

(1991) 08 SHI CK 0005
In the High Court Of Himachal Pradesh
Case No : C.S. No. 35 of 1989

Himalayan Constraction Company

APPELLANT

Vs

The National Hydroelectric Power Corporation Ltd. and
Another

RESPONDENT

Date of Decision : 14-08-1991

Acts Referred:

Arbitration Act, 1940 — Section 20
Contract Act, 1872 — Section 73
Limitation Act, 1963 — Article 137

Citation : (1992) 1 ShimLC 314

Hon'ble Judges : D.P. Sood, J

Bench : Single Bench

Advocate : Bhupinder Gupta, for the Appellant; P.A. Sharma, for the Respondent

Final Decision : Allowed

Judgement

D.P. Sood, J.—The National Hydroelectric Power Corporation (in short "defendants"), vide its letter, dated 9th of January, 1985, accepted the tender of the Plaintiff for "construction" of approach road from permanent bridge to temporary bridge on left bank of river Ravi at Kheri below the estimated cost i.e. for rupees 4, 47, 174 against due execution of the arbitration agreement. The work in question was executed and completed on 28-6-1985 and not on 18-6-1985 as alleged by the Plaintiff. By a Subsequent extension of time, the Plaintiff already executed increased quantity of work valuing at rupees 15,83,748 at the behest of the defendants and on the basis of instructions imparted to it from time to time. Plaintiff Submitted its claim vide letter, dated 5-5-1986 (Annexure-D2). Subsequently, Plaintiff sent Anr. letter, dated 2-7-1986 in the form of a notice to invoke Clause 55 of the Arbitration Agreement No. 25 entered into between the parties inter se pertaining to the work in question and referring to the fact that dispute regarding non-payment of final bills, details having already been preferred on 5-5-1986 He further stated therein that eventually their due payment of final bill may be released within ten days of the receipt of

the said notice failing which they shall have no alternative but to approach the appropriate authority for appointment of Arbitrator under Clause 55 of the Agreement. Apart from it, the Plaintiff claimed the existence of disputes upto the value of rupees 1,98,855 which were due and payable by the Defendants to him pursuant to Clauses 18.2 and 48 of the agreement. His grouse is that the defendants did not finally settle the claim except making a payment of rupees 2,04,697. Thus, the Plaintiff served a notice on 22-9-1988 raising a dispute and claiming the following amounts, as detailed below, to be adjudicated through appointment of an Arbitrator as per the terms of the agreement:

Claim No. Nature of the Claim Amount claimed Claim No. 1. Claim on a/c of unmeasured Rs. 8,11,704.00 quantities of earth work (verified at site by the Committee).

Claim No. 2. Difference of rate for removal Rs. 27,846.00 of over burden. ----- Rs. 8,38,550.00 Claim No. 3. Loss of profit/overhead. Rs. 6,35,885.00

Claim No. 4. Interest paid to other parties Rs. 6,57,070.00 such damages under Section 73 of the Indian Contract Act.

Claim No. 5 Advances booked bad debt Rs. 90,700.00 and become irrecoverable. ----- Rs. 22,24,642.65

Claim No. 6. Extra rate for deviated Rs. 1,98,856.00 quantities (Clause No. 18.2 of AGT).

Claim No. 7. Security deposits. Rs. 40,430.00 ----- Rs. 24,63,928.00

The non-action on the part of the defendants led to the filing of the instant application u/s 20 of the Arbitration Act, 1940 (in short the Act") seeking relief for the appointment of an arbitrator by this Court.

2. The Defendants admitted the entrustment of the work to the Plaintiff against due execution of the Arbitration Agreement but denied the existence of any dispute and, hence, it is contended that no question of appointment of any Arbitrator arose. It is further contended that the Plaintiff had finally settled all the claims and received the entire payment in full and final settlement of his claim in the third running bill pertaining to the work in question by making and signing an endorsement in his hand on 7-4-1988. It is further contended that work having completed on 28-6-1985, the defect liability period expired on 29-12-1985 and requirement of notice to be served upon them (defendants) in relation to any claim, if any, expired on 29-1-1986 but as the notice had been served on 2-7-1986, after expiry of six months of the requirement of service of notice, no dispute or claim of the Plaintiff existed nor they have any locus stand to file the instant application seeking the relief prayed for therein.

