OD-1

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/535/2022

M/S. B.B.M. ENTERPRISES
Vs
STATE OF WEST BENGAL AND ORS.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 27th June, 2024

Appearance:
Mr. Sakya Sen, Adv.
Ms. Nilanjana Adhya, Adv.
...for the petitioner

Mr. Dhruba Ghosh, Sr. Adv.
Mr. Priyankar Saha, Adv.
Mr. Arindam Mandal, Adv.
Mr. Paritosh Sinha, Adv.
Ms. Ajeyaa Choudhury, Adv.
Ms. P. Ghosh, Adv.
...for the State respondents

The Court : Learned Counsel appearing for the petitioner contends in support of the application under Section 11 of the Arbitration and Conciliation Act, 1996 that the petitioner did certain work for the respondent authorities. The work-in-question was completed on July 12, 2000.

Subsequently, a completion certificate was also issued to that effect which indicated that payment had been made up to the second R/A Bill to the tune of Rs. 1,30,97,481/-. However, within the contemplation of the agreement between the parties, in particular Clause 7 thereof, the final bill was to be submitted by the contractor within a month from the date fixed for completion of the work;

otherwise, the Engineer-in-Charge's certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on all parties. It is contended that in view of such provision, unless a final bill was drawn and/or prepared and also certified by the Engineer-in-Charge, the cause of action for claiming the final bill amount did not ripen.

In the present case, it is an admitted position that the respondents have already paid the final value of the work done partially, to the tune of Rs.1,59,78,404. However, the balance of Rs.24,21,596/- along with the refund of the security deposit amounting to Rs. 11,44,205/- has not yet been paid to the petitioner.

Learned Counsel for the petitioner, in support of his contention, cites a co-ordinate Bench judgment in the matter of *M.L. Dalmiya and Co. vs. Union of India* reported at *AIR 1963 Cal 277* as well as an unreported judgment of a Co-ordinate Bench in FMA 1093 of 2013. In the said judgment, the Courts, while considering a similar situation as the present, took into consideration modalities of cases relating to work contracts. It was held in *M.L. Dalmiya (supra)*, inter alia, that in such cases, it is the duty of the Government after doing the work departmentally to give the contractor a certificate of completion. Till such certificate is given, the contractor cannot submit his bill and the cause of action for payment in terms of the contract does not arise. Since the Government did not intimate its decision in the said case, it was held that the time cannot run before that date. In the unreported judgment of *M/s. Biptrade (supra)*, in FMA 1093 of 2013, the Court, in similar lines, observed that in course of the

execution of a works contract or a building contract, continual payments are made by the employer to the contractor at agreed intervals.

It was further held that till the final bill is prepared and the same is certified for payment, the question of limitation generally does not arise in a works contract. As such, in the present case, it is argued that in view of non-grant of certificate by the engineer, the cause of action did not mature until recently, when the petitioner claimed such amount but the same was not disbursed in favour of the petitioner.

Under such circumstances, it is argued, a notice under Section 21 of the 1996 Act was issued on June 2, 2022, thereby setting the ball rolling in respect of commencement of the arbitration proceeding. However, in view of no agreement being expressed by the respondents regarding the reference of the matter to arbitration, the present application has been filed.

Learned senior counsel appearing for the respondent submits that the application is bad for mis-joinder and non-joinder of parties. It is submitted that at best, the respondent no. 1 – State and the Superintending Engineer, National Highway Circle-I could be said to be party to the agreement between the parties. However, respondent no. 2, the Chief Engineer, P.W.D. and the respondent no. 4, Executive Engineer, National Highway Division No. I, are not relevant parties at all.

Learned senior counsel also expresses the handicap of the respondents due to dearth of the relevant documents since the petitioner sat tight over the matter and only became alive to the purported issues after about 20 years. It is

submitted that the claim under consideration is ex-facie time-barred and nothing more than 'dead wood'.

In support of his argument, learned senior counsel places reliance on paragraph 9 of the application where the petitioner admits that the work was completed and the final bill was drawn and/or prepared; yet the same was not paid. Again, in paragraph no. 15 of the application, the petitioner admits that the cause of action for the claim arose first on July 30, 2000 when the work was completed and the final bill prepared but not paid.

In continuance of his arguments, learned senior counsel appearing for the respondents places reliance on the completion certificate annexed at page 18 of the petition which clearly denotes that the work was completed as long back as on July 12, 2000 and payment was duly made.

