

(2006) 10 DEL CK 0092
In the Delhi High Court
Case No : CS (OS) No. 2479A of 1998

Radical Builders (India) Pvt. Ltd.	Vs	APPELLANT
Pharmaceutical Employees Co-op. Group Housing Society Ltd.		RESPONDENT

Date of Decision : 19-10-2006

Acts Referred:

Arbitration Act, 1940 — Section 10, 11, 12, 13, 14
Arbitration and Conciliation Act, 1996 — Section 11, 11(6)
Limitation Act, 1963 — Article 137, 8, 8(1), 8(2)

Citation : (2007) 1 ARBLR 171 : (2007) 137 DLT 709

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Arvind Minocha, for the Appellant; B.S. Arora, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—This petition has been filed u/s 20 of the Arbitration Act, 1940 seeking appointment of an arbitrator to adjudicate upon the disputes between the parties. The respondents had set up a plea of the claims being barred by limitation. On 8th May, 2006 it was recorded by this Court that the question can be decided based on documents which are not in dispute at all. Accordingly, the matter was taken up for hearing on 26th September, 2006 when it was pointed out by both the parties that based on the documents which are on record, the petition itself can be disposed of. Consequently, both sides were heard on the issues raised in the present matter.

2. To the extent that there is no dispute on the factual matrix, the facts are briefly noted hereafter. The respondent had floated a tender for construction of 300 multi storeyed flats at Patpar Ganj, Delhi in 1985. On 14th January, 1986, the petitioner was awarded this work. Two agreements, one relating to civil works while the other relating to sanitary works were executed.

3. The tender conditions which form part of the contract contained Clause 63 for reference of disputes to arbitration by the Fellow of Institute of Architects agreed

by the parties, which reads as under:

63. Settlement of dispute - Arbitration

All dispute and differences of any kind whatever arising out of or in connection with the contractor or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the Architect, who shall state his decision in writing. Such decision may be in the form of a Final Certificate or otherwise. The decision of the Architect with respect of any of the excepted matters shall be final and without appeal. But if either the employer or the contractor be dissatisfied with decision of the Architect on any matter, question or dispute of any kind (except any of the excepted matters) 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 28 days after receiving notice of such decision give a written notice to the other party through the Architect requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute, and dispute or difference of which such written notice has been given and no other 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 Fellows 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.

The Arbitrator, the Arbitrators or the Umpire as the case may be shall have Power to open up review and revise any certificate, opinion, decision, requisition or notice serve in regard to the excepted matters referred to in Clause (60) and to determine all matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every or any such reference the cost and incidental to the reference and award respectively shall be in the direction of the Arbitrator or Arbitrators or the Umpire as the case may be, who may determine the amount thereof or direct the same to be taxed as between Attorneys and Client or as between party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration Act 1940 or any modification thereof for the time being in force. The award of the Arbitrator or Arbitrators or the Umpire as the case may be shall be final and binding on parties. Such reference except as to the withholding by the Architect of any certificates under Clause 60 to which the contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works arising from any cause unless with the written consent of the employer and the contractor.

Provided always that the employer shall not withhold the payment of an interim certificate nor the contractor except with the consent in writing of the Architect in any way delay the carrying out of the works by reason of any such matters, question or dispute being referred to Arbitration but shall proceed with the work with all due diligence and shall until the decision of the Arbitrator or Arbitrators or the Umpire as the case may be, given, abide by the decision of the Architect and no Award of the Arbitrator or the Arbitrators or the Umpire as the case may be shall relieve the contractor of his obligations to adhere strictly to the Architects' instructions with regard to the actual carrying out of the works. The employer and the contractor hereby also agree that Arbitration under this clause shall be condition precedent to any right of action under the contract.

4. The petitioner has contended that when the work was nearing completion, a letter dated 21st October, 1991 was issued to it, which reads thus:

This has a reference to the meeting we had with the Managing Committee in the presence of your Project Manager, Shri Dharam Vir Singh in your absence to discuss the progress of work at Site.

It was observed that there was no progress at site and quite a few finishing works were still remaining because of which Members were getting agitated. Your Project Manager was requested to take immediate action to which he showed his reluctance in your absence.

Under such circumstances, it was decided to get the immediate remaining work done through other Agency at your cost and risk, which please note.

Thanking you

5. The petitioner denied all allegations made in this letter by its communication of 26th October, 1991. Thereafter the Architect who had been appointed by the respondent conducted a joint inspection and several discussions were held. Finally by letters dated 3rd January, 1992 and 6th January, 1992, the petitioner was directed to start the work and rectify the defects which have been pointed out. According to the petitioner, by these communications, the rescission of the contract was thus revoked and the petitioner was required to complete the remaining work within three months thereafter. The petitioner has filed several communications from the arbitrator in respect of the bills which were submitted by it from time to time on which the architect was recommending payments to the contractor. In this respect, letter dated 10th January, 1992, as also letters dated 25th August, 1993, 22nd December, 1993 have been placed on record enclosing the bills from the petitioner.

