

(1998) 03 DEL CK 0057

In the Delhi High Court

Case No : Suit No. 2425-A and 2426-A/95

United Engineers

APPELLANT

Vs

Ahinsa Co-op G/H Society Ltd.

RESPONDENT

Date of Decision : 30-03-1998

Acts Referred:

Citation : (1998) 45 DRJ 274 : (1998) 120 PLR 42 : (1998) 4 RCR(Civil) 408

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : Mr. S.K. Mittal, for the Appellant; Mr. S.S. Rana, for the Respondent

Judgement

D.K. Jain, J.—These two petitions u/s 20 of the Arbitration Act, 1940 (for short the ACT), registered as suits, seeking reference of disputes and claims mentioned in para 9 of the petitions, based on clause 6 of the Articles of Agreement, dated 30 September 1984, between the parties, are opposed by the respondent on the pleas of these being barred by time; not maintainable for non-joinder of a party and res judicata.

2. Since the issues involved in both the matters are the same except that they pertain to contracts for two jobs, these are being disposed of by this common judgment.

3. The circumstances leading to this contest are as follows :-

4. The petitioner firms are the contractors. The respondent is a Group Housing Society. The latter had to build a complex at Plot No.27-1, Sector-IX in Rohini, Delhi and for the work of sanitation (Suit No.2425-A/95) and electrification (2426-A/95) engaged the petitioners. As employer, the respondent society entered into two separate agreements, both dated 30 September 1989 with the petitioners/contractors for the aforesaid works. Payment was envisaged to be made to the contractors on certification of the bill by the Architect, M/s.Ram Krishan Associates Pvt. Ltd. Clause 6 of the Articles of Agreement provided for "Settlement of disputes" and "Arbitration" in case of any dispute. On disputes,

inter alia, about the final payment due to the contractors, arising in terms of clause 6, the contractors moved the said Architect, who, after notice to the respondent not well-placed or too happily worded, issued a full and final certificate on 27 December 1990 and communicated the same to the parties.

5. Misconstruing the aforesaid "final certificate" by the architect as "award", the petitioners/contractors filed suits no.689-A/91 and no.523/92 in this Court for making the "award" of the "arbitrator" the rule of court. Later, on learning, during the course of arguments about its misconception, suit no.689-A/91 was withdrawn by the petitioner on 10 November 1993. The other suit was dismissed for non-prosecution. The petitioners then invoked the arbitration provisions in clause 6 and by letter dated 13 December 1994, communicated to the respondent the names of three persons eligible for appointment as arbitrators under Clause 6, and called upon the respondent to agree to the arbitration of any one. In their reply through an Advocate, dated 21 December 1994, the respondent assailed the proceedings before the Architect and declined to agree to the appointment of arbitrator, as suggested by the petitioners/contractors. In consequence, invoking clause 6 of the agreement, the petitioners have now moved these petitions for appointment of arbitrator in terms of arbitration clause. Not disputing the existence of arbitration clause in the agreement between the parties, as noticed above, the petitions are opposed on the grounds of limitation; non-joinder of parties and res judicata due to petitioners' filing and dismissal of aforementioned earlier two suits.

6. The points for consideration which emerge from the above are;

- i) Whether the petitions are barred by time?
- ii) Whether the petitions are not maintainable for not impleading the Architects?
- iii) Whether the petitions are barred by res judicata?

7. I have heard Mr.S.K. Mittal, Advocate for the petitioners and Mr.S.S. Rana, Advocate for the respondent society.

8. Relying on Maj (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority 1988 SC 1008, wherein it was held that period of limitation for filing petition under sections 20 and 8 of the Act has to be computed from the date when the claim is asserted and payment is declined, Mr.Mittal has contended that it was only on 13 December 1994, when the petitioners had asserted their claim for payment in terms of final certificate issued by the architect as stipulated under the Articles of Agreement and had demanded arbitration in terms of clause 6 of the agreement, which demand the respondent declined in their letter dated 21 December 1994, that the cause of action to move for appointment of arbitrator had accrued to petitioners and that since the period of limitation has, thus, to commence from 21 December 1994, these petitions u/s 20 of the Act, filed in October 1995, are within time. As regards the plea of res judicata, raised by the respondent he has urged that the petitioners had earlier filed petitions under

sections 14 and 17 of the Act under bonafide misconception of arbitration clause and Realizing the said mistake had withdrawn the said suits unconditionally. As the matter was not finally heard and decided the dismissal of those suits would not act as res judicata.

9. Mr.S.S. Rana, on the other hand, has submitted that; the architect having admittedly issued "full and final certificate" on 27 December 1990, the payment not made in terms thereof, the cause of action to take recourse to arbitration arose on that date, the present applications filed in October 1995 are clearly barred by limitation; and the petitioners having withdrawn their earlier suit no.689 A/91 and got dismissed S.No.523/92, the principles of res judicata are clearly attracted, and the instant petitions are barred by res judicata. In support, reliance is placed by the learned counsel on a decision of this court in Atar Singh & Bros. Vs. DDA 1996 RLR 75 and of the Supreme Court in S. Rajan Vs. State of Kerala and another, . To appreciate the controversy and rival contentions it would be helpful to notice arbitration clause 6 of the agreement, which is reproduced below:-

Settlement of Dispute, Arbitration.

