

HIGH COURT OF DELHI
Bench: HON'BLE MR JUSTICE VIBHU BAKHRU,
HON'BLE MR JUSTICE AMIT MAHAJAN
Date of Decision: January 05, 2024

RFA(COMM) 43/2023

SHRI ANIL KHANDELWAL **Appellant**

versus

THE REGISTRAR UNIVERSITY OF DELHI **Respondent**

Sections, Acts, Rules, and Articles mentioned in the judgment:

Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC)

Arbitration and Conciliation Act, 1996 (A&C Act)

Section 11(6) of the Arbitration and Conciliation Act, 1996

Section 12A(1) of the Commercial Courts Act, 2015

Limitation Act, 1963

Clause 7 of the General Conditions of Contract (GCC)

Subject of the Judgment:

This judgment deals with the appellant's challenge to an order by the Commercial Court dismissing their suit for recovery of dues on the grounds of limitation and the existence of an arbitration agreement. The key issues include the jurisdiction of the court to entertain the suit despite the existence of an arbitration agreement and whether the suit was barred by limitation for certain claims.

Headnotes of Judgment:

Commercial Appeal – Suit for recovery of dues – Dismissal of suit by the Commercial Court on the grounds of limitation and existence of an arbitration

agreement – Appellant challenges the impugned order – Jurisdiction of the court to entertain the suit not affected by the existence of an arbitration agreement – Suit barred by limitation for certain claims, but not all – Claim for Labour Escalation, Hiring Charges, Supervision Charges, Watch and Ward Expenses, Material Escalation, Loss of Material, and Interest on Late Payment barred by limitation – Appellant’s admission of delay in filing suit not conclusive – Appeal dismissed on grounds of limitation.

Referred Cases with Citations and Representing Advocates:

The judgment does not mention any specific referred cases or citations. The representing advocates are:

For the Appellant: Mr S.C. Singhal, Mr Dinesh Malik, and Mr Puneet Jain, Advocates.

For the Respondent: Ms Aakanksha Kaul, Ms Versha Singh, Mr Aman Sahani, and Ms Rhea Borkotory, Advocates.

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning an order dated 12.07.2022 (hereafter ‘**the impugned order**’) passed by the learned Commercial Court, Delhi whereby, the respondent’s application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereafter ‘**the CPC**’) was allowed. Consequently, the suit filed by the appellant being CS(COMM) No.226/2019 captioned ***Shri Anil Khandelwal Proprietor M/s Nand Kishore Anil Kumar v. The Registrar, University of Delhi***, was dismissed.

2. The learned Commercial Court accepted the respondent’s plea that the suit was barred by limitation. The learned Commercial Court also observed that there was an arbitration agreement between the parties and therefore, the appellant could not invoke the jurisdiction of the Civil Court. Therefore, the aforementioned suit was not maintainable.

3. The principal controversy to be examined is whether the suit filed by the appellant was *ex facie* barred by limitation. And, whether the suit could be rejected as not maintainable on the ground that the parties had entered into an arbitration agreement.

FACTUAL CONTEXT

4. The appellant claimed that he was carrying on his business of construction and allied activities under the name of his sole proprietorship concern named M/s Nand Kishore Anil Kumar. The respondent (University of Delhi) had awarded a contract for construction to the appellant for the construction of “*Vertical Extension of Two Stories of the Dr. B.R. Ambedkar Centre for Biomedical Research, North Campus, University of Delhi*” for a consideration of ₹2,26,96,182.55/- in terms of a Letter of Award (LoA) dated 13.10.2008. The work was required to be completed within a period of fifteen months to be reckoned from ten days after the date of issuance of the LoA.

5. The appellant claims that thereafter a formal agreement was executed between the parties, which provided that the work would commence on 10.11.2008. The stipulated date of completion was fixed as 09.02.2010.

6. The appellant claims that the work was finally completed on 30.11.2010 despite being temporarily stopped during the period from 13.04.2009 to 30.10.2009.

7. The appellant claimed that he raised running account bills from time to time. And, after completion of the works, he submitted the final bill subject to the condition that additional expenditure would be claimed later.

