
(1995) 08 MAD CK 0033

In the Madras High Court

Case No : O.S. Appeal No's. 136 to 141 of 1992

The Madras Metropolitan Water Supply and Sewerage Board
and Another

APPELLANT

Vs

Ramakrishna Reddy and Another

RESPONDENT

Date of Decision : 04-08-1995

Acts Referred:

Arbitration Act, 1940 — Section 23, 37(1)
Limitation Act, 1963 — Article 137

Citation : (1995) 2 CTC 373 : (1995) 2 LW 694

Hon'ble Judges : Srinivasan, J;S.S. Subramani, J

Bench : Division Bench

Advocate : P. Sathasivam, for the Appellant; P. Subba Reddy, for the Respondent

Final Decision : Allowed

Judgement

S.S. Subramani, J.—These six Appeals are by the defendant in C.S. Nos. 144 to 149 of 1992 filed u/s 20 of the Arbitration Act. The suits

were decreed by a learned single Judge of this Court by a common judgment on 20.3.1992

2. The respondent herein entered into six contracts with the appellant as per agreements dated 31.8.1981 and 30.11.1981. After completion of

the contract, and after receipt of final bills without any protect, the respondent herein issued legal notices to the appellant herein stating that there

are certain disputes and that he wanted the same to be referred to an Arbitrator. A reply was sent by the appellant disputing the liability. Thereafter

six suits were filed by the respondent herein u/s 20 of the Arbitration Act for referring the matter to an Arbitrator. C.S. Nos. 144 to 149 of 1992

are the various suits filed by him. O.S.A. No. 136 of 1992 is preferred against the judgment in C.S.No. 144 of 1992; O.S.A. No. 137 of 1992 is

preferred against the judgment in C.S.No. 145 of 1992; O.S.A. No. 138 of 1992 is preferred against the judgment in C.S.No. 146 of 1992;

O.S.A.No. 139 of 1992 is preferred against the judgment in C.S. No. 148 of 1992 and O.S.A. No. 141 of 1992 is preferred against the

Judgment in C.S.No. 149 of 1992. Since the parties are the same, it is sufficient if we make mention of the parties as appellant and respondent.

3. In C.S. No. 144 of 1992, which is the subject matter of O.S.A. No. 136 of 1992, demand for final payment was made on 28.2.1985 and the

reply was issued on 21.3.1986. In C.S. No. 145 of 1992, against which O.S.A. No. 137 of 1992 is filed, demand for final payment was made on

19.7.1985 and the reply was on 9.10.1985, 8.12.1985 and 3.2.1986. In C.S. No. 146 of 1992 against which O.S.A. No. 138 of 1992 is filed,

demand was made on 18.6.1985 and the reply was given on 16.10.1985. In C.S. No. 147 of 1992 from which O.S.A. No. 139 of 1992 arises,

demand was made on 12.9.1985 and the reply was given on 16.10.1985, 15.11.1985, 9.12.1985, 3.2.1986 and 21.3.1986. In C.S. No. 148 of

1992 from which O.S.A. No. 140 of 1992 arises, demand was made on 10.3.1986 and the reply was given on 20.3.1986, and in C.S. No. 149

of 1992 from which O.S.A. No. 141 of 1992 arises, demand for final payment was made on 7.3.1986 and the reply was given on 22.3.1986.

These dates are relevant for the purpose of computing the period on limitation, and these dates are seen from the notices issued by the respondent

in these Appeals to the appellant.

4. It is not disputed in the notice itself and also in the complaints filed before the learned Judge that even in the reply, the appellant (Board) has disputed

its liability to pay any amount as claimed by the respondent. It was thereafter final bills were received without protest. The various dates on which

final bills were passed are as follows:- In C.S. No. 144/92, final bill was passed on 5.10.1987; in C.S. No. 145/92 on 10.9.1987; in C.S. No.

146 of 1992 on 12.5.1987; in C.S. No. 147 of 1992 on 12.6.1987; in C.S.No. 148/92 on 8.9.1987 and in C.S.No. 149 of 1992 the final bill

was passed on 23.1.1988.

5. As stated earlier, it was after notice and reply final bill was passed, and the respondent received the payment thereunder without any protest.

Long thereafter, on 17.9.1990, he issued notices to the appellant calling upon it

to refer the matter to an Arbitrator. The appellant sent a reply on 28.12.1990 repudiating the claim. All the suits were filed on 5.3.1991. 6. In the suits, the main defence was that the claim is barred by limitation, and the appellant wanted the matter to be heard regarding the same. According to the appellant, if on admitted facts, the claim is barred, there is no purpose in referring the matter to an Arbitrator.

7. The respondent contended that the question of limitation is also a matter to be decided by the Arbitrator.

8. The learned single Judge held that the question of limitation also could be referred to the Arbitrator. Learned Judge further held that the question of limitation is also a matter in dispute and hence the Arbitrator is competent to decide the same.

