
(2010) 02 SHI CK 0008
In the High Court Of Himachal Pradesh
Case No : Arbitration Case No. 22 of 2007

Ranjit Singh and Company	Vs	APPELLANT
H.P. State Electricity Board		RESPONDENT

Date of Decision : 22-02-2010

Acts Referred:

Arbitration Act, 1940 — Section 20, 8
Arbitration and Conciliation Act, 1996 — Section 31, 34
Income Tax Act, 1961 — Section 226(3)
Limitation Act, 1908 — Article 115, 120, 56
Limitation Act, 1963 — Article 113, 18

Citation : (2010) 2 ShimLC 279

Hon'ble Judges : Kuldeep Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kuldeep Singh, J.—The present petition u/s 34 of the Arbitration and Conciliation Act, 1996 (for short "Act") has been filed by claimant for setting aside, award dated 30.3.2007.

2. The facts, in brief, as per petitioner are that an agreement was executed between the parties and the petitioner undertook the works relating to "Erection of 220 KV Transmission line from Sungra to Kunihar". The petitioner duly executed the works and completed the same in the year 1989. The "final bill" was also raised for the works in December, 1989. The respondent vide letters dated 13.6.2003, 20.8.2003, 10.9.2003 and 30.9.2003 asked the petitioner to accept some amount as full and final payment, the petitioner refused to give full and final discharge as required by the respondent. The petitioner vide letter dated 12.2.2004 invoked arbitration clause of the agreement between the parties and sought reference. The matter was referred to Arbitrator by respondent vide letter dated 5.5.2004.

3. The respondent paid a sum of Rs. 4,92,468/- to petitioner on 20.6.2004 which

was accepted by the petitioner under protest. The petitioner had put up claims before the Arbitrator which were opposed by the respondent by filing reply. The petitioner in the rejoinder re-asserted the claims and denied the defence of respondent.

4. On the pleadings of the parties, the Arbitrator has framed sixteen issues. The culled out summary of various claims as per award dated 30.3.2007 is as follows:

Claim No. 1 : Payment against pending bills as per Part-A of Annexure "A" (column 9) of the Statement of Claim - recovery of Rs. 1,62,800.00 and recovery against TDS Rs. 1188.00.

(a) The amount of Rs. 1,62,800.00 which has been recovered by the claimant out of the respondent's bill in June, 2004 pertains to slip removal which does not form a part of the Contract. The claim is rejected.

(b) The amount of Rs. 1188/- deducted by the respondent on account of TDS be paid by the respondent to the Income Tax Department, in favour of the claimant, alongwith interest and penalty if any for late payment. The claim is partially upheld to this extent.

Claim No. 2 : Balance payment as per Part-B of Annexure "A" of statement of Claim - Rs. 9,31,813.35.

An amount of Rs. 6,72,913/- was payable by the respondent under the contract against this claim but the same, being time-barred is not allowed under this award. Remaining amount of Slip Removal does not form a part of this Contract. The claim is rejected.

Claim No. 3: Payment against bills for backfilling or retaining walls as per Part-C of Annexure "A" of statement of claim - Rs. 7,74,058.00

The amount of Rs. 25,727/- was payable by the respondent against this claim but the same, being time-barred, is not allowed under this award. The claim is rejected.

Claim No. 4 : Payment against erection of Towers on account of difference in actual weight or erected towers and ceiling weight of towers quoted by suppliers (Bill No. EUM/1/98, dated 7.9.1998 Ref. Annexure "A" {Total (D) Column 9} Rs. 17,843.38.

Rejected

Claim No. 5; Interest @ 18% for delayed payment of Rs. 4,92,468 w.e.f. 30 days from submission of bills till date of payment (22.6.4) Rs. 14,62,630.00.

Dues which were paid by the respondent to the claimant had already become time-barred in June, 2004 and as such the interest for the late payment is not allowed. The claim is rejected.

Claim No. 6: Interest @ 18% for delayed payment of Rs. 18,69,869 w.e.f. 30

days from submission of bills till date of payment.

Rejected as not applicable following rejection of claims 1 to 4 above except for that on the amount of Rs. 1188/- which shall be payable to the Income Tax Department in shape of penalty or otherwise as per rules of the said Department.

Claim No. 7: Damages/Loss on account of delay in payment.

Rejected as not applicable for reasons similar to those mentioned against Claim No. 6.

Claim No. 8: Cost of arbitration proceedings.

