

(1999) 05 DEL CK 0109
In the Delhi High Court
Case No : O.M.P.No. 237/97

Chawla Techno Construct Limited

APPELLANT

Vs

The Embassy of Italy

RESPONDENT

Date of Decision : 06-05-1999

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 20, 5

Citation : (1999) 3 AD 863 : (1999) 79 DLT 531 : (1999) ILR Delhi 385

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Mr. G.L. Sanghi and Ms. Barka Babbar, for the Appellant; Mr. V.P. Singh and Mr. Jasmeet Singh and Mr. V.K. Sidharthan, for the Respondent

Judgement

S.K. Mahajan, J.—Certain disputes having arisen between the parties in relation to the construction of the Italian Embassy Building Complex, including the residence of the Ambassador, by the petitioner, the same were referred to the arbitration of Justice Dalip K.Kapur (Retired Chief Justice of this Court). Before the arbitrator, the petitioner raised the question of the validity of the arbitrator's appointment and on 23rd October, 1994 the arbitrator after giving opportunity to the parties to file written submissions held that it was only after the written submissions were filed before him that he would decide whether oral hearing was necessary on the question of the validity of his appointment. In the meantime, the period of four months for making and publishing the award expired and an application being O.M.P.No.80/95 was, Therefore, filed in this Court for extension of time to enable the arbitrator to make and publish his award. The application was resisted by the petitioner on the ground that the arbitrator did not have any jurisdiction to arbitrate in respect of the matters which had been referred to him and that his appointment was illegal. On these pleas taken by the parties, the Court on 9th July, 1997 passed the following order:-

"This is an application u/s 28(1) of the Arbitration Act, 1940 by the petitioner for extension of time to enable the arbitrator, to proceed with the arbitration and

make and publish his award.

Although the application is opposed by the respondent-contractor on various grounds but the main ground on which the contractor seems to resist the extension of time is that the arbitrator has no jurisdiction to arbitrate in respect of the matters which have been referred for his arbitration. It is alleged that the appointment of the arbitrator is illegal; the claims raised do not fall within his jurisdiction and neither the claim of Rs.23,02,799/-, now made before the arbitrator, was raised against the contractor nor the rest of the claims are even quantified and as such they do not constitute pre-existing disputes, which could be referred for arbitration.

I have heard learned counsel for the petitioner. No arguments have been addressed on behalf of the contractor on the ground that the senior counsel who was briefed in the matter is out of India. Pleadings in the matter were completed in March 1996 and since then the matter is hanging fire. I have declined request for adjournment.

From the reply filed by the contractor it appears and in fact it is not disputed by learned counsel for the petitioner that the objection with regard to jurisdiction of the arbitrator was taken by the contractor in his counter statement of facts and it was duly noticed by the learned arbitrator in the hearing held on 23rd October, 1994 when he made the following order:-

"The first question for consideration is the validity of the Arbitrator's appointment which has been raised in the counter statement by the contractor. Written arguments relating to this question will be submitted by both sides on or before 31st October, 1994. On a consideration of the written arguments copies of which may be exchanged, I will decide whether oral hearing is necessary on this point or whether I can decide this point without any further hearing. The exchange of the copies should be done after they have been filed before me. If any authorities are to be referred to in the written arguments, either the book or the photocopies thereof are to be enclosed."

The respondent-contractor's grievance in para 4 of the reply is that written arguments having been filed, the learned arbitrator had to decide if oral hearing on the question is necessary but he did not do so and proceeded further. Having regard to the afore extracted order made by the learned arbitrator, it would be just and proper if the learned arbitrator decides the question of his jurisdiction before proceeding further in the matter.

Accordingly I would allow the application and extend the period for making the award by a further period of four months to enable the arbitrator to decide the objection raised by the contractor with regard to his jurisdiction before proceeding further in the matter.

Let the parties or their counsel appear before the learned arbitrator on 2nd August, 1997 at 11 A.M."

2. I am informed that the appeal filed against this order was dismissed by the Division Bench of this Court on 13th August, 1997.

