

(2008) 02 MP CK 0045
In the Madhya Pradesh High Court

Aggyaram and Co.

APPELLANT

Vs

Madhya Pradesh Public Works Deptt. and Others

RESPONDENT

Date of Decision : 14-02-2008

Acts Referred:

Limitation Act, 1963 — Section 9

Citation : (2008) 3 ARBLR 165 : (2008) ILR (MP) 1799 : (2008) 2 MPLJ 390

Hon'ble Judges : S.A. Naqvi, J;Arun Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Arun Mishra, J.

The petitioner assails the order dated 5-4-2000 passed by the M.P. Arbitration Tribunal, Bhopal in reference Case No. 44/99 dismissing the application as barred by limitation.

The petitioner/Contractor was given a work for construction of Government Higher Secondary School building at Shamshabad. The date of completion of the work was 17-2-89, though the petitioner was allowed to complete the work by 11-5-90 by letter dated 30-4-90 of the Superintending Engineer. The contract was terminated on 23-3-90. The remaining work was given to other agency. Notices were served on 22-1-93 and on 16-6-94.

The petitioner referred the quantified claims to the Superintending Engineer on 25-7-94 and he rejected the reference on 15-1-99. The petitioner preferred the reference case before the Arbitration Tribunal on 15-3-99 and during the pendency of the reference case, the petitioner preferred an appeal before the Chief-Engineer on 14-6-99. No decision was taken by the Chief Engineer on the appeal. The Arbitration Tribunal has held that limitation came to end on 7-2-96, the reference was preferred before the Tribunal on 15-3-99. There was delay of more than three years. The reference case has been dismissed as barred by limitation, considering Section 7B(1)(a) and Section 7B(1) (b) of Madhya Pradesh

Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as "the Adhiniyam"). Dissatisfied with the order passed by the Arbitration Tribunal, the revision has been preferred by the contractor.

Shri R.D. Hundikar, Learned Counsel appearing on behalf of the petitioner has submitted that the Superintending Engineer has rejected the reference on 15-1-99. The application filed before the Tribunal was within the period of one year from that date thus, it was within limitation. He has relied upon the Division Bench decision of This Court in Ram Niwas Shukla Vs. State of M.P. and Another, .

Shri Sudesh Verma, Learned Counsel appearing on behalf of the respondents has submitted that the petitioner has failed to take recourse of Clause 29 of the agreement, thus it was not open for him to prefer claim petition before the Arbitration Tribunal beside that it was hopelessly barred by limitation. Once the period of limitation came to an end, it would not be revived by rendering a decision by the Superintending Engineer beyond the period of limitation i.e, 15-1-99. He has also relied upon Section 9 of the limitation Act, 1963 to contend that once the limitation starts running, it cannot be checked. Thus, in the instant case, limitation came to an end, the fresh period of limitation would not be available, would not start on rendering of decision by Superintending Engineer.

First, we deem it appropriate to consider Clause 29 of the agreement whether the petitioner has taken steps as per the agreement entered into between the parties which is necessary in order to maintain reference petition before the tribunal. The relevant portion of Clause 29 containing the Arbitration Clause is quoted below:

ARBITRATION CLAUSE

Clause 29-Except as otherwise provided in this contract all question and dispute relating to the meaning of the specifications and instruction hereinbefore mentioned and as to the thing whatsoever in any way rising out or relating to contract designs drawings specifications estimates concerning the works or the execution of failure to executive the some whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the Superintending Engineer in writing for his decision within a period of 30 days of such occurrence, thereupon the Superintending Engineer shall give his written instruction/or decision with on a period of 60 days of request. This period can be extended by mutual consent of the parties.

Upon receipt of written instructions or decision, the parties shall promptly proceed without delay to comply such instructions or decision. If the Superintending Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested of if the parties are aggrieved against the decision of the S.E., the parties may within 30 days prefer an appeal to the Chief Engineer who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The

Chief Engineer will give his decision within 90 days. If any party is not satisfied with the decision of the Chief Engineer he can refer such dispute for arbitration by at Arbitration Board to be constituted by State Government which shall consist of three members of whom one shall be chosen from among the officers belonging to the Department not below the rank of S.E. one Retired Chief Engineer of any Technical Department & one serving officer not below the rank of S.E. belonging to another technical Department. The aforesaid Clause 29 clearly provides that the dispute shall be referred to the Superintending Engineer in writing for his decision within a period of 30 days of accrual of cause of action thereafter the Superintending Engineer shall give his writing instructions/decision within a period of 60 days. This period can be extended by mutual consent of the parties. If the Superintending Engineer fails to give his decision in writing within a period of 60 days or mutually agreed extended time after being requested if the parties are aggrieved against the decision, may prefer an appeal to the Chief Engineer within 30 days and the Chief Engineer will give his decision within 90 days.

