(2009) 12 DEL CK 0047

In the Delhi High Court

Case No : O.M.P. No. 214 of 2000

I.T.I. Limited APPELLANT

Vs

Par Pressings and Another RESPONDENT

Date of Decision : 04-12-2009

Acts Referred:

Arbitration Act, 1940 — Section 33, 37(3), 8, 8(2)
Arbitration and Conciliation Act, 1996 — Section 11, 34, 43(2)
Limitation Act, 1963 — Article 137

Citation : (2009) 12 DEL CK 0047

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Dayan Krishnan, Gautam Narayan and Mahfooz Nazici, for the Appellant; C. Mukund, Ashok Jain and Pankaj Jain, for the Respondent

Judgement

Vipin Sanghi, J.—By this order I propose to dispose of the objections u/s 34 of the Arbitration and Conciliation Act, 1996 (the Act) filed by the petitioner ITI Limited against the preliminary award dated 10.05.2000 passed by the sole arbitrator, Devender Kumar Sangal, former Secretary and Director General, Department of Telecommunications, whereby the preliminary objection of the petitioner with regard to the claim of the respondent being barred by limitation has been rejected. Briefly stated, the facts are as under:

2. The petitioner ITI Limited undertakes the manufacture and assembly of various mechanical products. The respondent, Par Pressings - a small scale industry, was selected as an Ancillary Unit for the supply of ''Unit Assemblies'' (UTAs). These UTAs were the subassemblies of the Cross Bar Telephone Exchanges manufactured by the Petitioner Company which they supplied to Department of Telecommunications (DOT). At one point of time the Cross Bar Exchanges were phased out by the DOT. Consequent to the phasing out of the Cross Bar Exchanges, the DOT cancelled the orders placed by it on the petitioner. The petitioner company vide its communications dated 05.02.1992, 07.03.1992 and 30.04.1992 required the respondent to stop the supply of UTAs.

This gave rise to claims by the respondent against the petitioner.

3. Respondent through its letter dated 03.10.1994 addressed to Chairman & Managing Director (CMD) of the petitioner, inter alia, requested him to constitute a competent authority duly empowered to negotiate a settlement and resolve the claims and disputes with the respondent. In the eventuality of no settlement being arrived at, the respondent sought reference of the dispute to arbitration and stated that they are agreeable to the CMD of the petitioner acting as the sole arbitrator. Again on 14.02.1995 the respondent sent another communication to the CMD of the petitioner, inter alia, requesting him to refer the matter to arbitration as per the petitioners'' policy direction dated 29.03.1993.

4. It appears that the petitioner company initially paid no heed to the request of the respondent to either settle the claims made by it, or even to refer the matter to arbitration. Due to the persistent pressure mounted by the respondent to settle their claims, the petitioner company finally held a High Level Committee meeting on 30.04.1999 in presence of the representative of DOT to review the claims of the respondent. In the said meeting a decision was taken to appoint "an independent outside eminent personality who will scrutinize the whole claim of M/s. Pressing and decide upon the amount payable, if any, to M/s Par Pressing by M/s. ITI. The decision of such independent person will be binding on both the parties."

5. In pursuance of the above resolution, the petitioner addressed a letter dated 09.06.1999 to Sh. D.K. Sangal to look into the disputed claim of the respondent and to give his decision. A copy of this letter was also sent to respondent, inter alia, seeking its confirmation of acceptance of appointment of Sh. D.K. Sangal to look into the disputed claims.

6. The respondent responded to the above communication vide letter dated 15.06.1999 whereby it agreed "to the appointment of Mr. D.K. Sangal as the sole Arbitrator to adjudicate the dispute between ITI Ltd. and Par Pressings". On 11.11.1999, the petitioner sent a communication to Mr. D.K. Sangal with the subject "In the matter of Arbitration between" the respondent herein as the claimant and the petitioner herein as the respondent. It was further stated:

Referring to the above subject, we write to inform you that S/Sri.N. Venkatraman, Dy. General Manager [P&A-IR], Corporate Office, and JP Mishra, Dy. General Manager, Mankapur Unit have been nominated to represent the company in the Arbitration Proceedings." "We shall be thankful if you could kindly intimate the above two officials and the Claimant, indicating a convenient date and time to hold a Preliminary Meeting to discuss and decide the procedure for the conduct of the Arbitration Proceedings including Payment of Fees of the Arbitrator, Costs of the Arbitration, Time Schedules for filing of representations by both the parties, Time schedule for depositing money etc.

....

2. It is suggested that the Arbitration Proceedings may be held at our Business Coordination Office, 1st Floor, Core No. 6, Scope Complex, 7, Lodhi Road, New Delhi-110 003. You may kindly intimate your convenience and the facilities required at the venue to enable us to make necessary arrangements.