10. All disputes and differences of any kind whatever arising out of or in connection with the contract of the carrying out of the works (whether during the progress of after the determination or abandonment or breach of the contract shall be referred to and settled by the Architects who shall state their decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the excepted(sic) matters shall be final and without appeal as stated in Clause no.35. But if either the employer or the contractor be dissatisfied with the decision of the Architect on any matter, question or the dispute of any kind (except any of the excepted(Sic) matters) or as to the withholding by the Architect of any certificate of which the contractors) may within 28 days after receiving notice to such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon, Such written notice shall specify the matters which are in dispute and such 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 to the appointment of a single arbitrator to the arbitration of two Arbitrators being both Fellow of the Indian Institute of Architects or fellow of Institute of Engineers or Equivalent one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an umpire.

11. From the arbitration clause it is evident that the said clause is in two parts. The first part provides for reference of disputes and differences of any kind whatever arising out of or in connection with the contract to the Architects, who are required to state their decision in writing, which may be in the form of a final certificate or otherwise. The proceedings before the architect are not in the

nature of judicial proceedings and his decision not an award. The second part stipulates that if either the employer or the contractor is dissatisfied with the decision of the Architects, then, except on the excepted matters, the party aggrieved, by the final certificate issued by the architects, could, within 28 days after receiving notice of such decision, ask for reference of disputes or differences thereon to the arbitration for which the machinery is prescribed. The proceedings before the said arbitrator are to be "judicial proceedings" and then there will be an "award".

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 Vs. T.P. Kunhaliumma* 1977 SC 282 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 21 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 30 September 1989 when the petitioners submitted their final bill, to the Architects for settlement and in any event on 27 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 16 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 27 December 1990. Basing its claim thereon, the petitioners by their letter dated 13 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 27 December 1994, giving rise to a 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 16 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 27 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 applications, filed within three years of respondent's reply dated 21 December 1994, are well within time.

14. Mr.Rana's reliance on Atar Singh's case and S.Rajan's case (supra) is misplaced. In Atar Singh's case (supra), it has been held that if an arbitrator has already entered upon reference, a party cannot apply u/s 20 of the Act for appointment of another arbitrator. In the instant case, the architect to whom the final bill was referred could in no sense of the term, inspire of his adumbration in this behalf, arrogate to himself or the authority of or be taken to be arbitrator. Reference of final bill to him was only for settlement, culminating in full and final certificate being issued, which is not an "award". There is no dispute with the proposition of law laid down by the Supreme Court in Rajan's case (Supra). It only held that the right to apply for reference of disputes to arbitration u/s 20 of the Act accrues when differences arise between the parties to arbitration agreement.

15. The next plea in defense that the Architect who issued the final certificate, having not been imp leaded makes the application not maintainable, is equally meritless. The architect, certifying payment due to be made is not a necessary party and the petitions without impleading the architect are well constituted.

16. The plea of "res judicata" raised in defense as a last resort, as noticed earlier, is equally untenable. Proceedings before the architect were not judicial proceedings and the final certificate issued by him cannot partake the nature of an "award". It is only after an award that application under sections 14 & 17 of the Act, for making it rule of court, can be filed. Suit No.689/91 and Suit No.523/92 were dismissed - the first as withdrawn and the latter for non-prosecution. There being no award, these suits under sections 14 and 17 of the Act were not maintainable and were withdrawn. Again, these suits were not heard and finally decided on merits. In any case the subject matters of those suits and of the present petitions are entirely different. The principle of res judicata is not applicable to the facts of the instant cases.

17. The allegation made by Mr. Rana, learned counsel for the respondent in the passing that the petitioners have not come to the court with clean hands inasmuch as they have failed to disclose in these petitions the filing and dismissal of earlier suits is stated to be rejected. Para 7 of the present petitions does refer to this fact.

18. The objections raised in resistance to the petitions being meritless are rejected. The petitions are allowed and the arbitration agreement is directed to be filed. The claims/disputes set out in para 9 of the petitions are referred to the arbitrator/arbitrators as indicated below:

The respondent in terms of the arbitration clause 6, set out hereinabove, is called upon, in terms of the said clause, to agree to the appointment of a single arbitrator or two arbitrators, who respectively is or are fellows of Indian Institute of Architects or fellows of Institute of Engineers, as the case may be, within six weeks from today, failing which Justice P.K.Bahri, a retired Judge of this court will be the sole arbitrator to decide the disputes/claims aforesaid. The learned arbitrator will fix his own fees and the same and the expenses of arbitration shall be borne by the parties in equal proportion. The learned arbitrator shall make and publish his award within four months from the date of his entering on the reference.

19. A copy of this order be sent to the learned arbitrator directly by the office. Certified copies of the order may be issued dusty to counsel for the parties.

20. Both the petitions stand disposed of. There will, however, be no order as to costs.