(2007) 09 DEL CK 0084

In the Delhi High Court

Case No : Writ Petition (C) Nos: 6209 of 2003, 6212 of 2003, 6216-18 of 2003, 6224 of 2003, 6227 of 2003, 6230 of 2003, 6240 of 2003, 6241 of 2003, 6249 of 2003, 6250 of 2003, 6255 of 2003, 6256 of 2003, 6259 of 2003 and CM. No.: 7464-65 of 2003

D. Pal and Co. APPELLANT

Vs

MCD RESPONDENT

Date of Decision : 20-09-2007

Acts Referred:

Arbitration Act, 1940 — Section 11, 11(6), 20, 34
Contract Act, 1872 — Section 28, 28(a), 28(b)

Citation : (2007) 6 ILR Delhi 175 Supp

Hon'ble Judges : Dr. M.K. Sharma, C.J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Anusuya Salwan, for the Appellant; Amit Gupta, for the Respondent

Judgement

1. All these petitions involve identical and similar issues and, therefore, we propose to decide all these writ petitions by a common judgment and order. The petitioners herein entered into a contract with the respondent for executing work. Disputes arose between the parties. The petitioners sought for reference of the disputes to an arbitrator. The said request of the petitioners was considered but the respondent had refused to refer the said disputes to an arbitrator on the ground that the petitioners had received final payments through cheques and that the same were accepted. It was stated that there were no disputes which could be referred to an arbitrator.

2. Being aggrieved, the petitioners filed applications u/s 11 of the Arbitration and Conciliation Act, 1996 (Act for short) praying for appointment of an Arbitrator. The matter was placed before the Civil Judge for hearing the aforesaid applications u/s 11 of the Act filed by the petitioners. The Civil Judge by it''s order dated 30th July, 2003 dismissed the said applications, holding that there was nothing on record, which would indicate that the petitioners could invoke the arbitration clause as they had failed to do the same within 90 days from the date

of the final bill. Learned Civil Judge held that the petitioners had waived their rights for appointment of the Arbitrator. The applications were consequently dismissed.

3. Being aggrieved by the aforesaid order, the petitioners filed these writ petitions before this Court, which were considered and allowed by the order dated 7th February, 2005. It was held that in view of the decision of the Supreme Court in Konkan Railway Corporation vs. Mehul Construction Co., JT 2000 (9) SC 362, the Civil Judge had wrongly assumed jurisdiction, which was actually not vested in him. All questions and aspects were to be examined by the arbitrator. Consequently, order passed by the Civil Judge was set aside. The Division Bench proceed to appoint an Arbitrator to decide disputes between the parties.

4. The respondent filed a SLP as against the judgment and order of the Division Bench of this Court. The said SLP has been disposed of in the light of the decision of the Constitution Bench in S.B.P. and Company Vs. Patel Engineering Ltd. and Another, . The Supreme Court has set aside the order passed by the Division Bench of this Court and the matter has been remand back to the High Court for fresh decision in the light of the judgment of the Constitution Bench. Consequently, these writ petitions are listed.

5. Learned counsel for the petitioners has submitted before us that in view of the decision of the Supreme Court in Patel Engineering Ltd. (supra), the issue with regard to limitation is to be adjudicated by the Court while deciding an application u/s 11 of the Act. Another contention that is raised for our consideration is whether there was any accord and satisfaction in this matter that precludes the petitioners from seeking a reference.

6. For deciding the issue whether application u/s 11 of the Act is barred by limitation, learned counsel for the respondent has relied upon the following clause in the agreement between the parties.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 90 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the MCD shall be discharged and released of all liabilities under the contract in respect of these claims.

7. The aforesaid clause stipulates that if a contractor does not make demand for appointment of an arbitrator in writing within 90 days of intimation that final bill is ready for payment, any claim made thereafter shall be deemed to be waived and barred. It also stipulates that the Municipal Corporation of Delhi/respondent will be discharged and released of all liabilities in respect of claims, which are raised after 90 days of the intimation that final bill is ready for payment.

8. It may be stated here that the question whether a claim is barred by limitation

or not is to be decided by the arbitrator. We are only concerned with the question whether or not the application u/s 11 of the Act filed in the Court is within limitation and to satisfy ourselves that the claim made is live. It is well settled that Article 137 of the Limitation Act, 1963 was applicable to a petition u/s 20 of the Arbitration Act, 1940. Reference in this regard can be made to the decision of the Supreme Court in Hari Shankar Singhania and Ors. vs. Gaur Hari Singhania and Ors. AIR 2006 SC 2488. In this case it was observed as under:-

It is now well settled that Article 137 of the Limitation Act, 1963 applies to an application u/s 20 of the Arbitration Act, 1940. Accordingly, an application u/s 20 of the Act for filing the arbitration agreement in the Court and for reference of disputes to arbitration in accordance therewith is required to be filed within a period of three years when the right to apply accrues. The right to apply accrues when difference or dispute arises between the parties to the arbitration agreement. In the facts of the case, it is therefore necessary to find out as to when the right to apply accrued.