3. After the time was extended by the Court, the arbitrator again heard the parties, however, the proceedings could not be concluded and the respondent Therefore, filed another application u/s 28 of the Arbitration Act for extension of time to enable the arbitrator to make and publish his award. This application was registered as O.M.P.No.212/97. After the said application for extension of time u/s 28 of the Arbitration Act was filed, the petitioner filed the present application under Sections 5, 11 and 12 of the Arbitration Act for revoking the authority of the appointed arbitrator, namely, respondent No.2 and for passing such further order as the Court may deem just and proper in the circumstances of the case.

4. The main contention of Mr.Sanghi, learned Senior Advocate appearing on behalf of the petitioner, is that 1) the arbitrator had no jurisdiction in respect of the matters which were not preexisting disputes as the arbitration can be invoked only for disputes which exist between the parties; claim for Rs.23,02,799/- having never been made against the respondent prior to the appointment of the arbitrator, did not constitute preexisting dispute and was, Therefore, beyond the scope of reference; 2) the arbitration clause in question contained bare provision of appointment of the arbitrator and, Therefore, reference could be made only by the parties or by an order of the Court u/s 20 of the Arbitration Act; the reference having been made by the Ambassador unilaterally, it was not valid; and 3) the claim before the arbitrator was barred by time. Certain other objections were also raised in the petition which were not pressed by Mr.Sanghi during the course of arguments.

5. Mr. Sanghi contends that the petitioner having raised the question of jurisdiction of the arbitrator and this Court by order dated 9th July, 1997 passed in O.M.P.No.80/95 having directed the arbitrator to decide the objection raised by the contractor with regard to his jurisdiction before proceeding further in the matter, the arbitrator has clearly misconducted himself and the proceedings by not complying with the aforesaid order of the Court inasmuch as he has not decided the question of jurisdiction and, therefore, the authority of the appointed arbitrator was liable to be revoked and a new arbitrator was required to be appointed. It is also contended that the work was completed on October 15, 1989; on March 10, 1990 the then Ambassador of Italy issued a letter of appreciation for the work done by the contractor, namely, the petitioner and the matter having been referred to the arbitrator on 7th April, 1994, the claim was clearly time barred. The arbitrator, Therefore, according to Mr.Sanghi, should not only have decided the question about the validity of his appointment but also should have first decided the question of limitation as well.

6. It is contended by Mr.Sanghi that no demand was ever made by the respondent claiming the amount of Rs.23,02,799/- from the petitioner before the matter was referred to the arbitrator and unless there was an assertion of a right by one party and denial of the same by the other, no dispute existed between the

parties and unless there was a dispute no reference could be made to the arbitrator about a non-existent dispute. He has referred to the judgment reported as Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, in support of his contention that a dispute arises where there is a claim of one party and a denial and repudiation of the claim by the other party and that existence of dispute is essential for appointment of an arbitrator u/s 8 or a reference u/s 20 of the Arbitration Act; there should be a dispute and there can only be a dispute when a claim is asserted by one party and denied by other on whatever grounds; mere failure or inaction to pay does not lead to the inference of the existence of dispute.

According to Supreme Court dispute entails a positive element of assertion of claim by one party and denial by another. Mere failure or inaction to accede to a claim or a request does not lead to the inference of the existence of dispute. In a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case. Relying upon these observations of the Supreme Court, Mr. Sanghi contends that as no claim was asserted before reference to the arbitrator was made, there could not be a dispute and as such the reference to the arbitrator was wholly illegal.

7. On the question of the claim before the arbitrator being time barred, it is contended by Mr. Sanghi that the work having been completed on 15th October, 1989, the cause of action, if any, to make a claim against the petitioner arose on the completion of the work and the matter having been referred to the arbitrator on 7th April, 1994, the claim was clearly beyond time. For this, he refers to the judgment of the Supreme Court in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, (Supra) and Union of India Vs. M/s. Momin Construction Company, . In the aforesaid judgments, while deciding an application u/s 20 of the Arbitration Act, the Supreme Court held that it was now well settled that Article 137 of the Limitation Act 1963 would apply to any petition or application filed in a Civil Court u/s 20 of the Act and the right to apply u/s 20 of the Arbitration Act having arisen before 11.8.1965, the application made on 26.2.1971 was plainly barred under Article 137 of the Limitation Act.

