
(2017) 01 AHC CK 0192

In the Allahabad High Court

Case No : Arbitration and Conciliation Appl.U/s11(4) No. 54 of 2015

M/s Ram Shakti Construction

APPELLANT

Vs

Agra Development

RESPONDENT

Date of Decision : 11-01-2017

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2017) 2 ADJ 262 : (2017) 2 AllWC 2087

Hon'ble Judges : Ashwani Kumar Mishra, J.

Bench : Single Bench

Advocate : S.N. Tiwari, Krishna Mohan Sahai and S.K. Tiwari, Advocates, for the Applicant; Rohan Gupta, Suresh C. Dwivedi, Advocates, for the Opposite Parties

Final Decision : Dismissed

Judgement

Ashwani Kumar Mishra, J.—The applicant has invoked jurisdiction of this Court under section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator. It is claimed that an agreement containing arbitration clause was entered into between the parties on 26.4.2006 for construction and maintenance of a road under the scheme of respondent Development Authority. This agreement has been annexed along with this application as Annexure-1. The work was to be performed within a period of one year i.e. by April, 2007. The applicant claims that it proceeded with the contract and completed the work, in terms of the agreement. It is claimed that as against the total project cost of Rs.54 lacs, the applicant was paid a sum of Rs.46 lacs by the year 2007, where-after no further amount was paid.

2. It transpires that a dispute arose towards the end of the year 2007 as to whether the work was properly performed or not? Materials have been placed on record in the counter affidavit to demonstrate that work performed was unsatisfactory and proceedings to blacklist the applicant were also initiated on 18.7.2007. It further appears from the record that towards end of the year 2007 or beginning of the year 2008, the same work was assigned to some third party

and the work was got completed. The applicant has however brought on record a document along with its rejoinder affidavit to claim that contract work was completed by the applicant to the satisfaction of the authorities. The prayer in this application is opposed on the ground that the claim sought to be adjudicated upon is a dead/stale claim and is not liable to be referred to arbitrator. It is in this context that facts of the present case would have to be analysed.

3. This Court finds that there is an issue as to whether work awarded was satisfactorily performed by the applicant or not? It is not in dispute that the contract work was required to be completed within a year. It is also not disputed that the alleged contract work was undertaken as per applicant before end of the year 2007. The applicant asserts that it had received the amount pursuant to the contract till the year 2007 and no amount was paid thereafter. Since contract work was completed as per applicant and no payment was made after 2007, a cause had arisen to the applicant. A period of nearly four years expired, even thereafter without any action on part of the applicant. This is sought to be explained by contending that applicant repeatedly approached the authorities for payment of amount, but the same was not released. The facts do not end here. The applicant being dissatisfied with the denial of payment, ultimately approached High Court by filing Writ Petition No.61972 of 2011, for a direction to the respondents to release the amount payable towards final payment along with 24% interest w.e.f. July, 2006 till the date of filing of the writ petition. A further prayer was made to direct the respondents to decide applicant's representation. This petition was dismissed by this Court vide following order dated 1.11.2011:-

"Heard Mr.S.N. Tiwari, learned counsel appearing for petitioner and Mr. Praveen Kumar Shukla, Advocate holding brief of Mr.M.C. Chaturvedi, learned counsel appearing for respondent Nos. 2, 3 and 4 and learned Standing Counsel for respondent No.1.

Petitioner's main grievance before this Court is with regard to certain money claim simpliciter arising out of contractual obligations.

According to us, contractual obligations between the parties cannot be adjudicated in writ proceeding in the manner as proposed, particularly when the amount is not admitted. Therefore, it is not a fit case for interference by this Court. Hence, the writ petition can not be admitted and is, therefore, dismissed, however, without imposing any cost.

In any event, passing of this order will in no way affect the right of the petitioner, if any, to approach the appropriate Court or forum in accordance with law."

