

(1995) 07 DEL CK 0053
In the Delhi High Court
Case No : Suit No. 1899 of 1993

Ahluwalia Contracts (India) Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-07-1995

Acts Referred:

Citation : (1995) 59 DLT 363

Hon'ble Judges : Lokeshwar Prasad, J

Bench : Single Bench

Advocate : J.R. Midha and K.C. Mittal, for the Appellant;

Judgement

Lokeshwar Prasad, J.

(1) M/S. Ahluwalia Contracts (India) Limited, a Company incorporated under the provisions of the Companies Act, 1956, having its registered office at B-4/205, Safdarjung Enclave, New Delhi (hereinafter referred to as "the Petitioner Company") has filed the present petition u/s 20 of the Arbitration Act, 1940 (hereinafter referred to as "the Act. averring that the Petitioner Company carry on the business of construction, engineering and designing and that the Petitioner Company are a builder of international repute and have earned a big name in the above said business. It is alleged that the Petitioner Company submitted tender for the construction of "Central Institute of Education Technology at Ncert Campus, New Delhi to Respondent No. 1 Union of India, through Respondent No. 2, i.e. the Construction Engineer, Civil Engineering Division, Department of Space, Ahmadabad ,which was accepted by the above said respondents on 12th August, 1986. It is further alleged that after the execution of the "Contract Agreement" the Petitioner Company commenced the construction of the said project and completed the same on 28th February, 1989 to the satisfaction of the respondents and the same was duly handed over to the respondents. It is alleged that the Petitioner Company have raised the following claims on the respondents who have failed to settle the same as a result of which disputes have arisen between the parties:-

(i) Balance outstanding payment due on account of under payment/non-payment of certain extra and substituted items which arose during the execution of the work Rs. 22,90,670.00 (ii) Balance outstanding payment under paid in the final Bill Rs.2,12,422.00 (iii) Non-payment of certain claims under Clause 10-CC of the Contract Agreement Rs. 4,09,332 / - (iv) Loss and damages due to prolongation of work attributable to the delays and default of respondents Rs.15,95,310.00 (v) Claims towards refund of security deposit amount Rs. 1,00,000.00 (vi) Cost of arbitration Rs.50,000.00 Total Rs.46,57,734.00

In addition to the above claims, the Petitioner Company have also claimed pre suit interest @10% per annum and pendente lite and future interest @18% per annum. It is alleged that there is a valid arbitration agreement between the parties, as contained in Clause 25 of the Contract Agreement, and all the above stated disputes are covered within the said arbitration agreement. The Petitioner Company have further averred that in terms of the above stated arbitration agreement, the Petitioner Company vide notice dated 27th January, 1992 called upon the respondents to appoint the Arbitrator within 15 days of the receipt of the notice. However, despite due service of the said notice the respondents failed to appoint the Arbitrator as a result of which the Petitioner Company was left with no other alternative but to approach this Court u/s 20 of the Act for filing the Arbitration Agreement in the Court and reference of the above said disputes between the parties to arbitration. It is averred that this Court has jurisdiction to entertain and try the matter because the cause of action arose at Delhi and the parties also carry on business at Delhi.

(2) Notice of the petition was issued to the respondents asking the respondents to show cause as to why the arbitration agreement be not filed ? The respondents have filed detailed reply. In the reply, filed on behalf of the respondents, the respondents while admitting the arbitration agreements between the parties, have contended that as per Clause 25 of the Agreement, the contractors have to seek appointment of Arbitrator within 90 days of receiving the intimation from the Department that the bill is ready for payment. It is further contended that the request of the Petitioner Company was not acceded to and no Arbitrator was appointed as the case was a time barred case and the final bill was accepted by the Petitioner Company without any objection. It has been stated in the reply that the petition is without any cause of action and is liable to be dismissed.

(3) The Petitioner Company filed a rejoinder controverting the contentions of the respondents and reiterating the averments made in the petition. In addition to the rejoinder, the petitioner has also filed an application u/s 151 Cpc dated 3.10.94 with the prayer that the petition may be disposed off even without calling the parties either to file documents or to lead evidence for reasons noted in the body of the application itself.