8. In Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, (Supra), the facts were that the work was completed on 2nd April, 1980. Between February 1983 to December 1985 the contractor sent various letters to the Delhi Development Authority to finalise his bills and finally served the notice requesting the authority to release the security of Rs.1,00,000/- and refer the disputes to arbitration. On the Authority having failed to do so, a petition u/s 20 of the Arbitration Act was filed in January, 1986 seeking direction from the Court to file the arbitration agreement in the Court for reference of disputes to arbitration. On these facts the Court while holding that Article 137 of the Limitation Act would apply to any petition or application filed in a Civil Court, dismissed the application as barred by time. In appeal to the Supreme Court it was observed that the High Court proceeded on the basis that the work was

completed in 1980 and, Therefore, the contractor became entitled to the payment from that date and the cause of action arose from that date, however in order to be entitled to ask for a reference u/s 20 of the Act, there must not only be an entitlement to money but there must also be a difference or a dispute. It was also observed that on completion of the work a right to get the payment would normally arise but where the final bill, as in that case, had not been prepared and when the assertion of the claim was made on 20th February, 1983 and there was nonpayment, the cause of action arose from that date, that is to say, 28th February, 1983. It was true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. The Court, Therefore, held that the petition was within time and the matter was referred to the arbitrator.

9. In Union of India Vs. Momin Construction Company, (Supra), the Court held that the claim for referring the case to arbitration arise when the contractor issued a no claim certificate and the final bill in respect of the works contract was passed. Right to apply u/s 20 of the Arbitration Act, Therefore, arose to the contractor before 11th August, 1965 when no claim certificate was issued by the contractor. Application u/s 20 of the Arbitration Act having made on 26th February, 1971 was, Therefore, held to be barred by time.

10. Mr. Sanghi, Therefore, contends that as the cause of action, if any, accrued to the respondent to refer the claims to the arbitration on the completion of the work on 15th October, 1989, the claims were barred by time and could not be referred to the arbitrator.

11. There appears to be a basic fallacy in the contentions of Mr.Sanghi inasmuch as in the present case the disputes have not been referred to the arbitrator through the agency of the Court but have been referred directly by the appointing authority to the arbitrator. It is now for the arbitrator to decide whether the claims as referred to him were beyond time. In my view, this Court cannot, at this stage, hold that the claims were not within time. This Court in this petition under Sections 5,11 and 12 of the Arbitration Act has no jurisdiction to decide the question as to whether claim was within time. It is the contention of Mr. V.P. Singh that under clause 55 of the agreement the contractor is required to maintain the building and while the period of maintenance in relation to the building work is 12 calendar months from the completion of the work, the period of maintenance in relation to the termite proofing and water proofing is eight years from the date of final completion of work. According to Mr.Singh, therefore, as the disputes in the present case relate to the water seepage from the roofs of the building which eventually substantially damaged the buildings, as is evident from the order of the arbitrator dated 22nd September, 1997, limitation will not start till the leakage is detected and rectified by the contractor. In my view, at this stage this Court will not like to express any opinion on the question of limitation as it is clearly within the domain of the arbitrator to decide the

question as to whether the claim was within limitation or not. The aforesaid judgments cited by Mr. Sanghi are not applicable to the facts of the present case as those judgments related to the petition filed u/s 20 of the Arbitration Act.

12. The other objections of Mr. Sanghi is about the jurisdiction of the arbitrator on the ground that there did not exist any dispute before the matter was referred to the arbitrator and for purposes of making a reference the existence of a dispute was necessary. According to Mr. Sanghi, no assertion of right was made by the Embassy before the claims were referred to the arbitrator and consequently in view of the judgment of the Supreme Court in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority (Supra), there did not exist any dispute.