Parties shall bear their respective costs. The Arbitrator has not charged any fees.

5. The petitioner has filed application u/s 34 of the Act against the impugned award on the grounds that the learned Arbitrator has erred in holding the claims are barred by limitation. The respondent had made some recoveries in the final bill paid in June 2004, the claims could not be said to be time-barred. The award so far as issue of limitation is concerned is against the agreement as well as against the provisions of Limitation Act. The findings of the learned Arbitrator on limitation are against the public policy of India.

6. The learned Arbitrator has failed to take into consideration the Joint Measurement Certificates (JMC) while considering the disputed quantities. JMC were not produced by the respondent despite specific request made by the petitioner. The learned Arbitrator should have drawn adverse inference against the respondent for not producing JMC. The learned Arbitrator has erred in relying on measurement books produced by the respondent even though the respondent failed to produce JMC.

7. The learned Arbitrator while deciding issue No. 2 has failed to give any reason to hold that an amount of Rs. 1,62,800 was deducted from the part of the bill of the petitioner amounting to Rs. 1,63,988. The findings of learned Arbitrator on issue No. 2 are against the mandate of Section 31 of the Act.

8. The learned Arbitrator has erred in returning the finding that slip removal is not part of the contract. Clause 9 of the agreement has not been properly considered by the learned Arbitrator. It has not been appreciated that even the respondent was making payments for some quantities of slip removal work executed by the petitioner under the agreement, therefore, respondent is estopped from claiming that the slip removal is not part of contract.

9. The learned Arbitrator has decided wrongly issue No. 9 rejecting the claim of petitioner for payment for the difference in weights of towers. The best evidence in this regard was with the respondent in the shape of record of the weight paid to the suppliers of the towers. The said record was not produced by the respondent but learned Arbitrator has not drawn adverse inference against the respondent. The award on this count is total non-application of mind to the controversy.

10. The learned Arbitrator has wrongly decided issues No. 10 and 11. It has not been appreciated that respondent was in possession of JMC which were not produced. The learned Arbitrator has not drawn adverse inference against the respondent for not producing JMC and has thus erred in deciding issues No. 10 and 11 against the petitioner. The learned Arbitrator has rejected the claim of interest of the petitioner wrongly, illegally which is also against the public policy of India.

11. The respondent has filed reply and has contested the petition. It has been submitted that the award is not beyond the scope of submissions to the Arbitrator. The impugned award is just, proper, reasoned and consequently warrants no interference. On merits, the respondent has refuted the objections and prayed for dismissal of the petition. It has been stated that bill of the petitioner could not be released by the respondent in view of Notice u/s 226(3) of the Income Tax Act, 1961 from Deputy Commissioner of Income Tax, Meerut (UP.) dated 29.12.1989 whereby the respondent was directed to deposit the amount of Rs. 15,00,000/- or the amount due and payable to the petitioner to his office. As according to said authority, a sum of Rs. 15,00,000/- was recoverable from the petitioner on account of income tax. The petitioner has also placed on record letter dated 25.11.1992 Annexure R-2 of Income Tax Officer, Ward No. 3, Meerut informing that deduction made u/s 226(3) in the case of M/s Ranjit Singh & Company be treated as withdrawn as no amount is outstanding against the said assessee. It has been asserted that payments were to be made as per the contract agreement and the petitioner Company was entitled to the payments according to the terms mentioned in the agreement.

12. The petitioner filed rejoinder and re-asserted the case set-up in the petition. On the pleadings of the parties, the following issues were framed:

1. Whether the award of the Arbitral Tribunal is against the public policy of India? OPO.

Relief.

The parties led their evidence by way of affidavits.

13. I have heard the learned Counsel for the parties and have also gone through the record. Mr. Bhogal, Senior Advocate has made submissions mainly on the issue of limitation decided by the learned Arbitrator with consequential relief in case the said issue is decided in favour of the petitioner. He has submitted that learned Arbitrator has erred in returning the findings that almost all main claims of the petitioner are time-barred. He has submitted that works were executed and completed in the year 1989 and the final bill was submitted in December, 1989. The respondent made payment of Rs. 4,92,468/- to petitioner on 22.6.2004 against the bill submitted in December 1989, therefore, by no stretch, the claims of the petitioner which are based upon final bill submitted in December 1989 are time-barred. The learned Counsel for the respondent has submitted that reference of dispute to Arbitrator and limitation regarding claims

are two separate, distinct aspects of the case. The existence of dispute is material for referring the dispute to Arbitrator but the claims can be allowed by Arbitrator only if those are within limitation. He has submitted that the existence of dispute and limitation regarding claims cannot be mixed up. He has submitted that learned Arbitrator has rightly held the claims to be time-barred.

