

(2019) 03 DEL CK 0015

In the Delhi High Court

Case No : Company Petition No. 461 Of 2015

Ahlcons (India) Pvt Ltd

APPELLANT

Vs

Victoria Hospitalities Pvt. Ltd

RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Limitation Act, 1963 — Article 18, 137, Section 14, 18
Companies Act, 1956 — Section 433(e), 434, 439

Citation : (2019) 258 DLT 171 : (2019) 174 DRJ 335

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Raunak Satpathy, Vishal Bhatnagar, Nitin Sharma

Final Decision : Dismissed

Judgement

Jayant Nath, J

1. This petition is filed under section 433(e), 434 and 439 of the Companies Act, 1956 for winding up of the respondent company. It is the case of the petitioner that the respondent on 28.10.2009 had awarded contract for Facade work comprising of aluminium, railing, canopy, roofing etc. at Raddisson Hotel Project at Greater Noida to the petitioner. The total consideration or the value of the work was agreed to be Rs.3,15,62,730/-. It is the case of the petitioner that it had successfully completed the work and raised the periodical invoices which were duly certified by the respondent for payment and thereafter the payments were made. It is pleaded that the petitioner successfully completed the work and submitted its 9th and final bill on 23.7.2011 for a total amount of Rs.3,41,65,475. The certification of the final bill was done by the respondent company on 31.3.2012 for a total amount of Rs.3,06,72,657/-. A sum of Rs.17,76,992/- was withheld on account of retention money. Hence, it is pleaded that total of Rs.47,22,587/-remains unpaid by the respondent. Reliance is also placed on the TDS certificates which show that the respondent accepts the total outstanding dues to be Rs.3,06,72,657/-. The petitioner also relies upon

correspondence exchanged between the parties. Reliance is also placed upon notice dated 24.4.2015 sent under section 433(e) and 434 of the Companies Act, 1956.

2. The respondent has filed its reply. In the reply the plea taken is that the petitioner not only delayed the execution of the contract so awarded but also miserably failed to complete the work thereby causing heavy loss to the respondent. It is pleaded that the final bill raised by the petitioner was for of Rs.3,41,65,475/- and out of the said raised bill the respondent certified bill for Rs.2,60,88,642/- on 31.3.2012 and the said amount was paid without any delay. However, the respondent admits deduction of a sum of Rs.41,00,000/-tentatively and the sum was debited in the Statement of Account of the petitioner. The petitioner miserably failed to execute the work contract, as per the agreed specification so awarded to it on account of which the respondent had to suffer losses on account of monetary and brand reputation. Hence, a debit note of Rs.41 lacs was made on the petitioner.

3. I have heard learned counsel for the parties. Learned counsel for the respondent has reiterated that there has been inordinate delay in completion of the work and also the quality of work done by the petitioner is disputed. Hence, he states that it is a bona fide dispute and this court may not entertain the present winding up petition. It is also pleaded that the claim is barred by limitation.

4. I may deal with the plea of limitation first. The final running bill was sent on 23.07.2011. The present winding up petition has been filed on 20.05.2015. However, a perusal of the Statement of Account filed by the respondent would show that there are payments made by the respondent to the petitioner in 2017. There is an entry of 20.8.2017 which describes adhoc payment of RA Bill-4 which is said to have been tendered for an amount of Rs.17,66,846/-. Similarly, there are entries of 2017 regarding retention money which is being released to the petitioner again in 2017.

5. Article 18 of the Schedule to the Limitation Act, 1963 reads as follows:-

Description of suit

Period of limitation

Time from which period begins to run

18. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.

Three Years

When the work is done

6. I may look at some of the judgments dealing with Article 18 above. This court in Municipal Corporation of Delhi vs. M/s. Gurbachan Singh & Sons, 208 (2014)

DLT 177 had noted that in a proceeding for recovery of price for work done, cause of action commences when work is done in terms of Article 18 of the Schedule to the Limitation Act. This court held as follows:-

"3. xxx

Three things, inter-alia, can be culled out from these paragraphs.

Firstly ordinarily on the completion of the work, the right to get payment begins. Though Article 18 is not stated, this line is in terms of Article 18 of the Limitation Act. The second aspect is that a dispute arises when there is a claim on one side and its denial/repudiation by the other. The third aspect is that a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders.

16. A summary of the conclusions on reading of the aforesaid relevant clauses of the contract in question and the judgments as dealt with above, bring out the following salient points:

(i) Limitation commences when the cause of action accrues/arises.

(ii) Accrual/arising of cause of action necessarily varies as per facts and circumstances of each case and the nature of jural relationship between the parties viz contractual or otherwise and so on.

(iii) As regards contracts for execution of building work, Article 18 comes into play in that when no specific date for payment is fixed, limitation commences and the cause of action accrues for the purpose of limitation on the completion of work.

(iv) In its application, Article 18 will cause different dates for accrual of causes of action in building works when a time period is fixed for submitting of a bill by the contractor and to which there is no response of the owner. Where a final bill is submitted and liability under the same, even if, in part, is admitted or some payment is made then such actions extend limitation in terms of Section 18 of the Limitation Act.

(v) No fresh period of limitation can arise simply because letters and reminders are written time and again, attempting to keep the claim alive, although the claim by virtue of Article 18 of the Limitation Act, has become clearly time barred.

xxx"

7. Similarly, In South Eastern Coalfields Ltd. vs. B.S.Agrawal and Ors., MANU/CG/0480/2013 the High Court of Chhattisgarh held as follows:-

"9. Article 18 of the Limitation Act, 1963 provides as under:

"18. For the price of work done by the Plaintiff for the defendant in his request where no time has been fixed for payment.

Three Years

when the work is done."