8. Admittedly, the appellant was paid an aggregate sum of ₹2,71,19,725/- against the bills including, that of the final bill. The appellant claims that he accepted the said amount “*on the condition and assurance of the defendant that the additional expenditure will be claimed latter on*”.

9. The appellant has averred in its plaint that on 08.02.2016, he had sent a letter to the respondent for release of payment under Clause 10C of the General Conditions of Contract (GCC) and payment for reimbursement of testing charges. The letter dated 08.02.2016 indicates that the appellant had requested for release of the following payments:

- “1. Payment of ₹18.25 Lacks approx under clause 10C for reimbursement of labour and interest.
2. Payment of Rs.50,800/- bill already submitted for reimbursement of testing charges.”

10. The appellant has averred that, thereafter, he sent another letter dated 16.11.2017 to the University Engineer, University of Delhi giving details as to the payments required to be made for the completed works.

11. The appellant claims that since, the payments as due were not made, he sent a letter dated 18.01.2018 to the Vice Chancellor, University of Delhi regarding clearance of the bills generated by the appellant on 08.10.2015. The appellant claims that thereafter, he sent another letter dated 08.02.2018 for clearing of payments as the payment of VAT (Value Added Tax) had to be cleared by the Government. This was in context of the roll out of the Goods and Services Tax regime.

12. The appellant claims that none of the departments of the respondent had responded to the aforementioned letters.

13. The appellant avers that on 06.04.2018, the respondent reimbursed testing charges amounting to ₹49,064/- but, did not release the balance amount as claimed.

14. The appellant claims that GCC as applicable to the Agreement between the parties, *inter alia*, provided that the disputes arising from the Agreement would be referred to arbitration. Accordingly, the appellant issued a notice dated 17.05.2018 invoking Clause 25 of the GCC (Arbitration Clause) and sought reference of disputes to arbitration. The claims raised by the appellant in his notice as set out in the plaint, are reproduced below:

“S. No.	Particulars	Amount (₹)
1.	Labour Escalation under clause 10-C	11,81,330.49
2.	Hiring Charges of shuttering material from 14.04.2009 to 30.10.2009 i.e. total 199 days @ Rs.7,500/-	14,92,000.00
3.	Supervisor for 6 months & 15 days @ Rs.15,000/-	97,500.00
4.	Chokidar for watch and ward in each shift of 8 hours x 3 x 6.5 @ Rs.8,000/-	1,56,000.00
5.	Material Escalation due to delay	7,50,000.00
6.	Loss of material	4,00,000.00

7.	Interest on Late Payment	23,32,847.27
	Total	64,09,677.76”

15. The respondent did not accede to the appellant’s request for appointing an arbitrator. Consequently, the appellant filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter ‘**the A&C Act**’) before this Court praying for the appointment of an arbitrator to decide the aforementioned claims. The said petition (Arb.P.801/2018) was disposed of by this Court on 05.12.2018, as the appellant did not press the same.

16. The common order dated 05.12.2018 passed by this court, *inter alia* in Arb.P.801/2018, reads as under:

“1. After arguments, these petitions are not pressed but liberty is granted to the petitioner to file a civil suit in a civil court, and of course this liberty does not mean liberty is granted by this Court that the civil court will necessarily entertain the suit upto trial, and all the defences of facts and law will be open to the respondent when the civil suit is filed to urge that the suit is not maintainable at the threshold, if the law so provides.

2. The petitions are disposed of accordingly.”

17. Thereafter, on 23.01.2019, the appellant requested for a preinstitution mediation settlement in terms of Section 12A(1) of the Commercial Courts Act, 2015. However, the respondent declined to participate in the mediation process and a report to the said effect was furnished to the appellant on 16.02.2019. Thereafter, the appellant filed the suit in question on 18.02.2019. As stated above, the same was dismissed consequent to the impugned order.

REASONS AND CONCLUSION

18. A plain reading of the impugned order indicates that the suit was dismissed on two grounds. First, that it was filed beyond the period of limitation; and second, that the same was not maintainable because there was an Arbitration Agreement between the parties.