Clause 29 provides for time-frame within which Superintending Engineer and Chief Engineer have to be approached and also the time within which they will take a decision on the dispute or appeal as the case may be. In the instant case, the contract was undisputedly terminated on 23-3-90. The first demand notice to recover the extra amount incurred due to the employment of debitable agency was served to the contractor on 22-1-93, subsequent notice was served on 16-6-94. It was necessary for the contractor to approach the Superintending Engineer to assail the termination of the contract by the Executive Engineer within 30 days of the date of termination of the contract which took place on 23-3-90 on the ground of purported illegality. As, first demand notice with respect to the recovery of extra-amount incurred due to the employment of debitable agency was served on 22-1-93, he should have approached the Superintending Engineer within a period of one month to assail the same i.e, upto 22-2-93. Even, second demand notice was served on 16-6-94, even if it is taken that fresh cause of action accrued on service of second demand notice, though infact it did not accrue, the contractor again failed to approach within 30 days, he preferred claim before the Superintending Engineer on 25-7-94, beyond the period of thirty days. Thus, the petitioner has miserably failed to invoke Clause 29 of the agreement. It was necessary for him to strictly follow the procedure prescribed under Clause 29 in order to maintain reference petition before the Tribunal under the Adhiniyam. He again approached the Chief Engineer in the year 1999 on 14-6-99 whereas when the Superintending Engineer has failed to take a decision within 60 days on the claim made by the petitioner on 25-7-94. It was incumbent upon the petitioner on failure of the Superintending Engineer to take a decision within a period of 60 days to approach the Chief Engineer within 30 days after the expiry of the 60 days period on 25-7-94. Thus, the Chief Engineer was not approached within the prescribed period by the contractor. Thus, he has failed to take recourse of the period

stipulated in Clause 29 of the agreement and it is not the case of the petitioner that time was extended by mutual consent of the parties, before the Superintending Engineer to take a decision in the year 1999. Thus, reference petition before the Tribunal was not maintainable as per the decision rendered by the Full Bench of this Court in *State of M.P. and Another Vs. Kamal Kishore Sharma*, , in which considering the Clause 29, the Full Bench has laid down thus:

7. On bare perusal of the provision it is apparent that changes have been made vide amendment of the year 1995 and earlier period of limitation of one year was prescribed after the decision of final authority under the agreement. Now the Act is modified and it is mandatory to refer the dispute for decision of the final authority under the terms of works contract. The amendment in the Act was brought by Act No. 36 of 95 and the statement and objects and reasons for the said amendment was that in order to enable the arbitration tribunal to function more effectively it has become essential to amend the Act and it is further provided that since the verbiage of Sub-section (1) of Section 7-B is defective, this section has been modified suitably. The meaning of word "verbiage" as defined in the Oxford Dictionary is "needless accumulation of words" or the section is expressed in more words than are needed. Thereby tribunal has clarified the provisions of Section 7-B of the Adhiniyam. Since the language of Section 7-B is simplified which is now clear and unambiguous contention of counsel for the respondent cannot be accepted that the words occurring in section that "decision of final authority under the terms of works contract" would mean that party must approach final authority under the works contract before filing the dispute. He submitted that only requirement is that the dispute must be first referred to the final authority under the terms of the works contract and party is not required to approach final authority as per terms of Clause 29 of the works contract after approaching Superintending Engineer. Thus, if a particular manner is prescribed under the works contract for referring the dispute to the final authority, the procedure laid down in the contract must be followed. Reference should be made to the final authority in terms of the agreement for works contract and not otherwise. Since unnecessary words have been reduced in Section 7- B vide amendment by Act 36 of 95, the real meaning can be drawn from the unamended provision. Thus, it is clear that before admitting the reference Tribunal must satisfy itself that the dispute has been referred for the decision of the final authority strictly as per the terms of the works contract. It may be further clarified that after the judgment in *Lachmandas* (supra) was delivered legislature has further amended the Act vide notification dated 5th January, 2005 and added Sub-section (2-A) to Section 7-B in the Adhiniyam. In order to clarify the position of limitation, it is further provided that the Tribunal shall not admit a reference petition unless it is made within three years from the date on which the works contract is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the works contract.