ISSUE No. 1:

14. Mr. Bhogal, has submitted that all payments made to the petitioner on the basis of bills are to be considered advances which are subject to final bill. The final bill was submitted in December 1989. The respondent did not release the payment of final bill to the petitioner on one pretext or the other but started correspondence with the petitioner to accept an amount of Rs. 5,06,608.55 after deduction of recoveries in full and final settlement of the claim and a letter dated 13.6.2003 to this effect was written to petitioner. The respondent thereafter had written letters dated 20.8.2003, 10.9.2003 offering to release Rs. 5,06,608.55 to the petitioner in full and final settlement of claim. The petitioner vide letter dated 18.9.2003 had shown its inability to accept the amount of Rs. 5,06,608.55 in full and final settlement of the claim but requested the respondent to release Rs. 5,06,608.55 to the petitioner and a pre-receipted receipt was also given on 18.9.2003 to the respondent. The petitioner was informed vide letters dated 30.9.2003 and 20.10.2003 by the respondent that since petitioner has not given the required certificate for releasing the payment, therefore, the payment could not be released to the petitioner. The petitioner vide letter dated 12.2.2004 requested the Chairman of respondent to appoint Arbitrator to adjudicate the dispute between the parties on the ground that as against the claim of Rs. 23,80,102/- the respondent is offering only Rs. 5,06,608.55 to the petitioner. The petitioner had also claimed interest in the letter dated 12.2.2004. The respondent vide letter dated 5.5.2004 informed the petitioner that the competent authority has directed to convey to the petitioner that the payment of admitted claim of Rs. 5,06,608.55 be released to the firm, necessary order in regard to request of firm to nominate the Arbitrator as provided in the contract to decide regarding the balance payment of the case will be issued separately. In the meantime, the petitioner was paid Rs. 4,92,468/- vide cheque dated 22.6.2004.

15. There is no dispute between the parties that Chief Engineer(Arbitration), HPSEB was appointed as the sole arbitrator to adjudicate the disputes between the parties vide Chief Engineer (P&M) order dated 5.5.2004 which was superseded by the appointment made by Chairman, HPSEB vide Secretary, HPSEB endorsement dated 20.6.2005. In supersession of endorsement dated 20.6.2005 the Chairman, HPSEB nominated and appointed Chief Engineer (SP), HPSEB as Arbitrator in accordance with Secretary, HPSEB endorsement dated 21.10.2005 to adjudicate upon the claims and counter-claims of the parties in accordance with the Act.

16. Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, in support of his submission that dispute between the parties had arisen on 13.6.2003 when

the respondent had decided to pay only Rs. 5,06,608.55 after deduction of recoveries to the petitioner against outstanding claim of Rs. 23,28,102/-. The petitioner even after 13.6.2003 had some correspondence with the respondent but ultimately petitioner on 12.2.2004 made a request for appointment of Arbitrator as per the agreement, therefore, the claims of the petitioner are within limitation. In Major (Retd.) Inder Singh Rekhi, the question before the Supreme Court was the period of limitation for filing application u/s 20 of the Arbitration Act, 1940. The learned Single Judge and Division Bench of the High Court held that the application u/s 20 was barred by time. In that context, the question before the Supreme Court was when dispute had arisen for filing application u/s 20. The Supreme Court has held that 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 Arbitrator u/s 8 or a reference u/s 20 of the Arbitration Act, 1940. On facts, the Supreme Court held that the application u/s 20 was filed within the period of three years and, therefore, the application was within time.

17. The expression "final bill" has not been used in the agreement. The terms of the payment are provided in clause 1 of Article VII of the agreement which is as follows:

CLAUSE -1 TERMS OF PAYMENT:- Subject to any deductions which the purchaser may be authorized to make under the contract the company shall be entitled to payment of the work as under:

(i) (a) 100% per cent of the monthly erection bills & PVC through the Engineer-in-charge against 5% Bank Guarantee.

The learned Arbitrator has held that Article 18 of Limitation Act controls the period of limitation in the present case. Article 18 of the Limitation Act, 1963 is as follows:

Description of suit Period of Limitation Time from which period begins to run
----- For the
price of work done Three years. When the work is done. by the plaintiff for the
defendant at his request, where no time has been fixed for payment.

