

REPORTABLE**IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 7184 OF 2008****M/S. EMM ENN ASSOCIATES****... APPELLANT(S)****VERSUS****COMMANDER WORKS ENGINEER
& ORS****... RESPONDENT(S)****WITH****CIVIL APPEAL NO. 7185 OF 2008****J U D G M E N T****ASHOK BHUSHAN, J.**

These two appeals raising identical questions of law have been heard together and are being decided by this common judgment. For deciding both the appeals, it shall be sufficient to refer to facts and pleadings in Civil

Appeal No. 7184 of 2008. Appeal No. 7184 of 2008 has been filed against judgment of Chief Justice of Punjab & Haryana High Court in Arbitration Case No. 184 of 2006 by which judgment learned Chief Justice has dismissed the application, filed by appellant for referring the dispute to an arbitrator in exercise of power under Section 11 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as 'Act').

2. Civil Appeal No. 7185 of 2008 has also been filed against the identical judgment of learned Chief Justice in Arbitration Case No. 89 of 2006 by which the application filed by the appellant for appointing an arbitrator has been dismissed.

3. Brief facts giving rise to Appeal No. 7184 of 2008 now need to be noted.

The appellant a partnership firm was allotted a contract on 10.11.1998 for providing additional security fencing at Mullanpur. The work was completed on

10.7.2000. Work completion certificate was issued. Final bill was prepared on 20.2.2001 and the payment of final bill was made to the petitioner on 10.04.2001. Payment of the undisputed part of the final bill was made by cheque dated 10.04.2001.

4. Although Clause 67 of general conditions of contract contemplated for recovery from contractor in several contingencies one of which as referred in sub-Clause (f) was that if as a result of any audit and technical examination, any over payment is discovered in respect of work done under this contract, the contractor shall on demand make payment of a sum equal to the amount of over-payment. Sub-Clause (g) further provided that the Government shall not be entitled to recover any over-payment beyond a period of two years from the date of payment of the undisputed portion of the final bill.

5. Even though, two years period expired after payment of final bill, no demand for any recovery was issued by the Government. Contractor by letter dated

23.02.2005 served a notice stating that final bill amount as paid during April, 2001 did not include the payments due to contractor against several items which were claimed as per appendix A annexed to the notice.

6. It was further stated that the decision be communicated within thirty days failing which it shall be assumed that the claim is disputed and contractor shall be left with no remedy except to seek adjudication by an arbitrator appointed in terms of the contract.

7. The Garrison Engineer issued a letter dated 22.03.2005 informing that contractor had signed the final bill without any protest and had given 'No Further Claim' certificate. Hence no arbitrable dispute exists. The claim now intimated after the lapse of a period of approx four years is baseless and hence denied.

8. A letter dated 24.03.2005 was written by the contractor to the chief engineer in reference to notice dated 23.02.2005 with a prayer that arbitrator under

condition 70 of the Contract may kindly be appointed to adjudicate the dispute. The appellant thereafter filed an application under Section 11 of the Arbitration Act before District Judge, Ropar. The application was ultimately taken by Chief Justice of the High Court and by an order dated 12.03.2007, the application was rejected taking the view that appellant's claim is not a live claim. Aggrieved against the above judgment dated 12.03.2007 in Arbitration Case No. 184 of 2006, Appeal No. 7184 of 2008 has been filed.

9. Arbitration Case No. 89 of 2006 has also been filed by the appellant seeking appointment of an arbitrator under Section 11 of the Act in the said case and also the work was completed on 23.09.2000 and the final bill was paid on 10.04.2001. Notice along with list of claim was sent by the appellant on 23.02.2005 i.e. on the same day when notice in Arbitration Case No. 184 of 2006 has been sent.

10. Hon'ble Chief Justice giving the same reasons rejected the application in Arbitration Case No. 89 of 2006 holding that the claim made by the appellant is not a live claim. Hon'ble Chief Justice by order dated 12.03.2007 took the view that final bill has been paid on 10.04.2001, the notice having been given only on 23.02.2005 the period of limitation was over. With regard to the Clause 67 of the contract, it was observed by the Chief Justice that Embargo of two years as per sub-Clause (f) and (g) is with regard to the right of the Government for effecting recovery from the contractor which clause does not extend the period of limitation in favour of the contractor.

11. Shri O. P. Gupta, the partner of the appellant firm has appeared in-person and made his submission. We have also heard the learned counsel appearing for the respondents.

