
(1990) 09 DEL CK 0043

In the Delhi High Court

Case No : Interim Application No. 1740 of 1990 and Suit No. 70A of 1990

Deepak Industries Ltd.

APPELLANT

Vs

National Research Development Corporation of India and
Others

RESPONDENT

Date of Decision : 17-09-1990

Acts Referred:

Citation : (1991) 1 ARBLR 185 : (1991) 43 DLT 34

Hon'ble Judges : Arun Kumar, J

Bench : Single Bench

Advocate : H.N. Salve, Kumkum Sen and B.K. Sood, for the Appellant;

Judgement

Arun Kumar, J.

(1) The plaintiff M/s. Deepak Industries Limited has filed the present petition under Sections 20 and 33 of the Arbitration Act, 1940. The plaintiff also filed an application for interim relief bearing I.A. No. 1740 of 1990, praying for stay of the arbitration proceedings before the arbitrators who are arrayed as defendants 2 and 3, till the disposal of the main petition u/s 20 of the Arbitration Act. When the application for interim relief came up for final hearing before me, counsel for the parties agreed that since the pleadings in the main petition were also complete and for purposes of decision of the interim application, the same points" would be required to be gone into as for purposes of decision of the main petition, the whole matter may be disposed of. In view of this agreement between the counsel for the parties, I proceeded to hear arguments on the main petition itself. By this order I propose to dispose of the main petition which has been registered as Suit No. 70-A of 1990 and I.A. No. 1740 of 1990.

(2) The plaintiff and defendant No. I entered into an agreement dated 2nd March 1977 under which the plaintiff was to carry out developmental work on a horizontal boring machine as per the specifications mentioned in the agreement. The project was required to be completed by 28th February, 1979. However, time

for completion of the project was extended by defendant No. I up to 31st March 1980. There was no extension of time after the said date. Disputes arose between the parties. Clause 18 of the agreement dated 2nd March 1977 contains an arbitration clause, in pursuance whereof the disputes have been referred to arbitration. The arbitration proceedings are pending before the arbitrators, defendants No. 2 and 9.

(3) On 11th October 1984, defendant No. 1 annulled the agreement dated 2nd March 1977 and claimed a sum of Rs. 4,58,831 from the plaintiff on account of money advanced by it to the plaintiff Along with 25 per cent of the said advance amount as compensation. Defendant No. I thereafter filed a suit in this Court which was registered as S. No. 253 of 1985 for recovery of Rs. 5,73,538.75 against M/s. Deepak Industries Ltd., the present plaintiff, under the summary procedure of Order 37 of the Code of Civil Procedure. The defendant in the said suit (plaintiff herein) filed an application under Sec. 34 of the Arbitration Act pleading that in view of clause 18 of the agreement dated 2nd March 1977 the suit was liable to be stayed. The said application was allowed vide Order dated 11th August 1986 and the suit filed by defendant No. I herein was ordered to be stayed. An appeal against the order (bearing Fao (OS) No. 229 of 1986) was dismissed on 30th of October 1986. Thereafter National Development. Research Corporation of India, defendant No. I herein, filed a petition u/s 20 of the Arbitration Act in this Court which was registered as Suit No. 1364-A of 1987. Those proceedings were not contested and no written statement was filed by the defendant Mr. Deepak Industries Ltd., who are the plaintiffs before me in the present petition. Accordingly vide order dated 4th October 1988. the petition u/s 20 of the Arbitration Act was allowed and the disputes set out in para 22 of the petition were referred to arbitration.

(4) On 10th March 1989 the joint arbitrators entered upon the reference. Statement of claim was filed before the arbitrators by M/s National Research Development Corporation of India (defendant No. I herein) to which M/s. Deepak Industries (the plaintiff herein) filed its counter claim/written statement, Subsequently the plaintiff applied for amendment of its counter claim before the arbitrators. By order dated 12th December 1989 the joint arbitrators disallowed the plea of bar of limitation which the plaintiff herein wanted to raise in its counter claim while certain other pleas were allowed to be raised by way of amendment of the counter claim. A copy of the order of the arbitrators dated 12th December 1989 has been placed on record by the plaintiff as an annexure to the main petition u/s 20. The grievance of the plaintiff herein is that the plea of limitation which the plaintiff wanted to raise in its counter claim before the arbitrators was by way of defense to I he claim of the opposite party and Therefore the arbitrators could not disallow the same merely on the ground that no dispute relating to limitation was referred to them under the order of reference dated 4th October 1988 passed by this Court in S. No. 1364-A/87. The plaintiff has accordingly prayed as under in the present petition :-

