

Madhucon Projects Limited Vs. Ue Development India Pvt Ltd.

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Court : Andhra Pradesh

Decided On : Mar-14-2011

Judge : G.Rohini, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11(5), (6); companies Act; Limitation Act - Article 137

Appeal No. : ARBITRATION APPLICATION No.71 of 2010

Appellant : Madhucon Projects Limited

Respondent : Ue Development India Pvt Ltd.

Advocate for Def. : Sri B.S.Shivaji, Adv.

Advocate for Pet/Ap. : Sri S.V.Bhatt, Adv.

Judgement :

ORDER

1. This application is filed for appointment of an Arbitrator under Section 11(5) & (6) of the [Arbitration and Conciliation Act, 1996](#) (for short 'the Act') for resolving the disputes between the parties under Joint Venture Agreement dated 29.08.2002.
2. The applicant company claims to have been carrying on business in execution of Infrastructure and Major Civil Projects, execution of Roads, Highways/Bridges

etc., The respondent is also a company incorporated under the provisions of the companies Act and it has been engaged in execution of infrastructure projects.

3. The applicant and the respondent herein formed a joint venture referred to as Madhucon-UEDI Joint Venture under the Agreement, dated 29.08.2002 to execute a portion of the works for strengthening of the existing two lanes from KM 300/0 to KM 359/20 and the widening thereof to four lane dual carriage way of NH 5. It is not in dispute that the four lane strengthening and widening work was entrusted to National Highway Authorities of India (NHAI) vide Government of India's notification dated 04.02.1999. NHAI awarded the work to GMR Tuni- Anakapalli Express Way Private Ltd., (for short GMR), - a Special Purpose Vehicle incorporated to implement the project work in terms of the agreement dated 09.10.2001 entered into between NHAI and GMR. GMR in turn entered into an Engineering Procurement and Construction Agreement (EPC agreement) dated 10.01.2002 with the respondent herein and its holding company-United Engineers (Malaysia) for a sum of Rs.231 crores. In terms of the said EPC agreement, the respondent and the applicant entered into an agreement dated 29.08.2002 forming the Joint Venture for execution of the four lane widening and strengthening work.

4. It is pleaded by the applicant that as per the terms and conditions of the agreement dated 29.08.2002, the applicant had completed the works entrusted to it and discharged its obligation under the agreement. Since outstanding issues remained for discussion, the applicant pursued negotiations through the Coordinating Board in the meetings held as contemplated under the agreement dated 29.08.2002. However, by letter dated 10.02.2009, the respondent expressed that no further useful purposes would be served by any such meetings between the parties. In the circumstances, invoking the arbitration clause under the agreement dated 29.08.2002 the applicant issued notice dated 19.02.2009 nominating P.Tulasi Ram as its Arbitrator. In response to the same, the respondent by letter dated 10.04.2009 requested the applicant to forward the curriculum of Mr. Tulsiram for their perusal. The said details were furnished by the applicant by letter dated 14.04.2009. However, the respondent failed to nominate its Arbitrator within 30 days. Hence, the present application invoking the jurisdiction of this Court for appointment of an Arbitrator.

5. In the counter affidavit filed on behalf of the respondent company, a preliminary objection has been raised as to the maintainability of the application on the ground that the application is barred by limitation. It is contended that since the applicant raised its claims in the year 2004 vide letter dated 16.08.2004, the limitation to initiate arbitration proceedings expired three years from the date of issuance of the letter dated 16.08.2004. It is also contended that the claims made by the applicant are all time barred and no live claim, capable of being referred to arbitration, was existing on the date when the applicant sought to refer the disputes to arbitration. I have heard the learned counsel for the both the parties.

6. The learned counsel for the applicant while submitting that even after the applicant had discharged its obligation under the agreement, negotiations through Coordinating Board for finalization of the outstanding differences between the parties continued till 2009, vehemently contended that the arbitration application filed on 08.04.2010 cannot be held to be barred by limitation. In support of the plea of the applicant that the efforts were being made for settlement of the differences between the parties till February, 2009, the learned counsel has drawn the attention of this court to a series of letters exchanged between the applicant and the respondents with regard to the outstanding issues relating to the agreement dated 29.08.2002. Thus, according to the learned counsel for the applicant the right to apply for arbitration accrued to the applicant only in February, 2009 and therefore, the objection raised by the respondent that the application is barred by limitation is not tenable. The learned counsel for the applicant further contended that since the question whether there is a live claim or not requires adjudication on evidence by the Arbitral Tribunal, the applicant's request cannot be rejected on that ground at the threshold. In support of the said submissions, the learned counsel for the applicant relied upon the decisions of the Supreme Court in *Hari Shankar Singhania and others v. Gaur Hari Singhania and others*¹ and *Shree Ram Mills Ltd., v. Utility Premises (P) Limited*².

7. On the other hand, the learned counsel for the respondent while relying upon *National Insurance Company Limited V. Boghara Polyfab Private Limited*³ and *Steel Authority of India Ltd., v. Budharaja, Government and Mining Contractor*⁴ vehemently contended that having allowed the claims to become stale it is not

open to the applicant to invoke the arbitration clause under the agreement.