13. Mr. V.P. Singh, learned Senior Advocate, appearing on behalf of the respondent refuting the submissions of Mr. Sanghi contends that from the order dated 9th July, 1997 passed by this Court in O.M.P.80/95, it is evident that the only question relating to the jurisdiction raised before the arbitrator was the validity of his appointment. In the hearing held before the arbitrator on 23rd October, 1994, the following order was passed:-

"The first question for consideration is the validity of the Arbitrator's appointment which has been raised in the counter statement by the contractor. Written arguments relating to this question will be submitted by both sides on or before 31st October, 1994. On a consideration of the written arguments copies of which may be exchanged, I will decide whether oral hearing is necessary on this point or whether I can decide this point without any further hearing. The exchange of the copies should be done after they have been filed before me. If any authorities are to be referred to in the written arguments, either the book or the photocopies thereof are to be enclosed."

14. When the question of extension of time came before the Court in O.M.P.No.80/95, the Court also observed that the contractor's grievance in para 4 of the reply was that written arguments having been filed, the arbitrator had to decide if oral hearing on the question was necessary but it did not say so and proceeded further in the matter. It was in this context, according to Mr.V.P.Singh, that the Court directed the arbitrator to decide the objection raised by the contractor with regard to his jurisdiction before proceeding further in the matter. The arbitrator by a detailed order passed on 22nd September, 1997 had decided all these questions. According to him, Therefore, the arbitrator had complied with the orders of this Court and had decided the question of jurisdiction. In any case, according to Mr.Singh, there was extensive correspondence between the parties about the claim made by the Embassy which was not admitted by the contractor and consequently disputes arose between them and the same were referred to the arbitrator.

15. Paragraph 2 of the application u/s 28 of the Arbitration Act being O.M.P.212/97 shows that specific averment had been made by the Embassy that after the construction of the Embassy complex was completed on 15th October,

1989, the building complex was occupied and it was noticed that rain water had started infiltrating both in the Chancery of the Embassy and at the residence of the Ambassador causing inter alias large patches and leakage in various parts of the said building. The Embassy took up the matter with the contractor during 1990-93 and called upon it to have the necessary repairs and rectification jobs done so that the building could be restored to the contract specification, free from all defects and in wind and weather tight conditions. The contractor disputed its liability and sought to attribute extraneous causes to such damage and also disputed its liability to carry out the repairs and rectifications. Since disputes and differences arose between the parties, the Embassy under clause 6 of the contract, through a letter dated 7th April, 1994 addressed by the Ambassador of Italy in India appointed Mr. Justice D.K. Kapur (Retired) as the arbitrator.

16. Reply to this application was filed by the contractor and the averments made in paragraph 2 of the application have not been specifically denied. All that has been said is that the unilateral reference was made by the Embassy in violation of law laid down by the Supreme Court and, Therefore, the arbitration proceedings were illegal. It is not denied by the contractor that it did dispute its obligation to carry out necessary repairs and rectifications in the building so as to restore the building to contract specifications. There is clear assertion of a right by the embassy and denial by the contractor to carry out necessary repairs and rectifications. This satisfies the requirements laid down by the Supreme Court in *Inder Singh Rekhi Vs. D.D.A.* (supra).

17. That being the position, in my view, disputes have clearly arisen between the parties before the same were referred to the arbitrator and the judgment of the Supreme Court in *Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority* (Supra), is of no assistance to the contractor.

18. The next contention of Mr. Sanghi is that the reference was unilateral and it was only through an application u/s 20 of the Arbitration Act that the matter could be referred to the arbitrator. In support of his contention, he relies upon the judgment of the Supreme Court in *Banwari Lal Kotiya Vs. P.C. Aggarwal*, , in which a reference was made to the judgment of the Supreme Court in *Seth Thawardas Pherumal Vs. The Union of India* (UOI), .

19. I have gone through the judgment in *Banwari Lal Kotiya Vs. P.C. Aggarwal* (Supra). I am afraid the judgment does not support Mr. Sanghi. It was clearly observed in this case that where the parties by an agreement had agreed to submit present or future disputes to arbitration for adjudication to a named arbitrator, the party despite the Arbitration Act can straightway approach the arbitrator and resort to Section 20 is unnecessary because consent to such actual reference to arbitration shall be deemed to be there as this concept is included in the agreement signed by the parties and the aspect that differences or disputes actually arose subsequently would be inconsequential because the arbitration agreement as defined in Section 2(a) covers not merely present but future

differences also. The Court in that case while referring to argument of unilateral reference held as under:-

