
(1983) 03 DEL CK 0007
In the Delhi High Court
Case No : Suit No. 192-A of 1981

Jai Chand Bhasin

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 04-03-1983

Acts Referred:

Citation : AIR 1983 Delhi 508 : (1983) 5 DRJ 97 : (1983) 2 ILR Delhi 599 : (1983) RLR 426

Hon'ble Judges : Rajinder Sachar, J; D.R. Khanna, J

Bench : Division Bench

Advocate : P.N. Kumar, for the Appellant; D.P. Wadhwa and Atul Kumar, for the Respondent

Judgement

Sachar, J.—This matter has been placed before us on a reference made by the learned Single Judge, because it was pleaded before him that there was a conflict between judgments of learned two Single Judges of this Court namely in 1980 RLR 313 (Vilayatiram Mital v. Union of India) decided by Dalip Kapur, J., and 1982 RLR 12 (Ram Nath Mehra & Sorts v. Union of India), decided by Avadh Behari Rohatgi, J. On the point as to who is to decide whether if the demand for arbitration is not made within a stated period, the claim will be deemed to have been waived Kapur, J. has held that it is for the arbitrator. Avadh Behari, J. has held to the contrary, and says it is for the court, before making a reference u/s 20 of the Arbitration Act.

2. The applicant and the Union of India entered into a contract for the construction of a temporary accommodation for Kendriya Vidyalaya at Faridabad. The terms were reproduced in the agreement. Clause 25 of the agreement provides that except where otherwise as provides in the contract all questions and disputes relating to the meaning of the specifications, designs or otherwise concerning the works or the failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer,

Central P.W D., in charge of the work at the time of dispute. It is also a term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Govt. that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims (S.O. No. 209). The arbitrator(s) may from time to time with the consent of the parties enlarge the time for making and publishing the award.

3. On 4.3.1981, the petitioner/applicant moved an application u/s 20 read with Section 8 of the Arbitration Act praying that disputes having arisen between the parties, a reference was sought for arbitration, but the Union of India refused to appoint an arbitrator on the ground that the claim is time barred in accordance with the provisions of Clause 25 of the agreement (as mentioned above). In reply the respondent Union of India amongst others, took the objection that as per Clause 25 as the demand for arbitration that as per Clause 25 as the demand for arbitration was made beyond a period of 90 days of receiving the intimation from the government that the bill is ready for payment the claim of the contractor will be deemed to have been waived and the government shall be discharged and released of all liability under the contract in respect of these claims. Hence it was pleaded there can be no reference to the arbitration and the application u/s 20 of the Act be dismissed.

4. Before the learned Single Judge, it was sought to be urged by the Union of India that the Court itself should decide whether the claim made by the applicant was barred by time and if it so holds the question of referring the matter to the arbitration will not arise, and reliance was placed on judgment by Avadh Behari, J. (supra). The claimant on the other hand relied on the judgment of Dalip, Kapur, J. who has held that this matter has to be decided by the arbitrator. It is to resolve this conflict that the matter has been placed before a larger Bench.

5. Section 20 of the Arbitration Act lays down that where any persons have entered into an arbitration agreement before institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies they or any of them instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court, and where no sufficient cause is shown the Court shall order the agreement to be filed and shall make an order of reference to arbitrator.

6. Now there is no dispute that an agreement has been entered into between the parties. Mr. D.P. Wadhwa, the learned counsel for the Union of India, does not even dispute that Clause 25 does provide for referring the matter to arbitrator in case disputes arise between the parties. He also admits that the disputes, claims raised by the petitioner arise out of and relate to the contract between the parties. The only plea that he puts forth is that as the demand for arbitration in

