
(1999) 08 AP CK 0006
In the Andhra Pradesh High Court
Case No : AA No. 17 of 1997

Pressteels and Fabrications Pvt. Ltd.

APPELLANT

Vs

Chief Engineer, Electricity (Projects), Hyd.

RESPONDENT

Date of Decision : 03-08-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 11(6), 12(2), 5
Limitation Act, 1963 — Article 137, 3

Citation : (1999) 5 ALD 459 : (1999) 5 ALT 429

Hon'ble Judges : Krishna Saran Shrivastav, J

Bench : Single Bench

Advocate : Mr. C. Venkata Malla Reddy, for the Appellant; Mr. J. Siddaiah, SC for Appeals, for the Respondent

Judgement

1. This is an application for appointment of an independent arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act").
2. It is common ground that the purchase order for erection of Bommur, Ramachandrapuram 132 KV SC line was given to the applicant by the petitioner through order No. CPT-321/APT-38/76-2620/77, dated 7-1-1978. The entrusted work was completed by the applicant some time in the month of August, 1981. The erected line was handed over to the respondent on 31-8-1981. The final bill is yet to be finalised and paid to the applicant.
3. The case of the applicant in brief is that inspite of attempts when the respondent did not repay the final bill correctly, on 8-11-1996 the applicant prepared the final bill amounting to Rs.23,26,662/-, but the respondent did not pay any heed to it. Thereafter through letter dated 23-12-1996, the applicant nominated one Sri K. Krishan Rao, retired Engineer-in-Chief on his behalf and asked the respondent to appoint an arbitrator on his behalf to adjudicate the disputes. But the respondent through letter dated 21-1-1997 declined to do so and alleged that standard general conditions of contract for plant, machinery and manufactured equipment had not been enclosed to the specification APT 38 of

1976 and as per Clause 1.5, Section-I, general of the specification APT 38 of 1976, the conditions and directions embodied in it shall be binding and prevail upon the general conditions of contract and, therefore, disputes if any, can be decided only by Courts or Tribunals in Hyderabad and Secunderabad in accordance with Clause 1.21 of the specification APT 38 of 1976 and not by referring the matter to arbitration. It is pleaded that by virtue of clause 38 General Conditions of Contract, the applicant has got right to refer the dispute to an Arbitrator for adjudication. Therefore, an independent arbitrator should be appointed to resolve the dispute.

4. The respondent through its counter alleged that on 22-6-1995 the respondent had asked the applicant to finally settle the account and this application has been made to counter-blast the said demand. It is pleaded that Clause 38 of General conditions of contract is not applicable, because General Conditions of Contract are applicable only when the work is entrusted and included in the matters relating to plant, machinery and manufactured equipment and it does not relate to works on contract which was entrusted to the applicant, therefore, the general conditions of contract had not been appended to the work order in question. Therefore, there is no agreement between the applicant and the respondent to refer any dispute to arbitrator. It is further pleaded that by virtue of Clause 28 of the specification, in the event of dispute, it is a matter to be decided only by Courts, situated in the cities of Hyderabad and Secunderabad and no suits or legal proceedings shall be instituted elsewhere and, therefore, on this count only the arbitrator cannot be appointed and the application is liable to be dismissed.

5. Clause 3 of the impugned order issued in pursuance of the letter of acceptance of the offer for erection of 132 KV SC line, dated 3-12-1977 reads as under:

"General Conditions: Except where otherwise agreed to in this order, all the terms and conditions stipulated in the Specification 38 of 1976 and general conditions of contract appended to it are binding on you and they shall form part of this contract."

6. A look at the aforesaid Clause reveals that not only all the terms and conditions stipulated in the specification APT 38 of 1976, but also General Conditions of Contract appended to it are binding on the contractor and they are part of the contract, that is to say, impugned order issued in pursuance of the letter of acceptance of the offer dated 3-12-1977. It is not disputed before me that under Clause 38 of the general conditions of contract it is provided that if any question, dispute or difference whatsoever shall arise between the purchaser or engineer and other party upon or in relation to or in connection with the contract either party may forthwith give to the other notice in writing of such question, dispute or difference and the same shall be referred to the arbitration of two persons, one to be nominated by the purchaser and other by other party etc., etc.

7. Clause 1.5, Section-I of general specification No. APT 38 of 1976 says that the

general conditions of contract for plant, machinery and manufactured equipment of the Government of Andhra Pradesh enclosed to this specification shall fully apply,..... but, only by itself, it cannot be said that the general conditions of contract was not appended to the acceptance of offer dated 3-12-1977 or the order dated 7-1-1978 on the ground that work entrusted was only the works of contract, that is to say, for erection of 132 KV SC line only. Had general conditions of contract was intended not to be appended, Clause 3 of the impugned order dated 7-1-1978 would either been omitted or differently worded. The intention of the parties are manifestly clear as regards the settlement of disputes by way of arbitration in the event of there being any dispute. Thus, there appears to be no force in the contention of the learned Counsel for the respondent that the general conditions of contract containing Clause 38 referred to above had not been appended with the original agreement.

