

(2008) 07 DEL CK 0044
In the Delhi High Court
Case No : OMP 415 of 2005

Uppal Engineering Company Pvt. Ltd.	APPELLANT
Vs	
Abhinav Cooperative Group Housing Society Limited and Others	RESPONDENT

Date of Decision : 03-07-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 34, 7, 9

Citation : (2008) 3 ARBLR 64 : (2008) 104 DRJ 468

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Raju Ramachandran, Mandeep Singh Vinaik and Rishad Chowdhury, for the Appellant; Dayan Krishnan, Amit Gupta and Gautam Nayaran, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This is a petition u/s 34 of the Arbitration and Conciliation Act, 1996 seeking the setting aside of the award dated 30.06.2005 made by an arbitral tribunal comprising of three arbitrators. The challenge is essentially to the question of arbitrability of claim No. 1 which has been decided by the arbitral tribunal in favor of the claimant (respondent No. 1) herein. The petitioner has also raised issues with regard to limitation and has urged that part of the claim was time barred. It was also contended that the payments which had been made to the petitioner upon certificates issued by the architect cannot be overturned inasmuch as the architect has acted as an agent of the respondent No. 1. Lastly, it was contended that the decision making process of the arbitrators turned out to be a travesty of justice inasmuch as the majority view on the question of arbitrability decided as per the order dated 09.09.2004 had been notified only by the presiding arbitrator and such an order would be illegal in the absence of the signatures of the other arbitrators.

2. The respondent No. 1, who was the claimant before the arbitral tribunal, made

submissions to the contrary. It was urged on behalf of the respondent No. 1 that claim No. 1 was an arbitrable dispute particularly in view of the novation of the agreement between the parties recorded in the consent order dated 28.05.1998 passed by a learned single Judge of this Court while disposing of an application filed by the respondent No. 1 u/s 11 of the said Act for the appointment of an arbitrator / arbitral tribunal. It was also contended that the question of limitation must be pleaded specifically. This has not been done either before the arbitral tribunal or before this Court and unless and until specific pleas with regard to limitation are taken, in view of the decision of the Supreme Court in the case of Oil and Natural Gas Commission Vs. M.C. Clelland Engineers S.A., , the petitioner would not be permitted to raise such pleas in the course of oral arguments. With regard to the question of agency, it was submitted that in building and engineering contracts, the architect as certifier does not act as an agent of the employer, but acts as a quasi-judicial authority between the owner and the contractor. A reference was made to Law Relating to Building & Engineering Contracts in India, Fourth Edition by Kishore Gajaria. Moreover, the petitioner in its reply to the claims before the arbitral tribunal had taken the stand that the architect is not the agent of the respondent No. 1 and a unilateral decision to terminate the services of the architect could not have been taken by the respondent No. 1. It was submitted that the petitioner having stated before the arbitral tribunal that the architect was not an agent of the respondent No. 1, cannot be permitted to approbate and reprobate, by now taking the stand that the architect was an agent of the respondent No. 1.

3. With regard to the notification of the majority view of the order dated 09.09.2004 being signed by only the presiding arbitrator, it was contended on behalf of the respondent No. 1 that this issue no longer survives inasmuch as the question of arbitrability of claim No. 1 has been considered in the award itself and the award has been signed by all the arbitrators. Thus, even if the earlier incident could be regarded as an irregularity, the same stood cured by the signing of the award.