In the present case final authority is mentioned in Clause 29 of the agreement.

Clause 29 provides that if the Superintending Engineer fails to decide the dispute within sixty days or mutually agreed time after being requested, if the parties are aggrieved against the decision of the Superintending Engineer, the parties may within 30 days prefer an appeal to the Chief Engineer who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The Chief Engineer will give his decision within six months. It further provides that if any party is not satisfied with the decision of Chief Engineer, he can refer such dispute for arbitration by an Arbitration Board. Now when the question of referring the dispute to the Arbitration Tribunal is concerned, it will mean reference to the Tribunal. Therefore, final authority under the works contract will be the Chief Engineer and the dispute must be referred to him under the terms of the contract as both the parties had agreed to refer the dispute to the Chief Engineer and if any of the party is not satisfied with the decision of the Chief Engineer, then they can seek recourse of decision by the Arbitrator. Thus, dispute can only be entertained by the tribunal after dispute is referred for the decision of the final authority under the terms of the works contract. Therefore, we are of the opinion that the language of Section 7-B(1) is clear and specific which provides that dispute must be referred to the Arbitrator under the terms of the contract. Even if we peruse the original text in Hindi, the language used in Section 7-B(1) is reproduced as under:

1? vf/kdj.k dksbZ funsZ"k ml n"kk esa xzg.k ugha djsxk] tc rd fd &

?d? fookn igys ladeZ lafonk ds fuca/kuksa ds v/khu vafre izkf/kdkjh ds fofu"p; ds fy, funsZf"kr ugha fd;k tkrk gS] vkSj

?[k? ;kfpdk] vafre izkf/kdkjh ds fofu"p; ds lalwfpr fd, tkus dh rkjh[k ls ,d o"kZ ds Hkhrj vf/kdj.k dks ugha fd tkrh gS%

ijarq ;fn vafre izkf/kdkjh mls funsZ"k fd, tkus dh rkjh[k ls Ng ekl dh dkykof/k ds Hkhrj fookn dk fofu"p; djus esa vlQy jgrk gS ogka ;kfpdk Ng ekl dh mDr dkykof/k dk volku gksus ls ,d o"kZ ds Hkhrj vf/kdj.k dks dh tk,xh 1

and the aims and object in Hindi at para (3) is reproduced below:

pwaafd /kkjk 7&[k dh mi/kkjk 1 dh "kCnkoyh =wfViv.kZ gS] vr% bl mi/kkjk dks ;Fkksfpr :i ls mikUrfjr fd;k x;k gS1

As per aims and object amendment is brought because wordings of section is defective and has been properly clarified by the amendment.

Considering the provision of Section 7-B(1)(a) we are of the opinion that on interpreting the provisions of Section 7-B(1) it is crystal clear that no reference shall be admitted by the Tribunal unless dispute is first referred for the decision of the final authority in a manner as provided under the terms of the contract. Thus right of contractor to approach Tribunal arises after he has approached final authority after decision of Superintending Engineer in terms of the contract. If the contractor has failed to approach the final authority as provided under the terms and conditions of the works contract, petition will not be admitted by the

Tribunal. Dispute to the final authority should be preferred in the manner prescribed under the works contract. Since in the present case it is provided that in the case of abandonment or cancellation or in any dispute of works contract, the dispute must be raised before the Superintending Engineer within a period of 30 days. On his failure to decide the dispute within 60 days or after decision of the dispute, appeal must be preferred within 30 days, which shall be decided by chief Engineer within 90 days. Therefore, if appeal has not been preferred to the final authority in accordance with the terms of the works contract, petition will not be maintainable before the Tribunal.

It was laid down in the Full Bench that as appeal has not been preferred in accordance with the relevant clause of agreement of the works contract, the reference petition will not be maintainable before the Tribunal. Same is the factual scenario which emerges in the instant case, consequently, reference petition preferred before the Tribunal cannot be said to be maintainable. Another Full Bench of This Court in *Ravi Kant Bansal, Engineers and Contractors Vs. M.P. Audyogik Kendra Vikas Nigam (Gwalior)*, has laid down that it is necessary to entertain a counter-claim before tribunal to refer it to the final authority in terms of the works contract. The court held thus:

11. We are therefore, of the considered opinion that the Tribunal cannot entertain or admit a counter-claim if the dispute raised in the counter-claim filed by the opposite party has not been referred to the final authority in terms of the works contract or where it has been referred to the final authority but the counter-claim claim has not been filed before the Tribunal within the period of limitation as provided in Clause (b) or the proviso to Clause (b) of Sub-section (1) of Section 7B of the Adhiniyam.

