

(2009) 12 DEL CK 0148
In the Delhi High Court
Case No : A.A. No. 424 of 2008

Engineering Development Corporation	APPELLANT
Vs	
Municipal Corporation of Delhi and Another	RESPONDENT

Date of Decision : 08-12-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11
Contract Act, 1872 — Section 28
Limitation Act, 1963 — Article 137

Citation : (2009) 12 DEL CK 0148

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Anusuya Salwan, for the Appellant; Nalin Tripathi, Additional Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—This is a petition u/s 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an Arbitrator.

2. A contract was entered into between the parties vide Work Order No. EE (Pr) SZ/2002-2003/63 dated 1.10.2002. The contract was for construction of 12 class rooms and two toilets blocks. The petitioner claims that time was extended provisionally up to 31.7.2004 and thereafter the work was completed to the entire satisfaction of the respondent on 11.9.2005. On 28.2.2005 the respondent prepared their 5th R.A bill. This R.A. bill shows that the date of completion is shown as "work in progress".

3. In a petition u/s 11, the court has to basically see four aspects. The first is whether there is an arbitration agreement between the parties. The second is whether the disputes fall within the scope of the agreement. The third aspect to be seen is whether the petition has been filed within the limitation period and finally whether the claims are live claims.

4. In the present case the first two of the above stated aspects are not in dispute. What has been canvassed by the counsel for the respondent is that the petition is barred by time and that the claims are not live claims.

5. As regards the limitation issue, the right to file a petition for the appointment of an Arbitrator arises when a claim which is raised by one party is opposed and denied by the other party, I put a specific query to the counsel for the respondent as to when the claim of the petitioner for the work done was denied by the respondent, however, the respondent failed to point out any letter by which the claim of the petitioner for work done under the subject contract was denied. If that be so, I fail to understand how the petition is barred by time. It has been held by the Supreme Court in the judgment reported as Union of India (UOI) and Another Vs. L.K. Ahuja and Co.,) that unless and until disputes arise, limitation cannot be said to begin for the purposes of Article 137 of the Limitation Act. The counsel for the petitioner has rightly relied upon two judgments of this Court reported as Pandit Munshi Ram Associates Pvt. Ltd. v. DDA 2002 (Suppl.) Arb. LR 659 (DB) and also an unreported decision dated 20.9.2007 titled D. Pal Co. v. MCD (DB). Both these judgments are relied upon for the proposition that unless and until disputes arise, the limitation does not commence for filing of a petition for the appointment of an Arbitrator. The counsel for the petitioner has further relied upon the judgment of the Supreme Court in the case of Utkal Commercial Corporation Vs. Central Coal Fields Ltd., for the same proposition and has drawn my attention to para 10 wherein the Supreme Court has referred to its earlier judgment in the case of Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, to hold that a dispute arises only where there is a claim by one party denial/repudiation of such a claim by the other party.

In view of the aforesaid judgments and the fact that in the present case, the counsel for the respondent has failed to show me any letter whereby the respondent has disputed and denied the claim of the petitioner for the work done under the contract and I do not find that the petition is barred by limitation.

6. The second issue which has been urged by the counsel for the respondent is that by virtue of Clause 9 of the contract, the claims are no longer live claims. As per Clause 9, no further claim shall be made by the contractor after submission of the final bill and such claims as not stated in the final bill shall be deemed to have been waived and extinguished.

In the present case, I have not seen any final bill which has been annexed by the respondent. The only bill which is the last bill prepared is 5th running bill which in fact states that the work is in progress. The bill itself factually does not state that it is a final bill. Therefore, there is no question of application of Clause 9. In any case, I am of the view that any clause in the contract which artificially curtails the period of limitation is of no effect by virtue of Section 28 of the Contract Act, 1872. This has been so held in two recent judgments of this Court reported as Smt. Biba Sethi and Mr. Nitin Sethi Vs. Dyna Securities Limited, and Pandit Construction Co. v. DDA (143) 2007 DLT 270. Accordingly, I do not agree

that the claims are not live claims.

7. So far as the present contract is concerned Clause 25 requires appointment of the Arbitrator by the Commissioner, MCD. The Supreme Court in its recent judgment reported as Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., has held that even if the respondent fails to appoint an Arbitrator after service of the notice and the petition u/s 11 is filed in the court, the court would only direct that the Arbitrator be appointed in terms of the agreed clause between the parties. In accordance with the aforesaid judgment it is the Commissioner MCD who is to appoint the Arbitrator.

8. Accordingly, this petition is allowed with costs of Rs. 25,000/- and in terms of Clause 25, the Commissioner MCD is directed to appoint an Arbitrator to decide all the disputes/differences/claims/counterclaims/issues as arriving between the parties under the subject work order within a period of four weeks from today.