Learned senior counsel places considerable stress on the payment certificate issued in favour of the petitioner on September 6, 2001 which is annexed at page 19 of the application from which it is evident that the payment, even if in part, was made in terms of the final bill raised by the petitioner. Thus, it is argued that there is no scope of reference of the matter to arbitration, since the same pertains to a long-dead claim and should be nipped at the bud.

Upon a careful consideration of the arguments of the parties, it transpires that the petitioner has stated in paragraph no. 8 of the application that an amount was paid in part against the "final value of work done". It is also stated that the balance amount along with security deposit refund has not yet been paid by the respondents.

The said pleading is to be read in conjunction with Annexure C to the application which collectively annexes a completion certificate and a payment certificate.

It transpires from the completion certificate at page 18 of the application that the respondents had admitted that out of the total order value of Rs.1,84,00,000/-, only a payment up to the second R/A Bill to the tune of Rs.1,30,97,841/- was made.

Read in such context, there may be an ambiguity in the pleadings made in the Section 11 application. In paragraph no. 8, which is to be read in conjunction with paragraph no. 9, the petitioner claims that the part payment was made against the final value of the work done. However, it is not clarified as to whether such payment was an accumulation of the different disbursals made at various points of time against the corresponding R/A Bills, to be adjusted against the final payment.

In paragraph no. 9, the petitioner states that although the work was completed and the final bill was drawn and/or prepared, the same was not paid.

The respondents seek to argue that the drawal of the final bill itself would show that the cause of action of the present claim arose long back, immediately after the completion of the work, at least on September 6, 2001 on which date a payment certificate was issued.

However, the ambiguity arises in the context of Clause 7 of the agreement between the parties. In the final sentence of the said clause, it is provided that the final bill shall be submitted by the contractor within one month from the

date fixed for completion of the work. It goes on further to stipulate that even otherwise (meaning thereby that even if such bill was not drawn) the Engineer-in-Charge's certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on all parties. It is not admitted by the petitioner, nor substantiated at this stage by the respondents, that any such certificate was issued by the engineer concerned, regarding the total amount payable for the work, in terms of Clause 7.

Insofar as the pleading of the petitioner that a part of the final value of the work was paid, the same may or may not be linked with a final bill having been raised and being satisfied.

There is a scope of arguments inasmuch as the said part payments might have been made against the R/A Bills or otherwise, before the final bill was raised and certified.

It would be premature at this stage for this Court, sitting in the jurisdiction under Section 11 of the 1996 Act, to conclusively determine such issue.

The entire objection as to limitation, however, hinges on the said issue, since it may very well be argued by the petitioner that until and unless a certification was made by the concerned engineer to the final bill raised by the petitioner, the cause of action for the claim made by the petitioner would not ripen. If such view is ultimately established, then the bar of limitation would be effaced.

On the contrary, if it is ultimately proved that the engineer had actually issued a certificate regarding the total amount payable, in such event, definitely, the claim might be held to be barred by limitation.

However, it is completely beyond the domain of the Hon'ble Chief Justice and/or his designate, sitting in jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996, to adjudicate even prima facie on the merits of an arguable issue involved in the matter, which would fall categorically within the domain of adjudication by the Arbitrator.

All jurisdictional issues, including limitation, it is well settled, are to be decided by the Arbitrator. Even if there is a shade of doubt as to the issue of limitation, the Court sitting under Section 11 cannot decide the same conclusively and the matter has to be relegated to the Arbitrator.

In such view of the matter, taking into consideration all aspects of the *lis*, this Court is of the opinion that the objection as to limitation cannot be conclusively decided ex-facie on the materials available before the Court and/or pleadings of the parties. Accordingly, the matter is fit to be relegated to arbitration.

Even otherwise, the scope of the dispute falls within the ambit of the arbitration clause in the agreement between the parties and the dispute is otherwise arbitrable in law.

Accordingly, AP 535 of 2022 is allowed, thereby appointing Mr. Om Narayan Rai, Advocate (Mobile No.: 98749 58601) as the sole Arbitrator to resolve the disputes between the parties, subject to a declaration being obtained

under Section 12 of the 1996 Act from the said learned Arbitrator. The remuneration of the Arbitrator shall be fixed by the Arbitrator in consonance with the provisions of the 1996 Act read with its Schedules. It is clarified that all issues are kept open for being adjudicated by the learned Arbitrator and the merits of none of the issues have been entered into by this Court in any manner whatsoever.

(SABYASACHI BHATTACHARYYA, J.)

S.Bag/sg/sp/b.pal