18. The claim No. 1 is against recovery of Rs. 1,62,800/- and recovery against TDS Rs. 1188/-. In claim No. 2 an amount of Rs. 6,72,913/- was rejected by the learned Arbitrator being time-barred and the remaining amount on the ground that it does not form a part of the contract. In claim No. 3, an amount of Rs. 25,727/- was held payable by the respondent but again this claim was held time-barred. The claim No. 4 was rejected. The claim No. 5 of interest was held to be time-barred. The claim No. 6 was rejected following the rejection of claims No. 1 to 4 except an amount of Rs. 1188/- which was held to be payable to the Income Tax Department in the shape of penalty or otherwise as per the rules. The claim No. 7 of damages/loss on account of delay in payment was rejected on the

grounds on which claim No. 6 was rejected, under claim No. 8, the parties were directed to bear their own costs.

19. The learned Arbitrator in the impugned award has held that claims No. 1 (a), 2 do not form a part of the contract. The claim No. 6 was rejected in view of the rejection of claims No. 1 to 4. It means, learned Arbitrator rejected claim No. 6 partly on the ground that it does not form a part of the contract inasmuch as while rejecting claim No. 6, the learned Arbitrator has relied his decision for rejecting the claim No. 1 (a) and claim No. 2 which were rejected on the ground that those claims do not form part of the contract. The claim No. 7 has been rejected by following reasoning of claim No. 6. In other words, while rejecting claim No. 7, the learned Arbitrator has again relied partly his reasoning given for rejection of claim No. 1(a) and claim No. 2.

20. In *Gannon Dunkerley and Co., Ltd. Vs. Union of India (UOI)*, the appellant had filed a suit for recovery against Union of India above contract rate. The appellant had claimed three alternative amounts on three alternative rates. The Union of India contended that the claim was barred by law of limitation. But suit was decreed and decree of Rs. 1,36,222/- was passed in favour of the appellant and against Union of India. In appeal, the High Court took the view that the claim was covered by either Article 56 or Article 115 of the First Schedule of the Limitation Act, 1908 and the suit not having been filed within three years of the date on which the work was done and in any event of the date on which the claim was rejected was barred. The Supreme Court held that a suit is governed by Article 56 if it arises out of a contract to pay the price of work done at the request of the defendant. The Supreme Court has held further as follows:

9. Article 56 of the First Schedule to the Indian Limitation Act, 1908, prescribes a period of three years for a suit for the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment, and the period of limitation commences to run from the date when the work is done. A suit is governed by Article 56 if it arises out of a contract to pay the price of work done at the request of the defendant. The claim in the present case is for payment at an additional rate over the stipulated rate in view of change in circumstances, and not for price of work done by the appellant Company. It is true that additional work was done at the request of the Engineer-in-charge, but the claim in suit was not for the price of work done but for enhanced rates in view of altered circumstances.

10. Article 115 of the First Schedule to the Limitation Act is a residuary article dealing with the claim for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for, in the First Schedule. The period of limitation in such cases is three years and it commences to run when the contract is broken, or where there are successive breaches when the breach in respect of which the suit is instituted occurs, or where the breach is continuing when it ceases. The suit filed by the appellant Company is not a suit for compensation for breach of contract express or implied: it is a suit for

enhanced rate because of change of circumstances, and in respect of work not covered by the contract. The additional work directed by the Engineer-in-charge when carried out may be deemed to be done under the terms of the contract; but the claim for enhanced rates does not arise out of the contract; it is in any case not a claim for compensation for breach of contract.

11. The claim is therefore not covered by any specific article under the First Schedule, and must fall within the terms of Article 120. The Solicitor-General appearing on behalf of the Union of India contended that even if the claim falls within the terms of Article 120 of the Limitation Act, it was barred, for the appellant Company had in the suit made a claim for work done more than six years before the institution of the suit. Counsel submitted that under Article 120 the period of limitation commences to run from the date on which the defendant obtains the benefit of the work done by the plaintiff. But under Article 120 of the Limitation Act the period of six years for suits for which no period of limitation is provided elsewhere in the Schedule commences to run when the right to sue accrues. In our judgment, there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted: *Bolo v. Koklan* 57 Ind App 325 ; AIR 1930 270 (Privy Council) at p. 272).

