OCD-18

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
(Commercial Division)
ORIGINAL SIDE

AP-COM/827/2024

M/S R S ENTERPRISE
VS
SIMPLEX INFRASTRUCTURES LIMITED

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 8th October , 2024

Appearance:
Mr. Somnath Saha, Adv.
...for the petitioner

Mt. Ratul Das, Adv.
...for the respondent

The Court:- Learned counsel for the petitioner submits that the petitioner having not received due payments for work done by the petitioner, a composite dispute as well as invocation of arbitration clause was made by the petitioner. The respondent having not agreed to appointment of an Arbitrator, the present application has been taken out.

Learned counsel for the petitioner takes the Court through the relevant clauses of the work orders. Clause no. 25 of the work orders contains an arbitration clause which provides that in the event of any difference or dispute arising out of or in connection with the work order, the same shall be first amicably settled by mutual dialogue; but if the parties fail to settle so, the matter would be referred to arbitration.

Learned counsel for the petitioner further submits that the petitioner has been working as a sub-contractor under the respondent for a particular project and running bills were raised.

It has been an ongoing project. However, from an order dated July 18, 2024, passed in a suit filed by the present respondent against the principal employer that is the Principal Secretary, Housing Department, Government of West Bengal, the petitioner learnt that the project was sought to be foreclosed by the present respondent and, as such, the petitioner became apprehensive as to non-payment of its dues by the respondent, which gave rise to the cause of action for the present invocation.

Learned counsel for the respondent seeks at the outset to use an affidavit-in-opposition in order to controvert the pleadings made in the Section 11 application. It is submitted by learned counsel for the respondent that the claim of the petitioner is ex-facie barred by limitation. It is argued that no documents have been furnished along with the Section 11 application to indicate as to how the time for taking out a money claim got extended, since the last bill was raised beyond three years from the date of filing of the Section 11 application and, as such, is time barred.

Learned counsel for the respondent submits that in an affidavit-in-opposition, the respondent proposes to bring on record invoices and bank statements as well as other relevant documents on such count to indicate that the claim is barred by limitation.

Secondly, the respondent argues that the pre-condition of an amicable settlement of the dispute was not met in the present case and, as such, the present invocation of the arbitration clause is premature.

Learned counsel for the respondent also submits that there are several judgments which go on to hold that unless the pre-arbitration formalities as per the agreement between the parties are satisfied, there cannot be any reference to arbitration.

However, upon hearing learned counsel for the parties, this Court is of the opinion that no affidavit need be directed to be filed by the respondent for the simple reason that the scope of adjudication in an application under Section 11 of the Arbitration and Conciliation Act 1996 is extremely limited. The Court is primarily to see and ascertain as to whether there is a valid arbitration agreement between the parties and, at best, as to whether the claim is ex-facie barred by any law, including limitation.

The very fact that an affidavit and other documents are required to be furnished by the respondent for the Court to adjudicate whether the claim is time-barred goes a long way to show that the issue of limitation is debatable and arguable and, as such, is best left for adjudication before the Arbitrator. The Section 11 Court, with its limited charter, is not the appropriate forum to enter into such question.

On the face of the allegations made in the Section 11 application, the Court is to ascertain whether the claim is *ex facie* time-barred.

In paragraph no. 10 of the application, the petitioner has stated that the claim herein is within limitation as the bills being last R.A. bill covering the work done during the month of August 2021 was submitted on September 1, 2021 and part payments in respect of previous R.A. bills have been received thereafter, lastly on January 28, 2022 but since January 28, 2022, no further payment has been received by the petitioner in respect of its claims.

Even if the respondent files an affidavit-in-opposition and controverts such contention, it would be beyond the domain of the Section 11 Court to adjudicate on the same on merits.

That apart, the petitioner has relied on an order dated July 18, 2024 in a suit filed by the present respondent against the principal employer, which indicates *prima facie* that the petitioner therein (present respondent) proposed to foreclose the project in terms of the contract.

According to the petitioner, the said observation in the order in question was a stimulus for the petitioner to be apprehensive on whether it would receive its claims, since the present petitioner has been working as a sub-contractor under the respondent for the self-same project.

It is also evident from the nature of the transactions between the parties that the same contemplated continuous work by the petitioner as a sub-contractor of the respondent and intermittent payments during such work. Since the payment schedule was a continuum, keeping in view the nature of the work, it cannot be said that the claim is *ex facie* barred by limitation, having been refused prior to three years from the making of the claim for the first time.

Such an adjudication at this stage would not only be premature but also beyond the jurisdiction of the Section 11 Court and as such, such exercise should not be entered into by this Court at all.

In any event, it cannot be said that the claim is *ex facie* “dead wood”. At best, the question of limitation is arguable and can be raised before the Arbitrator as well.

Insofar as prior exhaustion of pre-arbitration amicable settlement is concerned, the petitioner has pleaded in the Section 11 application that such efforts at amicable settlement have failed.

In fact, Clause 25 of the work orders between the parties contemplates that the disputes if arisen between the parties are to be first amicably settled by mutual agreement.

The very fact that the respondent is opposing the reference to arbitration and that the petitioner's composite invocation of the arbitration clause and demand notice did not meet with any reply from the end of the respondent goes on to show that any further relegation to amicable settlement would be a futile exercise, unnecessarily delaying and protracting pre-litigation formalities between the parties.

As such, such meaningless and futile exercise need not be resorted to further. Since the dispute between the parties comes within the ambit of the arbitration clause and the issues are otherwise arbitrable, AP-COM/827/2024 is allowed, thereby appointing Mr. Om Narayan Rai, a member of the Bar Association, as the sole arbitrator to resolve the dispute between the parties, subject to a declaration being obtained from the said learned Arbitrator under Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his own remuneration within the framework of the 1996 Act and its Fourth Schedule.

Since the prayer for affidavits has been refused, it is deemed that none of the allegations made in the application under Section 11 are admitted by the respondent.

Needless to say, the above observations are all of a tentative nature arrived at only for the purpose of deciding the Section 11 application and it will be open to the parties to argue all points available to them before the Arbitrator, upon which the Arbitrator shall decide all issues independently in accordance with law without being influenced in any manner by any of the observations above.

(SABYASACHI BHATTACHARYYA, J.)

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