
(2001) 11 BOM CK 0019

In the Bombay High Court

Case No : Arbitration application No. 141 of 2001

Conart Engineers Ltd.

APPELLANT

Vs

Shamrock Industrial Co. Ltd.

RESPONDENT

Date of Decision : 05-11-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 21
Limitation (Amendment) Act, 1973 — Article 137

Citation : (2002) 3 ALLMR 486 : (2002) 2 BomCR 57 : (2002) 2 BOMLR 488 :
(2002) 3 MhLj 243

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : M.K. Mudnaney, for the Appellant; S.U. Kamdar and Kotwal,
instructed by Harilal Thakkar and Co., for the Respondent

Judgement

F.I. Rebello, J.—The case of the petitioner is : pursuant to their tender being accepted, the contract was entered into on 8 February, 1996. Clause 37 of the contract provided for reference of disputes to arbitration. Disputes and differences having arisen between the parties, the petitioners invoked the arbitral clause by their letter dated 2 May, 2001. In the said letter, it was set out that the respondents owed money to the petitioners. It is averred that on 31 March, 1998, the respondents had issued a cheque for Rs. 1 lakh in part payment. That cheque when deposited was dishonoured. By letter of 27 May, 1998, demand was made u/s 138 of the Negotiable Instruments Act. A pay order for the sum of Rs. 1 lakh dated 28 May, 1998, was issued which was received by the petitioners on 30 May, 1998.

1.1 It is averred that as there are disputes and differences, the petitioners were invoking the arbitral clause. They appointed their arbitrator and called on the respondents to appoint their arbitrator. The respondents replied by their letter dated 8 June, 2001, wherein insofar as the paras 4 and 5 [are concerned], it was set out that the respondents did not admit what is set out in those paragraphs of the letter. Thereafter it was mentioned that insofar as para 6 is concerned, the

disputes arose on account of the defective works done by the petitioners. The respondents denied that the dispute can be decided by arbitrator. In these circumstances, it was intimated that the appointment of the arbitrator was misconceived and without prejudice informed that the respondents did not agree to the name of the arbitrator as appointed. It may be mentioned that the petitioners herein had earlier filed a company petition which was dismissed by the Company Court on the ground that there was a bona fide dispute.

2. The respondents have opposed the present application u/s 11 of the Arbitration and Conciliation Act, 1996. It is their contention that the claim of the petitioner is barred by limitation. It is pointed out that even if the acknowledgement of the last payment is considered as 28 May, 1998, the application before this court is only filed on 1 August, 2001, which is clearly beyond the period of 3 years. The mere fact that the arbitral clause was invoked by letter of 2 May, 2001, it is contended, is of no consequences, as arbitral clause had to be invoked within 3 years of the cause of action accruing. It is further pointed out that Article 137 of the Schedule to Limitation Act would cover the present case. Reliance in support was placed on the judgment of the apex Court in *State of Orissa and another etc. Vs. Sri Damodar Das*, . In that case, the issue was the limitation which would apply in an application u/s 20 of the Arbitration Act, 1940. The apex court held that the claim for arbitration must be raised as soon the cause for arbitration arises as in the like manner of the case of cause of action arising in civil suit. Reliance was placed on the judgment in *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*, , the apex court held that the provisions of the Arbitration Act would apply to arbitration and notwithstanding any term in the contract to the contrary. It is then set out that the cause of action for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. On the facts of that case, it was found that the first contract was of the year 1967-68 and executed in 1967 itself. The amount was stated to have been received in September, 1967, itself. The notice was issued on 15 September, 1980. This was held to be hopelessly barred by limitation. It is this judgment which is the basis for the arguments advance by the petitioners.

3. The first question is what was being considered in the judgment in *State of Orissa*, supra. The question that was being considered was the application of the Limitation Act to an application u/s 20 of the Act of 1940. The apex court held that it was governed by Article 137 of the Limitation Act. Section 20 is an application to the court. In the instant case, as per the law declared by the apex court -- a petition u/s 11 is an invocation to the Chief Justice and/or his delegate. The exercise of power u/s 11 is administrative in character. That application is, therefore, not to a court. In these circumstances, Section 11 at least would not be governed by the provisions of Article 137 of the Indian Limitation Act.

4. The question will still remain as to whether in an application u/s 11 the delegate can refuse reference on the ground that the claim is barred by limitation. Ordinarily, in an administrative enquiry, such an exercise will not be done if there are disputed questions of facts which are required to be proved. It is only if the admitted facts are clear and require no further investigation, can, u/s 11, reference be refused. In the present case, can it be said that the claim is barred by limitation? In the very judgment in State of Orissa, supra, the apex court noted two expressions, namely, "action" and "cause of arbitration" and it was considered that it should be construed as "arbitration" and "cause of arbitration" bearing in mind the provisions of Section 37 of the Limitation Act, 1940 [?]. Reference was also made to Russell on Arbitration to point out that the limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place in respect of the dispute concerned. In para 7, the apex court observed as under:

"Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator."

4.1 Before the apex court, the question was when will the cause of arbitration commence in the absence of issuance of notice or omission to issue notice for long time after the contract was executed? The apex court observed that the cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract.

4.2 u/s 21 of the Act of 1996, it is set out that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. In other words, the arbitral proceedings commence with a request made by a claimant for reference to arbitration, and is received by the respondent. Section 21 was the subject matter of consideration by the apex court in Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, . It was considered insofar as Section 85 of the Act of 1996 is concerned. Bearing these facts, in my opinion, can it be said prime facie that the claim is barred by limitation? At the first instance, if the date 28 May, 1998, is considered, then, 3 years would expire on 27 May, 2001. The arbitration application was lodged in this court on 9 August, 2001. That, however, is immaterial. What is material is, considering Section 21, the invocation of the arbitration clause on 2 May, 2001 which was received by the respondents as per their letter dated 8 June, 2001, on 10 May, 2001, 10 May, 2001 would be within 27 May, 2001. If that be the case, prima facie, that claim is not barred by limitation as the arbitral proceeding commenced on that day. Section 11 application is only on failure to concur with the appointment of arbitrator that the assistance of the court is sought.

5. In the instant case, the petitioners having invoked the arbitral clause and the respondents did not concur to the appointment, they have approached by an application u/s 11. Prima facie, therefore, the contention that the claim is barred by limitation has to be rejected, in the light of that application made absolute in terms of prayer clause (a). All disputes and differences arising out of agreement dated 8 February, 1996, are referred to the sole arbitrator. Parties agree that Shri H. Suresh, retired Judge of this court, be appointed as sole arbitrator to decide all disputes and differences. All questions including the issue of limitation is kept open for consideration as what is decided is only on a prime facie consideration of the documents and pleas on record.

5.1 Application disposed of accordingly. No order as to costs.

5.2 Parties/authorities to act on an ordinary copy of this order duly authenticated by the personal assistant of this court.