6. Mr. Arvind Minocha, learned Counsel for respondent has pointed out a letter dated 27th January, 1992 issued by the petitioner, wherein also the petitioner had requested the respondent to release such payments which were duly certified by the architect in accordance with the agreement between the parties.

However, according to the petitioner on successful completion of the work, the

petitioner submitted bills on 25th August, 1993, which were duly received by the Architect on 26th October, 1993.

7. On 22nd December, 1993, the petitioner requested the architect to check the bill and certify the same for payment. No action, however, was taken on this bill.

Thereafter, the petitioner addressed a notice dated 15th June, 1994 to the Chairman and the Secretary of the Pharmaceutical Employees Co-op. Group Housing Society Ltd. A copy of this notice was also sent to Shri G.C. Sharma, Architect, for action in terms of the contract between the parties. In this communication, the petitioner stated as under:

You are requested to pay Rs. 5,85,13,305/- (Rupees Five Crores, Eighty Five Lakhs, Thirteen Thousand, Three Hundred & Five) only on or before 25th July, 1994 failing which it shall be construed that you have no intentions to pay our correct and legitimate dues.

In the unlikely event of your not making full payment by 25th July, 1994; this may be treated as request for appointment of arbitrator in terms of Condition 63 of Conditions of Contract between us and the name of learned Arbitrator so appointed may be forwarded to us for our agreement and further necessary action, if any. In case we do not hear from your end on or before 25.7.1994, we shall be constrained to take further action in the matter using legal remedies available to us under the terms of contract as also the law.

This is without prejudice to any rights or remedies accrued so far or may accrue hereafter and we reserve our right to claim compensation on account of aforesaid which will include but will not be limited to further interest on Rs. 5,85,13,305/- @ 24% together with losses of goodwill and costs for arbitration and legal proceedings.

Thanking you and hoping to receive full payment of Rs. 5,83,13,305/- on or before 25.07.1994.

8. This notice also did not evince any positive response. The petitioner consequently filed a petition u/s 11 of the Arbitration & Conciliation Act, 1996 being AA 159/97 submitting that the respondents had failed to intimate any name of any arbitrator for approval by the applicant and had also failed to appoint arbitrator(s). The petitioner, Therefore, prayed that the Court may also be pleased to direct the said arbitrator(s) appointed by the Court to adjudicate upon disputes/claims of the applicant which were mentioned in para 8 of the petition.

9. The record of AA 159/97 has been placed Along with the present petition. It would be useful to notice the submission of the petitioner in paras J & I of this petition, which reads thus:

I That being faced with the situation as aforestated whereby the respondent was neither settling the dues of the applicant nor was it replying to its various letters,

the applicant vide its registered letter dated 15.6.94 called upon the respondent to pay the dues of the applicant by 25.7.94 and also stated therein that in the unlikely event the payment is not made, the respondent may kindly intimate the name of the Arbitrator as per condition 63 of the Conditions of Contract for acceptance by the applicant and for reference of the disputes to arbitration. A true copy of the said letter is filed herewith. Even though the said letter was duly received by the respondent the respondent neither replied to the said letter nor took any steps for intimating the name of the Arbitrator to the applicant nor took any action whatsoever for referring the disputes to arbitration.

J. That the respondent having failed to take any action for appointment of the Arbitrator or for reference of the disputes to arbitration, the applicant is compelled to file the present application u/s 11(6) of the Arbitration and Conciliation Act, 1996. That the respondent having failed to send the name of the Arbitrator and also having failed to refer the disputes to arbitration have now lost their right to appoint/nominate the Arbitrator(s) and it is this Court alone which has the power to appoint the Arbitrator to adjudicate upon the claims of the applicant. This is necessary and in accordance with the provisions of the Act so as to secure the appointment of independent and impartial Arbitrator(s).

10. It appears that, in the meantime, an administrator had been appointed in respect of affairs of the respondent-Society, who filed an affidavit on 17th September, 1998 in the proceedings AA 159/97. In this reply, the Administrator stated thus:

9. That finally vide letter dated 21.10.91 the contract award rescinded and it was informed to the applicant that the work will be completed through other agencies. A copy of the said letter is annexed herewith as Annexure R-8.

10. That the applicant vide letter 26.10.91 requested the architect of the respondent society to withdraw the letter dated 21.10.91 but the said letter was never withdrawn by the respondent society or their Architect. A copy of the said letter is annexed herewith as Annexure R-9.

12. That after 21.10.91 no work was done by the applicant and the contract remained terminated and never renewed and the remaining work was got completed through other agencies.

13. That the cause of action had accrued on 21.10.91, when the contract of the applicant was terminated and hence the application for appointment of Arbitrator is barred by limitation.

It is noteworthy that in the reply dated 29th May, 1998, the respondent did not deny the assertions of the petitioner that its bills were pending with the respondent and that payments were due and payable by it. The respondent also did not deal with or reply to the assertions of the petitioner, as contained in para J or elsewhere.

