
(2016) 04 RAJ CK 0077

In the Rajasthan High Court

Case No : Civil Misc. Appeal No. 332 of 1998

Allied Construction Civil Contractor & Fabricators

APPELLANT

Vs

Hindustan Zinc Limited

RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Arbitration Act, 1940 — Section 20
Limitation Act, 1963 — Article 137

Citation : (2017) 2 RLW 891 : (2017) 1 WLC 146 : (2016) 3 WLN 53

Hon'ble Judges : Mr. P.K. Lohra, J.

Bench : Single Bench

Advocate : Mr. Siddharath Joshi, Advocate, for the Appellant; Mr. Vineet R. Dave on behalf of Mr. Kailash Joshi, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Mr. P.K. Lohra, J.—Appellant-contractor has preferred this appeal under Section 39 of the Arbitration Act, 1940 (for short 'the Act of 1940') to question the legality and propriety of judgment and order dated 19.03.1998 by which Additional District Judge No.1 Udaipur (for short 'the learned Trial Court') has rejected its application under Section 20 of the Act of 1940. The learned Trial Court by the impugned judgment and order declined the prayer of appellant to refer the matter for arbitration on the ground of limitation by invoking Article 137 of the Limitation Act, 1963 (for short 'the Act of 1963').

2. Succinctly stated facts of the case are that in response to NIT issued by the respondent, appellant submitted its tender for executing work in Zinc Smelter, Debari. After acceptance of the tender of appellant, work order was issued in its name by the respondent on 16.01.1982 followed by regular agreement between the parties in the month of March 1982. As per the version of appellant, it has executed the work amounting to Rs. 38,80,000/- but the requisite amount was not paid to it by the respondent commensurating with the work performed. The appellant ventilated his grievances that against the total work undertaken by it,

only a sum of Rs. 20,40,000/- was paid and the rest of the amount is illegally detained by the respondent. That apart, the appellant has also questioned the action of the respondent for retaining a sum of Rs. 44,000/- at the time of payment of bills. In substance, as per the appellant, a sum of Rs. 18,40,000/- + Rs. 44,000/- remained outstanding with interest accrued thereon.

3. Taking shelter of the relevant arbitration clause in the agreement, the appellant submitted an application under Section 20 of the Act of 1940 before the learned District Judge, Udaipur on 05.03.1994 which was subsequently transferred to the learned Trial Court. In its application, the appellant has pleaded all the facts to make out a case that dispute is referable to the arbitrator. The application submitted by the appellant is contested by the respondent by urging in the return that entire amount has been paid to the appellant and nothing is outstanding. Besides that, the respondent also romped in Article 137 of the Act of 1963 to persuade the learned Trial Court for rejection of the application of the appellant on the ground of limitation. Later on, the respondent also made endeavour for rejection of the application by submitting an application under Order 7, Rule 11 CPC precisely on the ground that application is barred by law.

4. The learned Trial Court heard arguments of rival parties and without analysing the objections of the respondent submitted in its application under Order 7, Rule 11 CPC rejected the entire application as barred by limitation. In the impugned judgment and order, learned Trial Court upon consideration of the matter recorded its finding that in an application under Section 20 and Section 8 of the Act of 1940, Article 137 of the Act of 1963 is applicable. Finally, learned Trial Court held that as the application under Section 20 of the Act of 1940 is laid by the appellant after expiry of six years, therefore, it is not only barred by limitation but the claim itself has gone stale.

5. Learned counsel for the appellant Mr. Siddarath Joshi submits that learned Trial Court has committed grave and serious error of law and fact in distinguishing the judgment of Supreme Court in the case of Mohd. Usman v. Union of India: AIR 1969 SC 474. Therefore, impugned judgment and order is not sustainable. Mr. Joshi would contend that legal position is no more res integra that Article 137 of the Act of 1963 is not applicable in relation to application under Section 20 of the Act of 1940 and the question of limitation is required to be considered by the arbitrator and not by the court under Sub-section (1) of Section 37 of the Act of 1940. Lastly, learned counsel has urged that impugned judgment and order is per se de hors the law and perverse, therefore, the same is not sustainable. Learned counsel for the appellant has placed reliance on following legal precedents:-

(1) Wazir Chand Mahajan & Anr. v. Union of India: AIR 1967 SC 990.

