

(1979) 12 DEL CK 0033

In the Delhi High Court

New Delhi Municipal Committee

APPELLANT

Vs

Tirath Ram Ahuja (P.) Ltd. and Another

RESPONDENT

Date of Decision : 19-12-1979

Acts Referred:

Citation : (1979) 12 DEL CK 0033

Hon'ble Judges : G.R. Luthra, J

Bench : Single Bench

Advocate : B.J. Nayyar, for the Appellant; M.S. Chadha, for the Respondent

Final Decision : Dismissed

Judgement

G.R. Luthra, J.—The present petition is u/s 20 of the Arbitration Act for appointment of an arbitrator in accordance with agreement between New Delhi Municipal Committee (hereinafter referred to as Committee) and Ws. Tirath Ram Ahuja (P.) Ltd., (hereinafter referred to as the contractors).

2. A contract was entered into between the Committee and the contractor for construction of a Five Star Hotel now named as Akbar Hotel at Chanakyapuri, New Delhi. That contract was reduced into writing. Vide that agreement, the construction was to be started by 30th November 1966 and was to be completed by 28th February 1969. A sum of Rs. 1,00,000 was deposited as security by the contractor with the Committee. The construction was to be made by the contractor under the supervision of an architect named in the agreement. Architect issued a final certificate on 18th, October 1970 certifying that net payment of Rs. 18,001 was due to the contractor, The contractor felt dissatisfied and requested for appointment of an arbitrator. Accordingly an arbitrator was appointed and award was made on 9th August 1974. That was filed in court on 22nd October 1974.

3. In the meantime Government of India directed technical examination of the works undertaken by the committee. Accordingly the work of construction of aforesaid hotel was also subjected to technical examination by Government

organization named as Chief Technical Examiner Central Vigilance Commission (hereinafter referred to as CTE).

4. It is alleged by the Committee that the report of CTE on the technical examination of the various projects including the work in question was received during May 1972 and that certain defects regarding present work were pointed out in the said report. The Committee on the basis of the said report made claims regarding refund of some of the amounts already paid by means of a letter dated 5th August 1974, The contractor repudiated those claims vide letter dated 14th August 1974. Since disputes and differences arose between the Committee and the Contractor, the former wrote on 12th September 1974 to the latter for referring the disputes- to the arbitration. but the latter refused to accede to, the request of the former by means of a letter dated 18th September 1974. Hence the present petition was brought by the Committee on 23rd April 1975.

5. The contractor contested. He denied that there were any referable disputes left when the matter already stood settled by means of referring the disputes to the arbitrator at his instance⁶ It was also contended that the present application was barred by limitation inasmuch as the same should have been brought within 28 days of the issuance of the final certificate on 18th October 1970, of the architect but the same was brought after about five years of expiry of limitation. Following issues were framed on August 30, 1978:-

1. Whether the suit is barred by limitation? If so, its effect? OPD

2. Whether the disputes are not referable to arbitration as alleged by the defendants? OPD

3. Relief. Issue No. 1.

6. Some portion of the arbitration clause is relevant for the purpose of deciding this issue because it is urged by the learned counsel for the contractor that right to refer the disputes and differences to the arbitration subsisted only for 28 days after the architect had issued final certificate as provided in Clause 38 of the Agreement of carrying out the work, that admittedly final certificate by the architect had been issued on 18th October 1970 and that there was no right of the committee to refer the disputes to the arbitrator after the expiry of 28 days from 18th October 1970, Relevant portion of arbitration Clause No. 47 of the agreement reads as under:-

"All disputes and differences of any kind whatever arising out of or in connection with the contract or the carrying out of the works whether during the progress of the work or after their completion and whether before or after the determination, abandonment or breach of the contract but not later than twenty eight days after the Architect has issued the final certificate as provided in Clause 38 of this agreement shall be referred to and settled by Mr. Shivnath Prasad who shall state his decision in writing. Such decision may be in the form of final certificate or

otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without appeal as stated in the preceding clause. But if either the Employer or the Contractor be dissatisfied with the decision of the Architect on any matter, question or dispute of any kind (except any of the excepted matter) or as to the withholding by the Architect of any certificate to which the contractor may claim to be entitled, then and in any such case either party (the employer or the contractor) may within twenty eight days after receiving notice of such decision give a written notice to the party through the Architect requiring that such written notice has been given and no other such (sic) shall be and is hereby referred to the arbitration and final decision of a single Arbitrator being a Fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single arbitrator, to the arbitration of two arbitrators both being Fellow of the Indian Institute of Architects, one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire."

6-A. The learned counsel for the committee contended that the aforesaid stipulation of limitation of 28 days was void in view of Section 28 of the Indian Contract Act. Section 28 of the Indian Contract Act reads as under:-

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.

Exception 1.- This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect, of the dispute so referred.

Exception 2.- Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen or affect any provision of law in force for the time being as to reference to arbitration."

The learned counsel pointed out that Section 28 invalidated any agreement which limited the time within which rights by parties could be enforced and that, Therefore, as the stipulation to refer the matters to arbitration within 28 days of the issue of final certificate by the Architect limited the time for enforcing right of reference, the said stipulation was void.