11. Subsequently, in the hearing on 15th October, 1998 in the AA No. 159/97,

the respondent pointed out that the Apex Court had pronounced the principles of law which would guide arbitration in Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, and submitted that the petition u/s 11 of the Arbitration & Conciliation Act, 1996 was not maintainable. In the light of the law laid down by the Apex Court in this binding precedent, on 6th November, 1998, the Court recorded the following order in AA 159/97:

Learned Counsel for petitioner wishes to withdraw this petition in view of the judgment of the Supreme Court reported in Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, with liberty to file afresh.

Dismissed as withdrawn with liberty. Consign.

The present petition has been filed thereafter on 9th November, 1998 u/s 20 of the Arbitration Act, 1940. The factual submissions on behalf of the petitioner are the same as were urged in the earlier case.

12. Before this Court also the respondent has placed reliance on the letter dated 31st October, 1991 and has denied that the bills of the petitioner were not settled or its dues were not paid. In para 8 of the reply, it has been further contended that:

That the contents of para 8 are totally wrong, incorrect and hence denied. The amount is due towards the respondents rather the respondents are entitled to damages for leaving the work in between.

13. It is, Therefore, evident that it is the case of the respondent itself that till a decision is taken by the architect, the petitioner cannot file the proceedings u/s 20 of the Arbitration Act, 1940. However, a further plea is taken that the petition is barred by limitation. This plea rests on the sole averment that the contract was rescinded on the 21st day of October, 1991. To this, the petitioner has replied that the rescission was withdrawn by the respondent vide letter dated 3rd January, 1992 and 6th January, 1992 and that the petitioner completed the work satisfactorily and without any objection.

14. It is well settled that while considering a petition u/s 20 of the Arbitration Act, 1940, this Court would have limited jurisdiction. The Court has to adjudicate on the issue as to whether there is a valid and binding arbitration agreement and as to whether disputes have arisen between the parties. So far as the merits or the de-merits of the disputes are concerned, under the Arbitration Act, 1940, the same are only within the jurisdiction of the the arbitrator.

15. So far as the issue as to the applicability of the Limitation Act to an application u/s 20 of the Arbitration Act, 1940 is concerned, the principles with regard thereto were laid down by the Supreme Court in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, wherein the Court held that Article 137 of the Limitation Act, 1963 would apply to an application u/s 20 of the Arbitration Act, 1940. Following the principles laid down by the Supreme Court in its earlier decision, in S. Rajan Vs. State of Kerala and another, the court

subsequently held thus:

9. According to Article 137, the period of three years begins to run from the date when the "right to apply accrues". The question is when did the right to apply u/s 20 accrue in this case. Section 20 reads as follows:

20. Application to file in Court arbitration agreement. - (1) Where any persons have entered into an arbitration agreement before the 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.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

10. According to Sub-section (1) where an arbitration agreement has been entered into before the institution of any suit with respect to subject matter of such agreement, and where difference has arisen to which the agreement applies, either or both the parties can apply to the court that the agreement be filed in Court. According to the sub-section, the occasion for filing the application arises when a difference arise between the parties to which the agreement applies. In such a case, it is open to a party to apply under this section instead of proceeding under Chapter II. In other words, an application u/s 20 is an alternative to the proceedings under Chapter II. Sub-section (2) is procedural. So is Sub-section (3). Sub-section (4) provides that after hearing the parties and on being satisfied that the agreement should be filed, "the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

11. Reading Article 137 and Sub-section (1) of Section 20 together, it must be said that the right to apply accrues when the difference arises or differences arise, as the case may be, between the parties. It is thus a question of fact to be determined in each case having regard to the facts of that case.

16. In the instant case, the petitioner submitted the final bills on 25th August, 1993 and sent a reminder on 22nd December, 1993. Finally a detailed notice was issued and even the arbitration clause invoked by the communication noticed above dated 15th June, 1994. The respondent at no point of time stated that no amount was due and payable to the petitioner. Even in the reply filed in the court in AA No.159/97, there was no such plea. I find that it is for the first time in the reply dated 17th May, 1999 that the respondent have actually denied that anything is due or payable to the petitioner.

17. It is well settled that the party can file a petition seeking appointing of an arbitrator only upon a dispute coming into existence. Such a dispute would arise when a claim is raised which is actually repudiated or denied by the other side. Clause 63 which was binding between the parties, clearly required the raising of the matter and its settlement by the architect who is required to give his decision in writing. Such decision as per the clause may be in the form of a final certificate or otherwise and the same had been agreed to be final. It is only in the event that the architect takes a decision on any matter, either granting amount claimed or withholding the grant of a certificate in respect of the payments claimed, and notice in respect of such decision has been received by either party, can the party which is dissatisfied, give a written notice to the other party, through the architect, requiring such matters in dispute be arbitrated upon.