respect of claim was not made within the time mentioned in Clause 25, the claim must be deemed to have been waived, the Court must decide this issue first because according to him, the Court has no jurisdiction to refer the matter to the arbitrator without first deciding whether the claims which the applicant puts forth are in point of fact within time or not. We cannot agree. This argument really invites the Court to substitute itself for the arbitrator who alone in terms of the arbitration agreement is to give his decision in matters arising out of contract. If Reference to the relevant part of Clause 25 only says that if the demand for arbitration is not made within stated time, the claim of the contractor will be deemed to have been waived. This part of Clause 25 does not make the agreement between the parties void, nor does it in any manner touch the agreement to the parties to refer their disputes arising out of the contract to the arbitrator. This part of Clause 25 really is only one of defenses to any particular claim being raised by the applicant, and the Union may successfully resist it subject to its proving the conditions laid down in the Sub-clause. But the said sub clause does not make the existing arbitration agreement non-existent. This plea relates to the merit of the claim-whether it be on the grounds of time or on the merits-all of them necessarily must be decided by the arbitrator. This particular plea cannot be invoked at the Threshold as a shield against the matter being referred to the arbitrator u/s 20 of the Act. Reference to arbitration can only be avoided if the plea was that there was no arbitration agreement, but no such plea is even suggested. The provision in Clause 25 that claim will be deemed to have been waived has no relevance in these proceedings u/s 20 of the Act. The question whether the claim has become time barred is for the arbitrator to decide, and "the question whether after the matter goes before arbitration it would be held that the matter had become time barred or had been abandoned is not at this stage to be decided". Punam Chand Jain Vs. The General Assurance Society Ltd. and Another, , where similar plea was rejected and reference made to arbitration as per agreement). Dalip Kapur, J. in Vilayati Ram case (supra) in our view correctly interpreted the above said clause when he held that such a provision does not say that such a claim will not be adjudicated upon by the arbitrator. It will be for the arbitrator to find out whether the Government has been discharged and released from liability or whether the claim has been waived. These are questions of fact. These are not to be determined by the Court. At this stage, we are only to see that there are disputes and those disputes are to be referred to arbitration and the arbitrator can decide those questions. We may in this connection mention that Kapur, J. though not deciding the matter, made some observations which may seem to suggest that such a clause may appear to be against public policy, and against natural justice being one side. We would like to clarify that we do not accept the correctness of these observations. The learned Judge was fully aware, and did notice that similar clause is to be found in insurance policies, and has been upheld by all Courts of India including the Supreme Court. Reference may be made to Pearl Insurance Co. Vs. Atma Ram, , and Union of India Vs. Rishi Raj and Co., Delhi, , where it has been held that such a clause is not void. Reference

may also be made to Sterling General Insurance Co. Ltd. Vs. Planters Airways Pvt. Ltd., wherein clause 12 of the Insurance policy provided that if a company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within three calendar months from the date of such disclaimer have been preferred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed have been abandoned and shall not thereafter be recoverable hereunder, came up for consideration. No arguments were raised that a clause void in construction contracts, when it is valid in insurance policies. The considerations of urgency, and the difficulty of obtaining evidence if long period was allowed to clause, apply with equal vigour to both type of contract. We cannot hold such a clause to be void or bad.

7. Avadh Behari, J in Ram Nath Mehra (supra), however, has held to the contrary, namely, that it is for the Court (and not for arbitrator) to decide whether the demand for arbitration is barred and has been made beyond the time limit fixed by the contract. In this he sought assistance from Section 37(4) of the Act, which lays down that where the terms of an agreement to refer future differences to arbitration provide that any claim to which the agreement applies shall be barred unless notice to appoint an arbitrator is givenwithin a time fixed by the agreement, and a differences arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper. Avadh Behari, J. reasoned that as the power u/s 37(4) can only be exercised by the Court, it necessary follows that it is for the Court and not the arbitrator to decide that the demand for arbitration is within time. Another reason in support of this finding was that as the arbitrator has no power to extend time, leaving the matter for his determination will leave the claimant without any remedy, even if it is a case of undue hardship. With great respect to the learned Judge, we feel that he has mixed up the question of extending time if a demand for arbitration is made beyond time, (which is the function of the Court and the preliminary question whether in fact in terms of the contract demand for arbitration is made beyond 90 days (which as it concerns a term of contract must need be decided by the arbitrator). It is no doubt true that Section 37(4) empowers the court only to extend the time in given circumstances of the case. But this provision need only be invoked when a claimant accepts that he has not moved for arbitration within the specified time. If for example in the present case, the applicant had accepted that notice for appointing an arbitrator had expired, and was seeking extension of time, he would move the necessary application u/s 37(4) of the Act. Bat the applicant says he is within time and has moved u/s 20 for appointment of arbitrator in terms of the arbitration agreement. In resisting such applications, the Union admits the existence of arbitration agreement, and also that claims arise out of contract. Its plea only is that the demand for arbitration relates to a claim made beyond the period of 90 days mentioned in the clause. But this plea