"(A)to pass an order clarifying that the defenses of limitation raised in paragraphs I (a) and (b) of the amendment application which is Annex. "C" to this petition are covered by the order of this Hon'ble Court dated 3rd October, 1989 in Suit No. 1364A of 1987 referring the disputes and differences to Arbitration and the order of the Learned Arbitrators dated 12th December, 1989 holding that the issue relating to limitation is beyond the scope of reference is incorrect and illegal. (b) In the alternative and without prejudice to prayer (a) hereinabove. pass an order referring the issue dispute and differences set out in paragraph 20 hereinabove to arbitration in accordance with the arbitration clause to be adjudicated upon by the Learned Arbitrators Along with the disputes and differences referred by this Hon'ble Court by order dated 12th December 1989 in Suit No. 1364A of 1987; (c)xx xx xx xx

(5) The present petition has been filed under Sections 20 and 33 of the Arbitration Act containing the aforesaid prayers of the plaintiff. The plaintiff has urged in the petition that the order dated 12th December 1989 passed by the arbitrators, if taken as an interim award, is liable to be set aside and the plaintiff is entitled to raise the plea of bar of limitation which is a defense to the claim of the opposite party and not really an independent dispute sought to be raised by it. In the alternative the prayer of the plaintiff is that if it is considered that plea of limitation is an independent dispute, the same may be now referred to arbitration as the matter is pending before the arbitrators. The arbitration is at an initial stage and in order to do complete justice, the plaintiff prays that it should be allowed to take the plea of bar of limitation as a defense to the claim of defendant No. I before the arbitrators. Before I proceed further, it will be worthwhile to quote the relevant para of the order/interim award dated 12th December 1989 of the arbitrators, which is as under :-

"THE Respondent has filed an application for amending its written statement. In paragraphs I (a) and (b) of the said application the Respondent seeks to raise the issue of limitation. Our attention has been drawn to the Order dated 3-10-89 made by the Delhi High Court in Suit No. 1364A/87. By this Order the High Court has referred only the disputes set out in para 32 of the Petition u/s 20 of the Arbitration Act, 1940 which was the subject matter of the said Suit. The said paragraph 22 sets out certain items of disputes which do not include any dispute relating to limitation. In the circumstances the Arbitrators are of the opinion that the issue relating to limitation is beyond the scope of the reference of these proceedings. In the premises, the amendments referred to in the said paragraphs I (a) and (b) of the said Application for Amendment are disallowed.

(6) It will be seen from the aforesaid that the arbitrators have really declined the prayer of the plaintiff to urge the bar of limitation on the ground that only disputes referred to in para 22 of the petition u/s 20 of the Arbitration Act were ordered to be referred to arbitration. On the ground the arbitrators have held that the issue relating to limitation is beyond the scope of reference. Counsel for the plaintiff has urged before me that when a suit is filed in court or a claim is

filed before the arbitrators, it is always open to the defendant to take whatever pleas that may be available to him in defense to such a suit or claim. There are no shackles in the way of the defendant. In fact the law permits a defendant to take alternative pleas and in certain cases pleas which may be inconsistent with each other. It is further submitted that an arbitrator like a court is expected to decide the matter before him in accordance with law. Reference is invited to AIR 1930 103 (Privy Council) to urge that even when the Limitation Act in terms did not apply to arbitration", it was laid down that the arbitrator should decide in accordance with law of the land. Now when Section 37 of the Arbitration Act specifically makes the Limitation Act applicable to arbitrations, there is no reason why a party should not be allowed to raise the plea of bar of limitation" in defense to a claim. In the alternative the counsel urges that if it is felt that the plaintiff cannot raise the said plea defense, this may be treated as a dispute and be now ordered to be referred to the arbitrators, especially in view of the fact that the arbitration proceedings are still pending and are at a very early stage.

(7) Counsel for defendant No. I has raised various points to persuade me to hold that the plaintiff is not entitled to the prayers contained in the main petition" u/s 20 of the Arbitration Act and the same is liable to be dismissed. The points raised by counsel for defendant No. I are :-

1. Waiver ; 2. Claim of the plaintiff being outside the scope of clause 18 of the agreement dated 2nd March 1977 ; 3. The present petition u/s 20 is barred by limitation; and 4. The present petition is barred under the provision's of Order II, Rule 2 of the Code of Civil Procedure.