In this behalf reference can usefully be made to several judicial pronouncements on the subject. In AIR 1981 Delhi 293 entitled *Oriental Building & Furnishing Co. Ltd., New Delhi v. Union of India*, the Court held thus:

9. In this connection, it is necessary to note that a difference can arise long after some work has been done under a contract. There can be negotiations between the parties and all sorts of correspondence. But, it is only when they come to the conclusion that they cannot resolve the dispute between them, that it can be said that a difference arises. A difference under the arbitration agreement is a claim made by one party which is refuted by the other party. At that stage, it is open to the parties or any of them to say - now let us go to arbitration to get this difference settled. It is at this stage that it is possible to say that a difference has arisen between them. In this sense, Section 20 of the Arbitration Act differs from the normal kind of claims that arise in suits. In the case of a suit, the date on which the cause of action arises is the date from which the limitation period starts. u/s 20, it is the date on which the right to apply accrues that determines the starting point. That starting point does not coincide with the date on which the cause of action for filing a suit arises.

10. To take a simple illustration. If there are two parties to a contract in which

one claims a breach of contract in which one claims a breach of contract by the other, then the period of limitation for filing the suit starts from the date of the breach. That is not the determining date if the contract is subject to an arbitration clause. If there is an arbitration clause, then the concerned party will make a demand from the other party and it is only when the demand is refuted or declined that the difference arises. It, Therefore, follows that the bar contemplated by the Limitation Act for filing an application u/s 20 of the Arbitration Act is different from that contemplated by the same Act for instituting a suit.

18. The principles laid down by this Court in this judgment was followed by the High Court of Orissa in its pronouncement reported at Secretary to Government of Orissa, Irrigation Dept. and Others Vs. Raghunath Mohapatra, wherein the Court held thus:

In this Court the respondent has filed an affidavit that the final bill in connection with the work was passed by appellant No. 3 on 23.11.77 and accordingly it has been urged on his behalf that his application dated 15.4.80 u/s 8(2) of the Act was clearly within time. On behalf of the appellants, a counter has been filed in this Court wherein it is stated that dispute between the parties actually arose on 22.7.74 when the respondent disputed the date of completion as well as the measurement. It is also stated in the counter that the final bill was passed by appellant No. 3 on 23-11-77. It is not in dispute that Article. 137 of the Limitation Act governs applications to the Court u/s 8 of the Act See The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, State of Rajasthan Vs. Mehta Chetan Das Kishandass, and AIR 1983 All 462 Sindh Construction Co. v. Union of India. The period of limitation prescribed under Article 137 of the Limitation Act is three years and the time from which the period begins to run is the date on which the right to apply accrues. In M/s. Oriental Building and Furnishing Co. Ltd., New Delhi Vs. Union of India, New Delhi v. Union of India in the context of Section 20 of the Act it was observed (para 4 and 9)

The important words in this section are the existence of the arbitration agreement and the existence of a difference between the parties. Secondly, this section presents an alternative to the parties other than proceeding to arbitration on their own, i.e., without coming to the Court. The way the Act is framed suggests that first you have to have a contract concerning the reference of certain types of disputes to arbitration. If you have this contract, still you cannot apply until you have a difference. The starting point of the reference u/s 20 is, Therefore, the date on which a difference arises to which the arbitration agreement applies. Neither party can move the Court without the existence of a difference between them. So, the material question is, when the difference arose between the parties and not when the lease expired, nor when it was entered into....

In this connection, it is necessary to note that a difference can arise long after some work has been done under a contract. There can be negotiations between

the parties and all sorts of correspondence. But, it is only when they come to the conclusion that they cannot resolve the dispute between them, that it can be said that a difference arises. A difference under the arbitration agreement is a claim made by one party which is refuted by the other party. At that stage, it is open to the parties or any of them to say - now let us go to arbitration to get this difference settled. It is at this stage that it is possible to say that difference has arisen between them. In this sense, Section 20 of the Arbitration Act differs from the normal kind of claims that arise in suits. In the case of a suit, the date on which the cause of action arises is the date from which the limitation period starts. u/s 20, it is the date on which the right to apply accrues that determines the starting point. That starting point does not coincide with the date on which the cause of action for filing a suit arises.

With respect, I agree with the principles decided in the aforesaid decision and the same principles should apply to an application u/s 8 of the Act. In the present case it cannot be said that the parties had come to the conclusion on 22.7.74 that they had failed to resolve the dispute between them merely because on that date the respondent disputed the date of completion as well as the measurement. Admittedly, the final bill in connection with the work was passed by appellant No. 3 on 23.11.77 and that is the date on which the right to apply accrued to the respondent. Hence, I hold that the respondent's application u/s 8(2) of the Act was filed by him within the period of limitation.

19. Undoubtedly the weight of authority is clearly in favor of the view that it is only if there is repudiation of a claim, there is a dispute in respect thereof. The principles applicable are culled out in judicial pronouncement reported at Dilip Construction Company Vs. Hindustan Steel Ltd., when the Court held as under:

The principles deducible from these authorities are-

- (i) The existence of a difference or dispute is an essential condition for the arbitrator's jurisdiction to act under an arbitration clause in an agreement;
- (ii) The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. A dispute implies an assertion of a right by one party and repudiation thereof by another;
- (iii) A failure to pay is not a difference, and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment.