7. Admittedly, in the first meeting of the parties with the arbitrator on 18.12.1999, the arbitrator entered into reference upon the receipt of the claim.

8. I have extracted from the aforesaid correspondence and narrated some of the aforesaid undisputed facts for the reason that a faint submission was made by the petitioner that the proceedings before Mr. D.K. Sangal were not an ''arbitration'', as he was not appointed as an ''Arbitrator'' but only as an "independent outside eminent personality" to scrutinize the claim of the respondent. This submission cannot be accepted because Mr. D.K. Sangal was evidently invested with the authority to independently scrutinize the claim of the respondent and to render his ''decision'', which the petitioner stated would be binding on both the parties. Moreover, the petitioner itself repeatedly and expressly described him as an ''Arbitrator'' and that is how his appointment was understood and treated by both the parties. This objection does not appear to have been raised before the learned Arbitrator, though it could have been raised. It cannot be permitted to be raised in these proceedings for the first time. This submission is accordingly rejected.

9. Before the arbitrator the petitioner raised a preliminary objection about the claim of the respondent being barred under the law of limitation. The arbitrator after considering the submissions of both the parties has given a reasoned preliminary award to the effect that the claimant''s claim was not barred by limitation under the Arbitration & Conciliation Act, 1996 read with the Limitation Act, 1963. Aggrieved by this preliminary award the petitioner has preferred these objections to the preliminary award dated 10.05.2000.

10. The notice in this petition was issued on 17.08.2000. By order dated 29.09.2000 this Court directed that the proceeding before the arbitrator will continue but the final award will not be passed. However, by the order dated 22.02.2001, this Court allowed the arbitrator to pass the final award. On 16.06.2001, the arbitrator passed the final award against the petitioner company where he awarded most of the claims of the respondent. This award is also under challenge in a separate petition filed u/s 34 of the Arbitration and Conciliation Act, 1996.

11. The petitioner submits that claim had been filed by the respondent before the learned arbitrator on 27.07.1999 whereas the same pertained to the period 1989 to 1992 as the supply orders that were rescinded pertained to that period. It is argued that the period of limitation for the recovery of price for goods supplied and for compensation for alleged breach of contract is three years from the date when the liability, if any, to pay arises or from the date when such liability was last acknowledged by the person liable to pay such amounts. In the absence of

any acknowledgment of the purported claim, the claim is barred by limitation. By placing reliance on Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, , it is contended that the arbitrator was duty bound to outrightly reject the claim which was, on the face of it, time barred.

12. It is next submitted by the Counsel for the petitioner that the letter dated 03.10.1994 cannot be considered as a proper notice for invoking arbitration and, therefore, no right accrues to the respondent therefrom. Alternatively, it is submitted that even if the letters dated 03.10.1994 and 14.02.1995 are assumed to be notices invoking arbitration, even then the claim is barred by limitation. It is argued that the right to seek appointment of an arbitrator u/s 8 of the Arbitration Act 1940 accrued on the expiry of 15 days from the date of service of notice, and even this right should have been exercised within three years from the date of accrual of the right. The observation of the arbitrator that Section 8 of the Arbitration Act, 1940 lays down no outer limit for approaching the court for appointment of an arbitrator is assailed by relying on the decisions in Utkal Commercial Corporation Vs. Central Coal Fields Ltd., ; Morena Mandal S.S.K. Ltd. Vs. New India Assurance Co. Ltd., J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and Another, where the courts have held to the effect that if the party seeking appointment of an arbitrator fails to move the court u/s 8 within the period of three years when such right accrues, the right to approach the court to seek appointment of an arbitrator would be barred by limitation. It is submitted that the position u/s 11 of the Arbitration and Conciliation Act 1996 is similar. Reliance is placed on the decisions in P.B. Enterprises, Engineers and Contractors Vs. Eastern Coalfields Ltd., and M.V.V. Satyanarayana v. U.O.I. Rep. by Dy. Chief Engineer (Cons.), S.C. Railway, Secunderabad and Ors. 1999 (2) Raj 173 (A.P.) in this regard.

13. It is also contended that the finding of the arbitrator that there is no outer limit of time u/s 8 of the Arbitration Act, 1940 is against the settled principles of limitation and hence against public policy of India. By referring to the decision in N. Balakrishnan Vs. M. Krishnamurthy, , it is contended that the question of limitation is a matter of public policy and is a good ground for setting aside the award u/s 34 of the Act. It has been held that the public policy with regard to prescription of limitation is enshrined in the maxim interest reipublicae up sit finis mum, that is, for the general welfare that a period be put to litigation.

