
(2016) 06 GAU CK 0002
In the Gauhati High Court
Case No : Arb. Pet. No. 4 of 2016

Raitani Engineering Works (P) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-06-2016

Acts Referred:

Citation : (2016) 4 GauLR 409 : (2016) 3 GauLT 691

Hon'ble Judges : Mr. Hrishikesh Roy, J.

Bench : Single Bench

Advocate : Ms. M. Jain and Ms. S.D. Deka, Advocates, for the Appellant; Mr. A.K. Sarkar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Hrishikesh Roy, J. :- Heard Ms. M. Jain, the learned Counsel appearing for the petitioners. The respondents are represented by Mr. A.K. Sarkar, the learned Standing Counsel for NF Railways.

2. This application is filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act"), for nomination of arbitrator to decide the claims of the contractor for the following 13 contracts:

Sl. No.

Agreement No.

Name of Work

Date of execution of agreement and extension granted

Date of completion/Termination of work

1.

CE/45

LCW-Earth work in formation in embankment DKE-MPP-LMG-SPB Section.

30.7.1986

10.6.1988 Extension granted till 30.9.1989

2.

CE/37

LCW-Earth work in formation in embankment DKE-MPP-LMG-SPB Section.

17.5.1989

15.5.1989

3.

CE/61

LCW-Earth work in formation in embankment at BP etc LMG-BPB Section.

16.10.1986

16.10.1990

4.

DCE/14

Earthwork in the formation in embankment at KOL-WDA in LMG-BPB Section.

23.12.1987

28.2.1989

5.

SE/131

Remoulding of earthwork at BPB Yard.

28.2.1990

3.3.1993

6.

SE/43

Rebuilding of Bridge No.575.

31.12.1990

3.3.1993

7.

DCE/7

LCW work Hawaipur.

24.7.1987

31.1.1989

8.

SE/24

Through renewal of rails on wooden sleepers between Kamakhyaguri and Narangi.

23.7.1987

9.

DE/14

Between LPC.BP deep screening of Ballast.

3.9.1987

28.2.1989

10.

DE/11

At BPB improvement of water supply.

22.9.1988

Terminated on 20.2.2001

11.

SE/2

At BPB Yard remoulding earthwork.

17.1.1991

1.6.1991

12.

SE/3

Treatment of leaky roof of service and residential building.

17.1.1991

10.5.1991 (completion date) Extension granted 31.12.1991; 15.4.1992 and 15.7.1992

13.

DE/125

Rel. Wall of Maibong.

14.6.1990

No records.

3. As can be seen from the Chart produced by the petitioners, the Contract No.DE/11 at Sl. No.10 was terminated and the case papers shows that sole arbitrator Sanjiv Rai was appointed on 31.3.2003, to adjudicate the resultant dispute. But award was never passed by the Arbitrator.

4. The works were executed between 30.7.1986 - 14.6.1990 but demand for appointment of arbitrator was made by the contractor only on 23.2.2015 (Annexure-VIII). Therefore the Railways have questioned the maintainability of the case by projecting that the contractor were in deep slumber for 20/22 years and therefore their demand for appointment of arbitrator is patently time barred.

5. Earlier, the contractor filed the WP(C) No.8368 & WP(C) No. 8380 of 2004 to secure payment of their dues and refund of the security deposits. The maintainability of the cases arising out of such old contracts was questioned even then by the Railways, by projecting that most contract agreements are not available with the employers. Moreover as the claim arises out of contracts, intervention of the Writ Court is unwarranted and in any case, the petition should be dismissed on the ground of laches. The learned Judge firstly found that arbitration clause covers the agreements and the contractor has belatedly approached the Court 22 years after completion of the works. But since the petitioners pressed hard for an innocuous direction, referring to the order passed earlier in the WP(C) No.3591/2004 which relates to withholding of the security deposit of the contractor, both writ petitions were disposed of by permitting the petitioner to file representation and direction was issued for due disposal of the representation, by Railway authorities.

6. Following the direction issued by the High Court on 14.12.2012, the contractor gave representation on 11.1.2013 (Annexure-VI) for release of their pending dues but they were informed by the Railways on 1.4.2013 (Annexure-VII) that, due to non-availability of the relevant documents for the very old contracts, payment can't be considered for the contractor.