8. In the light of the rival contentions noticed above, the following points arise for consideration :

(1) Whether the present application for appointment of arbitrator is barred by limitation?

(2) Whether any live claim is available for arbitration?

Point No.1:

By virtue of Section 43 of the [Arbitration and Conciliation Act, 1996](#) (for short 'the Act'), the Limitation Act, 1963 is made applicable to arbitrations. Article 137 of the Limitation Act, 1963 applies to an application under Section 11 of the Act and therefore, an application for appointment of an Arbitrator shall be filed in the Court within a period of three years when the right to apply accrues. It is a well settled principle of law that the right to apply accrues for seeking reference to arbitration when the differences or disputes arise between the parties i.e. when the claim made by one party is denied by the other party.

Before proceeding to find out as to when the right to apply accrued to the applicant in the present case, it is necessary to refer to Clause 18.2 of the Joint Venture Agreement dated 29.08.2002 which provides for resolution of disputes between the parties.

18.02 Resolution of Disputes between parties:

18.2.1 Except as otherwise specifically provided, the following provisions shall apply to any dispute or difference between the parties arising out of or in relation to this Agreement (hereinafter referred to as 'Dispute').

18.2.2A Dispute shall be deemed to arise when one party (hereinafter referred to as 'Disputing Party') serves on the other party (hereinafter referred to as 'Other Party'), a notice stating the nature of the Dispute (hereinafter referred to as 'Notice of Dispute').

18.2.3. The parties agree that they shall use all reasonable efforts to resolve between themselves any Disputes through amicable negotiations, such attempt shall take the form of a mediation by a committee comprising of the Chairman of UEM and MADHUCON to be held within seven (7) Business Days of the date of Notice of Dispute.

18.2.4 Any Dispute which could not be settled through amicable negotiations after a period of thirty (3) Business Days from the service of the Notice of Dispute shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1998 whereby:

a) all proceedings shall be conducted in English and a daily transcript in English shall be prepared.

b) the venue of arbitration shall be in Hyderabad, India; and

c) there shall be three (3) arbitrators, one each to be selected by the Disputing Party and the Other Party, and the third to be selected jointly by the two arbitrators appointed by the Disputing Party and the Other Party, who shall serve as the Chairman of the Arbitration Panel.

9. A perusal of the above clause shows that a dispute shall be deemed to arise when a "notice of dispute" is served by one party on the other party. Thereafter all reasonable efforts shall be made by both the parties to resolve the disputes between themselves through mediation by a committee comprising of the Chairman of the respondent and the applicant. In case the dispute could not be settled through such mediation, it shall be finally settled by arbitration in accordance with the [Arbitration and Conciliation Act, 1996](#). It is also clear that the parties have to select one arbitrator each and the two arbitrators so appointed by the parties shall jointly select the third arbitrator and he shall serve as the Chairman of the arbitration panel.

10. It is the specific case of the applicant that as per the terms of the Joint Venture Agreement dated 29.08.2002, the applicant is the executing agency for and on behalf of the Joint Venture "Madhucon-UEDI". It is pleaded that having started

execution of the work, the applicant had fully and finally completed the same by 27.03.2005. It is claimed that during execution of the said work the applicant was also entrusted certain additional works with an understanding that the extra cost and expenses would be paid by the respondent. The applicant claimed Rs.14,36,85,201/- vide letter dated 16.8.2004 in respect of variations and additional works for the period upto April, 2004.

11. While admitting the receipt of the said letter dated 16.8.2004, the respondent contends that the cause of action arose when the applicant made the first claim on 16.8.2004 and the period of limitation to initiate arbitration proceedings begins from that date.

12. At the outset, it is to be noticed that Clause 18.2.2 of the Joint Venture Agreement provides that a dispute shall be deemed to arise when one party serves on the other party a notice stating the nature of the dispute.

13. Admittedly, in the letter dated 16.08.2004 the applicant had only mentioned its claim in respect of variations and additional works and the respondent had not even disputed the said claim. Hence at that stage no dispute can be said to have arisen between the parties.

14. It is also relevant to note that the claims made by the applicant for reimbursement of additional costs were admittedly considered in the meeting dated 18.3.2005 of the Coordinating Board established under the Joint Venture Agreement. Thereafter the applicant by letter dated 19.05.2005 while submitting the details of its claims, made it clear that the total value of all the claims was Rs.433,288,658/- subject to further revision / modification. In response to the same, the respondent by letter dated 21.07.2005 informed the applicant that its claims were forwarded to the project company i.e., GMR vide letter dated 28.6.2005 and the same were rejected by the Project company by letter dated 18.7.2005. While requesting the comments of the applicant in order to send a reply to GMR, the respondent further added that in the event the applicant considers a discussion is necessary to finalize the draft reply, they can meet in their Bangalore office. Such a meeting was held and thereafter series of letters were exchanged between the applicant and the respondent. As the claims were not settled, the

applicant by notice dated 26.11.2007 while invoking arbitration clause 18.2.4 of the Joint Venture Agreement, requested the respondent to convey acceptance of its claim within 30 days. The respondent was also requested to inform the name and address of their arbitrator in case amicable settlement was not considered. Pursuant thereto, by letter dated 12.12.2007 the respondent called upon the applicant to furnish the details of its dispute so that the dispute resolution mechanism can be initiated.

