

(2000) 08 DEL CK 0074
In the Delhi High Court
Case No : Suit No. 2343-A/98

M/s. Parmeshri Dass and Sons

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-08-2000

Acts Referred:

Arbitration Act, 1940 — Section 20
Limitation Act, 1963 — Section 3

Citation : (2000) 56 DRJ 680

Hon'ble Judges : Surinder Kumar Aggarwal, J

Bench : Single Bench

Advocate : Mr. D.P. Sharma and Mr. Sandeep Sharma, for the Appellant; Mr. Ashok Bhasin and Mr. Atul Batra, for the Respondent

Judgement

S.K. Agarwal, J.—This petition u/s 20 of the Arbitration Act, 1940 (for short the Act) seeking directions to the respondents to file the arbitration agreement in the court and for reference of the disputes to the arbitrator to be appointed as per terms of the contract, raises the question whether the petition was filed within three years from the date when the cause of arbitration arose, the limitation prescribed under Article 137 of the Limitation Act, 1963?

2. The petitioner filed the above petition alleging therein that it is a registered partnership firm respondents invited tenders for execution of the work named "Provision of MT Complex & Misc Accn for RRH at Delhi Cantt". The petitioner's tender was accepted. The contract documents were duly signed. The work was to commence on 17th December, 1991. Stipulated date of completion was 16th June, 1993 (18 months); General conditions of the contract provided for settlement of all claims and disputes between the parties arising out of the contract by way of arbitration under clause 70 contract. The petitioner mobilised resources and material, and completed the work despite several hindrances on 31st January, 1994; on 1st February, 1994 respondents were requested for issuance of completion certificate and for preparation of final bill. The petitioner

made claim for certain deviations etc. Respondents pointed out certain defects in the work which were removed. However, in final bill the amounts demanded by the respondents were not included. The petitioner informed the "Chief Engineer" that payments for the claims made by him were not included in the final bill and same was signed by him under protest. On 15th February, 1995 the petitioner addressed a letter to the "Engineer in Chief", Army Headquarters, Kashmir House, New Delhi requesting for appointment of an arbitrator in terms of the contract. In response vide letter dated 1.3.95 Senior Surveyor on behalf of Engineer in Chief asked some information, which was also furnished by the petitioner on 25th March, 1995. Ultimately on 1st March, 1996 Chief Engineer informed the petitioner that his claim stood waived and extinguished. The petitioner claims that cause of arbitration commenced from this date.

3. Respondents filed the reply raising preliminary objection pleading that the petition is barred by limitation. On 25th July, 2000, it was clarified by the respondents that without prejudice to their rights they do not intend to file reply on merits to the petition at this stage.

4. On the basis of the pleadings of the parties and the documents filed by them, following undisputed facts emerge :

(i) In 1991-92 petitioner was allotted work for construction of MT Complex at RRH, Delhi Cantt, which was completed and in 1994 final Bill was prepared. Petitioner sought extra payment for certain deviations and also raised other claims. Final bill was signed by the petitioner under protest raising certain claims, but no protest was recorded at the time of receipt of payment.

(ii) On 18th February, 1995 petitioner wrote to the Engineer in Chief, Army Headquarters, Kashmir House, New Delhi requesting appointment of the sole arbitrator as per clause 70 of the contract. Copies of the letter were sent to (a) Chief Engineer, Delhi Zone, Delhi, (b) Chief Works Engineer (CWE), RRH and (c) Garrison Engineer, P2, RRH, Delhi Cantt, Delhi.

(iii) Senior Surveyor for Engineer in Chief vide letter dated 1st March, 1995 sought some further information from the petitioner. Copy of this letter was sent to the Chief Engineer. The petitioner sent required information on 25th, March, 1995 to the office of Engineer in Chief with copies to Chief Engineer, CWE and Garrison Engineer P2.

(iv) Garrison Engineer, P2, on 26th June, 1995 sent reply repudiating the claims of the petitioner stating that in case the department is dragged in the arbitration, the petitioner would have to bear the costs. Copy of this letter was forwarded to The Chief Engineer and CWE.

(v) The Chief Engineer, Delhi Zone, Delhi on 1st March, 1996 informed the petitioner that the claims raised by him were in violation of the provisions of the contract, that while receiving the payment he had not raised any claim; that claims were waived and extinguished and that the recoveries were to be made

from the petitioner for bad workmanship and defective work in terms of the contract.

(vi) On 22nd October, 1998 petitioner filed the above petition praying for directions to the respondents to file the arbitration agreement and for reference of the disputes to the appointed arbitrator in terms of clause 70 of the general conditions of the contract.

5. In the backdrop of the above facts the issue required to be determined is whether the period of limitation of three years would commence from 18th February, 1995 when the petitioner wrote letter to Engineer in chief requesting arbitration or from 26th June, 1995 when Garrison Engineer sent paradise reply to the claims of the petitioner or from 1st March, 1996 when Chief Engineer denied the claims of the petitioner stating that the claims were extinguished and waived.