3. On the pleadings of the parties, the following issues were framed:

1. Whether there exists a dispute between the parties capable of being referred

to the Arbitrator as alleged? O.P.P.

2. Whether Clause 555 of the Arbitration Agreement bars the dispute to be referred to the Arbitrator? O.P.D.

3. Relief.

4. Before deciding the rival points, issue-wise, it would be pertinent to state that the application u/s 20 of the Act is within limitation. There is no controversy about this legal proposition. In order to be entitled to order of reference u/s 20, it is necessary that there should be an arbitration agreement and, secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. Final running bill was prepared and payment ultimately made on 7-4-1988 in full and final settlement of all claims as per the endorsement duly signed by the Plaintiff of the even date. Prior to it, letters, dated 5-5-1986 and 2-7-1986 had also been sent to the defendants requiring them to release the payments in respect of the claims made in the earlier letter. Subsequently, notice was given by the Plaintiff to the defendants on 22-9-1988 seeking adjudication of their disputes by appointment of an arbitrator as per Clause 55(1) of the Arbitration Agreement.

There has been an assertion of the claim by the Plaintiff and implied silence on the part of the defendants. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the Plaintiff. The cause of action arose to the Plaintiff on 28-5-1985, 28-12-1985, 29-1-1986, 5-5-1986, 2-7-1986 and 7-4-1988. The Plaintiff became entitled to payment on the dates referred to above and the cause of action under Article 137 of the Limitation Act arose on different dates as stated. Existence of arbitration agreement, entitlement to money and consequent existence of difference or a dispute, thus, arose in between the parties inter se. It is true that on completion of the work, a right to get payment would normally arise but where the final bill, as in the instant case, had not been prepared as appears from the record when the earlier letters were sent to the defendants as per the assertion of the claim made by the Plaintiff since 5-5-1986 onwards till 7-4-1988 and for further claimed payments till 22-9-1988 when notice was served. The instant application was filed on 5-4-1989. It is also 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. A dispute arises whether there is a claim and a denial and repudiation of the claim. u/s 20 of the Act, the existence of dispute is essential for the appointment of an arbitrator. All these requirements are fulfilled in the instant case and, as such, the application u/s 20 seeking a direction for the appointment of an arbitrator in accordance with the Arbitration Agreement is within limitation.

Issue No. 1:

5. Under this issue, this Court has to determine whether. There are any arbitrable dispute existing in between the parties. In order to be entitled to ask for a

reference u/s 20, there must be an entitlement to money and a difference or dispute in respect of the same.

6. The test for determining the question is whether the recourse to the contract by which both the parties are bound is necessary for the purpose of determining whether the claim of the Respondent firm is justified or otherwise. If it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute, it must be held that the matter is within the scope of the arbitration clause and the arbitrators have jurisdiction to decide this case. In other words, a dispute implies an assertion of a right by one party and repudiation thereof by Anr. which may either be expressed or implied and may be by words or consent.

See : Union of India (UOI) Vs. Salween Timber Construction (India) and Others, a.m. A.M. Mair and Co. Vs. Gordhandass Sagarmull, and Union of India (UOI) and Another Vs. L.K. Ahuja and Co.,

7. There are seven items of claim made by the Plaintiff for which he has prayed for the appointment of the Arbitrator through this application. Item No. 1. pertains to the claim on account of un-measured quantity of earth work (verified at site by the Committee). Admittedly, as per the affidavits adduced by the defendants the Committee has categorically stated that work of execution from "0" meter to "234" meter of approach road referred to above was entrusted to the Plaintiff according to agreement No. 25 entered into between the parties pertaining to work in question. However, the Plaintiff has executed the work upto 248 meters. In other words, the Plaintiff has executed work for 14 meters more than the one which was entrusted to the Plaintiff pursuant to the contract. There is no dispute in between the parties to this effect. In view of the admitted position, item No. 1 executed by the Plaintiff does not fall within any clause of the contract, that is, agreement No. 25 and accordingly applying the test referred to above, this dispute contained in item No. 1 is not arbitral at all.