Thereafter, by letter dated 28.01.2008, the respondent notified its claims against the applicant. On 29.01.2008, the applicant addressed a letter to the respondent calling upon to appoint an Arbitrator from its side. However the respondent by letter dated 12.2.2008 contended that clause 18.2.3 had to be invoked for a meeting of the mediation committee. Though the forum of mediation as per Clause 18.2.3 was accepted for discussing the claims of both parties, it appears that there was no consensus between the parties with regard to the place of meeting. Ultimately, the meeting of the mediation committee was held at Bangalore on 02.02.2009 and the claims of both the parties were discussed. According to the applicant, certain decisions were taken in the said meeting and it was proposed to have a further meeting on 12.02.2009. The decisions so taken were confirmed by the applicant by letter dated 7.2.2009. However the respondent by letter dated 10.02.2009 while alleging that the applicant had imposed certain terms which were never agreed to between the parties concluded that the meeting proposed on 12.02.2009 might not achieve anything further.

15. In the light of the above noticed facts borne out of the record, the learned counsel for the applicant contends that the right to apply for arbitration accrued to the applicant only on receipt of the respondent's letter dated 10.02.2009 whereunder it was made clear by the respondent that amicable negotiations are not possible any further.

16. I find force in the submission of the learned counsel for the applicant since the stage of settlement by arbitration arises under Clause 18.2.4 of the Joint Venture Agreement only where any dispute could not be settled through amicable negotiations. In the instant case, negotiations were going on between the parties

for amicable settlement of the claims made by the applicant and the respondents upto February, 2009 and the last meeting of the mediation committee was held on 2.2.2009 at Bangalore. Though the applicant was expecting amicable resolution of all the pending issues in the next meeting that was scheduled on 12.2.2009, the respondent in its letter dated 10.02.2009 while raising certain objections, informed the applicant that the proposed meeting on 12.2.2009 was not possible. Therefore the applicant by notice dated 19.02.2009 invoked Clause 18.2.4 for final settlement by arbitration. The applicant by subsequent letter dated 31.03.2009 had also nominated its arbitrator followed by letter dated 14.4.2009 furnishing the profile of the arbitrator so nominated by it.

17. The receipt of the notices dated 19.2.2009, 31.3.2009 and 14.4.2009 invoking the arbitration clause and proposing the arbitrator has not been disputed by the respondent. However the respondent failed to select its arbitrator as required under Clause 18.2.4 (c).

18. It is clear from the facts noticed above, there were serious efforts by both the parties for settling the disputes. As a matter of fact, the respondent issued notice of disputes with regard to its claim only on 21.08.2008. Even thereafter, the negotiations took place between the parties on 02.02.2009. In view of the above facts, a dispute can be said to have arisen only on 10.02.2009 when the respondent made it clear that no purpose would be served by further meetings. Thereafter, the applicant made efforts for arbitration by nominating its Arbitrator. Even the details were furnished as sought by the respondent on 14.04.2009. However, the respondent did not come forward to nominate its Arbitrator. Therefore, the right to apply for arbitration can be said to have accrued to the applicant on 14.04.2009 or on 10.02.2009 when the respondent declined further negotiations. Hence, the arbitration application filed in April, 2010 is well within the period of limitation prescribed under Article 137 of the Limitation Act.

Point No.2:

So far as the question whether any live claim is available for arbitration, the law is well-settled that the Chief Justice or his designate when approached with an application under Section 11 of the Act has to consider whether he has jurisdiction

in relation to the contract, whether there is an arbitration agreement, whether the applicant is a party to the agreement and whether an arbitrable dispute subsists [vide SBP & COMPANY v. PATEL ENGINEERING LIMITED⁵]. It is further explained in National Insurance Company Limited's case (3 supra) that the question whether the claim is a dead claim or a live claim is an issue which the Chief Justice or his designate may choose to decide or leave it to the decision of the arbitral tribunal.

19. On a careful consideration of the facts and circumstances of the present case, particularly having regard to the fact that the matter involves various disputed questions of fact, I am of the view that the question whether any live claim is available for arbitration or not cannot be decided by this Court at this stage. In my considered opinion the said issue requires consideration on taking evidence along with merits of the claims involved in the arbitration. It is therefore appropriate to leave the said issue for the decision of the arbitrator.

20. For the aforesaid reasons, it would be appropriate to appoint an arbitrator as sought by the applicant and refer the matter for arbitration. Accordingly, Sri Justice Vaman Rao, a former Judge of this Court is hereby appointed as the Arbitrator for deciding the claims of the applicant as well as the counter-claims made by the respondent arising out of the Joint Venture Agreement dated 29.08.2002. The learned Arbitrator is at liberty to fix his fees and the same shall be borne by both the parties equally.

21. The Arbitration Application is accordingly allowed. No costs.

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