14. Petitioner also relies on the decisions in U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others, and Dresser Rand S.A. Vs. BINDAL Agro Chem Ltd. and K.G. Khosla Compressors Ltd., to bring home the point that mere acquiescence to the jurisdiction of arbitrators by a party would not estop a party to have remedy to challenge the award, as acquiescence does not necessarily confer jurisdiction. Hence the arbitration proceedings can be challenged as being barred by limitation even if the petitioner itself appointed the arbitrator.

15. On the other hand, submission of the respondent is that none of the ingredients of Section 34 of the Act for setting aside of the award is made out in

the present petition. It is submitted that a decision on the issue of limitation is primarily a question of fact. The decision of the arbitrator is clearly a decision on the facts of this case. The arbitrator''s is the last word on facts and this Court not being an appellate forum vis-?-vis the arbitral award cannot go into the correctness or otherwise of the findings of fact. It is argued that the learned Arbitrator has rightly held that the letter dated 03.10.1994 constitutes a notice for invocation of arbitration. In any event, the letter dated 14.02.1995 was clearly a letter invoking the arbitration agreement. Consequently by virtue of Section 37(3) of the Arbitration Act, 1940, as also Section 43(2) of Arbitration and Conciliation Act, 1996, the arbitration proceedings stood commenced upon the issuance of the said notices. He refers to decisions in Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd., J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and Another, Utkal Commercial Corporation Vs. Central Coal Fields Ltd., Morena Mandal S.S.K. Ltd. Vs. New India Assurance Co. Ltd., to submit that the arbitration commences by service of notice and issuance of request for appointment of an arbitrator. He submits that the interpretation of these documents (dated 3.10.1994 and 14.2.1995) by the learned arbitrator cannot be said to be an implausible interpretation. The same cannot be interfered with in these proceedings merely because the Court may be of the view that another interpretation was equally possible.

16. The Counsel for the respondent further submits that at no point of time the respondent had given up their claim. The respondent was always making efforts to realize its dues from the petitioner company. By referring to the decision in Lata Construction and Others Vs. Dr. Rameshchandra Ramniklal Shah and Another, and Basic Shiksha Parishad and Another Vs. Smt. Sugna Devi and Others, it is argued that since the claim had not been given up by the respondent, there was a continuing cause of action running against the appellant and the claim was, therefore, not barred by limitation.

17. Alternatively, it is argued that even if one were to assume that the remedy to seek appointment of the arbitrator (which accrued to the respondent upon issuance of the notice dated 03.10.1994 and/or dated 14.02.1995) was barred by limitation, that does not mean that the respondents? right to get the claims/ disputes resolved through arbitration was also extinguished. Reliance is placed on the decisions in Rukmini Amma Saradamma Vs. Kallyani Sulochana and others, and Prem Singh and Others Vs. Birbal and Others, to submit that Limitation Act bars only the remedy but does not destroy the right to which the remedy relates.

18. Before going further, it would be pertinent here to analyze the reasoning of the arbitrator whereby he held that the claim was not barred by limitation. The arbitrator had arrived at his finding by examining the provisions of both: Arbitration Act, 1940 (the old Act) and the Arbitration and Conciliation Act, 1996 (the new Act). He was concerned with the claim which fell due during in the period February, 1992 to September, 1993. He returned the finding that the

arbitration proceeding stood commenced on 03.10.1994 by virtue of notice/letter dated 03.10.1994 of the respondent when a request for appointment of arbitration was made for the first time. He was of the view that the matter was continuously pursued by the respondent and was even receiving the attention of the petitioner company. In his view, Section 8 of the old Act is an enabling Section, which only prescribes minimum period of 15 days after service of notice for approaching the Court for appointment of an arbitrator and it lays down no outer (upper) limit. He further goes on to observe that the original notice is not invalidated and barred by limitation if the party chooses not to come to the Court, but to pursue the matter himself with the other party.

19. Both parties have filed their respective written submissions and have also relied on them. Having considered the rival submissions of the parties and in view of the facts disclosed above, I am of the view that there is no merit in the objections raised by the petitioner to the impugned award on the ground that the claims of the respondent were barred by limitation.

20. Section 37(3) of the old Act and Section 43(2) of the new Act substantially provide that an arbitration shall be deemed to have commenced on the date request for the disputes to be referred to arbitration is received by the respondent. In this case the learned Arbitrator has found, as a matter of fact, that the claims pertained to the period 1992-93. This is also evident from the aforesaid narration of facts which is also not disputed. The learned Arbitrator has further found that the respondent had issued two notices to invoke arbitration, the first on 03.10.1994 and the second on 14.02.1995. The limitation for invoking arbitration was three years from the date of accrual of the cause of action, which as aforesaid, accrued in the years 1992-93. Consequently, the invocation of arbitration on 3.10.94 or at the latest on 14.2.1995 was well within the period of limitation by virtue of Sections 37(3) of the old Act or Section 43(2) of the new Act. The arbitration was deemed to have commenced upon the receipt of the aforesaid notice(s) by the petitioner.

