

(2008) 12 DEL CK 0183

In the Delhi High Court

Case No : Arbitration Petition No. 337 of 2005 and I.As No's. 10472 and 14156 of 2008

Mr. Balram Sehgal

APPELLANT

Vs

Mr. Vinod Kumar Sehgal

RESPONDENT

Date of Decision : 04-12-2008

Acts Referred:

Arbitration Act, 1940 — Section 20
Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 8
Contract Act, 1872 — Section 18
Limitation Act, 1963 — Article 137, 17, 29(2), 5

Citation : (2009) 156 DLT 538

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : Narinder Singh, for the Appellant; B.D. Sharma and Manish Sharma, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

Hima Kohli, J.—The present petition is filed by the petitioner u/s 11 read with Section 8 of the Arbitration and Conciliation Act, 1996 (in short the "Act"), praying inter alia for appointment of the named Arbitrator as referred to in the Reference Deed dated 30.4.1991, to adjudicate the disputes between the parties.

2. Briefly stated, the facts of the case are that the dispute, subject matter of the present petition, is between the petitioner, son of late Sh. Baldev Raj Sehgal and the respondent No. 1, his brother. Respondents No. 2 and 3 are the sisters of the petitioner and the respondent No. 1. Late Sh. Baldev Raj Sehgal, father of the parties, purchased a residential premises on 31.8.1963, bearing plot No. 33, Ashoka Park Extn., East Punjabi Bagh, Rohtak Road, Delhi, measuring 155.8 sq. yds.

3. The father of the parties expired on 17.2.1974, leaving behind the petitioner, the respondents and their mother, late Smt. Padma Sehgal as the legal heirs. It

is the case of the petitioner that the plot in question was a vacant piece of land, on which construction was carried out by the contribution of all the legal heirs of the deceased. During the lifetime of the mother, all the parties executed an Agreement dated 30.4.1991, duly witnessed by the respondents No. 2 and 3 and a Reference Deed of the same date, duly executed by the petitioner and the respondent No. 1, to which their mother and the respondents No. 2 and 3 were the witnesses. The present petition is based on the Reference Deed dated 30.4.1991.

4. In the Reference Deed, it was recorded that the property in question was purchased by the father of the parties, i.e. late Sh. Baldev Raj Sehgal and the respondent No. 1 being a government servant, wanted to take loan from the Government, hence all the legal heirs of the deceased executed a relinquishment deed in favour of respondent No. 1. However, as the petitioner claimed that he had equally spent on the super-structure of the aforesaid property and wanted to partition the property being a joint owner, certain disputes and differences arose between the petitioner and the respondent No. 1 regarding the aforesaid property and other family affairs.

5. It was agreed by the parties that to settle their disputes amicably and avoid litigation, an Arbitrator should be appointed. Accordingly, in the Reference Deed dated 30.4.1991, one Sh. Jagat Bir Vohra was appointed as a sole Arbitrator to decide all the disputes regarding the property No. 33, Ashoka Park, Extn., East Punjabi Bagh, Rohtak Road, Delhi, between the petitioner and the respondent No. 1 and give an award within three months or within such time as may be mutually extended by both the parties.

6. The present petition has been filed by the petitioner on 04.6.2005, seeking directions for appointment of the named Arbitrator as contained in the Reference Deed, for adjudicating the disputes between the parties, which disputes, counsel for the petitioner states are still pending.

7. The present petition is mainly assailed by the counsel for the respondent No. 1 on the ground that the petition is barred by limitation and is therefore liable to be rejected. A perusal of the para 19 of the petition shows that, as per the petitioner, the cause of action had arisen in favour of the petitioner when the Agreement dated 30.4.1991 was executed at Delhi and the respondent No. 1 started harassing the petitioner after the death of their mother and did not take any steps to partition the property. Thereafter, the cause of action is stated to have arisen on 20.1.2005, when the petitioner served a legal notice upon the respondent No. 1 to settle the matter amicably or to refer the disputes to the named Arbitrator within 30 days from the date of receiving the legal notice.