9. Originally there was a dispute as to the provision of the Limitation Act applicable to arbitration proceedings. But, as per the decision reported in

The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , it was held that Article 137 of the Limitation Act is applicable in respect of arbitration proceedings as well.

10. In A.I.R.1988 S.C.I 172 (Union of India and Anr. v. L.K. Ahuja and Co.), it was held thus:-

In order to be entitled to ask for a reference u/s 20, there must be an entitlement to money and a difference or dispute in respect of the same. It

will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference u/s 20 and, secondly, whether the claim

to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if no

admitted facts a claim is found at the time of making an order u/s 20, to be barred by limitation. In matters of this nature, the main question is

whether the application u/s 20 was within time.

11. In Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, , it was held thus:-

It is now well-settled that Article 137 of the Limitation Act, 1963 would apply to any petition or application filed in a Civil Court.

In order to be entitled to order of reference u/s 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise

to which this agreement applied. In this case, there is no dispute that there was

an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. But in order to be entitled to ask for a reference u/s 20 of the Act there must not only be an entitlement to money but there must be a difference or a dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28th Feb. 1983 and there was non-payment, the cause of action arose from that date, that is to say, 28th of February, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator u/s 8 or a reference u/s 20 of the Act.

12. Finally, the Supreme Court in *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*, considered the entire matter and held thus:-

The present case is a hopelessly barred claim as the petitioner by his conduct slept over his right for more than 10 years. Statutory arbitrations stand apart. In these circumstances it is an exceptional case and the courts below have justifiably exercised their discretionary power and jurisdiction under Sections 5 and 12(2)(b) to permit the respondent to rescind the arbitration agreement and declared that the arbitration agreement shall cease to have effect with respect to the difference or dispute referred to in the notice of the petitioner and relieved the parties from the arbitration agreement.

Arbitration implies timely commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen.

Delay defeats justice and equity aids the 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.

In view of Section 37 of the Arbitration Act, the provisions of the Limitation Act

would apply to arbitrations. The arbitrator was entitled and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the Court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a Court of law to arbitrate their disputes or differences. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence. For the purpose of Section 37(1) "Action" and "cause of action" in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e., when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on.....

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

That was a case where an application was filed by the appellant before the Apex Court seeking arbitration. There he sent his Bills on 12.7.1979, but demand was not made. He sent notice on November 20, 1979 for reference to arbitration. After receipt of the notice, the respondent in the Apex Court filed arbitration suit before the Calcutta High Court u/s 5, 12 and 33 of the Arbitration Act for revoking his authority. The main ground of defence was that the claim was hopelessly barred by limitation. The learned Judge of the Calcutta High Court held that since the claim is beyond three years, it is hopelessly barred by limitation. Taking that view, the learned Judge cancelled the arbitration clause in the agreement. Appeal filed before a Division Bench was also not successful. It is against the concurrent finding, the appellant filed SLP before the Supreme Court. We are reiterating the facts of that case only for the purpose of showing that the Court itself is competent to consider the question of limitation, if on admitted facts, the claim is barred.

13. In this connection, it is also worthwhile to take into consideration Sub-section

(1) of Section 37 of the Arbitration Act which reads thus:-

All the provisions of the Indian Limitation Act, 1908 shall apply to arbitration as they apply to proceedings in Court.

By virtue of the said Sub-section, all the provisions of the Limitation Act are made applicable to arbitration proceedings as well. As stated earlier,

as per the decision reported in The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , Article 137 of the Limitation Act is the

appropriate Article for making a reference u/s 20 of the Arbitration Act. The same reads thus -

137. Any other application for which no period of limitation is provided elsewhere in this division

Three Years

When the right to apply accrues

The Article says that time begins to run when the right to apply accrues. Commenting on that, in the last decision of the Supreme Court Panchu

Gopal Bose Vs. Board of Trustees for Port of Calcutta, , it was held that the "action" and "cause of action" in the Limitation Act should be

construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question

i.e., when the claimant acquires the right to require arbitration. In paragraph 10 of the judgment, their Lordships of the Supreme Court have

followed the decision reported in (1957) 1 All.E.R. 669 (West Riding of Yorkshire County Council v. Huddersfield Corporation) and held that

the period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date

when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned. Their

Lordships further held in paragraph 11 thus-

Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been arbitration clause, the case

of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from

the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified

number of years from the date when the claim accrued.

Finally, their Lordships held in paragraph 13 thus;-

...The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.

Their Lordships further held that "Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years

from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the

specified number of years from the date when the claim accrued.