(4) I have heard the learned Counsel for the parties on the petitioner's application (1.A. No. 8875/94) dated the 3rd October, 1994 and also on the

merits of the case. On behalf of the Petitioner Company arguments were advanced by Mr. J.R. Midha, Advocate whereas on behalf of the respondents, the matter was argued by Mr. K.C. Mittal, Advocate. The learned Counsel for the Petitioner Company submitted that the respondents in the reply have admitted the arbitration agreement between the parties as contained in Clause 25 of the Contract Agreement and have also admitted the existence of the disputes between the parties which are covered within the ambit and scope of arbitration agreement and as such the petition was liable to be allowed. He submitted that the only objection raised by the respondents to the maintainability of the petition was that the Petitioner Company had not preferred the claim within 90 days of receiving the intimation of the readiness of the final bill as prescribed under the arbitration clause. He further submitted that the above objection of the respondents is without any substance as the Petitioner Company had sought for the appointment of the Arbitrator within the prescribed period of 90 days because the date of the intimation of the readiness of the final bill is 27th November, 1991 whereas the Petitioner Company sought for the appointment of the Arbitrator on 27th January, 1992 and the respondents were maliciously denying the receipt of the letter dated 27th January, 1992 which was sent to them under Certificate of Posting. He submitted that no intimation was given by the respondents to the Petitioner Company on 3rd July, 1991 as alleged in the reply. He also submitted that it is incorrect that a final bill was accepted by the Petitioner Company without any objection. He submitted that the final bill was signed by the Petitioner Company under duress in order to get the payment of the final bill, the release of which was withheld by the respondents for about two years after the completion of the work. He further submitted that even otherwise the request of the Petitioner Company for appointment of an Arbitrator cannot be refused on the ground that the claim was not made within 90 days because the bar if any, was to be decided by the Arbitrator. The learned Counsel for the respondents, while arguing the matter on behalf of the respondents, submitted that in the first place the request of the Petitioner Company cannot be acceded to as the same was time barred in terms of the provisions of Clause 25 of the Contract Agreement. His second limb of argument was that this Court has no jurisdiction as the work in question was executed at Ahmedabad and the agreement in question was also signed between the parties at Ahmedabad. Lastly, it was submitted by him that in terms of Clause 25 of the Contract Agreement, the Arbitrator is to be appointed by the Chief Engineer, Department of Space, Bangalore and where the Chief Engineers refused to appoint the Arbitrator, as in this case, the Court has no jurisdiction to deal with the matter and the application deserved to be thrown out on this count alone.

(5) The position which emerges out as a result of the above discussion is that the Petitioner Company after completion of necessary formalities, i.e. execution of Contract Agreement etc. was entrusted with the task of the construction of "Central Institute of Education Technology" at Ncert Campus, New Delhi by the respondents and that the Petitioner Company completed the said project which

was duly handed over to the respondents. Thus the existence of a valid agreement, containing arbitration clause (Clause No. 25) is admitted by both the parties. Admittedly, disputes exist between the parties which are covered within the ambit and scope of arbitration agreement. The objections raised by the respondents to the maintainability of the petition are that the Petitioner Company have not preferred the claim within time; that this Court has no jurisdiction and that where the Chief Engineer, Department of Space, Bangalore refused to appoint the Arbitrator, as in this case, the Court has no jurisdiction to deal with the matter and the petition is liable to be dismissed on the above ground alone.

(6) As regards the first objection of the respondents that the request of the Petitioner Company, for appointing an Arbitrator, cannot be acceded to being barred by time, the position is that the case of the respondents is that as per Clause 25 of the Contract agreement, the Petitioner Company had to seek appointment of an Arbitrator within 90 days of the intimation of the readiness of the final bill. In the instant case as per the case of respondents, the final bill was ready on 3rd July, 1991 and the request of the Petitioner Company as contained in their letter dated 6th April, 1992, seeking appointment of an Arbitrator, at the first instance, was received in the office of the respondents on 13th April, 1992 which was taken into consideration and was found to be barred by time and the Petitioner Company were accordingly informed vide letter dated 23rd/28th June, 1993. However, the case of the Petitioner Company is that in terms of the provisions contained in Clause 25 of the Contract Agreement, the Petitioner Company had sought for the appointment of the Arbitrator within the prescribed period of 90 days. It is contended on behalf of the Petitioner Company that the date of the intimation of the readiness of the final bill in the instant case was 27th November, 1991 and the Petitioner Company sought for the appointment of the Arbitrator vide letter dated 27th January, 1992 (within 90 days), which was sent to the respondents under Certificate of Posting. The respondents in the reply have admitted this fact that in petitioner's letter dated 6th April, 1992 there is a reference about petitioner's letter dated the 27th January, 1992, seeking the appointment of the Arbitrator. In the reply, it is further stated that the above said letter dated the 27th January, 1992 was reported to have been sent under Certificate of Posting. It is stated in the reply that the above said letter was not received in the office of the respondents and that the Post Master of Andrews Ganj Post Office, New Delhi was approached to confirm the authenticity of petitioner's claim of having sent the above mentioned letter under Certificate of Posting and the postal authorities informed that there was no guarantee for delivery of postal articles to the addressee if the articles were sent under Certificate of Posting and that the same was equivalent to ordinary postal articles. In the reply filed on behalf of the respondents, it is not disputed that the date of the intimation of the readiness of the final bill was not 27th November, 1991 as alleged by the Petitioner Company. As regards, the contention of the Petitioner Company that it had sought for the appointment of Arbitrator vide letter dated 27th January, 1992, sent to the respondents under Certificate of