21. The finding of the learned arbitrator that there is no outer limitation of time for a party to avail of the remedy to get the arbitrator appointed may not be correct in view of the Supreme Court decisions in Utkal Commercial Corporation (supra) and J.C. Budhraja v. Orissa Mining Corporation Ltd. (supra). However, this erroneous finding of the learned arbitrator does not make any difference in the facts of this case for the reasons stated hereinafter.

22. No doubt, the Arbitrator was not appointed within the period of three years from the date of commencement of arbitration i.e. 3.10.1994/14.2.1995. Article 137 of the Limitation Act, 1963 applies to a proceeding u/s 8 of the old Act or Section 11 of the new Act. But in the present case, no application/petition was made to a competent Court by the respondent to seek appointment of an arbitrator. The appointment of the learned arbitrator Sh. D.K. Sangal was not made by the Court either in proceedings u/s 8 of the old Act or Section 11 of the new Act, but by the petitioner. Therefore, the question of the appointment being

made within limitation did not arise.

23. Consequently, in my view Article 137 of the Limitation Act is of no relevance in the facts of this case. At best, what could be said is that on the expiry of the period of three years from the date of invocation of arbitration i.e. 3.10.1994/14.2.1995, the remedy of the respondent to approach the Court to seek the appointment of the Arbitrator got barred by limitation. However, the respondents right to get its disputes with the petitioner resolved through arbitration did not get extinguished and the arbitration agreement, though not enforceable through a judicial process, continued to subsist.

Consequently, if an Arbitrator was appointed by the petitioner (even after the expiry of the period of limitation within which the respondent could enforce the arbitration agreement by approaching the Court u/s 8 of the old Act or Section 11 of the new Act), it cannot be said that the appointment of the arbitrator is illegal or that the claim of the respondent preferred before the Arbitrator, so appointed by the petitioner, was barred by limitation. I may refer to the following extract from J.C. Budhraja v. Orissa Mining Corporation Ltd. (supra) at this stage:

25. The learned Counsel for the appellant submitted that the limitation would begun to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4.6.1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation for a petition u/s 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced.

26. Section 37(3) of the Act provides that for the purpose of Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4.6.1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4.6.1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition u/s 8(2) of the Act. Insofar as a petition u/s 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition u/s 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, , Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, and Utkal Commercial Corporation Vs. Central Coal Fields Ltd., also make this position clear.

24. Had the petitioner not appointed the Arbitrator, the respondent would have

been remediless to seek the appointment of an Arbitrator through the process of the Court. However, that does not mean that the appointment of the Arbitrator by the petitioner itself after the commencement of the arbitration proceedings, which already stood commenced on 3.10.1994/14.02.1995, could be said to be barred by limitation. The date of filing of the claim before the Arbitrator so appointed, in my view, was of no relevance, just as the date of appointment of the Arbitrator (who was appointed by none other than the petitioner) was of no relevance.

25. The decisions in U.P. Rajkiya Nirman Nigam Ltd. (supra) as well as the decision in Dresser Rand S.A. (supra), in my view have no application in the facts of this case. In U.P. Rajkiya Nirman Nigam Ltd. (supra), the appellant without prejudice to its rights to question the existence and validity of the arbitration Clause as well as the agreement itself proceeded to nominate an Arbitrator. The Court held that in the absence of a binding contract, by merely nominating an Arbitrator the appellant would not be estopped from maintaining an application u/s 33 of the old Act, as acquiescence does not confer jurisdiction. However, in the present case there is hardly any issue raised with regard to the existence of arbitration agreement contained in the petitioner''s own circular, which is in writing, and on the basis of which both parties proceeded to deal with the matter before Shri D.K. Sangal as an arbitration proceeding. As aforesaid, since the underlying arbitration agreement was not the subject matter of dispute, the nomination of the Arbitrator by the petitioner had the effect of fulfillment of the obligation to take the disputes to arbitration, even though the period within which the arbitration agreement could have been legally enforced had already expired. An arbitrator appointed belatedly by the appointing authority does not lose his authority as an Arbitrator on the ground of delay in his appointment and once appointed, he gets vested with all the powers and authority of an Arbitrator. Similarly, in Dresser Rand S.A. (supra), the issue was with regard to the existence of the arbitration agreement itself and this case did not deal with a fact situation like in the present case. Consequently, the same in my view has no application in the present case. For the aforesaid reasons, I find no merit in this petition and dismiss the same leaving the parties to bear their respective costs.