12. The appellant's case is that the claim raised by contractor by notice dated 23.02.2005, was not barred by

time and was a live claim which ought not to have been rejected by the Chief Justice in exercise of his power under Section 11 of the Act. It is contended that the issues as to whether the claim is barred by time are the issues which ought to have been left for decision of arbitrator. It is contended that payment in respect to the final bill made on 10.04.2001, was payment with regard to undisputed amount. Apart from undisputed amount there were other claims of the contractor and the 'No Liability' certificate given by the appellant was only with regard to undisputed claim. Payment made on 10.04.2001 was the payment only in reference to undisputed claim and that in no manner precluded the appellant from raising claim.

13. As per Clause 67 of the contract, there was two years period for effecting any recovery from the contractor and when no claim against the contractor was raised during the aforesaid period, the appellant raised the claim for disputed amount which was not paid. The

period of two years is defect liability period and it was clearly open for the appellant to raise the claim for disputed amount after expiry of the aforesaid period of two years.

14. The respondents never adjudicated the disputed part of the final bill and after serving notice the appellant had rightly sought for adjudication by an arbitrator which application has been rejected by Hon'ble Chief Justice not on valid considerations.

15. Learned counsel appearing for the respondents supported the judgment of the Chief Justice and contends that for filing any application limitation is three years as per Article 137 of the Limitation Act, 1963. Final bill had been paid on 10.04.2001, any application for any claim in respect to final bill ought to have been raised within three years. It is contended that the respondents have raised the preliminary objections in reply objecting the application for arbitration filed by the

appellant, which has rightly been rejected by the Chief Justice.

16. We have considered the submissions of both the parties and have perused the record, what is the nature of jurisdiction of the Chief Justice while deciding an application under Section 11 of the Act has elaborately been considered by Seven Judge Bench of this court in ***SBP & CO. versus Patel Engineering Ltd and another (2005) 8 SCC 618***. In para 47 of the judgment, conclusions were recorded by the larger Bench. Conclusion IV is relevant for the present case which is quoted as below:

“47. We, therefore, sum up our conclusions as follows:

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or

arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.”

17. The Chief Justice exercises the judicial power while passing an order under Section 11 of the Act thus can examine the question as to whether the claim which has been raised before him survives and needs to be adjudicated. It goes without saying that if Chief Justice finds that claim is a dead claim, he can exercise jurisdiction in rejecting the application.

18. A two Judge Bench of this court in ***Indian Oil Corporation Limited vs. SPS Engineering Limited, 2011 (3) SCC 507***, had occasion to consider what is a

'live claim' within the meaning of Section 11 of the Act. Elaborating the jurisdiction of the Chief Justice, under Section 11 of the Act following was laid down by this court in para 14 of the judgment:

“14.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 acknowledgment 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.”

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19. Further this court has observed that an application under Section 11 of the Act is expected to contain pleading about the existence of a dispute and the applicant is not expected to justify the claim or plead extensively in regard to limitation or production of

document to demonstrate that claim is within time in proceeding under Section 11 and that issue should normally be left to the Arbitral Tribunal. Following was observed in para 15:

“15. An application under Section 11 of the Act is expected to contain pleadings about the existence of a dispute and the existence of an arbitration agreement to decide such dispute. The applicant is not expected to justify the claim or plead exhaustively in regard to limitation or produce documents to demonstrate that the claim is within time in a proceeding under Section 11 of the Act. That issue should normally be left to the Arbitral Tribunal. If the Chief Justice or his designate is of the view that in addition to examining whether there is an arbitration agreement between the parties, he should consider the issue whether the claim is a dead one (long time-barred) or whether there has been satisfaction of mutual rights and obligation under the contract, he should record his intention to do so and give an opportunity to the parties to place their materials on such issue. Unless the

parties are put on notice that such an issue will be examined, they will be under the impression that only questions of jurisdiction and existence of arbitration agreement between the parties will be considered in such proceedings.”

20. From the above, it is clear that Chief Justice may chose to hold a claim as a dead claim only when the claim is evidently and patently long time barred claim and there is no need for any detailed consideration of evidence. An illustration have been given in para 14 as extracted above. The above illustration becomes relevant for the facts of the present case. In the present case also, the appellant has raised the claim beyond the three years of completing of the work but within five years of completion of the work.

21. In the present case, the appellant has also contended that there is a defect liability period of two

years during which any recovery can be made from the contractor. Further the categorical case of the appellant was that final payment made at 10.04.2001 was the final payment of the undisputed claim and there were other claims of the appellant which were disputed and the payment received on 10.4.2001 was with regard to undisputed claim. There being no adjudication with regard to disputed claim the claim raised by notice dated 23.02.2005 cannot be said to be barred by time or a dead claim.

22. In the present appeal by IA No. 03 of 2012, the appellant has brought certain additional materials for consideration of the Court. By annexure 16 certain certificates which were given by the contractor on 20.02.2001 that is when the final bill was prepared, has been brought on record. The payment was made by cheque dated 10.04.2001 and para 3/4 of the certificate filed at the 2nd page of the annexure 16 states as follows:

“3. Printed Certificate signed by the petitioner at the time of receiving payment of the undisputed part of the Final Bill.