4. Applicant thereafter filed another Writ Petition No.13722 of 2012, in which again prayer was made for releasing the amount due and payable to applicant and an additional prayer was added to direct Vice Chairman to appoint an arbitrator to resolve the dispute. This petition was also dismissed on 21.3.2012 along with exemplary cost of Rs.50,000/-. The order dated 21.3.2012 passed by Division Bench of this Court reads as under:-

"The present petitioner M/S Ram Shakti Construction through its proprietor Devendar Singh Tarkar had earlier approached this Court by filing Civil Misc. Writ Petition No. 61972 of 2011 seeking the following reliefs:

"i. issue a writ, order, or direction in the nature of mandamus, directing the respondent no.2 and 3 to insure the final payment + 24% interest with effect from July 2006 to till today in repairing of the road under the Scheme of Shastri Puram Scheme.

ii. issue a writ, order, or direction in the nature of mandamus directing the respondents to decide the petitioners representation dated 17.12.2008, 8.9.09 and 5.8.11 as annexure no.14, 16, and 17 to this writ petition in pursuance of the enquiry report dated 5.8.08 and 15.6.09 as annexure no.13 and 15 to this writ petition.

iii. issue a writ, order, or direction, as this Hon"ble Court may deem fit and proper in the circumstance of the case.

iv. award cost to the petitioner."

According to the petitioner, it had undertaken repairing of Master Plan 100 feet and 175 feet roads at Shastri Puram for a sum of Rs.54,43,000/-. The work was completed and the petitioner had submitted bills for final payment. When the payment was not being released, the petitioner had approached this Court by means of the aforementioned writ petition which had been dismissed by this Court vide judgment and order dated 1.11.2011. The judgment and order dated 1.11.2011 is reproduced below:

"Heard Mr. S.N. Tiwari, learned counsel appearing for petitioner and Mr. Praveen Kumar Shukla, Advocate holding brief of Mr. M.C. Chaturvedi, learned counsel appearing for respondent Nos. 2, 3 and 4 and learned Standing Counsel for respondent No.1.

Petitioner"s main grievance before this Court is with regard to certain money claim simpliciter arising out of contractual obligations.

According to us, contractual obligations between the parties cannot be adjudicated in writ proceeding in the manner as proposed, particularly when the amount is not admitted. Therefore, it is not a fit case for interference by this Court. Hence, the writ petition can not be admitted and is, therefore, dismissed, however, without imposing any cost.

In any event, passing of this order will in no way affect the right of the petitioner, if any, to approach the appropriate Court or forum in accordance with law."

By means of the present writ petition, the petitioner has sought for the following reliefs:

(A) Issue a writ, order of direction in the nature of mandamus directing the respondents to forthwith release the amount to the petitioner or to arbitrate the

matter before the Vice Chairman Agra Development Authority.

(B) Any other suitable writ, order or direction in the nature of the writ as this Hon"ble Court may deem fit and proper on the facts and circumstances of the case; and

(C) Award costs of the writ petition to the petitioner."

Except for adding with a direction to issue to arbitrate the matter before the Vice Chairman, Agra Development Authority, rest of the reliefs claimed herein is more or less similar. The contract is the same. Both the writ petitions were affirmed by Sri Devendra Singh Tarkar who is the proprietor of the petitioner firm. The petitioner deliberately concealed the material facts regarding filing of the earlier writ petition and its dismissal by this Court. The petitioner wanted to take a chance. However, the fact of filing the earlier writ petition was brought to the notice of this Court by the learned counsel for the respondent no.2 to 4 Sri S.C. Dwivedi. The Court has verified from the original record and finds that the petitioner deliberately concealed the facts of filing of the earlier writ petition and its dismissal.

The Court deprecates such a practise and is, therefore, left with no other option but to dismiss the writ petition with exemplary cost of Rs.50,000/(Fifty Thousand) so that in future this practise is discouraged."

5. The orders passed by this Court rejecting the writ petitions were not challenged and have been allowed to become final. The applicant nevertheless still persisted with making of representations from time to time. The authorities appears to have convened a meeting of concerned officer and an office note dated 13.1.2015 was prepared noticing relevant fact relating to entering into a contract and that work was not completed; that work was later assigned to somebody else; that the writ petitions filed by the applicant had already been dismissed with cost; that after lapse of such long time the dispute cannot otherwise be resolved because specifications as per contract and evidence in respect thereof had ceased to exist. The authority ultimately passed an order on 10.4.2015 stating that the contract work since had been performed more than 8 years back, it was no longer possible to adjudicate such stale claim. It was also recorded that whatever payment was liable to be paid had in fact been released to the applicant and no further claim could be entertained now. It is after this order that the applicant has moved an application for appointment of arbitrator and as no arbitrator was appointed, applicant has filed the present application.