10. "Work and Labour" in legal nomenclature is a term of precise legal import. In England, it is the name of one of the common counts in actions of assumpsit being for work and labour done and materials furnished by the plaintiff for the defendant: Black's Law Dictionary 6th Edn. p. 1604. The Courts in India have, therefore, given a wider meaning to the words 'work done' in Article 18 and treated a works contract as coming within its purview. The starting point of limitation in each case must, however, depend on its own facts and circumstances.

11. In Halsbury's Laws of England 3rd Edn. Vol. 24 p. 218, the meaning of the expression 'work done' is given thus:

"On a general contract for work to be done, the cause of action accrues when the work is done. A contract to do work may, however, contain a condition that the price should be paid out of.....when a certain contingency has happened, and in such a case the cause of action does not arise until the.....Contingency has happened."

12. In Gannon Dunkerley and Co. Ltd. Vs. Union of India MANU/SC/0475/1969 : 1969 (3) SCC 607, the Supreme Court held as under:

"11.In our judgment, there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted : Bolo v. Kokan and others, 51 IA 325."

13. In Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority MANU/SC/0271/1988 : (1988) 2 SCC 338, the Supreme Court, while considering applicability of Article 137 of the Limitation Act, 1963, held as under:

"It is also true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on February 28, 1983 and there was non-payment, the cause of action arose from that date, that is to say, February 28, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action."

14. In National Aluminium Co. Ltd. and another Vs. G.C. Kanungo MANU/SC/0867/2009 : AIR 2009 SC 2928, the Supreme Court held as under:

"5. In other words, there was no finality in the matter and the matter was alive for consideration. If this date i.e. 26-5-1992 is taken into account, the claim made was within the period of three years. That being so, the claim as made was within the period of limitation and the stand of the appellant that the claim was

barred by limitation is not tenable.

15.....

16....

17....

18. In *M/s. Ashok Construction Company Vs. Union of India* MANU/SC/0004/1970 : 1971 (3) SCC 66, the Supreme Court held that question of limitation is not a pure question of law. Para 8 of the report states as under:

"8. The question of limitation was not a pure question of law. Whether the claim was barred by law of limitation depended upon proof of facts. From the date of settlement of claims three years had not lapsed before a notice asking for reference was made. Prima facie, the claim was not barred by the law of limitation."

8. The legal position that follows from the above judgements are that Article 18 of the Limitation Act would apply for the purpose of computing the period of limitation for work done where no period of limitation is prescribed. The period of limitation would normally commence when the work is completed. Admittedly, in the present case final bill has been presented on 23.07.2011. It has been corrected and certified on 31.03.2012. Limitation at best would have expired on 30.03.2015. Any payment or entries made in 2017 in the Statement of Account would be beyond the period of limitation.

9. At this stage, learned counsel for the petitioner relies upon schedule 1 of the Limitation Act to claim that amount was for balance due on a mutually open and current account. However, Statement of Mutual current and open account has not been placed on record. Reliance is placed on a Statement filed by the respondents alongwith the reply to plead that the same would tantamount to Open Mutual and current account. The plea is entirely misplaced.

10. The question of what is a mutual open and current account has been considered by the courts frequently and the test to determine the same is well settled. In this context Division Bench of this Court in the case of *Manish Garg v. East India Udyog Ltd.* 2001 III AD (Delhi) 493, held as follows:

"6. "Account current" is an open account between two or more parties or an account which contains items between parties from which the balance due to one of them is, or can be, ascertained, from which it follows that such an account comes under the terms of an open account in so far as it is running, unsettled or unclosed. To this extent, there is no difficulty however, the theory upon which the doctrine as Mutual Account rests is that there is a mutual understanding between the parties, either expressed or implied, that they will continue to credit each other until one signifies a contrary intention, when the balance being ascertained, becomes due and payable. In *Hindustan Forest Company v. Lalchand* reported in AIR 1959 SC 1349 the Supreme Court defined Mutual

Account as under:

"To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligation."

7. The instant case cannot be treated as a case of mutual accounts. *Keshrichand Jaisukhalal v. Shillong Banking Corporation Ltd. Shillong* (in liquidation) reported in AIR 1959 SC 1349 was a case of mutual account. In that case, the Respondent bank gave loans on overdrafts, and the Appellant made deposits. The loans by the Respondent created obligations on the Appellant to repay them. The Respondent was under independent obligations on the Appellant to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the Appellant were not merely complete or partial discharges of its obligations to the Respondent. There was a shifting balance; on many occasions the balance was in favour of the Appellant and on many other occasions, the balance was in favour of the Respondent. There were reciprocal demands between the parties, the account was mutual.

8. Thus for an account properly to be called Mutual Account there must be mutual dealing in the sense that both the parties come under liability under each other. In this case, this ingredient is not satisfied. It was simply a case of debtor and creditor only and not a case of mutual obligations which will in the ordinary way result in enforceable liabilities on each side. Mutual Account is when each has a demand or right of action against the other."

The compilation of entries filed by the respondent cannot be termed a mutual open and current account. The plea of the petitioner is misplaced.

11. Another plea is now raised, at this stage by the petitioner, is that on 24.03.2015 the petitioner had filed the first winding up petition. That petition was withdrawn with liberty to file a fresh petition after making an attempt to serve the notice of winding up to the respondent company. It is pleaded that the time spent for re-filing the present winding up petition should be excluded from the period of limitation and such exclusion would render the petition within limitation.

12. The plea is misplaced. Section 14 of the Limitation Act has no application to a winding up petition.

13. As I have already held that the claim raised by the petitioner is barred by limitation, I need not go into the merits or demerits of the other pleas raised. The petition is accordingly dismissed. Liberty is granted to the petitioner to take steps before appropriate civil court, as per law. The civil court if approached may deal with the contentions of the parties as per law.