7. Following the above stand of the respondents, the petitioner made the demand for appointment of arbitrator through their notice dated 23.2.2015 (Annexure-VIII). It was claimed in the notice that execution of the works was completed during 1987-1991 for the 12 contract pertaining to Lumding Division and just after due completion, demand for final payment and release of the security deposit, was made by the contractor. Since maintainability of this petition is being questioned for the belated demand for arbitration, some portion of the notice dated 23.2.2015 being relevant on this aspect, is extracted herein below:-

.....

The works against so many contract agreements were carried out from the year since 1987 to 1991 in the direct supervision of Senior DEN/C, N.F. Railway, Lumding.

The 12 Nos. of contract agreements pertained to Senior DEN/C, N.F. Railway, Lumding only. The awarded works against different contract agreements completed in time to the optimum satisfaction of the Railway authorities and just after completion of the work I put my demand for final payment of the work done quantity as well as release of S/D money held up with the Railway, vide so many letters/appeal/reminder/notices but neither the payment is released nor released any of the S/D money held up with the Railway. Not only this while I approach to the General Manager/Works, N.F. Railway, Maligaon as well as General Manager, N.F. Railway, Maligaon, certain orders were communicated to the Senior Divisional Engineer/C at Lumding but no heed is paid towards payment of pending bills and release of S/D money. All the correspondence will be produced in the later stage when required.

.....

As can be seen from the extracted passage that earliest demand for appointment of arbitrator was made only on 23.2.2015 (Annexure-VIII) and since it is contended to be a time barred claim, it would be necessary to examine the concerned clause relating to arbitration.

8. Under the General Condition of Contract (GCC), settlement of disputes is envisaged through demand for arbitration, under Sub-Clause 4(1) of Clause 63 and the same being relevant, is extracted herein below :-

"4.(1) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, but except in any of the "Expected Matters" referred to in clause 63 of these conditions the Contractor, after 90 days of his presenting his final claim on disputed matters may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other, shall referred to arbitration."

9. While the demand for appointment of arbitrator is made for all of 13 contracts, we should be conscious of the fact that, for the contract which was terminated (DE/11), the sole arbitrator was appointed on 31.3.2003 itself. But no award was passed by the appointed arbitrator.

10. To make the claim for contractual payment in civil suits, limitation period of 3 years after completion of the work is prescribed under Article 18 of the Limitation

Act. Three years is the time limit also for a suit for recovery of money, as prescribed under Article 26 of the Limitation Act. However when the dues are acknowledged in writing to be paid at a future date, the computation of limitation period gets extended to the future date. The claims for breach of contract is covered by Article 55 of the Limitation Act and here also, 3 years limitation period is prescribed from the date of breach of contract. Thus when subsequent acknowledgment in writing is made, fresh period of limitation begins under Section 18 and then the period of limitation is to be computed from the date of acknowledgment. Exclusion of time in computing the period of limitation for pursuing in a wrong Court is envisaged under Section 14 of the Limitation Act. That apart, promise to pay in writing will bring in Section 25(3) of the Indian Contract Act, 1872 for a time barred claim. But it is imperative to bear in mind that timely action is expected since Section 45 of the Arbitration Act makes it clear that, Limitation Act applies to arbitration proceeding.

11. Ms. M. Jain, the learned Counsel submits that the petitioners were pursuing their firstly claim with the railways, then before the Writ Court and thereafter with the notice invoking the arbitration clause, demand was made for appointment of arbitrator. She also contends that although the contracts were executed long back, the Railway through their letter of 18.12.2003 have acknowledged their obligation and this should be construed as an acknowledgement of the contractual claims. Therefore it is submitted that limitation period should be computed not from the date of the final claim but from the date of acknowledgment i.e. 18.12.2003.

12.1. Ms. M. Jain relies on R. Madesh v. M. Rathinam in support of her above contention. The issue before the Madras High Court was, whether the plaintiff is entitled to a decree based upon the admission made by the defendants admitting the liability and whether acknowledgment of liability made after the period of limitation, satisfies the conditions laid down under Section 25(3) of the Contract Act. In that context, Section of 18 of the Limitation Act was considered and the learned Judge observed that the essential requirement of a valid acknowledgment is that it must be made before expiry of the limitation period, it must be with regard to the liability in respect of the right in question and it must be made writing. What happened in that case is that, during pendency of the suit, the defendant wrote a letter to the plaintiff in which there is an express promise to repay a sum of Rs.25 Lakhs and the promise was conveyed as under :-

"...We hereby extend the limitation and agree and undertake to repay the sum of rupees twenty five lakhs only payable by us to you as above in the following manner:-

????????????????"