20. The pronouncement of the Division Bench of this Court in Shah Construction Co. Ltd. Vs. Municipal Corporation of Delhi, is also instructive in this behalf. On the issue as to the date on which cause of action accrues entitling a claimant to file an application u/s 20 of the Arbitration Act, 1940, the Court held thus:

The touchstone is as to when the cause of action accrues because it is only then that there would be a right to apply. To constitute a cause of action first is the

coming into existence of a right, and secondly, its infringement of threat to be infringed. Cause of action in substance denotes and determines the starting point of limitation. It is a settled proposition that the question as to when right to sue accrues depends largely upon the facts and circumstances of each particular case. The Division Bench in *Union of India Vs. Vijay Construction Co.*, cannot be said to lay down the rule of law that in a case of a contract cause of action would necessarily arise on the date of the rescission of the contract. That was so in the particular facts of that case, and, as has been noticed above, it was asserted in the application itself that the cause of action arose on the date of rescission of the contract. The nature of dispute or difference will have to be seen in each case and with reference to that it will have to be examined as to when the cause of action arose. A claim is not necessarily a difference between the parties unless that claim is disputed. Cause of action would Therefore, arise when the claim of one party, when it arises, is denied or there is a threat to deny. Only in that event, it becomes a dispute and cause of action arises from that date. Then arises the question of reference to arbitration. The Arbitration Act contemplates three kinds of arbitration : (1) arbitration without intervention of a Court dealt with in Chapter II of the Act (Sections 3 to 19); (2) arbitration with intervention of a Court where there is no suit pending dealt with in Chapter III of the Act (Section 20) and (3) arbitration in suits which is covered by Chapter IV of the Act. A party may proceed u/s 20 of the Act instead of proceeding under Chapter II. This section confers power on the Court to order the agreement to be filed, and, further, to make an order of reference to the arbitrator appointed by the parties, or, where the parties cannot agree upon an appointment, to an arbitrator appointed by the Court. Sub-section (1) of Section 20 makes it plain that the provisions of the section can be availed of only if no proceedings under Chapter II has been initiated. Section 8 does not contain any provision empowering the Court to make an order of reference to the arbitrator as one finds in Sub-section (4) of Section 20 : See *The Union of India (UOI) Vs. Shri Om Prakash*, The party has thus an option to proceed either under the provisions of Chapter II or of Chapter III in proceeding with the reference. In *Balika Devi and Another Vs. Kedar Nath Puri*, , it was held that where one of the parties to arbitration agreement refuses to concur in the appointment of an arbitrator under the arbitration clause, the other party has the option either to move the Court u/s 8 of the Act or u/s 20 of the Act. There is nothing in Section 20 to compel the other party not to take recourse to Section 8 of the Act. It is his concern whether to apply u/s 8 or u/s 20 of the Act. When a party, Therefore, chooses to apply u/s 20 he will have to do so within 3 years of the accrual of the cause of action.

In this case before the completion of construction work by the contractor, the Corporation cancelled the contract in the suit by the contractor to recover the amount due for the work done, the Corporation made a counter claim in respect of the extra expenditure incurred by it for getting the work which was left out by the contractor completed through other agencies. The counter-claim was denied by the Contractor. At the close of the suit on the application made by the parties

u/s 21, the Court made a reference to the sole arbitrator "to decide the matters in difference" between the parties to the suit. The arbitrator ignored the counter claim of the Corporation and made an award in favor of the contractor.

In this case, the Court held that the cause of action for the Corporation to apply u/s 20 of the Arbitration Act in respect of its counter claim must be held to have arisen on the date when counter claim was denied by the arbitrator. Reliance was placed by the Court on several judicial pronouncements. It was held that the reply of the contractor denying the claim of the Corporation was filed in the suit on 20th February, 2006 and the cause of action would, in any case, arise from that date. The Court laid down the principle that the right to apply u/s 20 of the Arbitration Act, 1940 would accrue when there existed a dispute which can be the subject matter of the reference. In the absence of a dispute between the parties to the arbitration agreement, there could be no reference.

21. A pronouncement of the learned single Judge of this Court in 1998 120 (3) PLR 42 (Delhi) entitled *United Engineers and Anr. v. Ahinsa Co-Op. Group Housing Society Ltd.* is extremely relevant on the issue which have been raised before this Court. In this case, the Court after detailed consideration held thus:

12. Reverting now to the issue raised on the point of limitation to apply u/s 20 of the Act, in view of the decisions of the Supreme Court in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, and followed in *S. Rajan's* case (*supra*), it cannot be disputed that the application u/s 20 of the Act is governed by Article 137 of the Limitation Act, 1963 and the period of three years stipulated therein, begins to run from the date when the "right to apply accrues." The real controversy, however, is about the date when the right to make the present petitions accrued to the petitioners. According to the petitioners it accrued on 21st December, 1994 on the respondent declining to refer the disputes to an Arbitrator in terms of Clause 6 of the agreement and, thus, the present petitions filed in October, 1995 are well within time. On the other hand the stand of the respondent is that it accrued on 30th September, 1989 when the petitioners submitted their final bill to the Architects for settlement and in any event on 27th December, 1990 when the Architects issued the "full and final certificate" for payment in terms whereof, no payment was made, the present petitions filed on 16th October, 1995 are barred by time. It would appear that Clause 2 of the Articles of agreement between the parties provides for payment by the respondent and in case of dispute about the amount due as payable, Clause 6 of the agreement provides for settlement by the Architects. Admittedly, as noticed above, the disputes did arise and it was referred by the contractors to the Architects, who, after notice to the respondent decided the matter and communicated to the parties about their making and issuing "full and final certificate" on 27th December, 1990. Basing its claim thereon, the petitioners by their letter dated 13th December, 1994 called upon the respondent to refer the question of non-payment in terms of the Architect's certificate for adjudication by arbitration. The respondent disputed and denied its liability to pay under the