Posting the position in that even the verification made from the postal authorities of the Post Office at Andrews Ganj, New Delhi have not disputed the alleged dispatch of the above said letter under Certificate of Posting from Andrews Ganj Post Office to the respondents on 27th January, 1992 as alleged by the Petitioner Company. Even otherwise the above question as to whether the demand for Arbitrator has been made within the stipulated time and whether the claim should be deemed to have been waived in terms of Clause 25 of the Contract Agreement is essentially a question for the Arbitrator to decide. In my above views I stand fortified by a decision of the Full Bench of this Court in case Ved Prakash Mittal v. Union of India & C.E., reported as 1984 Rlr 487.

(7) As regards the second submission of the learned Counsel for the respondents that this Court has no jurisdiction, the same too in my opinion is without any substance. In the presence of the above facts, the correctness which has not been disputed even by the respondents, there is hardly any substance in the above objection taken by the learned Counsel for the respondents that this Court has no territorial jurisdiction to entertain the present petition. In view of the above discussion, this Court, in my opinion, has jurisdiction to entertain the present petition of the Petitioner Company.

(8) In so far as the submission of the learned Counsel for the respondents that where the Chief Engineer, Department of Space, Bangalore, refused to appoint an Arbitrator, as in the present case, this Court has no jurisdiction to deal with the matter, the same too in my opinion, is without any substance. In case Kishan Chandv. Union of India, reported as ILR(1974) Ii Delhi 637, a Division Bench of this Court (S.N. Andley, C.J. and T.P.S. Chawla, J.) took the above view. However, on a reference made by B.N. Kirpal, J. (as he then was), the matter was referred to a Full Bench of this Court consisting of Awadh Behari, Sultan Singh and C.C. Jain, JJ. The Full Bench of this Court in case Ved Parkash Mittal v. Union of India and C.E., reported as 1984 Rlr 487 , relying on an earlier decision of the Supreme Court in case Union of India (UOI) Vs. Prafulla Kumar Sanyal, held:

"SUPPOSE C.E. refuses or neglects to appoint the Arbitrator. here do we go from here ? Can the Judge fold his hands and say: "I have no power"? In that case the arbitration agreement is itself destroyed. But it is dangerous so to hold. In our opinion. Section 20(4) certainly comprehends a case covered by Section 4 of the Act. Section 4 enacts that the person designated shall appoint the Arbitrator. But the residual jurisdiction is vested in the Court u/Section 20(4). The Court will lean in favor of exercising its power to effectuate the arbitration agreement. We ought not to give judicial encouragement to the hands-off theory propounded by the D.B. in Kishan Chand. They ousted the jurisdiction of the Court to appoint an Arbitrator u/Section 20(4). Thus the power of the Court was nullified. The result was that the clause was destroyed and the power of the Court was destroyed. We cannot agree with such a conclusion on the meaning of the clause."

(9) In view of the above discussion the petition is allowed and it is ordered that the Chief Engineer, Department of Space, Bangalore to appoint an Arbitrator as

contemplated under Clause 25 of the Contract Agreement within two months from the date of the passing of the order. The Arbitrator so appointed, will immediately enter on his duties and dispose of all the reference/disputes between the parties within the stipulated time. The Arbitrator so appointed shall also decide the question as to whether the demand for arbitration has been made within the stipulated time and whether the claim of the Petitioner Company should be deemed to have been waived in terms of the provisions of the above said Clause of the Contract Agreement. In case, the Chief Engineer fails to appoint the Arbitrator within the above said period, Shri. M.L. Jain, a retired Judge of this Court shall be the Arbitrator. In the circumstances of the case, there should be no order as to costs.