The Supreme Court allowed the appeals and the decree passed by the trial Court was restored alongwith 6% interest per annum from the suit till payment.

21. The Articles 18 and 113 of the Limitation Act, 1963 are equivalent to Articles 56, 120 respectively of the Indian Limitation Act, 1908. In the impugned award many claims of the petitioner were not found within contract as per the findings recorded by the learned Arbitrator. On the face of this finding, it cannot be said that all claims raised by the petitioner before the learned Arbitrator were governed by Article 18. It cannot be said with certainty when predominant claims are not governed by Article 18 then which specific Article will govern the limitation for the claims raised before the Arbitrator. In these circumstances, the petitioner is entitled to the benefit of ambiguity and it can be safely held that residuary Article 113 will govern the limitation in the present case which is to the following effect:

Description of suit	Period of Limitation	Time from which period begins to run	
-----	-----	-----	Any suit
for which no	Three years.	When the right to sue	period of limitation is accrues.
provided	elsewhere	in	this
-----	-----	-----	Schedule.

22. The limitation under Article 113 starts when the right to sue accrues and the period of limitation is three years. The "final bill" was submitted by the petitioner to the respondent in December 1989. This bill remained in limbo and except for

some correspondence nothing tangible crystallized. The respondent on 13.6.2003 finally woke up from the slumber and decided to release a sum of Rs. 5,06,608.55 after recoveries in full and final settlement of the claim of the petitioner. According to petitioner as per its letter dated 12.2.2004, the claim of the petitioner was Rs. 23,80,102/-. Thus, respondent first time on 13.6.2003 admitted the claim of the petitioner only to the extent of Rs. 5,06,608.55 minus recoveries and denied the rest of the claim of the petitioner. Thus, 13.6.2003 is all important date when respondent denied the claim of the petitioner. On 13.6.2003, the petitioner came to know that its raised claim has been denied by the respondent and, therefore, 13.6.2003 can be safely taken the date on which cause of action accrued to the petitioner under Article 113 of the Limitation Act, 1963. The payment of an amount of Rs. 4,92,468/- by respondent to petitioner on 22.6.2004 is only ministerial act after the decision taken on 13.6.2003 refuting the rest of the claim of the petitioner.

23. It has come on record in the arbitration proceedings that after 13.6.2003 again some correspondence was exchanged between the petitioner and the respondent. The petitioner ultimately on 12.2.2004 made a request for appointment of Arbitrator for adjudicating the dispute between the parties wherein the petitioner has indicated its claim of Rs. 23,80,102/-. In the letter of request dated 12.2.2004, the petitioner has also claimed interest. The Arbitrator was initially appointed on 5.5.2004 but the appointment was superseded by endorsement dated 20.6.2005 and another endorsement dated 21.10.2005. Thus, taken from any angle, on the start of cause of action on 13.6.2003 the application filed by the petitioner on 12.2.2004 for adjudicating its dispute which resulted into the appointment of the Arbitrator is within limitation under Article 113 from the date of cause of action i.e. 13.6.2003. The learned Arbitrator has erred in applying Article 18 of the Limitation Act and returning the finding that almost all claims of the petitioner are time-barred, such findings are not sustainable. The issue No. 1 is decided in favour of petitioner and against respondent.

24. After having come to the conclusion that findings recorded by the learned Arbitrator on the issue of limitation are wrong and not sustainable, the next question is what ultimate order this Court can pass in view of the fact that the learned Arbitrator has allowed some claims of the petitioner on merits but rejected them on limitation. The relief prayed in the petition is for setting aside the impugned award, no other specific relief has been prayed in the petition. At the time of hearing of the petition nothing has been relied from the Act or otherwise on behalf of petitioner that this Court while setting aside the award can also award the amount over and above what has been awarded by learned Arbitrator and pass appropriate order.

25. In *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, , in paragraph 52 the Supreme Court has held that 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure

fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The Court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. In view of the law laid down by the Supreme Court, it is clear that this Court can only quash the award leaving the parties free to begin the arbitration again* if it is desired. The power of setting aside in certain circumstances may include the power of reducing of the amount awarded by the Arbitrator but it is difficult to hold that power to set aside award also includes the power to award some amount to the petitioner over and above the amount awarded by the Arbitrator on the basis of decision of the Court.

26. In view of the above, the petition is allowed. The impugned award is accordingly set-aside with liberty to the petitioner to go for fresh arbitration in view of law laid down by the Supreme Court in *Mcdermott International INC* (supra).