Received Rs. 57532/-. This payment is in full and final settlement of all money due under C WE/AF CHD / CHD-5/98-99 and I have no further claim in respect of the

**Sd/-
Contractor”**

“4. Payment by Cheque of the undisputed part of the Final Bill made by the dispersing officer, mentioned-herein-below:-

Cheque No. H – 916930 dated 10.4.2001 for Rs. 57532/- issued in favour of M/s Emm Enn Associates on SBI AF Chandigarh Treasury.

**Sd/-
Signature of Dispersing Office ”**

23. Para 04 of the above certificate as quoted above clearly mentions payment by cheque of the undisputed part of the final bill and above certificate also clearly indicates that payment on 10.04.2001 was made of the undisputed part of the final bill which presupposes that there are certain other claims which are disputed. Clause 67 of the contract entered between the parties

also uses expressions “undisputed portion of the Final Bill”

24. Appellant had relied on Clause 67 which contains a heading “Recovery From Contractor” under sub-Clause (f) and (g) which is to the following effect:

(f) If, as a result of such audit and technical examination, any over-payment is discovered in respect of the work done under this Contract, the contractor shall on demand make payment of a sum equal to the amount of over-payment or agree for effecting necessary adjustment from any amounts due to him by Government. If however, he refuses or neglects to make the payment on demand or does not agree for effecting adjustment from any amounts due to him, Government shall be entitled to take action as in sub-para (a) hereinbefore. If as a result of such audit and technical examination any under payment is discovered, the amount of under payment shall be duly paid to the Contractor by Government.

(g) Provided, that, nothing hereinbefore contained shall entitled the Government to recover any over-payment in respect of any price agreed between the C.W.E or the G.E. and the Contractor under the circumstances specifically prescribed for such method of assessment and that the said right of the Government to adjust

over-payment from any sum due or from any sum which may become due to the Contractor or from Security Deposit or Security Bond amount and adjust under payment, shall not extend beyond a period of two years from the date of payment of the undisputed portion of the Final Bill or in the case of minus Bill, from the date, the net amount of the final bill is communicated to the Contractor. “

25. In sub-Clause (g) the period of two years under which the Government is entitled to make recovery is “from the date of payment of the undisputed portion of the final bill”. The examination of the additional materials brought on this appeal, does indicate that the case required consideration of relevant bills and certificates and determination on the question as to whether the claim laid by appellant was a dead claim and was not a live claim depended upon scrutiny of relevant documents. The pleadings in the proceeding under Section 11 by the appellant were clearly to the effect that on 10.04.2001, he was paid only undisputed part and

the appellant has reserved his right to raise claim to the disputed part.

26. In view of the Division Bench judgment in **Indian Oil Corporation Ltd.** supra para 14 as extracted above, the present was the case which ought to have been left for the decision by the Tribunal. We, however, have proceeded further to examine the claim raised by the appellant in his notice dated 23.02.2005. The pleadings of the appellant are categorical to the effect that the final payment made on 10.04.2001 was only with regard to undisputed portion and he has reserved his right to raise claim with regard to other disputed claims.

27. The disputed claims having never been adjudicated, we are of the view that there was a dispute which needed an adjudication after looking into all relevant documents, bills and certificates which could have been appropriately examined by Arbitral Tribunal and the observation of the Chief Justice “As the appellant has failed to prima facie

show this court that there was a live claim of the appellant” does not commend us.

28. The claim raised by petitioner in the facts of the case could not have been said to be a dead claim. Especially in view of the additional documents which have been placed before us by IA No. 03 of 2012. We are thus of the view that the order dated 12.03.2007 passed in Arbitration Case No. 184 of 2006 and 89 of 2006 deserves to be set-aside.

29. As a consequence thereof, the application made by the appellant under Section 11 of the Act is allowed. We, however, consider it apposite to remit the case to the High Court (designated Judge) to pass consequential orders for appointment of the arbitrator for deciding the disputes which have arisen between the parties. The appointment of the arbitrator may be made in the first instance with the consent of the parties and if, for any reason, it is not possible to do so then the Court will

appoint the arbitrator in its discretion. It be done within one month from the date of the parties appearance.

30. Parties to appear before the designated Judge in the High Court on 25.07.2016 to enable the Court to pass appropriate consequential order as directed above. Both the appeals are accordingly allowed.

.....J.
(ABHAY MANOHAR SAPRE)

.....J.
(ASHOK BHUSHAN)

**NEW DELHI,
JUNE 26, 2016.**

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