said certificate for the first time in its reply dated 27th December, 1994, giving rise to cause of action to apply u/s 20 of the Act. It was on this date that the right to apply accrued in favor of the petitioners. The application filed on 16th October, 1995 cannot be, thus, said to be barred by time.

13. The contention of Mr. Rana, learned Counsel for the respondent however, is that the certificate having been issued by the Architects on 27th December, 1990, the cause of action to apply arose then only, is meritless. It is only on demand to appoint an arbitrator and its denial that cause of action to apply u/s 20 of the Act accrues and not when the payment became due. It was also submitted for the respondent that the claims themselves are barred by time and, Therefore, there is no point in referring the claims for arbitration. Be that as it may, in a matter referable to arbitration it is not for this Court to comment on it. The question whether the claims are barred by time falls within the domain of Arbitrator and is not to be decided by the Court before making reference. Thus the present application, filed within three years of respondents reply dated 21st December, 1994, are well within time.

22. Mr. Arvind Minocha learned Counsel for the petitioner has also placed reliance on the judgment of this Court reported in M/s. Naraindas R. Israni Vs. Union of India, wherein also the Court held thus:

15. It is crystal clear from above that the petitioner could have invoked the arbitration clause within 90 days from the date on which he received the intimation that the bill is ready for payment. Admittedly no intimation was given in this regard by the respondent to the petitioner as no document has been placed on record showing the said intimation. In view of the above this Court is of the view that the period of limitation in the instant case would start running from 15.10.88 i.e. the date of the payment with regard to the final bill. If the period of limitation is so computed as per the provisions of Clause 25 of the agreement in that eventuality we find that the arbitration clause was invoked within less than 90 days. I am supported in my above view by the observations of P.C. Mallick, J. as made in M.L. Dalmiya and Co. Vs. Union of India (UOI), "If any payment is made on a running bill, such sum will be deducted from the final bill as being an advance payment on account of the final bill. If one or more of the running bills submitted by the contractor has or have not been paid and the cause of action for the realisation of the same has become time barred due to the passage of time, nevertheless, the contractor will be entitled to recover the same as a part of the final bill. Failure to pay the final bill constitutes a new cause of action and the starting point of limitation for payment will arise from the date of default in the payment of the final bill.

23. From a reading of the principles laid down in the afore noticed judicial pronouncements it is clear that refusal to pay the final bill constitutes a new cause of action and the starting point of limitation for the payment will arise from the date of default in payment of such bills. It is also extremely well settled that it is only upon refusal to make payment of the bill that cause of action for

invoking the arbitration clause would arise. In the instant case, the petitioner sought reference of the matter and appointment of the arbitrators also by its notice dated 15th June, 1994 which was also not acceded to by the respondent.

24. At this stage, it is also necessary to notice certain proceedings before this Court. It is trite that the question as to whether the claim is justified or whether it subsists or not is itself arbitrable. Issues relating to whether there is accord and satisfaction of the claims raised by a claimant have been repeatedly held by a catena of judicial precedents to be within the jurisdiction of the arbitrator and not of the court in proceedings u/s 20 of the Arbitration Act, 1940. Therefore, so far as the contention of the respondents that no amount is due or payable is concerned, this would be purely within the jurisdiction of the arbitrator to consider and decide.

25. In the instant case, so far as the issue of limitation is concerned, I find that for the first time the respondent has denied payment of dues of the petitioner only in the reply which has been filed before this Court in the year 1999. Admittedly, the bills of the petitioner were pending for certification before the Architect. Despite reminders, the Architect took no steps. As per Clause 63, the cause of action for filing of the application u/s of the Arbitration Act, 1940 could have arisen only when the cause of action when the claim of the petitioner had been repudiated. Even when the petitioner filed the petition u/s 11 of the Arbitration & Conciliation Act, 1996 i.e. AA 159/97, the respondent did not dispute the same.

26. On the 14th January, 2003, this Court recorded the following order:

It appears that claims of the petitioner could not be taken into consideration because of mismanagement of the respondent-society which was superseded during the execution of the work and an Administrator was appointed. The final bills submitted by the petitioner with the society are still pending. It would be appropriate in the interest of justice to direct Administrator of the Society to hear both the parties and redress the grievance of the petitioner in just and fair manner. If the petitioner still feels aggrieved, the instant petition can be taken up for consideration on merits. This exercise by the Administrator would be without prejudice to the rights and contentions of the parties raised in these proceedings.

Petition shall appear before the Administrator on 2nd February, 2003 at 11 A.M. for the aforesaid purpose. dusty.