9. The above ratio will equally apply to a petition u/s 11(6) of the Act. Therefore, as per provisions of Article 137 of the Limitation Act, 1963, a party can file an application u/s 11(6) of the Act within three years of a difference or dispute arising. It is also well settled that an agreement to curtail or reduce the period of limitation prescribed under the Limitation Act, 1963, would be void as it offends Section 28 of the Contract Act, 1872. Supreme Court in the case of National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, has observed that:-

19. From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending section 28 of the Contract Act. This is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall sand extinguished and any subsequent action would be time barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

10. Reading of the above passage shows that the Supreme Court had drawn a

distinction between a clause in an agreement that curtails or reduces the period of limitation prescribed by law and a clause which does not seek to curtail period of limitation but provides for forfeiture or waiver of the right to make a claim, if action is not commenced within a specified time. In the former case, Section 28 of the Contract Act was held to be applicable but a clause of the second type, it was held was not hit by Section 28 of the Contract Act.

8. After the above decision of the Supreme Court, Section 28 of the Contract Act, 1872 was amended in the year 1997 itself and Clause (b) was inserted in Section 28. The said clause reads as under:-

28. Agreements in restraint of legal proceedings, void.

(a) xxxxxxxxxxxxxxxx

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

11. The aforesaid observations of the Supreme Court in National Insurance and Co. Ltd. (supra) have now to be read and understood in light of Section 28(b) of the Contract Act. Section 28(b) of the Contract Act declares that every agreement which discharges a party from any liability or extinguishes right of any party by prescribing in a contract a specified restrictive period for enforcing rights shall be void. Thus in view of Section 28(a) of the Contract Act, 1872, by an agreement, parties cannot prescribe a shorter period of limitation than the one prescribed by law. Period of limitation prescribed by the statute cannot be reduced and restricted by an agreement. Similarly, in view of Section 28(b) of the Contract Act, 1872, the said ratio will equally apply where an agreement provides for release or forfeiture of rights by prescribing a shorter period than the period prescribed under the Limitation Act, 1963 or under any statute. By a contract, the statutory period for making a claim cannot now be reduced by prescribing forfeiture or discharge, if a claim is not made within a specified time. By the aforesaid amendment, prescriptive clauses which extinguish or provide for forfeiture of rights or discharge of liability for failure by a party to sue within a prescribed time, have been held to be void. The aforesaid amendment has been considered by this Court in Explore Computers Pvt. Ltd. Vs. Cals Ltd. and Another, , M/s Naresh Kumar Gupta vs. The Vice Chairman/Engineer Member D.D.A. and Ors. 2000 II AD (Del) 628 and Shri J.K. Anand Vs. Delhi Development Authority and Another, and has been interpreted in the manner stated above.

12. In the case of Explore Computers Pvt. Ltd. (supra), it has been held that:-

53. On a conspectus of the aforesaid judgments, two aspects have to be noted. The first is that it is the terms of the bank guarantee which have to be given due weight and the second is the distinction which is sought to be carved out in National Insurance company case (supra) between a clause curtailing the period of limitation being void u/s 28 of the Contract Act and a clause which provides for

forfeiture or waiver of a right if no action is commenced within the period stipulated by the agreement. Insofar as the second aspect is concerned, it cannot be lost sight of that the judgment in National Insurance Company case (supra) was delivered on 23.3.1997 and thus related to the provisions of Section 28 as it stood prior to the amendment because that was the substantive law in force at the time when the cause of action had arisen. The amendment to Section 28 was made with effect from 8.1.1997 and it is not disputed that the cause of action in respect of the subject matter in the present suit arose after the amendment. Sub-clause (b) of the amended Section 28 deals with the clauses which extinguish the rights of any party thereto or discharge any party from any liability begin void under the said section. Thus the scope of Section 28 has been widened whereby Clause (a) deals with the position prior to the amendment alone and Clause (b) is in addition.?

13. Considering the facts and circumstances of the case and in view of Section 28 of the Contract Act, we are of the considered opinion that it could not be appropriate to hold that the right of the petitioners to demand arbitration in respect of claims raised, stands extinguished and the respondent-Municipal Corporation of Delhi is discharged and released from all its liabilities as the said claims were not made within the period of 90 days from the date of intimation about the final bill. The clause relied upon by the respondent-MCD is void and hit by Section 28 of the Contract Act. No other contention or ground was raised to support the contention that the application u/s 11 of the Act is barred by limitation.

