

M/S. Emm Enn Associates vs Commander Works Engineer & Ors on 29 June, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3079, 2016 (13) SCC 61, (2016) 2 CLR 238 (SC), (2016) 5 ANDHLD 20, (2016) 5 SCALE 828, (2016) 122 CUT LT 665, (2016) 5 MAD LJ 406, (2016) 2 ALL RENTCAS 761, (2016) 4 CAL HN 19, (2016) 4 ARBILR 114, (2016) 4 RECCIVR 439, (2016) 165 ALLINDCAS 120 (SC), (2016) 3 BANKCAS 464, 2016 (4) KCCR SN 374 (SC), 2017 (120) ALR SOC 28 (SC)

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Bench: Ashok Bhushan, Abhay Manohar Sapre

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPEALLATE 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 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. Normally, when a power is conferred on the highest judicial authority who normally performs judicial functions and is the head of the judiciary of the State or of the country, it is difficult to assume that the power is conferred on the Chief Justice as *persona designata*. Under Section 11(6), the Chief Justice is given a power to designate another to perform the functions under that provision. That power has generally been designated to a Judge of the High Court or of the Supreme Court respectively. *Persona designata*, according to Black’s Law Dictionary, means “a person considered as an individual rather than as a member of a class”. When the power is conferred on the Chief Justices of the High Courts, the power is conferred on a class and not considering that person as an individual. In *Central Talkies Ltd. v. Dwarka Prasad* while considering the status in which the power was to be exercised by the District Magistrate under the United Provinces (Temporary) Control of Rent

and Eviction Act, 1947 this Court held: (SCR pp. 500-01) “A persona designata is ‘a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character’. (See Osborne’s Concise Law Dictionary, 4th Edn., p. 253.) In the words of Schwabe, C.J., in *Kokku Parthasaradhi Naidu Garu v. Chintlachervu Koteswara Rao Garu*⁴, personae designatae are, ‘persons selected to act in their private capacity and not in their capacity as Judges’. The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purposes of the Eviction Act.” In *Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker* this Court after quoting the above passage from *Central Talkies Ltd. v. Dwarka Prasad*³ applied the test to come to the conclusion that when Section 18 of the Kerala Buildings (Lease and Rent Control) Act, 1965 constituted the District Judge as an Appellate Authority under that Act, it was a case where the authority was being conferred on the District Judges who constituted a class and, therefore, the Appellate Authority could not be considered to be persona designata. What can be gathered from P. Ramanatha Aiyar’s *Advanced Law Lexicon*, 3rd Edn., 2005, is that “persona designata” is a person selected to act in his private capacity and not in his capacity as a judge. He is a person pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character. It is also seen that one of the tests to be applied is to see whether the person concerned could exercise the power only so long as he holds office or could exercise the power even subsequently. Obviously, on ceasing to be a Chief Justice, the person referred to in Section 11(6) of the Act could not exercise the power. Thus, it is clear that the power is conferred on the Chief Justice under Section 11(6) of the Act not as persona designata.”

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. Normally a persona designata cannot delegate his power to another.

Here, the Chief Justice of the High Court or the Chief Justice of India is given the power to designate another to exercise the power conferred on him under Section 11(6) of the Act. If the power is a judicial power, it is obvious that the power could be conferred only on a judicial authority and in this case, logically on another Judge of the High Court or on a Judge of the Supreme Court. It is logical to consider the conferment of the power on the Chief Justice of the High Court and on the Chief Justice of India as Presiding Judges of the High Court and the Supreme Court and the exercise of the power so conferred, is exercise of judicial power/authority as Presiding Judges of the respective courts. Replacing of the word “court” in the Model Law with the expression “Chief Justice” in the Act, appears to be more for excluding the exercise of power by the District Court and by the court as

an entity leading to obvious consequences in the matter of the procedure to be followed and the rights of appeal governing the matter. The departure from Article 11 of the Model Law and the use of the expression “Chief Justice” cannot be taken to exclude the theory of its being an adjudication under Section 11 of the Act by a judicial authority.

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 29, 2016.