

\$~5

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

% *Date of Decision: 06th October, 2021*

+ **ARB.P. 856/2021**

SAGAR CONSTRUCTIONS THROUGH SHRI
SUBASH CHAND SAINI Petitioner
Through Mr. Sanjay Bansal, Adv.

versus

GOVT. OF NCT OF DELHI Respondent
Through Mr. Naushad Ahmed Khan,
Adv.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

[Hearing Held Through Videoconferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes, which have arisen between the parties.

2. By a letter dated 10.11.2014, the respondent awarded the work of construction of twelve numbers SPS type (D/S) class rooms with toilet block and staircase at Government Co-Ed. School B-4, Paschim Vihar, New Delhi, to the petitioner. The said work was to be

completed within a period of four months from the date of the Letter of Acceptance (LoA), that is, on or before 19.03.2015.

3. The petitioner completed the said works on 16.03.2015.

4. The petitioner claims that the respondent had failed and neglected to release the payment due in respect of the aforesaid Contract. In the said context, the petitioner issued a letter dated 23.02.2016 requesting the concerned Superintendent Engineer to resolve the disputes and/or take further steps in accordance with Clause 25 of the General Conditions of Contract (GCC) as applicable to the Contract between the parties. Thereafter, the petitioner also approached the Chairman of the Dispute Resolution Committee (DRC) in terms of Clause 25 of the GCC. However, the disputes remain unresolved.

5. Thereafter, by letters dated 10.09.2018 and 11.12.2019, the petitioner requested the concerned Chief Engineer to appoint an Arbitrator for adjudication of the disputes. The petitioner's request for the appointment of an Arbitrator was denied on the ground that the petitioner had not invoked the Dispute Resolution Clause within a period of one hundred and twenty days from the date of preparation of the Final Bill.

6. Mr. Khan, learned counsel appearing for the respondent, submits that the claims made by the petitioner are also barred by limitation as the same were made beyond the period of three years from the date of completion of the work. Clause 25 of the GCC, which is applicable to the Contract in question, reads as under:

“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, claims, 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 letter 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 the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of

claims / disputes prior to invoking arbitration.

- (i) 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 is no Additional Director General, the Director General, 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.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment or arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter

statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

7. There is no dispute as to the existence of an Agreement to refer the disputes between the parties, relating to the contract in question, to arbitration.

8. Mr. Khan, learned counsel appearing for the respondent does not dispute the existence of the Arbitration Clause or that the petitioner had invoked the same. He, however, submits that since the request for arbitration was not made within a period of one hundred and twenty days from the date of preparation of the Final Bill, the petitioner has lost its rights to seek the aforesaid remedy. He also submits that in any event, the petitioner’s claims are barred by limitation.

9. Mr. Bansal, learned counsel appearing for the petitioner, has countered the aforesaid submissions.

10. The question whether the period of invoking the arbitration could be restricted to a period less than as provided under the

Limitation Act, 1963 is no longer *res integra*.

11. In ***Grasim Industries Limited v State of Kerala: (2018) 14 SCC 265***, the Supreme Court considered an appeal from an order where the appellant was non suited on the ground that the demand for appointment of the Arbitral Tribunal was not made within the time as stipulated in the arbitration agreement. The Supreme Court found that the relevant clause did not stipulate any time and further held as under:

“11. Section 28(b) [of the Contract act, 1872] unequivocally provides that an agreement which extinguishes the right of a party on expiry of the a specified period, would be void. Therefore, even if a restricted period for raising an arbitral dispute has actually been provided for (as was determined in the impugned order), the same would be treated as void”

12. A Coordinate Bench of this Court in the case of ***National Highways Authority India v. Mecon – Gea Energy Systems India Ltd. JV: 199 (2013) DLT 397*** held as under:

41. A perusal of the amended Section 28 of the Contract Act, 1957 extracted above would show that both kinds of agreements i.e. agreements which restrict the period of limitation within which claims could be referred, as also agreements which extinguish the right of a party to prefer a claim or discharges any party from any liability under a contract on expiry of a specified period, are void to that extent.

42. Before the amendment of Section 28 in 1997, the agreements reducing the period of limitation were distinguished from those which did not limit the time within which a party might enforce his

rights, but which provided for a release or forfeiture of rights, if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, being outside the scope of the section, were held to be binding between the parties. Thus, in *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.* (AIR 1997 SC 2049), the Supreme Court drew a clear distinction between an agreement which curtails the period of limitation and an agreement which provides for forfeiture or waiver of the right itself, if no action is commenced within the period stipulated by the agreement. The first was held to be void as offending Section 28 but, the later was held not falling within the mischief of Section 28. Thus, it was held that curtailment of the period of limitation was not permissible in view of Section 28 but extinction of the right itself, unless exercised within the specified time, was permissible and can be enforced.

43. After the 1997 amendment to Section 28 of the Indian Contract Act, 1872, not only the curtailment of the period of limitation is void, but also the extinction of right, if sought to be brought by the agreement within a specific period, which period is less than the period of limitation prescribed for the suit under the Contract in question, is also rendered void. In other words, after the amendment to Section 28 of the Indian Contract Act, 1872 by Act 1 of 1997, the distinction between curtailing of the period of limitation and extinction of the right itself, after the specified period, no longer exists.”

13. The contention that the claims made by the petitioner are time barred is also without merit. There is a distinction between the disputes being barred by limitation and the petition under Section 11

of the A&C being barred by limitation. The period of limitation for filing the petition would run from receipt of notice under Section 21 of the A&C Act and since no specific period is specified, Article 137 of Limitation Act, 1963 would apply (See - *Bharat Sanchar Nigam Limited & Anr. v Nortel Networks India Private Limited: (2021) 5 SCC 738*).

14. The period of limitation for the disputes will commence from the date of cause of action till invocation of the agreement to refer the disputes to arbitration. The question whether the disputes are within the period of limitation falls within the jurisdiction of the Arbitral Tribunal and unless it is, *ex facie*, apparent that the disputes are barred by limitation, the parties are required to be referred to arbitration (See - *Vidya Drolia & Ors. v Durga Trading Corporation: (2021) 2 SCC 1*).

15. This Court is also unable to readily accept that the claims made by the petitioner are barred by limitation. It is clearly a contentious issue and it is not necessary for this Court to address the said issue in this proceeding as the same would be required to be considered by the Arbitral Tribunal.

16. The present petition was listed on 07.09.2021 when the learned counsel for the respondent accepted notice and had sought time to file a reply. The respondent was granted two weeks' time to file the reply. However, no reply has been filed by the respondent as yet.

17. In view of the above, the material averments made in the present petition are accepted as uncontroverted. However, it is

clarified that this will not preclude the parties in any manner from canvassing such contentions as advised before the Arbitral Tribunal.

18. Considering that there is no dispute as to the existence of the Arbitration Agreement and the petitioner has invoked the same, this Court considers it apposite to allow the same.

19. Accordingly, Mr M.C. Mehra, District Judge (Retired) (Mobile No. 9868980027), is proposed to be appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

20. The parties are at liberty to approach the Arbitrator for eliciting his consent and the necessary disclosure as required under Section 12(1) of the A&C Act.

21. Let the same be furnished to this Court before the next date of hearing.

22. List on 25.10.2021

VIBHU BAKHRU, J

OCTOBER 6, 2021

‘gsr’

[Click here to check corrigendum, if any](#)