14. We may also refer here to the decision of the Supreme Court in Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd., . In this case, the Supreme Court has considered the ratio of the decision in the case of S.B.P and CO. (supra) and examined what can be regarded as a live issue and what is the nature and scope of enquiry by the Court, while deciding an application u/s 11(6) of the Act. It was held that:-

27. We shall take up the last contention raised by the appellant regarding the scope of the order passed by the Chief Justice or his designated Judge. It was contended that since the designated Judge has already given findings regarding the existence of live claim as also the limitation, it would be for this Court to test the correctness of the findings. As against this it was argued by the respondent that such issues regarding the live claim as also the limitation are decided by the Chief Justice or his designate not finally but for the purpose of making appointment of the arbitrators u/s 11(6) of the Act. In our opinion what the Chief Justice or his designate does is to put the arbitration proceedings in motion by appointing an arbitrator and it is for that purpose that the finding is given in respect of the existence of the arbitration clause, the territorial jurisdiction, live issue and the limitation. It cannot be disputed that unless there is a finding given on these issues, there would be no question of proceeding with the arbitration. Shri Salve as well as Shri Venugopal invited our attention to the observations

made in para 39 in SBP and Co. vs. Patel Engg. Ltd. 2 which are as under: (SCC pp. 660-61)

39. It is necessary to define what exactly the Chief Justice, approached with an application u/s 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator u/s 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.

A glance on this para would suggest the scope of the order u/s 11 to be passed by the Chief Justice or his designate. Insofar as the issues regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his designate has to decide those issues because otherwise the arbitration can never proceed. Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse, of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.

15. In view of this decision and applying the test as propounded by the Supreme Court, we hold that the disputes raised are live and not dead.

16. The next question that arises for consideration is whether the arbitration clause has extinguished, as the petitioners have received payments of the final bills. It is stated by the respondent that the petitioners have accepted payments and, therefore, there was accord and satisfaction. It is pointed out that the final bill was prepared and payment was made and received by the respondent without any endorsement thereon, and further that the said payments were being received without protest or with a right to raise further claim. It is stated that the final bills were paid and, therefore, petitioners cannot have any further grievance and no request for referring the matter to arbitration should be entertained.

17. On going through the records, we find that the petitioners had not made any endorsement that the payments received were in full and final settlement of their claims. Petitioners have not issued any no-claim certificate. Learned counsel for the petitioner has submitted that the word ''final bill'' was written by the respondent and not by the petitioners as claimed. As to who had written the word "final bill" cannot be decided in these petitions. However, principal of accord and satisfaction in relation to the arbitration clause has been interpreted by the Supreme Court in several judgments. In Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, , after referring to the earlier decisions in Damodar Valley Corporation Vs. K.K. Kar, , Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash , Union of India (UOI) and Another Vs. L.K. Ahuja and Co., and Wild Life Institute of India, Dehradun v. Vijay Kumar Garg, (1997) 10 SCC 528 , it has been held that an arbitration clause in agreement continues to subsist even when it is claimed that there is accord and satisfaction and normally it is for the arbitrator to decide whether or not there was any accord and satisfaction resulting in extinction and discharge of obligations under the contract. In the present case, there is no pleading or any evidence to show

that the arbitration clause stands extinguished. In fact there is no document or evidence to show that the petitioners had accepted the payments unequivocal or without any reservation. There is no express settlement between the parties terminating the contract and bringing it to an end. The question whether there was any accord and satisfaction will have to be determined by the arbitrator who will also decide the effect and consequence of the petitioners accepting payments under the final bills. The question whether the petitioners have waived their rights is to be determined and decided by the arbitrator.

18. Pursuant to the order dated 7th February, 2005, this Court had appointed an arbitrator. Order dated 7th February, 2005 was made subject matter of appeal before the Supreme Court but no stay order was passed. The arbitrator appointed by the Court proceeded with the arbitration and has passed awards. The said awards have been placed on record. Learned counsel for the petitioner has submitted before us that the awards that have been passed can be declared to be awards in terms of the order of this Court but validity of the said awards could be challenged and questioned by the respondent in terms of Section 34 of the Act. The said statement is made in view of the fact that the Supreme Court has set aside the order dated 7th February, 2005 allowing applications u/s 11 of the Act and appointing an arbitrator. It may be noted that before order dated 5th February, 2007 was passed by the Supreme Court, awards had already been made on 31st October, 2006 by the arbitrator. In view of order dated 5th January, 2007, there was no need for the respondent-MCD to file objections to the awards and challenge the same u/s 34 of the Act. Therefore, for the period of limitation, the respondent would be entitled to file appeals/petitions against the awards u/s 34 of the Act within the limitation period prescribed therein, as if the awards have been passed on 20th September, 2007. It is agreed by the learned counsel for the petitioners that since we have passed the order today directing awards to be taken on record, the period of limitation u/s 34 of the Act shall begin from today. All the petitions are accordingly disposed of in terms of the aforesaid order. There will be no order as to costs.