4. Before I consider the rival contentions of the parties, it would be appropriate to note a few facts with regard to the background of the case. The respondent No. 1 is a group housing society. In 1989, it invited tenders for the construction of 149 dwelling units at Chilla, Dallupura (now known as Vasundhara Enclave) through its architect M/s Govardhan Kundi and Associates (hereinafter referred to as "the said architect"). The petitioner's tender was found to be the most suitable and the work of constructing the dwelling units was awarded to the petitioner. A contract dated 14.09.1989 was signed and executed by and between the parties for this purpose. Clause 44 of the special conditions of contract provided for arbitration. The same reads as under:

Clause 44 Settlement of Dispute Arbitration:

All disputes and differences of any kind whether arising out of or in connection with the contract 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 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 Architects with respect to any of the excepted matters shall be final and without appeal as stated in Clause 34. But if either the Employer or the Contractor be dissatisfied with the decision of the Architects or any matter, question or the disputes of any kind (except any of the excepted matters) or as to the withholding by the Architects 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 twenty eight days after receiving notice to such decision, give a written notice to the other party through the Architects requiring that such matters in disputes 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 claim 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 parties or in case of disagreement to the appointment of a single Arbitrator, two Arbitrators being both fellow of the Indian Institute of Architects, shall before taking upon themselves the burden of Reference appoint an Umpire.

The Arbitrators, and the Umpire shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice save in regard to the excepted matters referred to in Clause 34 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 of and incidental to the reference and award respectively shall be in the discretion of the Arbitrator or Arbitrators or the Umpire who may determine the amount thereof or direct the same to be taxed as between Attorney and Client or Clients 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. The submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration Act 1940 or any modification thereof, the award of the Arbitrators or Arbitrator or the Umpire shall be final and binding on the parties. Such reference except as to the withholding by the Architects of any certificate under Clause No. 32 to which the Contractor claims to be entitled, shall not be opened or entered upon until after the completion or the alleged completion of the works or until after 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 the interim Certificate nor the Contractor except with the consent in writing of the Architects in any way delay the carrying out of the works by reason of any such matter, question or disputes all due to diligence and shall until the decision of the Arbitrator or Arbitrators or the Umpire be given, abide by the decision of the Architects and no award of the Arbitrator or the Arbitrators or the Umpire shall relieve the Contractor of his obligations to adhere

strictly to the Architect's 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 a condition precedent to any right of action under the contract".

5. Though the aforesaid arbitration clause is rather lengthy, what is essential for the purpose of this petition is that there are two categories of matters - ordinary matters and excepted matters. Insofar as ordinary matters are concerned, a two-tier system for dispute resolution was provided. In the first instance, a dispute with regard to ordinary matters was to be resolved by the architect. In case either of the parties was dissatisfied with the conclusion of the architect, they had a further opportunity to have the dispute or disputes referred to arbitration. On the other hand, in the case of excepted matters, this two-tier system was not available and the decision of the architect was final and binding without either party having recourse to any further appeal or arbitration. The result of this is that excepted matters are not arbitrable. It is an admitted position that claim No. 1, which is the bone of contention in the present petition, fell within the area of excepted matters. As such, in terms of contract between the parties, claim No. 1 was not arbitrable. But, the matter does not rest here.

6. The respondent No. 1 had alleged that in connivance with the said architect, the petitioner procured incorrect certification from him on the strength of which the petitioner claimed payments against jobs even though the same had not been executed at all. Consequently, as a result of such illegal and fraudulent act on the part of the petitioner, in collusion with the said architect, the respondent No. 1 was put to great financial loss running into several lakhs of rupees. Faced with such a situation, the respondent No. 1 terminated the services of the said architect on 29.06.1997 which was conveyed to the said architect on 22.07.1997. Shortly thereafter, on 18.08.1997, the respondent No. 1 also terminated the agreement dated 14.04.1989 which had been entered into with the petitioner.

7. Since there were disputes which required resolution, the respondent No. 1 was of the view that, as the services of the said architect had been terminated in the circumstances indicated above, and there was no architect in place to take a decision either as to the excepted matters or the other matters as provided under the contract, the proper course would be to file a petition u/s 11 of the said Act and seek the appointment of an independent arbitrator in respect of all the matters, including those which were otherwise excepted. On 16.09.1997, the respondent No. 1, Therefore, filed AA 228/1997 u/s 11 of the said Act for the appointment of an arbitrator.