6. Sri K.M. Sahai, learned counsel for the applicant submits that after the contract work was completed, applicant continued to press its claim for release of balance payment amounting to Rs.10 lacs and upon failure of the authorities, the applicant had filed two writ petitions in the year 2011 and 2012. It is stated that applicant continued to represent in the matter and ultimately it was only in the month of April, 2015, that applicant"s claim has been rejected. A cause of action thus arose for the applicant to raise claim for appointment of arbitrator and as

such prayer was not accepted, applicant has filed the present application. Learned counsel in support of his contention has relied upon judgments of the Apex Court in *Indian Oil Corporation Limited v. SPS Engineering Limited*: (2011) 3 MHLJ 507, *Etoile Cretions v. Sarl Danset Deco*: (2016) 8 MHLJ 263, *Wexford Financial Inc. Panama v. Bharat Heavy Electricals Limited*: (2016) 8 MHLJ 267.

7. Sri Rohan Gupta, learned counsel for the respondent authorities, on the other hand, submits that cause of action had arisen to the applicant in the year 2007 itself, after the proceedings for blacklisting was initiated, and dispute could be referred to arbitrator within a period of three years thereafter. Learned counsel states that the writ petition filed for payment of money was also rejected by this Court in the year 2011. It is stated that even if this is taken to be commencement of cause for the applicant, then also the application sent for reference of dispute to arbitrator is beyond a period of three years and therefore the claim is hopelessly time barred. Learned counsel states that after the applicant had failed to complete the contract work in the year 2007, the work was got completed by engaging a third party and the technical details relating to work performed was not available thereafter. The claim raised in 2015 by the applicant is a dead claim. Sri Rohan Gupta, in addition to judgment of the Apex Court in *India Oil Corporation Ltd.* (supra) has relied upon Full Bench decision of Gauhati High Court in *Assam State Electricity Board v. Mokalbari Kanoi Tea Estate (P) Ltd.* delivered in Writ Appeal No.369 of 2010 as well as judgment delivered by the Gauhati High court in Arbitration Petition No.9 of 2007, dated 25.7.2008.

8. The Constitution Bench of the Apex Court in *SBP & Co. v. Patel Engineering Ltd.*: (2005) 8 MHLJ 618 has been pleased to specify the issues that are required to be examined by the Chief Justice, or his designate, while deciding application under section 11(8) of the Act in para 39 of the judgment, which is reproduced:-

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and

the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."

9. Law in that regard has been further explained in *Indian Oil Corporation Ltd. (supra)*. In the context of an exercise of jurisdiction under sections 11(6) & (8), the Chief Justice or his designate is not expected to go into merits of the claim or examine maintainability or tenability of claim either on facts and law while deciding application under section 11 of the Act. Para 14 of the judgment is reproduced:-

"11. To find out whether a claim is barred by *res judicata*, or whether a claim is "mala fide", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under section 11 of the Act is whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under section 11 of the Act. The Chief Justice or his Designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration : If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his Designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under section 11 of the Act."

10. In *Etoile Creations (supra)* and again in *Wexford Financial Inc. Panama (supra)*, the Hon"ble Supreme Court has been pleased to hold that within the narrow confines of jurisdiction under section 11, the Chief Justice or his designate is primarily concern with question as to existence of arbitration in the performance and whether dispute raised falls within the scope of said limit.

Merits of the claim or due performance of agreement is not required to be adjudicated while deciding application under section 11 of the Act. In Schlumberger Asia Services Ltd. v. Oil & Natural Gas Corporation Ltd.: (2013) 7 MHLJ 562, the Hon"ble Supreme Court has been pleased to observe that a question of limitation would also be left to be decided by the arbitrator and ought not to be examined at the stage of appointment of arbitrator under section 11.

11. Although, it is true that the question whether a claim is barred by limitation or need not be gone into by the judge designate, while exercising jurisdiction under section 11 of the Act, but it is imperative that a satisfaction is arrived by the court that a live claim exists, which could be arbitrated upon. In the present case, the contract was performed in 2007. Whether the work was completed or not was an issue which arose in 2007 itself. It is also on record that a third agency was employed for completing the contract work. Admittedly, no payment was released to applicant after 2007. Successive writ petitions filed were also dismissed in 2011-12. The applicant by its very conduct allowed the dispute to die down. It would be too late in the day to allow revival of such stale claim, particularly when neither the measurements could be ascertained nor the issue could be resolved by arbitration. The stand that applicant had continuously been representing in the matter can hardly be treated to be satisfactory explanation for such long latches. It would thus not be just and legal to appoint an arbitrator so as to revive a stale and dead claim.

12. Application accordingly lacks merits and is rejected.