(2) Mohd. Usman v. Union of India: AIR 1969 SC 474

(3) M/s. Shiv Construction Company v. State of Rajasthan & Ors., 2005(4) WLC

6. In *Wazir Chand Mahajan* (supra), a three-judges Bench of Supreme Court made endeavour to examine the provisions of Article 181 of the Limitation Act, 1908 vis-a-vis application under Section 20 of the Act of 1940 in conjunction with Section 37(1) of the Act of 1940. The Court held,-

"7. There is no doubt that clause (1) of Section 37 of the Arbitration Act deals only with the authority of the arbitrator to deal with and decide any dispute referred to him: it has no concern with an application made to the Court to file an arbitration agreement and to refer a dispute to the arbitrator. After an agreement is filed in Court and the matter is referred to the arbitrator, it is for the arbitrator to decide by the application of the law contained in the Limitation Act, whether the claim is barred. But Section 37(1) does not confer authority upon the Court to reject the application for filing of an arbitration agreement under Section 20 of the Arbitration Act because the claim is not made within three years from the date on which the right to apply arose. In dealing with an application for filing an arbitration agreement, the Court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit, and also that a dispute has arisen with regard to the subject-matter of the agreement which is within the jurisdiction of the Court. But the Court is not concerned in dealing that application to deal with the question whether the claim of a party to the arbitration agreement is barred by the law of limitation: that question falls within the province of the arbitrator to whom the dispute is referred."

7. In *Mohd. Usman* (supra), Supreme Court while reiterating the principles laid down in *Wazir Chand Mahajan* (supra) held,-

"7. Before their amendment by the Indian Arbitration Act, 1940, Article 158 of the Limitation Act applied to applications "under the Code of Civil Procedure, 1908 to set aside an award" and Article 178 applied to applications "under the same Code for the filing in Court of an award". The Arbitration Act, 1940 amended Articles 158 and 178. The amended Article 158 applies to applications "under the Arbitration Act, 1940 to set aside an award or to get an award remitted for consideration", that is to say, to application under Sections 16 and 30 of the Act. The amended Article 178 applies to applications "under the Arbitration Act, 1940 for the filing in Court of an award", that is to say to applications under Section 14 of the Act. In amending Articles 158 and 178 the legislature acted upon the view that the references to the Code of Civil Procedure, 1908 in the second schedule to the Limitation Act could not in the absence of the amendment be construed as references to the Arbitration Act, 1940. At the same time the legislature refrained from amending Article 181 and providing that the article will apply to other applications under the Arbitration Act, 1940. It is manifest that the legislature intended that save as provided in articles 158 and 178 there would not be any limitation for other applications under the Act. Take the case of an application under Section 28 of the Act for

enlargement of the time for making the award. A similar application under paragraph 8 of the second schedule to the Code was governed by Article 181 but a like application under Section 12 of the Indian Arbitration Act, 1899 was not subject to any period of limitation. There is nothing to indicate that for the purpose of limitation Section 20 of the new Act should be regarded as a reenactment of the corresponding provision of the Code and not of the Indian Arbitration Act, 1899. An application under Section 8 of the new Act corresponding to paragraph 5 of the second schedule to the Code and Section 8 of the Indian Arbitration Act, 1899 stand on the same footing. In the circumstances, it is not possible to construe the implied reference in Article 181 to the Code of Civil Procedure as a reference to the Arbitration Act, 1940, or to hold that Article 181 applies to applications under that Act. The rule of construction given in Section 8(1) of the General Clauses Act cannot be applied, as it appears that the legislature had a different intention. It follows that an application under Sections 8 and 20 of the Arbitration Act, 1940 is not governed by Article 181. The Limitation Act does not prescribe any period of limitation for such an application. It follows that the present application under Sections 8 and 20 is not barred by limitation."

8. In *M/s. Shiv Construction Company (supra)*, a co-ordinate Bench of this Court while relying on the aforesaid two decisions of Supreme Court reiterated the same principle and held,-

"(8). The conclusion which can be derived from the perusal of the aforesaid judgments that it is not for this Court to decide whether the claim of the contractor would be old or stale or justified or not and that would be for the arbitrator to decide during the course of arbitration proceedings but the precise question that this Court is concerned as to whether the application under Section 20 of the Arbitration Act, 1940 could be filed beyond the period of three years of the preparation of the final bill. In the absence of any specific limitation under the Arbitration Act, 1940 for this purpose, there seems to be force in the submissions made by learned counsel for the appellant that the application in the present case filed in the year 1988 i.e. on 23.11.1988 after serving a notice on the respondents for appointment of an arbitrator was maintainable and the trial Court has erred in rejecting the said application as time barred invoking the Article 137 of the Limitation Act, 1963."