8. In the said petition, the respondent No. 1 had, inter alia, stated that one of the disputes which required resolution was with regard to "the respondent (petitioner herein) failing to execute specific jobs against which they fraudulently received payments in connivance with the architect, M/s Govardhan Kundi and Associates, the value of the same as on date is nearly - Rs. 15 lacs". In the said

petition, the respondent No. 1 also stated that it had already terminated the contract of the said architect for his failure to honestly perform his part under the contract. It was, Therefore, submitted that as the said architect would himself be an aggrieved party, he would not be in a position to function as an honest, unbiased adjudicator of the disputes between the parties. It was contended that since there is a named arbitrator, i.e., M/s Govardhan Kundi and Associates in the contract between the parties and that as the said arbitrator cannot function in an unbiased manner, it was a fit case for the appointment of an arbitrator u/s 11 of the said Act. It was, Therefore, prayed that an order of reference be made to the arbitrator after appointing him and all disputes and differences between the parties arising out of the contract be referred to such arbitrator.

9. During the pendency of the said petition u/s 11 of the said Act, on 15.10.1997, the respondent No. 1 filed an application u/s 9 of the said Act seeking the appointment of a Local Commissioner to take measurements because the petitioner was not coming forward for joint measurements. It was contended that the measurements were necessary because the entire case revolved around fraudulent and false certification with regard to the extent of the works done by the petitioner. By an order dated 27.10.1997, a learned single Judge of this Court passed an order appointing a Local Commissioner for the purposes of taking measurements and the Local Commissioner submitted his report on 24.03.1998. The petitioner filed its reply to the respondent No. 1's said petition u/s 11 on 08.04.1998. The petitioner had specifically taken the plea that reference to arbitration should be limited to only those matters which are covered by the arbitration Clause 44.

10. However, by a consent order dated 28.05.1998, the said petition u/s 11 of the said Act was disposed of in, inter alia, the following manner:

This petition can be disposed of at this stage itself. It has been agreed between the parties that all the disputes and differences arising out between the parties shall be referred for the arbitration. It has also been agreed that the dispute regarding steel not mentioned in the petition by the petitioner shall also be referred for the adjudication of the Arbitrators. It has also been agreed that the respondent shall also be entitled to raise any dispute before the Arbitrators including the objections to the report of the Local Commissioner appointed by this Court....

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Counsel for the respondent has suggested the name of Brig. Mr M.M.S. Parihar, retired Chief Engineer, MES as the Arbitrator on their behalf. Mr Chatterjee prays for some time to supply the vacancy on their behalf. Let vacancy be supplied on their behalf within two weeks. I appoint Mr. R.S. Jindal, retired Chief Engineer of DDA as the Umpire. Let notice be sent to the Umpire by the Registry. Fees shall be decided by the Arbitrators/Umpire themselves....

11. On 19.06.1998, a joint letter was issued to the presiding arbitrator by the

petitioner and the respondent No. 1. The said letter reads as under:

Subject: Arbitration of the Disputes between M/s Abhinav Co-op. Group Housing Society Ltd. And M/s Uppal Engineering Co. Pvt. Ltd.

Sir,

The Hon''ble High Court vide its order dt. 28.5.98 has appointed you as the Umpire in arbitration proceedings in the above noted case and has also recorded that Brig. (Rtd.) M.M.S. Parihar, Chief Engineer (Rtd.) (M.E.S.) has been nominated as the Arbitrator by the respondent M/s. Uppal Engineering Co. Pvt. Ltd. The Abhinav Co-op. Group Housing Society Ltd. has been allowed to supply the vacancy of the Arbitrator on their behalf within 2 weeks.