must be investigated. In terms of arbitration agreement all questions of dispute must be referred to arbitration. Existence of an arbitration agreement, of course must be decided by the Court. Similarly, if extension of time is sought as per Section 37(4), it is for the Court. But the Clause 25 does not frustrate the arbitration agreement-all it says is that in such a case the claim of the contractor will be deemed to have been waived or abandoned. It is significant to note, however that arbitration agreement continues to subsist. In such a situation the reason why claim of a contractor may not be allowed J, whether because of time bar or on merits or on any other reason are all within the jurisdiction of the arbitrator to whom the parties have agreed to refer their disputes. In such a case Section 37(4) has no applicability. We may note that Luthra, J. in Suit No. 103-A of 1980, Shri Swaran Singh v. Union of India & another, decided on 31-8-1981, and Bhim Sain v. Union of India 1982 RLR 20 has taken the same view as that of Kapur J. These authorities have our respectful approval. The decision of Avadh Behari Rohtagi J. (supra) has to be held to be wrongly decided, and is hereby overruled. We may mention that in Union of India Vs. Rishi Raj and Co., Delhi, , some observations are made by Ansari, J. which may seem to suggest that the Court can decide whether a claim of the contractor is within time and then to decide whether to refer to arbitration. For the reasons mentioned already, this part of observation cannot be accepted as laying down correct law. In our view then there is no admission by the applicant that demand for arbitration in respect of any claim is beyond 99 days the question of invoking Section 37(4) is premature and does not arise. In all cases arising u/s 37(4) of the Act including Sterling General Insurance Co. Ltd. (supra), the Court was moved because the applicant himself accepted that time had run out and he was seeking extension.

8. In a way provisions of Section 37(4) of the Act bear close resemblance to Section 28 of the Arbitration Act which empowers the Court that it may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award. Just as court has power u/s 28 to enlarge the time for making the award, similarly, Section 37(4) empowers the Court to extend the time for giving notice for appointing an arbitrator in respect of any claim beyond the period of 90 days, in stated circumstances of undue hardship. Thus Section 28 of the Act comes into play when the stage reaches of making the award. Section 37(4) may, however, be invoked even before moving the court for appointing an arbitrator. This power of the Court u/s 37(4) must be distinguished from the power of the Court u/s 20 of the Act, which deals with a different situation. It is this refusal to differentiate between the two situations that has led, and we say so with the greatest respect, into the error in which Avadh Behari, J. fell, in holding that it is for the Court to decide if with respect to any claim demand for arbitration was made in time. It is correct that Section 37(4) does not permit the arbitrator to extend the time within which notice for appointing an arbitrator should have been given. But at this stage of an application u/s 20 of the Act when the applicant maintains that his claim is within time invocation of Section

37(4) of the Act is not attracted. The question whether claim is within time or not, and which of many claims is within time, are all matters of disputed questions of fact and evidence, and are within the purview of arbitration. "Whether a particular claim is untenable by the arbitrator on the ground that notice of the claim has not been given and whether the same is time barred or not, are all matters for examination by the arbitrator and not by the court while exercising its jurisdiction u/s 8. The question is to be gone into by the arbitrator. The court is only to examine if there is an arbitration agreement at all. The existence or the validity of the claims and disputes are matters within the jurisdiction of the arbitrator. "(See Fertiliser Corporation of India Ltd. Vs. Ravi Kumar Ohri,). It should also be emphasised that the clause 25 is very widely worded inasmuch as it provides that "all questions and disputeswhatsoever, in any way, arising of or relating to the contract shall be referred to the arbitration, are sufficiently wide to include the question of disclaimer and the rights of the parties to make a reference to arbitration These wide words have been interpreted to cover the point whether in the circumstances of this case the contractor must be deemed to have abandoned his claim (See Ruby General Insurance Co. Ltd. v. Peare Lal Kumar and another AIR 1951 P&H 440. It is also well settled that in an application filed u/s 20 of the Act, the Court is not concerned in dealing with that application to deal with the question whether the claim of a party to the arbitration agreement is barred by the law of limitation : that question falls within the province of the arbitrator to the whom the dispute is referred. Wazirchand Mahajan and Another Vs. Union of India (UOI), .

9. As a result we would uphold the view taken by Kapur, J. and Luthra, J. in Shri Sawaran Singh (supra) and Bhim Sain (supra) respectively. The contrary view taken by Avadh Behari, J. see text does not lay correct law and must be held to have been wrongly decided. We would, Therefore, answer the question by holding that it is for the arbitrator to decide whether in fact the applicant had or had not made a demand for arbitration within 90 days of receiving the intimation from the government that the bill is ready for payment, and in the circumstances whether the claim should be deemed to have been waived and the government is discharged and released from its liability. These are not matters which are within the purview of the Court when dealing with the application like the present u/s 20 of the Act. There is no dispute that there is arbitration clause. We would, Therefore, in the circumstances order that the agreement be filed in the Court and the matter to be referred to the arbitration in terms of the arbitration agreement.

10. The suit stands disposed of as above.

No costs.