Point NO. 1

(8) In support of his first point counsel for defendant No. I submits that the plaintiff never took the plea regarding defendant No. I's claim being barred by time, Therefore, no dispute could be said to have been raised on this ground and no reference of such a dispute could be made to the arbitrators. This act of the plaintiff according to counsel for defendant No. 1. amounts to waiver and it disentitles the plaintiff to raise this plea at a subsequent stage. In support of his contention counsel has invited my attention to a judgment of this Court reported as Delhi Cloth & General Mills Co. Ltd. Vs. Municipal Corporation of Delhi 1989(3) DL 257.(2) My attention has been particularly drawn to the following passage in the said judgment:

"WHEN whole of the subject disputes were being referred to arbitration but not the question of limitation, it can well be presumed that the M.C.D. gave up the plea regarding bar of limitation. Parties can always agree not to press a particular issue".

The counsel vehemently argues that the plea of limitation would be deemed to have been given up by the plaintiff in the facts and circumstances of the case and as such the decision of the arbitrators is correct and the plaintiff is not entitled to take such a plea before the arbitrators now. According to the counsel

this shows that the plaintiff was never serious about this plea and if this plea is now allowed to be taken, it will amount to piece-meal arbitration which is not permissible under the law. I have carefully considered the rival contentions of the parties on" this aspect of the case. It will be useful to narrate the background of certain proceedings which took place between the parties in this connection.

(9) "THE first stage when the plaintiff herein took some positive step was to file an application u/s 34 of the Arbitration Act praying for stay of the suit of the defendant herein, being S. No. 253185. In para 12 of the said application it was averred that the claim of the plaintiff in the said suit was barred by limitation. Thereafter in the proceedings u/s 20 which were started by defendant No. 1 herein (S. No. 1673-A/87) no written statement was filed by the plaintiff herein and those proceedings were never contested. Therefore, again there was no occasion for any plea of bar of limitation being raised. It is also quite reasonable and understandable that a party may feel that in defense to a suit or claim, it will be open to it to take whatever defenses that are available under the law. In fact it appears to me that the plaintiff is not raising any dispute as such when it seeks to raise the plea of bar of limitation in: defense to the claim of the opposite party. The defendant is entitled to take whatever defenses that are open to it under the law. So much so that the defendant can take even alternative and some times inconsistent defenses. The right of a defendant to plead all the defenses which may be available to him in law finds statutory recognition u/s 9 of the Specific Relief Act 1963 so far as it relates to suits for specific performance of contracts and the right of defendant to contest and defend such suits. I may further add that so far as the plea of bar of limitation is concerned. Section 3 of the Limitation Act enjoins upon the Court to take note of this even if no such plea or defense is taken. I am of the considered view that the plaintiff herein was entitled to plead the bar of limitation in defense to the claim of the defendant No. 1 who is the claimant before the arbitrators. Reliance placed by the counsel for defendant No. 1 on Delhi Cloth & General Mills (supra) does not help the defendant. The facts of the said case are clearly distinguishable as compared to the facts of the present case. The said decision arises from a civil suit which was pending in court in which the written statement had been filed by the defendant. Out of several issues framed on the basis of the pleadings of the parties, one of the issues was "Whether the suit is within limitation ?" It was later on when the matter reached the stage of evidence that an application u/s 21 of the Arbitration Act was filed by the parties before the Court for reference of disputes which were the subject matter of the suit to arbitration. The application u/s 21 was jointly presented by the parties to the said suit and the said application contained a list of disputes which were agreed by the parties to be referred to arbitration. In spite of the existence of an issue of limitation framed in the suit, in the disputes enumerated in the application" u/s 21 of the Arbitration Act, the said issue was not included for being referred to the arbitrator. In these circumstances this Court held that it will be presumed that the defendant gave up the plea regarding limitation. In an application u/s 21 of the Arbitration Act all disputes in

a pending suit are liable to be referred to arbitration on agreement between the parties. In the said case the agreement between the parties came about and the disputes which were sought to be referred to arbitration were enlisted. Out of several disputes when one of them (limitation) was not included in the list, it was obvious that the party which raised the plea on the basis whereof the issue was framed, did not press its plea or in other words waived it.