19. The decision of the learned Commercial Court that the suit filed by the appellant was not maintainable on the ground of existence of the Arbitration Agreement between the parties, is erroneous. The existence of an arbitration agreement does not preclude a party from instituting an action for the adjudication of its claims in a court or before any judicial authority. However, in the event any such action is instituted, the counter party is entitled to file an application under Section 8 of the A&C Act before the judicial authority for

referring the parties to arbitration. However, the said application is required to be moved no later than the date of submitting its first statement on the substance of the dispute. It follows that the counter party(ies) can elect to not make an application under Section 8 of the A&C Act within the stipulated time and contest the action. The fact that the parties have entered into an Arbitration Agreement does not denude the jurisdiction of the court to entertain the suit, if none of the parties elect to pursue their claims/counterclaims in arbitration.

20. In the present case, the respondent had not filed any application seeking reference of the parties to arbitration. The finding of the learned Commercial Court that the suit was not maintainable on the ground of existence of the Arbitration Agreement, is fundamentally flawed.

21. The remaining issue to be addressed is whether the suit was filed within a period of limitation.

22. Mr. Singhal, the learned counsel appearing for the appellant had contended that the suit was within the period of limitation, *inter alia*, on the ground that the part payment (reimbursement of testing charges amounting to ₹49,064/-) was paid by the respondent on 06.04.2018. He contended that the present suit was filed within a period of three years from the said date and therefore, could not be rejected as being barred by limitation.

23. He also contended that the time spent by the appellant in pursuing his petition under Section 11(6) of the A&C Act is required to be excluded in terms of Section 14 of the Limitation Act, 1963.

24. The question whether the suit was instituted within the period of limitation, is required to be determined on the basis of the facts as averred in the plaint and in the application filed by the appellant seeking condonation of the delay in filing the suit.

25. It is material to note that in his plaint, the appellant had unequivocally admitted that the suit was filed beyond the stipulated period of limitation. The learned counsel for the respondent had contended that in view of the said admission, the appellant could not contend to the contrary.

26. It is material to note that, in his plaint the appellant had averred that that there was a delay of twelve days in filing the suit. But it is pointed out that the period spent by the appellant in pursuing mediation in terms of Section 12A(1) of the Commercial Courts Act, 2015 is required to be excluded and

the same was not considered. Thus, according to the learned counsel for the appellant the suit cannot be considered as barred by limitation on account of the said admission. The said contention is merited and the suit cannot be dismissed solely on the basis of the appellant's admission in the plaint that the suit was filed after a delay of approximately twelve days.

27. In his plaint, the appellant had averred that the work was completed on 30.11.2010 and after completion of the work, he submitted his bills. He had also acknowledged that the respondent had paid a total amount of ₹2,71,19,725/-. This included the payment against the final bill. The appellant had not disclosed the date on which this payment was made but had averred that he had accepted the said payment with the caveat that additional expenditure would be claimed subsequently. It is also apparent from the pleading that the amount of final bill was received at the material time.

28. In terms of Clause 7 of the GCC (which was referred to by the learned Commercial Court), the final bill was required to be submitted by the appellant within one month of the date fixed for completion of the work or at the date of certificate of completion furnished by the Engineer-in-Charge. In terms of the said Clause, the payment was required to be made within the period of three months in case the amount of the contract was up to two lacs and within a period of six months, if the same exceeded the said amount. The said Clause further provided that in the event there was any dispute then the undisputed amounts would be paid within the said period (three months or six months as the case may be) and that the contractor would be required to submit a list of the disputed items within thirty days from the date of disallowance, failing which the same would be considered as fully waived and absolutely extinguished. Clause 7 of the GCC as set out in the impugned order, is reproduced below:

29. "Clause 7. No payments shall be made for a work estimated to cost rupees two thousand five hundred or less till after the whole of the work shall have been completed and certificate of completion given. But in the case of a work estimated to cost more than rupees five thousand the contractor shall on submitting, the bill, be entitled to receive a monthly payment proportionate to the part thereof then executed to the satisfaction of the Engineer-in-Charge, whose certificate of the sum payable shall be final and conclusive against the contractor. But all such intermediate payments shall be regarded as payments by way of advance against the final payment only and not as payment of work actually done and completed, and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed, or re-erected or be considered as an admission of the due performance of the contract, or any part thereof in any respect or the accruing of any claim, nor shall it conclude, determine, or affect in any way the powers of Engineer-in-Charge under these conditions or any of them as to the final settlement and adjustment of the accounts or otherwise or in any other way vary or affect the contract. The final bill shall be submitted by the contractor within one month of the date fixed for completion of the work or of the

date of the certificate of completion furnished by the Engineer-in-Charge and payment shall be made within three months if the amount of the contract plus that of the additional items is upto Rs. 2 Lakhs and in 6 months if the same exceeds Rs. 2 Lakhs of the submission of such bill. If there shall be any dispute about any item or items of the work then the undisputed item or items only shall be paid within the said period of three months or six months as the case may be the contractor shall submit a list of the disputed items within thirty days from the disallowance thereof and if fails to do this, his claim shall be deemed to have been fully waived and absolutely extinguished”.

30. Thus, the period for limitation for making a claim for any amount due in respect of the work done would be reckoned from the date when the work was completed, that is, on 30.11.2010 or from the date when the respondent was obliged to pay the amount for executing the works.

It is also the appellant's case that the final bill was raised at the material time. The learned Commercial Court had noted that the final bill was raised by the appellant in the year 2010. The appellant does not dispute the same, however, he contends that the appellant had reserved his right to raise further amounts after payment of the final bill.

31. It is relevant to note that the claims raised by the appellant in the suit includes Labour Escalation under Clause 10C of the GCC amounting to ₹11,81,330.49/-; Hiring Charges for shuttering material from 14.04.2009 to 30.10.2009 quantified at ₹14,92,000.00/-; Supervisory Charges for a period of six months and fifteen days quantified at ₹97,500/-; Watch and Ward expenses for the said period quantified at ₹1,56,000.00/-; Material Escalation due to delay in completion of the work quantified at ₹7,50,000.00/- and loss of material quantified at ₹4,00,000.00/-. In addition, the appellant also claims an interest on late payment quantified at ₹23,32,847.27/-. Plainly, the cause of action for recovering the amounts due on Labour Escalation, Additional Hiring Charges, Charges for Supervision and Watch and Ward, Material Escalation and loss of material had arisen prior to, or on completion of the works. In terms of Clause 7 of the GCC, the appellant was required to claim the said amounts along with his final bill and pursue the same within the specified period. These claims are, clearly, barred by limitation as they have been filed beyond the period of three years from the date of completion of the works, the date of the final bill or from the date of receipt of the final bill.

32. The application filed by the appellant before the learned Commercial Court seeking condonation of delay in filing the suit indicates that the appellant had calculated the period of limitation of three years with effect from

08.02.2016. According to the appellant, he had raised the said bills on the said date and therefore, the period of limitation was required to be computed from the said date. A plain reading of the letter dated 08.02.2016 indicates that the appellant had made a claim for payments under two heads: Reimbursement of Labour under Clause 10C of GCC and Reimbursement of Testing Charges. The appellant had not made any claim with regard to Hiring of Charges for Shuttering, Supervision Charges and Watch and Ward, Material Escalation, Loss of Material or Interest on late payment. These claims are concededly barred by limitation.

33. As noted above, the cause of action for making a claim regarding Labour Escalation had arisen on or prior to the completion of the works or on expiry of six months from submission of the final bill. Thus, any action seeking such amount would be barred by limitation. The letter dated 08.02.2016, *inter alia*, requesting for payments of Labour Charges (Labour Escalation) under Clause 10C of GCC, would not extend the period for limitation for making such a claim.

34. It is settled law that once the period of limitation starts running, it does not stop on account of any unilateral communications issued by the claimant. In ***Geo Miller and Company Private Limited v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited: (2020) 14 SCC 643***, the Supreme Court had observed as under:

“21. Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7-10-1979 and 4-4-1980 arose on 8-2-1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose....”

35. In view of the above, we find no fault with the decision of the learned Commercial Court in dismissing the appellant's suit as barred by limitation.

36. The appeal is, accordingly, dismissed. The parties are left to bear their own costs.

*Disclaimer: Always compare with the original copy of judgment from the official website.