9. Per contra, Mr. Vineet R. Dave learned counsel appearing for the respondent submits that learned Trial Court has examined the matter threadbare while rejecting the application of the appellant under Section 20 of the Act of 1940 as barred by limitation and, therefore, no interference with the impugned judgment and order is warranted. Learned counsel for the respondent would contend that Article 137 of the Act of 1963 is applicable vis-a-vis application under Section 20 and Section 8 of the Act of 1940 and, therefore, learned Trial Court has rightly invoked the said Article for rejecting the application of the appellant on the ground of limitation. Lastly, learned counsel has urged that application under

Section 20 of the Act of 1940 was filed by the appellant after six years and by that time its claim became not only barred by limitation but had also gone stale and, therefore, while exercising discretion judiciously, learned Trial Court has rightly non-suited it by the impugned judgment and order. In support of his contention, learned counsel has placed reliance on following legal precedents:-

(1) Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority: AIR 1988 SC 1007

(2) Union of India v. Momin Construction Company, (1997) 9 SCC 97

(3) Asia Resorts Ltd. v. Usha Breco Ltd., (2001) 8 SCC 710

(4) Indian Oil Corporation Ltd. v. M/s. SPS Engineering Ltd., AIR 2011 SC 987

10. In Major (Retd.) Inder Singh Rekhi, a two-judges Bench of Supreme Court has held that Article 137 of the Act of 1963 is applicable in relation to application for reference under Section 20 and 8 of the Act of 1940 while relying on its earlier decision in case of the Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma, (1976) 4 SCC 634. The judgment of Kerala State Electricity Board was though pertaining to applications under Section 16 of the Telegraph Act, 1885 but the Supreme Court after discussing threadbare Article 181 of Indian Limitation Act, 1908 vis-a-vis Article 137 of the Act of 1963 opined that former is to be applied on the basis of ejusdem generis to the later i.e. Article 137 of the Act of 1963. While reproducing the complete text of both the provisions, the Court held,-

"The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other applications as in the 1963 Limitation Act. The words "any other application" under Article 137 cannot be said on the principle of ejusdem generis to the applications under the Civil Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period."

11. In Momin Construction Company (supra), Supreme Court has followed the verdict in Kerala State Electricity Board (supra) and held that Article 137 of the Act of 1963 is applicable in relation to application under Section 20 of the Act of 1940.

12. In Asia Resorts Ltd. (supra) while reiterating the principles laid down in Kerala State Electricity Board, the Court held,-

"There is not much controversy that the residuary Article 137 of the Limitation Act applies so far as the period of limitation is concerned for an application under Section 20 of the Arbitration Act, 1940. The residuary Article 181 of the Limitation Act, 1908 was replaced by Article 137 in the Limitation Act, 1963. Earlier, Article 181 was applicable only in respect of application to be filed under the Civil Procedure Code. This article was replaced by Article 137 in the Limitation Act, 1963 in a modified form. By insertion of Article 137, it cast a wider net so as to include any application for which no period of limitation was provided elsewhere in that division. The third division of the Limitation Act, 1963 deals with various applications to be filed under various special statutes. The definitions of "applicant" and "application" are also inserted in the Limitation Act, 1963. Therefore, it is clear that the intention of the legislature was to provide a residuary article prescribing period of limitation for filing petitions and applications under the various special laws. This Court in *Kerala SEB v. T.P. Kunhaliumma* held that the Article 137 would apply to any petition or application filed under any Act to a civil court and it cannot be confined to applications contemplated by or under the Code of Civil Procedure. In *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*, *Union of India v. L.K. Ahuja and Co.*, *Steel Authority of India Ltd. v. J.C. Budharaja*, *Government and Mining Contractor and Union of India v. Vijay Construction Co.* this Court held that the period of limitation for filing application under Section 20 of the Arbitration Act, 1940, is as prescribed under Article 137 of the Limitation Act."

13. In *Indian Oil Corporation Ltd.* (supra), Supreme Court made endeavour to examine the powers of the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996 on an application for appointment of arbitrator. Dilating on such powers, the Court opined that Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim but 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 arbitration agreement survived. The Court held,-

"To find out whether a claim is barred by *res judicata*, or whether a claim is "mala fide", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under section 11 of the Act is whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under section 11 of the Act. 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 acknowledgement 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."