12.2. The Madras High Court construed the above as an express promise to make payment of a time barred debt. But the issue to be considered here is

whether the Railway's letter of 18.12.2003 (Annexure-I) can be construed to be such an express acknowledgment to pay the contractual dues. In the respondent's letter the processing status of the claims are indicated but for some of the contracts, the information relates to release of the security money. The final payment made in respect of few items is also indicated. This letter written of 18.12.2003 even with generous interpretation can't in my understanding, be construed to be an unequivocal promise to pay the dues of the contractor and therefore the argument made to the contrary by Ms. Jain is not accepted. In order to apply Section 25(3) of the Contract Act, the debtor while acknowledging his liability must make an express promise and the language used must indicate that it is something more than an acknowledgment of debt. But neither an express promise nor an acknowledgment of debt is discernible in the Railway's letter of 18.12.2003. Therefore I hold that the time limit for the contractor doesn't get extend by this letter.

13. In *Schlumberger Asia Services Limited v. Oil and Natural Gas Corporation Limited* reported in (2013) 7 SCC 562, the Supreme Court considered the power of Chief Justice or his designate to consider long time barred claims and it was observed that it is optional for the Judge to decide whether the claim is evidently and patently time barred. If a claim for appointment of arbitrator is made decades after completion of the work, without the benefit of any acknowledgment of liability which might keep alive the claim, it is open for the Judge exercising powers under Section 11 of the Arbitration Act, to pass appropriate order on a time barred claim.

14. In the present case, when the petitioners approached the Writ Court, no relief was granted to them under the public law remedy and instead the Court noted that the claim is based upon non-statutory bilateral agreements. The direction issued by the Writ Court to consider the petitioners' representation was based upon an earlier case i.e the WP(C) NO.3591/2004 and that case relates to limited claim for refund of security deposit only. Such innocuous direction for consideration of the representation can't in my perception, extend the period of permitted time, to make demand for appointment of arbitrator. This is logical since demand for arbitration is permitted immediately after 90 days of presentation of the final claim, under Sub-Clause 4(1) of Clause 63 of the GCC. Thus a contractor is not expected to wait indefinitely to invoke the arbitration clause. The claim here primarily relates to contractual dues and refund of security deposit but when the final claim was presented after conclusion of the contracts during 1986-1990, the demand for arbitration can't reasonably be left to be made, 25 years after conclusion of the works.

15. The exclusion of time for bona fide proceeding in a Court is also contemplated, under Section 14 of the Limitation Act but here we are not considering period of limitation, for filing a suit. That apart, it was clearly reflected in the Writ Court's judgment of 14.12.2012 that the petitioners are pursuing very old claims where, even the contract agreements are unavailable

with the Railways and hence the Court refused to adjudicate the merit of the long dead claims. The withholding the security deposit was however left open to be considered by the Railways on the basis of the petitioner's representation. The very old contract documents were not available with the employer and therefore they refused to entertain the belated claims for payment. In fact the petitioners in their letter dated 7.7.2015 (Annexure-IX) offered cooperation for re-construction of the records. But interestingly, for the Contract No.DE/125, the contractor in their own chart extracted earlier, have acknowledged that records for this contract executed on 14.6.1990 are not available with them as well.

16. While considering such petition for appointment of arbitrator, the laches of the petitioners can certainly be taken into account and a futile exercise can't be ordered to be performed by the arbitrator when the works were executed 25 years ago and the contract documents are not available with the employer. The claim here is found to be hopelessly time barred and no express commitment of the respondents is found to make payment of the contractual dues on a future date. Therefore appointment of arbitrator for stale claims is found to be unjustified.

17. Under Section 16 of the Arbitration Act, the Arbitration Tribunal is also competent to decide on its jurisdiction but I see no reasonable basis for the contractors to wait for more than 20 years to invoke the arbitration clause when their final claim remained unconsidered for 2? decades. The demand for arbitration could be made 90 days after presentation of the final claim and slumbering for such long period would in my view, certainly disentitle the contractor from any order in this petition under Section 11 of the Arbitration Act. Therefore relief is declined in this patently time barred case and accordingly the petition is dismissed.