8. Counsel for the petitioner states that the cause of action has to be examined in the light of the fact that the disputes may have arisen on 30.4.1991 when the Agreement and Reference Deed were executed by the parties, but the right to apply for arbitration continued to accrue even thereafter as during the lifetime of

the mother, the petitioner did not approach the Arbitrator, at the request of his mother. He states that the mother of the parties expired on 05.8.1996, and after her death, the petitioner was assured by the respondent No. 1 that he shall take steps to partition the suit property and hence, the petitioner did not take further steps in the matter. Thereafter, the petitioner is stated to have met with an accident on 23.2.2002, due to which, he was confined to bed for 2-3 years. It is pertinent to note that the petitioner has failed to substantiate the said submission by enclosing any relevant documents, including his medical certificates etc. After 23.2.2002, counsel for the petitioner refers to the next relevant date as 20.1.2005, on which date, a legal notice was issued by the petitioner to the respondent No. 1 and upon failure of the respondent No. 1 to act, the petitioner preferred the present petition on 31.5.2005.

9. Counsel for the petitioner seeks to rely on the provisions of Section 18 of the Contract Act 1872, which defines the term, "Misrepresentation" and Section 19, which deals with "Voidability of agreements without free consent". He also refers to Section 17 of the Limitation Act, 1963, to contend that the period of limitation can be extended, in cases of fraud or mistake. He further submits that in view of the provisions of Section 43 of the "Act", the Limitation Act applies to arbitrations as it applies to the proceedings in Court. Also, u/s 43(3) of the "Act", in cases of undue hardship, the Court can extend the time where the time fixed by an agreement to commence arbitration proceedings has expired. In support of the aforesaid submissions, counsel for the petitioner relies on the following judgments:

- (i) Ashok Leyland Ltd. Madras v. The Union of India and Anr. AIR 1980 Delhi 140;
- (ii) New Delhi Municipal Committee v. Tirath Ram Ahuja AIR 1980 Delhi 185;
- (iii) Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority,
- (iv) Pallav Sheth Vs. Custodian and Others,
- (v) Gulbarga University v. Mallikarjun S. Kodagali and Anr. (2008) 7 SCC 784;

10. On the other hand, counsel for respondent No. 1 submits that the present petition is barred by limitation as no action whatsoever was taken by either of the parties to approach the Arbitrator, in terms of the Reference Deed and nor was the time mutually extended for seeking an award.

11. For the purpose of examining the right of the petitioner to apply u/s 11(6) of the "Act" for calculating the period of limitation, it is necessary to establish, in the first instance, the relevant date when the right to apply accrued in favour of the petitioner. In the case of State of Orissa and another etc. Vs. Sri Damodar Das, , it was held that the right to apply accrues u/s 20 of the Arbitration Act, 1940, as soon as a dispute or difference arises on unequivocal denial of claim by one party to the other party, as a result of which, the claimant acquires a right to refer the dispute to arbitration. When a difference arises or disputes arise between the parties, is a question of fact and not a question of law and has to be

determined in each case having regard to the facts of the case. S. Rajan Vs. State of Kerala and another,

12. Section 43 of the `Act" provides that the provisions of Limitation Act would apply to the arbitration in the same manner as they apply to claims before the Court. (Refer Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, . Provisions of the Limitation Act, 1963 show that Article 137 under Part II of the Schedule, which is a residuary Article, is applicable in respect of "other applications". The said Article stipulates the period of limitation, in respect of any other application, for which no period of limitation is provided elsewhere in the schedule, to be three years from the date when the right to apply accrues. In other words, the period of three years prescribed under Article 137 starts from the date when the right to apply for arbitration accrues. In the present case, the petitioner admits that the right to apply accrued within three years from the date when the Reference Deed and Agreement dated 30.4.1991 were executed between the parties. In other words, the said period of three years started w.e.f. 01.5.1991 and expired on 30.4.1994. Counsel for the petitioner, however, contends that the right to apply continued to accrue in favour of the petitioner right from 30.4.1991 till the date of the filing of the present petition. For establishing the said fact, he has been called upon to show from the record, any material including correspondence/communications of any nature with respondent No. 1 to establish that the parties intended to arrive at an amicable settlement with regard to the partition of the immovable property in question. Apart from the bald averments made in the petition, nothing has been placed on the record to substantiate the said submission. Therefore, this contention of the petitioner appears to be devoid of merits and cannot be accepted.

13. It is not even a case where the petitioner says that no disputes and differences had arisen between the parties prior to institution of the petition, as reference has been made in the Deed itself to the fact that the disputes and differences had arisen between the parties regarding the property and other family affairs. Hence, it is not as if either of the parties could not have moved the Court after 30.4.1991. Assuming that disputes and differences had arisen between the parties thereafter and parties could not resolve their interse disputes, and the differences that had arisen under the Deed of Reference remained unresolved, it was open to either of the parties to apply the Court to get their differences adjudicated upon. The same was also not done by the petitioner for about 15 years.