(10) The facts in the present case are quite different. Here the plea of limitation was never raised by the plaintiff herein, much less an issue being framed on such a plea. Therefore, the question of waiver will not arise. There is lot of difference in the scope and purpose of Sections 20 and 21 of the Arbitration Act. Therefore the said judgment of this Court, to my mind, does not help defendant No. 1, I hold that the plaintiff is entitled to take up the defense of bar of limitation in its counter claim before the arbitrators. Defendant No. 1 has urged before me that the plea of limitation was not taken in the counter claim in the first instance and was sought to be taken by way of amendment of the counter claim. However, this is not the ground on which the arbitrators have rejected the amendment sought by the plaintiff. Moreover this argument is not of any substance. The decision of the arbitrators disallowing the amendment of counter claim so as to take the plea of bar of limitation is totally erroneous and amounts to misconduct of the proceedings. The same is set aside. I permit the plaintiff to amend its counter claim so as to take up the plea of bar of limitation. Point NO. 2.

(11) Counsel for defendant No. 1 has failed to show how the plea sought to be raised by the plaintiff is outside Clause 18 of the agreement. Even otherwise in view of my decision on the first point there is no need to go into this point any further. Point NO. 3

(12) Under this head, the counsel for defendant No. 1 has urged that the present petition u/s 20 of the Arbitration Act is barred by time. According to the counsel a period of three years is applicable as per Article 137 of the Limitation Act and the present petition having been filed now is clearly barred by limitation and is, Therefore, liable to be dismissed on this ground alone. The law regarding applicability of Article 137 of the Limitation Act to proceedings u/s 20 of the Arbitration Act seems to be well settled. Reference can be made to *Globe Motors Ltd. Vs. Mehta Teja Singh and Co.*, ; *Shah Const. Vs- Mcd* 1985 Delhi 358; *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, : and *Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority*, in this behalf. According to 00^^01 for defendant No. 1, the breach of agreement occurred in 1980. Thereafter a notice was given on 11th October, 1984. The first suit was filed in the year 1985 by defendant No. 1, the petition u/s 20 of the Arbitration Act was filed by defendant No. 1 in the year 1987. Counsel urges that taking any of these dates into account the present petition is clearly barred by limitation .Counsel further urge that the date of decision of Section 20 petition, i.e. 4th October 1988 cannot be taken as a starting point of limitation. However, the view that I have taken of this matter as per my decision under Point No.1, I

need not treat the present petition as a fresh petition u/s 20 of the Arbitration Act. Therefore, it is not necessary to go into the question of the present petition being barred by limitation. I can also treat the present petition as a petition praying for reference of further dispute regarding limitation to arbitration. The arbitration proceedings are still pending before the arbitrators and are at an initial stage. The plea of bar of limitation can be permitted now to be referred to the arbitrators as a dispute, I am supported in this behalf by a Division Bench judgment of this Court in Delhi Development Authority and Others Vs. Alkarma, . Point NO. 4.

(13) The fourth point urged by counsel for defendant No. 1 is the bar under Order II Rule 2 of the Code of Civil Procedure.

(14) Counsel submits that the plea of limitation sought to be raised by the plaintiff before the arbitrators would be deemed to be barred under the provisions of Order II, Rule 2 of the CPC on account of the alleged failure of the plaintiff to take such a plea earlier. Counsel has cited before me K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, in support, of his submission. In view of the history of the various proceedings between the parties the question of bar under provisions of Order II, Rule 2. of the CPC does not arise. The plaintiff never took any plea or raised any dispute at any stage before. Therefore, the provisions of Order II, Rule 2, CPC are not at all attracted in the facts and circumstances of the case and for the same reason judgment cited above K. V. George (supra) is also not attracted. Same is the position regarding the authority Kothari and Associates Vs. State of Gujarat and Another, cited by Counsel for defendant No. 1. On the contrary the counsel for the plaintiff has cited a Division Bench judgment of this court in DDA's (supra) case It has been held in the said judgment that "where, however, an award has not been made, it is open to a claimant to ask for more disputes to be referred to arbitration" provided the arbitration proceedings are not yet over". In the same para of the judgment the Court has also observed :-

"IN our opinion, the provisions of Order II, Rule 2 would apply, as we have already stated hereinabove, if the request for referring more disputes to arbitration is made after the making of the award. Once an award has been made, a party cannot be permitted to raise more disputes which he/it could and ought to have raised earlier."

(15) In the present case the award has not been made so far. The arbitration proceedings are at an initial stage. The provisions of Order II, Rule 2, CPC are not at all attracted.

(16) Under the circumstances I allow the petition, set aside the order dated 12th December 1989 passed by the arbitrators and permit the plaintiff to amend its counter claim so as to take up the plea of bar of limitation. There will be no orders as to costs. The suit as well as application stand disposed of.