7. So far as items Nos. 2 to 7 are concerned, the close perusal of the record shows that help of various Clauses Nos. 43, 44, 53 and 55 of agreement is required to be taken to know whether the dispute does or does not exist. In other words, the said items of claim do arise out of agreement No. 25 referred to above. However, Submission of the learned Counsel appearing on behalf of the defendants is that these claims purported to be adjudicated by the arbitrator is barred by lapse of time in view of the evidence adduced by the defendants. The second Submission put forth is that the contract work had been fully executed by the Plaintiff and he had accepted full and final payments of all the claims arising out of the agreement without raising any protest as is apparent from the third final running bill whereupon defendants have made an endorsement to the above said effect. The third limb of the argument of learned Counsel appearing on behalf of defendants is that the Plaintiff did not approach them for the adjudication of his claims in either of the letters dated 5-5-1986 and 2-7-1986. As such, it is pointed out that there was no dispute and the application of the

Plaintiff filed u/s 20 of the Act is mis-conceived.

8. Thus, judging the facts of the instant case in view of the principles laid down by the Apex Court in the case of L.K. Ahuja and Co. (supra), it is clear that for holding the non-existence of the disputes it is absolutely essential to take recourse to the terms of the contract or the correspondence exchanged between the parties. Even if this Court is required to determine as to whether the Plaintiff had settled the claims amicably in full and final settlement thereof, as per the endorsement contained in the third final running bill, help of the documents and correspondence exchanged in between the parties interest under the Arbitration Agreement is required. The question whether the claim to be adjudicated by the Arbitrator, was barred by lapse of time is within the jurisdiction of the Arbitrator and not of this Court. Further, the fact whether the entire payment pertaining to the execution of the work has or has not been covered by the clauses of the Arbitration Agreement, also requires adjudication at the bands of the arbitrator to be appointed under the Agreement and this question cannot be gone into by this Court at this stage.

9. From whatsoever angle the rival contentions of the parties may be considered, the ultimate conclusion favours the Submissions made by the learned Counsel for the Plaintiff qua items Nos.2 to 7. Issue No. 1 is decided accordingly.

Issue No. 2 :

10. Under this issue, it would be pertinent to detail Clause 55.5 which runs as under:

A notice of the existence in question, dispute or difference in connection with the contract, unless served by either party within 30 days of the expiry of the Defects Liability period, failing which all rights and claim under this contract shall be deemed to have been waived and thus forfeited and absolutely barred.

11. Under discussion on issue No. 1. I have already held that recourse to the terms of the contract (agreement No. 25 in the instant case) for the purpose of deciding the matter in dispute, has to be taken necessarily. Even the fact whether dispute exists or not or it has been waived or it is forfeited or is absolutely time-barred in view of Clause 55.5 of the Arbitration Agreement, referred to above, requires determination by the Arbitrator to be appointed under the Agreement irrespective of the evidence adduced by the parties to this effect as it falls within his ambit and not that of the jurisdiction of this Court. Thus, this clause of the arbitration agreement does not bar the dispute to be referred to the Arbitrator. Issue No. 2 is decided accordingly.

12. In view of the discussions made above, the application is allowed. The Chief Engineer concerned is directed to refer the disputes as per claim items No. 2 to 7 narrated above for the adjudication by appointing an Arbitrator pursuant to Clause 55 of the Arbitration Agreement entered into between the parties inter se. No cost.