their affiliates irrevocably and unconditionally waive, release and forever discharge GIL its affiliates and its directors, officers and employees, agents and representatives from ..... and MIPL, hereby agrees not to (and shall cause its affiliates not to) make any demand ....., provided however that such release shall not apply to (i) the Pass-through Claims and Pass-through Claim Amounts owed to MIPL(which shall be payable by GIL to MIPL, pursuant to Clause 7 only after such amounts are received by GIL from MHPA), the Continuing Provisions, .....(iii) any rights or remedies arising out of this Agreement.'*

***g) CONFIDENTIALITY CLAUSE***

*'16.2 A Party may disclose, or permit the disclosure of, information which would otherwise be confidential if and to the extent that:*

*(a) Such disclosure is necessary to enforce the rights of such Party under this Agreement or the Continuing Provisions before any dispute adjudicating*



*board, court of law, arbitral tribunal or any governmental authority;”*

12. From the above clause, it is prima facie evident that in so far as the obligations of respondent undertaken under the Agreement are concerned, those are *continuing* and *shall continue* till the petitioner recover from the respondent the *pass-through claim* amount in full, together with any interest payable thereon. It is an admitted fact the pass through claims are not paid to the Petitioner except a meagre sum of Rs.1,01,33,755/-, paid on 28.07.2016 and on 23.08.2016. The balance sum of approx. Rs.64 crores is still due with interest.

13. A reading of the above mentioned provisions, which are specific and clear, there is no matter of doubt the petitioner's claim is prima facie alive, within time and not barred by law of limitation.

14. The Respondent being conscious of its liability on 31.08.2020 assured MHPA (the principal employer) the claims of the petitioner are the responsibility of the respondent.

15. Without prejudice to the foregoing factual position described, another aspect is the petitioner engaged respondent as its authorised agent to secure pass through claims from MHPA. Thus, respondent acted as an agent of petitioner as defined in Section 182 of the Contract Act. The agency has not been terminated by petitioner under section 201 of the Contract Act and is continuing.

16. Having regard to the provisions referred to above, which are specific and clear, there is no matter of doubt the petitioner's claim is prima facie well within the time and not barred by the law of limitation. Even otherwise, limitation is always a mixed question of fact and law, which the learned Arbitral Tribunal can decide.



17. With respect to non-joinder of M/s.Marti Contractors Limited, the following provisions in the agreement dated 19.12.2013, viz. recital C and D are relevant:

*(C) MCL has, by a letter dated March 16, 2012 addressed to GIL (the "Comfort Letter"), undertaken to provide technical and financial support to MIPL and to take responsibility for the successful completion by MIPL of specified works awarded to it by GIL;*

*(D) The Parties intend to terminate the Contract Agreement and release MIPL and MCL from all liabilities towards GIL and MHPA under the Contract Agreement and the Comfort Letter, pursuant to the terms set out in this Agreement;"*

Further clause 2.1, records as under:

*"2.1 On the Payment Date, GIL shall do the following and/or the following shall occur:*

*(a) Deliver to MIPL the original version of the Comfort Letter if such original version is available with GIL. GIL will not be required to deliver the original version of the Comfort Letter to MIPL if such original version has been lost, and GIL's failure to deliver such original version will deemed to constitute a confirmation of such loss. Notwithstanding the foregoing, pursuant to this Agreement, **GIL hereby automatically releases MCL from all obligations and liabilities under the Comfort Letter and confirms the termination of the Comfort Letter and undertakes not to make or pursue any claim under the Comfort Letter.**"*

18. Thus, the respondent irrevocably and unconditionally waived, released and forever discharged the Marti Entities, their affiliates and their respective directors, officers and employees, agents and representatives have no claims against the respondent, as such neither the said entity can be a petitioner/claimant nor is necessary or a proper party to the instant proceedings.

19. The subject matter of the present claims are the amounts which are due and payable by the respondent to the petitioner under clause 7 of the said agreement. Hence the petitioner has raised an arbitral dispute under the agreement, therefore leaving all rights and contentions of the parties open, I



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hereby appoint Mr.Justice Krishna Murari (Retd. Judge of Supreme Court of India) (Mob.No.9415308516) as a sole arbitrator to arbitrate the disputes between the parties. The fee of the learned arbitrator shall be, preferably, as per IV<sup>th</sup> Schedule of the Arbitration and Conciliation Act.

20. The petition stands disposed of along with pending application(s).

**YOGESH KHANNA, J.**

**OCTOBER 09, 2023**

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