14. In the decision reported in (1957) 1 All E.R.669 (supra), the dispute was between two County. Councillors regarding the adjustment of certain

amount due to the reconstitution of Wards. When a claim was put forward, the same was disputed on the ground of limitation. The matter was

sought to be referred to an Arbitrator. It was in that connection, Lord Goddard, C.J. held thus:-

Counsel for the county council submitted that the cause of the arbitration, which would be equivalent for this purpose to a cause of action, did not

arise until the parties failed to agree. I cannot think in the circumstances that is right. There is no obligation on the parties to come to an agreement.

The money was demanded by the county council more than six years after the ""transfer has taken place and more than six years, therefore, after

the time when they might have demanded or required the money. Then, the matter having been left and no claim having been made to the money,

suddenly a claim comes forward which nobody was under any obligation, so far as the statute is concerned, to discuss or to attempt to agree. The

corporation merely said; ""we do not recognise that claim"". Thereupon an arbitrator was appointed. What he was appointed to do was to make a

financial adjustment arising out of what happened many years ago. In my opinion, when the realities of the transaction are looked at and the

documents to which I have been referred are considered, this is really an action to recover a sum of money by virtue of the provisions of Section

151 of the Act of 1939. Therefore, in my judgment, the answer to the arbitrator's question is that the claim is barred by the Limitation Act, 1939,

and I so declare.

15. R.S. Bachawat in his "Law of Arbitration" -First Edition (1983) has held (at pages 532 and 533) thus:-

...For the purposes of Section 37(1) "action" and "cause of action" in the "Limitation Act should be construed as "arbitration" and "cause of

arbitration 41. The Cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration.

An application u/s 20 is governed by Article 137 of the Limitation Act, 1963 and must be made within three years of the date when the right to apply first accrues.....

16. In the last decision of the Apex Court Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, , their Lordships also followed the principles enunciated by Russell on Arbitration which read thus:-

Disputes under a contract may also be removed, in effect, from the jurisdiction of the court, by including an arbitration clause in the contract,

providing that any arbitration under it must be commenced within a certain time or not at all, and going on to provide that if an arbitration is not so

commenced the claim concerned shall be barred. Such provisions are not necessarily found together. Thus the contract may limit the time for

arbitration without barring the claim depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the

courts. Or it may make compliance with a time-limit condition of any claim without limiting the operation of the arbitration clause, leaving a party

who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred. Nor, since

the provisions concerned are essentially separate, is there anything to prevent the party relying on the limitation clause waiving his objection to

arbitration whilst still relying on the clause as barring the claim.

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An extension of time is not automatic and it is only granted if "undue hardship" would otherwise be caused. Not all hardship, however, is "undue

hardship", it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by

allowing a claim to be reopened after it has become barred. The mere fact that a claim was barred could not be held to be "undue hardship.

17. On the above settled position of law, let us consider whether, on the admitted facts of this case, the claim is barred by limitation.

18. Admittedly, the respondent demanded final payment as per his notices dated 12.9.1985, 7.3.1986, 28.2.1985, 10.3.1986, 19.7.1995 and

19.6.1985 respectively, and it is also an admitted fact that the appellant has given reply notices repudiating the liability on 16.10.1985, 22.3.1986,

21.3.1986, 20.3.1986, 9.10.1985 and 16.10.1985 respectively. Admittedly, notices demanding payment were sent after completion of the work.

When there is a claim and repudiation, the cause of action arises atleast from the date of repudiation. Final bills were passed for payment on

12.6.1987, 23.1.1988, 5.10.1987, 8.9.1987, 10.9.1987 and 12.5.1987 respectively. The suits were filed before this Court only on 5.3.1991,

i.e., beyond a period of three years.

19. In Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, , it was held that "It is true that on completion of the work a right to get

payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of

the claim was made on 28th Feb.1983. and there was non- payment, the cause of action arose from that date, that is to say, 28th of February,

1983". Their Lordships have held that since final bill was not prepared, cause of action arose while demand was made. Impliedly it follows that

when final bills are passed, cause of action has to follow from that date. Learned counsel relied on the various demands made by the respondent

on 17.9.1990 and submitted that the suits were filed within three years from that date.

20. The said submission cannot be accepted in view of the same decision Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority,

where it is stated that "a party cannot postpone the accrual of cause of action by writing reminders or sending reminders". Therefore, the notice

dated 17.9.1990 can be treated only as a reminder. In all these cases, it was thereafter the respondent received final bills. He received the same

without protest. The cause of action has arisen only when the liability is repudiated. The respondent cannot after receipt of the final payment, issue

notices long after three years. So, on the admitted facts, if Article 137 of the Limitation Act applies, the claim will be barred by limitation and to

refer the matter to an Arbitrator when there is no subsisting claim will amount to causing great injustice to the appellant. Accordingly we set aside

the judgment of the learned single Judge and allow the Appeals. C.S.144 to 149/92 are dismissed. However, there will be no order as to costs.