14. Reliance placed by the counsel for the petitioner on the legal notice dated 20.1.2005 to state that the said notice being the last correspondence between the parties, the period of limitation for establishing the right to apply for arbitration commences from the said date, is misconceived, as the petitioner has not been able to establish any correspondence/communication whatsoever between him and respondent No. 1 in respect of the dispute, or the attempt to

resolve it. Reference made by the counsel for the petitioner to the judgment in the case of Ashok Leyland (supra) is of no assistance as in the aforesaid judgment, the Court was dealing with issue of applicability of Section 17 of the Arbitration Act, 1940 and its effect on Section 5 of Limitation Act, 1963 for the purposes of condonation of delay. In the present case, it is asserted by the counsel for the petitioner that the petition is well within time and therefore, no application has been filed for seeking condonation of delay.

15. In the case of M/s Tirath Ram (supra), the provisions of Article 137 have been mentioned for presenting a petition u/s 20 of the Arbitration Act, 1940 for the purposes of calculating the period of limitation. Counsel for the petitioner has relied on the case of Major (Retd.) Inder Singh Rekhi (supra) to state the same fact that Article 137 of the Limitation Act applies to the Arbitration Act, 1940 for the purposes of calculating the period of limitation. There is no dispute in this regard, as admittedly, Article 137 is a residuary article in the schedule and is applicable to petitions of such a nature. In the case of Pallav Sheth (supra), the Supreme Court observed that the limitation period of one year for initiating the contempt proceedings would be attracted by virtue of Section 29(2) of the Limitation Act and would commence from the date on which the commission of contempt came to the knowledge of a party. In the aforesaid context, the Supreme Court observed that in case the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of the other side, the period of limitation shall not begin to run until the fraud is discovered. It is not understood as to how this judgment can take the case of the petitioner any further as the petitioner has failed to establish any fraud or misrepresentation on the part of the respondent No. 1, except for making bald allegations to the said effect in the course of arguments. There is no reference to any fraud or misrepresentation by the respondent No. 1 in the petition. The said judgment has no application to the facts of the present case.

16. As already noted above, the facts of each case have to be examined in their own right to establish the accrual of the date when right to apply for arbitration arises. As this stage, counsel for the petitioner states that this Court ought to exercise its powers u/s 43(3) of the Act to extend the time for commencing the arbitral proceedings between the parties. Facts and circumstances of the present case do not establish that the petitioner took any steps, much less some steps to exercise his rights under the Deed of Reference. On the contrary, it is apparent that the petitioner chose to sleep over his rights. There are gaping holes in the narration of facts by the petitioner which he has failed to plug. The same is apparent from the fact that while the Deed of Reference between the parties was executed on 30.4.1991, the petitioner in his narrative jumps straightaway to the year 1996, when the mother of the petitioner expired on 05.8.1996, without furnishing any justifiable reason for the time lag. Even, thereafter, there is no explanation as to what correspondence, if any, was exchanged between the parties in respect of the pending family disputes. Then the petitioner seeks to take benefit of his accident in the year 2002-2003, to explain the inaction on his

part. As already noted above, the petitioner has not given any believable explanation for the complete silence maintained by him from in the year 1996 to the year 2002. No documents have been placed on record by the petitioner to show that he was confined to bed after the accident he met, for a period of 2-3 years. From the year 2002, the petitioner comes straight to the date, 20.1.2005 when a legal notice was issued by the petitioner to the respondent. In view of the above by no stretch of imagination can it be said that the present case was kept alive by the parties or any correspondence was exchanged between them to resolve their interse disputes. Had the petitioner been able to establish that negotiations were taking place between the parties to resolve their family dispute, the Court would have taken a different view. But in the present facts and circumstances, in the absence of any such communication/correspondence, it cannot be stated that the period of limitation for filing a petition u/s 11(6) of the Act, invoking the arbitration can be taken as the year in which a legal notice was issued by the petitioner to the respondent [Refer: Sh. Rajesh Kumar Garg Vs. MCD and Another, The right to apply for arbitration arose in the year 1991 itself, whereafter the petitioner has miserably failed to establish that any steps were taken by him, till the year 2005 for seeking arbitration.

17. In the aforesaid circumstances, it is held that the present petition is barred by limitation and is, therefore, rejected along with the pending applications. Needless to state that the observations made hereinabove are only in the context of prayer made by the petitioner for invoking the Reference Deed for appointment of an Arbitrator and shall not preclude the petitioner from exercising his civil remedies as may be available to him in law.