The Contract clause on Arbitration in the case envisages appointment of Architects, who should be Fellow of the Institution of Architects, as Arbitrators by the parties. However, we have agreed to the appointment of Engineers in place of Architects by the Society as well as by the Contractor. Therefore, the appointments of Brig. (Rtd.) M.M.S. Parihar as Arbitrator by the Contractor i.e. M/s. Uppal Engineering Co. Pvt. Ltd. and that of Shri C.S.P. Sastri, Director of Works (Rtd.), CPWD as Arbitrator by the Abhinav Co-op. Group Housing Society Ltd. are acceptable to both the parties and we agree to the proceedings conducted by the Arbitrators and the Umpire, who has been appointed by the Hon''ble High Court.

Thus, we agree that the arbitration tribunal shall consist of the following:

- 1) Shri R.S. Jindal, Presiding Arbitrator
- 2) Brig. (Rtd.) M.M.S. Parihar, Arbitrator
- 3) Sh. C.S.P. Sastri, Arbitrator.

The arbitration shall be under Arbitration and Conciliation Act, 1996.

12. Claim No. 1, as submitted by the respondent No. 1 before the arbitral tribunal, was the final statement of accounts after the contract was terminated on 18.08.1997 for the work done by the petitioner allegedly based upon the measurement of the works done and the rates payable under the terms and conditions of the contract. Under this claim, the respondent No. 1 stated that an excess amount of Rs. 3,80,40,473 was claimed and received by the petitioner on the basis of false and incorrect certificates allegedly procured by the respondent from the said architect. It was alleged on behalf of the respondent that the payments had been made to the petitioner on the basis of the said architect's certificates which were contrary to the terms of the contract and were in respect of the works which had not been executed at all or which were of substandard and inferior quality. It was also stated that the petitioner had not cooperated with the respondent No. 1 by coming forward for taking joint measurements of the work existing at the site. By virtue of the impugned award, the arbitral tribunal by majority (R.S. Jindal, Presiding Arbitrator and C.P.S. Sastri, Arbitrator) came

to the conclusion that claim No. 1 was arbitrable in the facts and circumstances narrated above and that the respondent No. 1 was entitled to a sum of Rs. 1,71,23,246/- under claim No. 1. It was, inter alia, noted in the award:

6. Broadly the above award of Rs. 1,71,23,246/- is on account of the following excess payments made to the respondent on the basis of the claims made by the respondent to this effect and wrongly certified for payments by the then Architect M/s Goverdhan Kundi & Associates.

i) Rs. 23,47,221/- Work claimed by the respondents certified for payment by the Architect M/s Goverdhan Kundi & Associates, paid to the respondent but not existing at site.

ii) Rs 79,14,698/- Excess payment claimed by the respondent for escalation under contract condition (CPWD Clause 10CC-Annexure XVI) wrongly certified for payment by the Architect and paid to the respondent.

The total amount paid to the respondent as escalation Rs. 1,70,08,934/- and that payable under CPWD Clause 10 (CC) is 90.51.086/- i.e. Rs. 86,70,184/- for the agreement items Rs. 4,24,052/- for Extra items 10 to 15 90,94,236/-

iii) 18,64,135 Less Recoveries for the materials issued by claimant for respondent Cement 4,58,100/- Steel 13,05,331/- Bricks 1,00,704/- 18,64,135/-

iv) 45,800/- Electricity Bill liable to be recovered from respondent

v) 49,51,391,71,23,246 Excess cheque payments received by respondent by way of advances etc.

13. The petitioner has challenged this finding of the arbitral tribunal on the grounds mentioned above. The order dated 28.05.1998 is admittedly a consent order. The parties had agreed that all the disputes and differences between the parties be referred for arbitration. It must be recalled that the respondent No. 1 sought arbitration even in respect of the excepted matters in view of the exceptional circumstance of the services of the architect having been terminated for having allegedly colluded with the petitioner. In response to this, the petitioner had contended that only those matters which were arbitrable under the contract be referred to arbitration. Despite these rival contentions, the petition was disposed of by the consent order that all the disputes and differences between the parties be referred for arbitration. In my view, the petitioner cannot be permitted to resile from this position by now contending that the expression "all the disputes and differences" has reference only to disputes and differences which were arbitrable under the contract between the parties. It must also be noted that the order dated 28.05.1998 also indicated that the parties had agreed that the dispute regarding steel which was not mentioned in the petition by the petitioner shall also be referred for adjudication of the arbitrators. This part of the order read with the earlier part leaves no manner of doubt that all disputes and differences which found mention in the petition had been agreed to be referred to arbitration. This conclusion is further supported by