It is admitted that the Administrator directed the Architect of the Society to give a report.

27. The matter was thereafter adjourned from time to time. Finally it appears that the architect has submitted a report dated 23rd June, 2003 which has been filed by the petitioner before this Court. The respondent received a copy of the report which has been filed. The architect has found amounts due in respect of both the contracts with the petitioner with the respondent. So far as the civil

works for the dwelling units are concerned, the architect has found a net amount of Rs. 66,41,651/23p due and payable, while so far as the sanitary and water supply contract is concerned, the architect has found a net sum of Rs. 17,07,719/15p as due and payable. A copy of this report was sent under a covering letter dated 23rd June, 2003 to the respondent. The architect has also recommended the release of security deposit of the contractor to it. Another copy of this report has been served upon the respondent through counsel before the same was filed before this Court, on 26th May, 2006 by the petitioner herein.

28. The petitioner had contended that no dispute has been raised to the certification of the Architect by the respondent. It has lost its right to do so in terms of the Clause 63 between the parties and that despite the processing of the final bill, still no payment is being made to the petitioner.

29. Be that as it may, the respondent has accepted the order dated 14th of January, 2003.

30. In the instant case, the certification if at all by the architect has been given during the tendency of this case as noticed above, when the Court issued a direction on 14th January, 2003 only. This material fact cannot be lost sight of. Thus it certainly cannot be held that the application of the petitioner is barred by limitation.

31. It would in this behalf be useful to consider the principles laid down by the Apex Court, in M/s. M.K. Shah Engineers and Contractors Vs. State of Madhya Pradesh, wherein the Court held thus:

17. No one can be permitted to take advantage of one's own wrong. The respondent-State of M.P. cannot and could not have been heard to plead denial of the two appellants' right to seek reference to arbitration for non-compliance with the earlier part of Clause 3.3.29. In the case of M/s. Chabaldas & Sons, the clause was complied with. Alternatively, even if it was not complied with in the case of M/s. Chabaldas & Sons, but certainly in the case of M/s. M.K. Shah, the fault for non-compliance lies with the respondent-State of M.P. through its officials. The plea of bar, if any, created by the earlier part of Clause 3.3.29 cannot be permitted to be set up by a party which itself has been responsible for frustrating the operation thereof. It will be travesty of justice if the appellants for all fault of the respondents are denied right to have recourse to the remedy of arbitration. A closer scrutiny of Clause 3.3.29 clearly suggests that the parties intended to enter into an arbitration agreement for deciding all questions and disputes arising between them through arbitration and thereby excluding the jurisdiction of ordinary civil courts. Such reference to arbitration and thereby excluding the jurisdiction of ordinary civil courts. Such reference to arbitration is required to be preceded by a decision of the Superintending Engineers and a challenge to such decision within 28 days by the party feeling aggrieved therewith. The steps preceding the coming into operation of the arbitration clause though essential are capable of being waived and if one party has by its

own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived. The party at fault cannot be permitted to set up the bar for non-performance of prerequisite obligation so as to exclude the applicability and operation of the arbitration clause.

32. Before this Court, the respondent has pointed out that the parties had entered into an agreement dated 14th January, 1986 which contained the following clause with regard to the disputes redressal between the parties.

5. Any dispute/disputes arising out of this contract shall be referred to the arbitration of Shri L.C. Sharma of M/s. G.C. Sharma & Sons, 28/G-2, Connaught Circus, New Delhi and Shri R.K. Bhatia, Secretary of the Pharmaceutical Employees Cooperative Group Housing Society Ltd. and Shri G.S. Bawa Chairman of the said Society shall be Umpire and his decision shall be final and binding on both the parties. The said arbitration shall be in accordance with the Arbitration Act.

33. This agreement was entered into in respect of both the civil construction and the sanitary installation as well as the water supply works which is the work which the petitioner had agreed to do for the respondent. The notice dated 15th June, 1994 issued by the petitioner was specifically addressed to the Chairman and the Secretary of the respondent. Copy thereof was also endorsed to the Architect. These persons were the persons, who were named in Clause 5 of the agreement dated 14th January, 1986. Let alone taking any action in terms of the requests of the petitioner to decide on the matters urged and raised, no acknowledgment was even issued to the petitioner.

34. Before this Court, the petitioner has contended that the dispute reversal mechanism is really contained in Clause 63 of the agreement between the parties. Even in the reply filed before this Court, the respondent has taken objection that the petitioner has not invoked Clause 63 and sought a decision of the architect on the matters in dispute and in the absence, thereof cannot file the present proceedings u/s 20 of the Arbitration Act, 1940. No objection has been taken by the respondent with regard to the reference of disputes under Clause 5 of the agreement dated 14th January, 1986. Assuming that the Clause 5 of this agreement was to operate and bind the parties, it is noteworthy that the petitioner had addressed the notice dated 15th June, 1994 to the three persons who have been named in Clause 5 as arbitrators. No steps were taken in terms of this clause. They have failed to take action as even per the Clause 5 of the agreement. This matter has remained pending ever since.