7. There is a distinction between limit on the enforcing of one's rights and the limit of the time when the very rights to enforce an agreement ceases to exists, The former cae comes within mischief and purview fo Section 28 while the latter does not. In former case the remedy to enforce certain rights is affected while in the latter cae it is sought to be enforced, which is lost.

8. The aforesaid distinction was recognised by Full Bench of Punjab High Court in Pearl Insurance Co. Vs. Atma Ram, . In that case a clause in the insurance policy ran as follow:-

"In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

It was contended that the clause was rendered void by Section 28 of the Contract Act. It was held that as the clause did not limit time within which the insured could enforce his rights and only limited time during which the contract was to remain alive it was not hit by the provisions of Section 28 of the Contract Act. The aforesaid judgment was followed by a single Bench of this court in Union of India Vs. Rishi Raj and Co., Delhi, . In that case a petition u/s 20 of the Arbitration Act was brought. There was Clause 19 of the agreement between the parties, first proviso of which read that any demand for arbitration in respect of counter-claims etc. had to be made within one year from the date of the termination of the contract. It was held that such a term was binding. Following observations were made (which are in para 10 at page 20):-

"Even if no period of limitation is prescribed under the Limitation Act, 1963 for filing an application u/s 20 of the Act or ever if Article 137 of the Limitation Act 1963 allows a period of 3 years for filling such an application it is open to the parties to prescribe the period of limitation or to restrict such period by mutual consent. That such restriction which is willingly placed by consent of both the parties is not opposed to public policy and is not void has been held by a Full Bench of the Punjab High Court in Pearl Insurance Co. Vs. Atma Ram, . Therefore, the counter-claim made by the respondent against the Government is barred by limitation by virtue of the first proviso to Clause 19 of the agreement and the only dispute in respect of which the respondent can demand reference to arbitration under the main arbitration clause of the agreement is the claim made by the Government against the respondent. It is only this dispute that the Court can refer to arbitration u/s 20 of the Act."

9. In the present case the very right to refer the dispute to arbitration was to be alive only for 28 days after the issue of final certificate by architect. So the very right to refer the disputes to arbitration ceased to exist after the expiry of 28 days from issuance of final certificate of architect. There was no such right which could be enforced. Hence there was a limit to the very existence of the right and there was no limit on the enforcement of the same and that being so stipulation in the present case was not hit by the provisions of Section 28 of the Contract Act.

10. In the present case admittedly final certificate was issued by the architect on 18th October 1970. Therefore, application u/s 20 of the Arbitration Act could be filed up to 15 the November 1970. The application was actually filed on 23rd April 1975 and was obviously hopelessly bared by time.

11. The present petition u/s 20 of the Arbitration Act is also barred by limitation as provided by the Indian Limitation Act. There is no specific article of the Schedule of Limitation Act which applies to such a petition. There is one residuary Article 137 which provides limitation of three years from the time right to apply accrues. Previously the view was that said article applied to petitions under the CPC only and none other. This view was expressed in the judgment of this court also Union of India Vs. Rishi Raj and Co., Delhi, but the aforesaid view was changed later on and it was held by the Supreme Court in The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, that the application contemplated under Article 137 are not confined to the ones under the CPC and the said article applied to all the applications under any law whatsoever. Hence in view of that judgment of the Supreme Court Article 137 has application to the petitions under S. 20 of the Arbitration Act.

12. What the Committee wants in the present case is to refer the disputes regarding refund of some amount paid to the contractor in view of CTE report. Therefore, right to apply under Sec. 20 of the Arbitration Act accrued when the payment was made. There is no date of payment mentioned in the petition. It was for the petitioner to have specified the said date for the purpose of bringing this petition within the period of limitation. It appears that as on the date of the making of the application view of the Supreme Court as well as other High Courts was that there was no period of limitation for filing such petitions, no date from which limitation started, had been mentioned in the petition. Therefore, it has not been shown that the petition was within the period of limitation.

13. In any case it appears that it was some time after 18th October 1970 that the final payment must have been made by the Committee to the contractor because in para 3 of the petition it is stated by the Committee that the Architect issued final certificate on 18th October 1970 certifying net payment of Rupees 180001 to the contractor excluding security deposit. So even if we take that final payment was made sometime in 1971 the period of limitation of three years expired in 1974. The petition was, Therefore, time barred when the same was brought on 23rd April 1975. Issue is decided accordingly in favor of the contractor.

Issue No. 2.

14. It is urged by the learned counsel for the contractor that no disputes had been left and that the Committee did not raise any at the time of reference to arbitration at the instance of the contractor. But that argument has no force because it was subsequently found by the Committee that some excess payments had been made which they claimed and which were repudiated by the contractor. Hence there was dispute regarding refund of some payments to the contractor which were referable to the arbitration. Issue is decided accordingly in favor of the Committee.

Issue No. 3.

15. In view of the findings of issue No. 1, I hereby dismiss the petition of the Committee, but leave the parties to bear their own costs.