6. I have heard learned counsel for the parties and have been taken through the record.

7. Learned counsel for the respondent argued that Section 3 of the Limitation Act, 1963, is mandatory. The court is bound to consider the question of limitation, even when the same is not pleaded in the petition. The petition u/s 20 of the Act seeking reference of the disputes must be filed within the period of limitation prescribed under Article 137 of the Limitation Act, 1963, which is three years from the date when the right to apply accrues. There is no dispute about these principles of law.

8. Learned counsel for the respondent then argued that the period of limitation would have commenced from the date on which cause of action would have arisen, had there been no arbitration clause: and that in this that the period of limitation commenced from 18.2.1995 the date when the petitioner issued notice to Engineer in Chief demanding arbitration. In the alternative, it was argued that the period at best would commence from 26.6.95 when their Garrison Engineer, with reference to the letter of petitioner sent paradise reply to him denying his claims, informing him that if the department is dragged in arbitration proceedings, he would be responsible for the costs. Reliance was placed on the following Supreme Court decisions:

(i) Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, wherein it was held:

"The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.

Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought

after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."

(ii) In *State of Orissa Vs. Damodar Dass* AIR 1997 SC 942 it was held:

"Russell on Arbitration by Anthony Walton (19th Edn.) at PP. 45 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

"Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause".

(iii) In *Steel Authority of India Limited Vs. J.C. Budharaja*, Government and Mining Contractor, the Supreme Court noticed its earlier decisions and applied the above principles.

9. Learned counsel for the respondent argued the cause of arbitration arose only from the date when the Chief Engineer repudiated his claims and not earlier, and placed reliance on the Supreme Court decision in *Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority*, wherein it was held:

"It is true that the 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 the claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator u/s 8 or a reference u/s 20 of the Act. See *Law of Arbitration* by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case".

10. It is now well settled that the terms cause of action can be equated to right to sue. Speaking broadly it means whole bundle of material facts which the petitioner must prove in order to succeed. In other words all the essential facts without proof of which the petitioner must fail would constitute cause of action. Therefore, it must include some act by the defendant in the absence of which no cause of action can possibly accrue. And as noticed above whether in a particular case cause of action has arisen or not has to be determined on the facts and circumstances of that case.

11. In this case vide letter dated 26th June, 1995 "Garrison Engineer" sent reply to the petitioner's letter denying the claims. This reply was forwarded to the Chief Engineer and Senior Surveyor. The letter sent by Garrison Engineer was neither for and on behalf of the Engineer in Chief nor it appears to convey any specific decision of the department. The factum of sending copy of reply to the "Chief Engineer" shows that the final decision was left to the Chief Engineer. Thus it would have been quite legitimate and natural for the petitioner to presume that the matter was being considered and at senior level and that decision was yet to be taken by the department on his letter of request for appointment of the arbitrator. Under these circumstances, the petitioner cannot be expected to rush to the court to seek the appointment of the arbitrator. Therefore, period of limitation cannot be deemed to have commenced either from 18th February, 1995, the date on which petitioner demanded arbitration or from 26th June, 1995 the date on which Garrison Engineer sent reply to the petitioner.

12. The Chief Engineer in his letter dated 1.3.1996 to the petitioner, repudiated the claims stating that the claims raised by the petitioner were in violation of the provisions of the contract; that while receiving the payment he had not made any claim; that the final bill was signed by him without reservation; that claims were waived and extinguished and that the recoveries were to be made from the petitioner for bad workmanship and defective work in terms of the contract. As observed by the Supreme Court in *Maj (Retd.) Inder Singh Rekhi case (Supra)*, mere failure or inaction to pay does not lead to inference of the existence of the dispute, it entails positive element and assertion of denying the request not merely inaction to accede to a claim or request. Thus, under the facts and circumstance of the case, cause of arbitration accrued from 1st June, 1996 when the Chief Engineer of the respondent repudiated the claims of the petitioners, not earlier, as till then the matter continued to be under consideration of the department.

13. In *Steel Authority of India Ltd's case (supra)* facts were different, in that the Contractor had given notice demanding amount in 1979 and there was no response from the Government and the amount was not paid. In between the contract it was renewed on fresh terms under these circumstances it was held that the cause of action for recovery of the amount accrued from the date of the notice, and that the contractor cannot wait indefinitely. He is required to take

action within the period of limitation. In this case, however, as noticed above letter dated 18th February, 1995 of the petitioner to Engineer inChief continued to be under consideration of the respondents uptill 1.6.1996 on which date the cause of arbitration accrued in favor of the petitioner. The objections raised by the respondents are thus declined.

14. In view of the above, petition is allowed. It is directed that the disputes raised be referred to the arbitrator to be appointed by the respondents in terms of the contract, without prejudice to the rights of the respondents to oppose such claims on merits or raise any counter claims.

15. The petition is accordingly disposed of with no order as to costs.