35. The present petition u/s 20 of the Arbitration & Conciliation Act, is also pending before this Court since 1998. In this view of the matter, looked at from any angle, in my view, the present case is a fit case where this Court can appoint an independent arbitrator to adjudicate upon the disputes between the parties.

36. The respondent has placed reliance on the pronouncements of the Apex

Court in Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, and of this Court in Union of India Vs. Vijay Construction Co., to urge that the cause of action for seeking the reference was within three years from the date when cause of action accrued.

37. In the Steel Authority of India's case (supra), there was a repudiation of the claim for damages which was being raised. The contractor had given a notice in 1979 demanding damages for loss suffered because of delay in handing over work site. It was in this background that the Court held that the claim of the contractor which was filed beyond the period of three years from the date of the notice was held to be barred by limitation.

So far as the pronouncement of this Court in Union of India v. Vijay Construction's case (supra) is concerned, in that case the claim was raised after more than three years from the date when the contract was rescinded.

38. In the case in hand, after the rescission of the contract, the respondent required the petitioner to carry out the works. The petitioner is contending that the same amounted to revocation of the rescission and that the bills are in respect of the works done after the rescission. Clause 63 clearly required a party to await certification of either the acceptance of the bills or the rejection by the architect and for this reason as well it cannot be held that cause of action had accrued in favor of the petitioner.

39. The admitted position before this Court is that bills were raised by the petitioner which remained pending with the Architect. Even notice in respect thereof was not acknowledged or later on dealt with or replied. Thus, as per Clause 63, so far as the bills remained pending without decision by the architect, no dispute had arisen. All that had occurred was that the petitioner had raised a claim. Certainly in the light of the agreement between the parties, this did not constitute a cause of action entitling the petitioner to file the petition u/s 20 of the Arbitration Act, 1940. It is only upon dissatisfaction with the determination and/or certification by the architect with regard to withholding of any amount that as per Clause 63, the petitioner could invoke the arbitration. This is also the stand taken by the respondent in reply before this Court.

For the same reason, the pronouncement reported in (75) 1998 DLT 576 entitled Rajbir Singh v. Union of India and Anr. is not applicable to the facts and circumstances of the present case.

40. The respondent has also placed reliance on the pronouncement of the Apex Court in S. Rajan Vs. State of Kerala and another, to contend that an arbitrator being named in Clause 5 of the agreement dated 14th January, 1986, the matter can only be referred to such arbitrator. Perusal of this judgment would show that the Apex Court laid down the principle that while considering application u/s 20 of the Arbitration Act, 1940, it is only if the arbitrator specified and named in the agreement refuses or fails to act, does the Court get the jurisdiction to appoint another person or persons as the arbitrator. In this behalf the Court has

considered the mandate of sub-Section 4 of the Section 20.

41. On the other hand, learned Counsel for petitioner has placed reliance on the pronouncement of this Court in K.C. Sharma Vs. D.P.A., to contend that the respondents in the instant case has failed to appoint the arbitrator to adjudicate upon the claims of the petition and consequently had forfeited the right to appoint the arbitrator. It has been claimed that it is now for the Court to appoint arbitrator. In this case, reliance was placed on the judgment of the Apex Court in G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, Madras and on an earlier pronouncement in 1993 (1) ALR 469 entitled Nandyal Co-op. Spinning Mills Ltd. v. K.V. Mohan Rao wherein the Court held that if no arbitrator had been appointed within 15 days from the date of receipt of the notice, the competent authority had abdicated himself of the power to appoint arbitrator under the contract and the Court gets the jurisdiction to appoint an arbitrator by operation of Section 8(1)(a).

42. In this petition seeking appointment of the arbitrator, the respondent has contested the petition objecting to its maintainability. Though the petitioner had mentioned Clause 63 in the notice dated 15th June, 1994, however, the respondents were aware of the agreement dated 14th January, 1986 and could have very well taken steps for appointment of the arbitrator. The notice of the petitioner was served on all parties concerned. No such act was done. In any case, having regard to the pendency of the matter since 1998 in these proceedings, having regard to the stand and conduct of the respondent and the proceedings pursuant to the order dated 14th January, 2003, in my view, the present case is a fit case where an independent arbitrator deserves to be appointed.

The respondent in its reply has also placed reliance on Clause 63 as afore noticed.

43. In the light of the facts noticed above, it is writ large on the face of the record that the persons named in the agreement have failed to act in terms thereof. In fact it is the respondents themselves who first failed to respond to the requests of the petitioner, then to those of the architect, appointed by them necessitating the petitioner to seek relief before this Court. The respondent is taking pleas merely so as to frustrate the claims and remedies of the petitioner.

44. Accordingly, this petition is allowed and Justice V.S. Aggarwal (retired) is appointed as an arbitrator to arbitrate on the disputes between the parties. The learned arbitrator would fix his fees in consultation with the parties. In addition, the learned arbitrator would be entitled to all out of pocket expenses. The fees and the expenses shall be shared jointly by the parties.

Since the issue of limitation stands decided, the learned arbitrator would decide on the merits of the claim.