"The proposition that where a contract between the parties contains what may be called an arbitration clause to refer future disputes to arbitration the agreement is merely an agreement to submit future differences to arbitration within the meaning of S.2(a) and that if disputes arise in future a reference has to be made to arbitration within the meaning of S.2(e) of the agreement and at this stage there should be a consent of both the parties is too wide to be accepted. It is true that the Act defines the two expressions "arbitration agreement" and "reference" separately. S.2(a) defines an "arbitration agreement" to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not" while S.2(e) defines a "reference" to mean "a reference to arbitration". The latter expression obviously refers to an actual reference made jointly by the parties after disputes have arisen between them referring the said disputes for adjudication to a named arbitrator or arbitrators while the former expression is wider as it combines within itself two concepts, (a) a bare agreement between the parties that disputes arising between them should be decided or resolved through arbitration and (b) an actual reference of a particular dispute or disputes for adjudication to a named arbitrator or arbitrators. If that be so, it stands to reason that only when the arbitration agreement is of the former type, namely, a bare agreement a separate reference to arbitration with fresh assent of both the parties will be necessary and in the absence of such consensual reference resort to S.20 will be essential but where the arbitration agreement conforms to the definition given in S.2(a), the party desiring arbitration can straightway approach the arbitrator or arbitrators and resort to S.20 is unnecessary because consent to such actual reference to arbitration shall be deemed to be there as the second concept is included in the agreement signed by the parties, and the aspect that differences or disputes actually arose subsequently would be inconsequential because the arbitration agreement as defined in S.2(a) covers not merely present but future differences also. In other words, in such a case there will be no question of there being any unilateral reference."

20. As the parties in the present case by an agreement had decided that in case of disputes, the matter will be referred to the sole arbitration of a person to be appointed by the Ambassador of Italy, in my view, reference of the disputes by the Ambassador to Justice Dalip K. Kapur (Retd.) was not a unilateral reference.

21. Now it is well settled that the leave to revoke the authority of an appointed arbitrator is to be granted in a sparing and cautious manner. Unless substantial miscarriage of justice will take place in the event of leave to revoke being refused, leave should not be given. The invocation of power u/s 5 of the Arbitration Act is not the rule, but only the exception. The basic tenet of all arbitral jurisdictions is that the parties should be left to their bargains and the arbitral tribunals which they have chosen. If that be so, the assumption can

easily be made that the Court shall, as a matter of course, not impose itself between the parties merely because an application under one or the other provision of the Arbitration Act has been made. Before discretion to give leave to revoke an arbitrator's authority is exercised, the Court must be satisfied that substantial miscarriage of justice will take place in the event of its refusal. As held by the Supreme Court in *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, , the grounds on which leave to revoke may be given can be put under five following heads :- i) Excess or refusal of jurisdiction by arbitrator; ii) misconduct of arbitrator; iii) charges of frauds; iv) disqualification of arbitrator; v) exceptional cases. In my view, none of the above grounds has been made out by the petitioner for revoking the authority of the arbitrator. I do not find any reasonable ground for an apprehension in the mind of the petitioner that the arbitrator will be biased in case his application is not allowed. The arbitrator happens to be a retired Chief Justice of this Court and, in my opinion, there cannot be a predisposition in his mind to decide for or against any party without proper regard to the merits of the case. The Court is confident that the arbitrator will decide strictly on merits of the case without being influenced by the filing of present application by the petitioner.

22. In my view, no case whatsoever has been made out for revoking the authority of the arbitrator. There are no merits in the petition and the same is accordingly dismissed with no order as to costs.

O.M.P. NO. 212/97

The application is opposed by the respondent mainly on the very grounds on which the respondent has sought the revocation of authority of the arbitrator in O.M.P. No. 237/97. For the reasons given in my order dismissing the petition of the respondent u/s 5, 11 and 12 of the Arbitration Act being O.M.P.No.237/97, I am of the opinion that no ground whatsoever has been made out for opposing the extension of time to enable the arbitrator to proceed further in the matter.

22. Accordingly, allowing the application, I extend the time to enable the arbitrator to make and publish his award by four months from the date of this order. The petition, accordingly, stands disposed of.