8. On a perusal of Clause 28 of the impugned order dated 7-1-1978 it is revealed that all or any disputes between the contractor and the respondent had. been agreed to be decided by the Courts or Tribunals situated in Hyderabad and Secunderabad cities. By no stretch of imagination it can be said that by the word "Court", it means that only the Civil Court has the jurisdiction to decide the dispute.

9. Under Article 137 of the Limitation Act, 1963 such an application for appointment of arbitration should be filed within a period of three years when the right to apply accrues.

10. In the case of State of Orissa and another etc. Vs. Sri Damodar Das, , it has been observed that Section 3 of the Limitation Act 1963 enjoins the Court to consider the question of limitation whether it is pleaded or not.

11. The next question that falls for determination is whether the claim of the contractor is barred by limitation ? Because, the contractor has sought the relief of appointment of an arbitrator years after the accrual of the cause of action ?

12. In the case of Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, , the Apex Court has held that:

".....the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question is when the cause of arbitration arises in the absence of issuance of a notice or omission to issue notice for long time after the contract was executed Arbitrator implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party,

after the claim in the cause of arbitration was allowed to be barred, it was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applied outside the scope of arbitration agreement allowing the claim, after considerable lapse of time, would be a harassment of the opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12(2)(b) of the Act."

13. In the case of State of Orissa (*supra*) the first contract was executed in the year 1967 and the contractor had received the payment of his bill in the month of September, 1967 itself. Notice for appointment of arbitrator was sent by the contractor on 15-9-1980. Under these circumstances, the Apex Court found that the claim for the work executed in 1967 was hopelessly barred by limitation. The second contract was for the year 1975-76 and the third contract was for the year 1976-77. With regard to these claims, the Apex Court considered the contention of the learned Counsel of Damodar Das that the State of Orissa had extended the time for execution of the works till 1977 and admittedly had completed the execution of the work of the second contract on 30-12-1977 but had abandoned the work for the third contract. Under these circumstances, the Apex Court held that it cannot be laid that there would be no dispute as to whether the claims are barred by limitation and observed that it would be difficult to decide whether the claims are barred by limitation and that it would be a matter for decision by arbitrator.

14. I had an occasion to deal with a similar question in the case of M.V.V. Satyanarayana Vs. Union of India and Others, . Relying on the case of State of Orissa (*supra*), I was of the opinion that when there is sufficient material on record to determine whether the claim made in the arbitration application is barred by limitation or not, the High Court at the time of deciding the question of appointment of arbitrator is competent to decline appointment of arbitrator on the ground that the claim in question is barred by limitation, but when there is no such material available on record, the question of limitation should be left to be decided by the arbitrator.

15. Relying on the case of Wazirchand Mahajan and Another Vs. Union of India (UOI), , it has been held in the case of Meda Narsimhulu Vs. Council of Scientific and Industrial Research, New Delhi and another, , that the jurisdiction conferred on the Chief Justice or a person designated by him u/s 11(4) and Section 11(6) of the Arbitration and Conciliation Act, 1996 does not comprehend the power to decide debatable and arbitrable question which could otherwise be decided by the arbitrator.

16. In the case of Utkal Commercial Corporation Vs. Central Coal Fields Ltd., , the Apex Court was pleased not to examine the question whether the claims filed before the arbitrators were barred by limitation or not, because the relevant particulars and details of the disputes between the parties were not placed

before the Apex Court. Therefore, the Apex Court observed that one cannot assume that the cause of action arose on the date of expiry of the contract. Whether the claims were or were not barred by limitation before the arbitration can be examined only on the basis of relevant material, which material had not been produced before the Apex Court and, therefore, the Apex Court was pleased to decline to examine the question of limitation.

17. The position of law that emerges is that when there are documents and material on record, the genuineness of which is not disputed between the parties to the arbitration proceedings, the High Court while considering the question of appointment of arbitrator is competent to decide the question of limitation but if the material is not placed before the High Court or the documents in question and the material are disputed and the question of limitation is debatable and arguable, then the question of limitation should be left to be decided by the arbitrator.

18. On a perusal of the record, it appears that after completion of work on 31-8-1981, there was correspondence between the parties to these proceedings from 7-8-1984 to 8-11-1996, but entire correspondence has not been placed before this Court. Under these circumstances, it is not possible to examine whether the claims set out in the application are not barred by limitation without the relevant material being placed before me and the question of limitation as to whether the claims are barred or not barred can be examined only by the arbitrator on the basis of the material and relevant documents and correspondence done by the parties is to this petition to be placed before him.

19. For the aforesaid reasons, I hold that the aforesaid questions are arbitrable, which can be decided by appointment of an independent arbitrator. The request for appointment of an arbitrator has been denied by the respondent and, therefore, the application deserves to be allowed, but without costs.

20. In the result, the application is allowed. Sri Justice A. Hanumanthu, a retired Judge of the High Court of Andhra Pradesh, is appointed as the sole arbitrator to decide all the disputes which have arisen between the parties including the question of limitation. His remuneration is tentatively fixed at Rs.60,000/- (Rupees Sixty Thousand Only) to be initially paid by the applicant. No costs.