Thus, the petition before the Tribunal was clearly not maintainable.

Coming to the question of limitation. It has to be considered in view of the fact that the petitioner has not taken recourse to Clause 29 of the agreement as provided within the period fixed, neither the Superintending Engineer nor the Chief Engineer were approached within the stipulated period under Clause 29 of the agreement. In *Ram Niwas Shukla (supra)*, the Division Bench of this Court has opined that even if the decision is referred to the final authority beyond 1-1/2 year that would give a fresh cause of action and period of limitation of one year would start from that date. Section 7-B was inserted by M.P. Act No. 9/1990 w.e.f. 24.4.1990, it was substituted by M.P. Act No. 36/1995 w.e.f. 15.12.1995. Section 7-B as it was inserted in 1990 read thus:

7-B. Limitation.-(1) The Tribunal shall not admit a reference

(a) in a case where a decision has been made in connection with a dispute under the terms of the agreement for a works-contract by the final authority under the agreement unless the reference petition is made within one year from the date of communication of such decision, if any.

(b) in a case where a dispute has been referred to the final authority under the agreement and such authority fails to decide it within a period of six months from the date of reference to it unless the reference petition is made within one year from the date of expiry of the said period of six months.

(c) Notwithstanding anything contained in Sub-section (1) where no proceeding has been commenced at all before any Court preceding the date of commencement of this Act or after such commencement but before the commencement of the Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 a reference petition shall be entertained within one year of the date of commencement of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 irrespective of the fact whether a decision has or has not been made by the final authority under the agreement.

Section 7-B after its substitution in the year 1995 as per Act No. 36 of 1995 reads thus:

7-B. Limitation.-(1) The Tribunal shall not admit a reference petition unless-

(a) the dispute is first referred for the decision of the final authority under the terms of the works contract; and

(b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority:

Provided that if the final authority fails to decide the dispute within a period of six months from the date of reference to it, the petition to the tribunal shall be made within one year of the expiry of the said period of six months.

(2) Notwithstanding anything contained in Sub-section (1), where no proceeding has been commenced at all before any Court preceding the date of commencement of this Act, or after such commencement but before the commencement of the Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990, a reference petition shall be entertained within one year of the date of commencement of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 irrespective of the fact whether a decision has or has not been made by the final authority under the agreement.

Sub-Section (2-A) of Section 7-B was inserted by M.P. Act No. 19 of 2003 w.e.f. 29.4.2003, which was published in extra ordinary Gazette dated 5th January, 2003 to the following effect:

(2-A) Notwithstanding anything contained in Sub-section (1), the Tribunal shall not admit a reference petition unless it is made within three years from the date on which the works contract is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the works contract.

It was further amended by Act No. 1 of 2004 to the following effect:

Substituted by M.P. Act No. 1 of 2004 (w.e.f. 5.1.2004)

[(2A) Notwithstanding anything contained in Sub-section (1), the Tribunal shall not admit a reference petition unless it is made within three years from the date on which the works contract is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the works contract.]

After the amendment made by the Act No. 1 of 2004, position has been made clear. However, in the instant case, authority as per agreement were not approached within time the limitation had come to an end as provided u/s 7B (1) (a) and Section 7B(1) (b) much before the decision was rendered by the Superintending Engineer. The Superintending Engineer was not approached within the time stipulated under Clause 29 of the agreement, any decision rendered by him on an invalid reference was not to give fresh cause of action. It is also settled proposition of law that once limitation has commenced and comes to an end, it would not be revived by rendering a decision on an incompetent reference. In *Ram Niwas Shukla (supra)*, the relevant clause of the agreement providing for raising of dispute was not the question agitated and limitation u/s 7-B of *Adhinyam* depends upon approaching the final authority as per the agreement. Thus, no assistance can be drawn by the decision of This Court in *Ram Niwas Shukla (supra)*.

esultantly, the revision is devoid of merit and the same deserves dismissal. The revision is hereby dismissed. However, parties to bear costs as incurred of the revision.