14. I have heard learned counsel for the parties, perused the impugned judgment and order and thoroughly scanned record of the case.

15. The contentious issue on which the rival parties have locked horns is applicability of Article 137 of the Act of 1963 in relation to application under Section 20 of the Act of 1940. Undeniably, in Wazir Chand Mahajan (supra) and two other legal precedents on which appellant has placed reliance, the judgments were rendered while construing the provision of Article 181 of the Indian Limitation Act, 1908 whereas the legal precedents on which respondent has placed reliance were decided while construing Article 137 of the Act of 1963. That apart, in Kerala State Electricity Board (supra), Supreme Court has also thoroughly examined both the provisions and carved out a material difference. For analysing differentiation in both the provisions with forensic approach, I deem it just and proper to reproduce the complete text of both the provisions as under:-

Article 181 of the Indian Limitation Act, 1908

Description of application

Period of Limitation

Time from which period begins to run

Applications for which no period of limitation is provided elsewhere in this schedule or by Section 48 of the Code of Civil Procedure

Three years

When the right to apply accrues

Article 137 of the Limitation Act 1963

Description of application

Period of Limitation

Time from which period begins to run

Any other application for which no period of limitation is provided elsewhere in this Division

Three years

When the right to apply accrues

16. A bare perusal of above-quoted Article 181 of the Indian Limitation Act, 1908 and Article 137 of the Act of 1963 makes it amply clear that applicability of residuary clause under Article 181 of the Indian Limitation Act, 1908 is circumscribed by insertion of words "in this Schedule" and Section 48 of the Code of Civil Procedure. In derogation to it, Article 137 of the Act of 1963 is a residuary clause which by its language clearly denotes that it can be applied vis-a-vis any application to be filed before a civil court without reference to CPC. This sort of construction of Article 137 of the Act of 1963 is clearly inferable from the legislative intent on account of insertion of words "elsewhere in this Division". In that background, there remains no quarrel that Article 137 of the Act of 1963 is applicable vis-a-vis an application under Section 20 of the Act of 1940 and consequently the verdicts on which the appellant has placed reliance wherein provision of Article 181 of the Indian Limitation Act, 1908 is construed and interpreted cannot render any assistance to its cause and are clearly distinguishable. Therefore, ratio decidendi of Kerala State Electricity Board (supra) clearly clinches the issue in favour of respondent, paving the way to attract Article 137 in respect of applications under Section 20 of the Act of 1940.

17. Now advertent to the factual matrix of the case, suffice it to observe that tender of the appellant was accepted on 16.01.1982 which culminated into agreement in March, 1982 and on completion of work, requisite amount was paid by the respondent on 23.05.1985. Therefore, if there was any cause of grievance available to the appellant, the limitation started from 23.05.1985. Assuming it that subsequently appellant has ventilated his grievances by serving a notice for referring the matter to arbitration on 26.12.1985 then too application filed by the appellant under Section 20 of the Act of 1940 was beyond six years as the same was presented on 05.03.1994. Subsequent representations or the notice served by the appellant on the respondent cannot furnish any cause of action much less fresh cause of action to the appellant inasmuch as none of these representations were acknowledged by the respondent. Acceptance of final bill by the appellant on 23.05.1985 pre-supposes that the amount mentioned therein is received by it without any demur. Assuming it that there was some dispute regarding the amount sought to be paid to the appellant, then it was expected of the appellant to ventilate its grievances within reasonable period. Although the appellant has made endeavour to espouse its cause by serving a notice to the respondent on 26.12.1985 but thereafter it remained indolent and no action was initiated at its behest for more than six years. Mere sending of successive representations cannot furnish any cause of action to the appellant in want of any

acknowledgement by the respondent. This being the position, by efflux of time, the so-called claim of the appellant has not only become stale but also time-barred within the four corners of Article 137 of the Act of 1963. Therefore, the findings and conclusions recorded by the learned Trial Court while dismissing the application of the appellant as time-barred are neither infirm nor de hors the law. The learned Trial Court has rightly pressed into service Article 137 of the Act of 1963 for non-suiting the appellant in its pursuit and as such there is no perversity in the impugned judgment warranting interference by this Court.

18. The upshot of above discussion is that instant appeal lacks in merit and the same is, therefore, dismissed.

19. Costs are made easy.