the fact that the order also records that the parties had agreed that the petitioner would be entitled to raise any dispute before the arbitrators, including the objections to the report of the Local Commissioner appointed by the court. It will be recalled that the Local Commissioner had been appointed by virtue of an order dated 27.10.1997 in an application filed by the respondent No. 1 u/s 9 of the said Act for the purposes of taking measurements. The object of which, was specifically for the purposes of noting the actual extent of work executed by the petitioner and fell entirely within the scope of claim No. 1. Clearly, it was within the contemplation of the parties that claim No. 1 would be adjudicated upon by the arbitrators. In Milkfood Limited Vs. G.M.C. Ice Cream Private Limited and Others, , it was observed that where both the parties gave a clear consent to refer the matter to arbitration before the High Court, "the parties by agreement gave a good-bye to all other proceedings and...agreed for reference of the disputes to the arbitrator. The sanctity of the undertaking given to the court by the parties has to be maintained. No one can be permitted to breach or flout the undertaking in this manner.

14. The joint letter issued on 19.06.1998 further constitutes a written agreement for reference to arbitration in terms of the order dated 28.05.1998. If there was any doubt as to whether there was an arbitration agreement of the kind required by Section 7 of the said Act, the said letter dated 19.06.1998 removes any such doubt. In these circumstances, I am of the view that the submission of the learned Counsel for the petitioner that claim No. 1 was not an arbitrable dispute, is untenable.

15. An alternative plea had been raised by the learned Counsel for the petitioner that even if it were held that the parties had consented for arbitration of claim No. 1, such a consent was clearly based on a misrepresentation. This argument was advanced in the context of the respondent No. 1's claim in the Section 11 petition being limited to Rs. 15 lakhs, whereas in the claim filed by the respondent No. 1 before the arbitral tribunal, a sum claimed was Rs. 3,80,40,473/- (which was later on amended to Rs. 2,92,58,702/-). This submission cannot be accepted. The sum of Rs. 15 lakhs was claimed by the petitioner, "as on date". The measurements had not been done at that point of time and it is only upon the Local Commissioner's report that the respondent No. 1 came to learn of the extent of the excess payments made by it on account of the false certificates given by the said architect. In any event, no such plea was raised by the petitioner before the arbitral tribunal and, Therefore, it cannot be permitted to agitate this issue before this Court . It must also be pointed out that this alternative plea of consent by misrepresentation was raised by the learned Counsel for the petitioner in the course of arguments. This has not been pleaded either before the arbitral tribunal or even in the present petition.

16. On the question of limitation, the learned Counsel appearing for the respondent No. 1 had, as noted above, placed reliance on the decision of the Supreme Court in the case of ONGC v. M.C. Clelland Engineers S.A. (supra). In

that case, the plea of limitation had been taken in the following manner:

The present arbitration itself is barred by limitation as the alleged claims are relating to the work done in 1981-92.

The Supreme Court considered such a statement to be a bald statement without any details and observed as under:

This is a very bald statement without setting out the details as to how the claim made by the respondent before the Arbitrators have become barred by the limitation particularly when the stand of the respondent is that they had running bills and payments were made from time to time and an account has to be taken as to what amount became due and when; the same has to be worked out. Whether all such details have to be worked out and whether the transactions between the appellant and the respondent did not become complete until the payment of final amount are matters for adjudication. Thus, it becomes very difficult to appreciate that the plea raised before the Arbitrators was sufficient to meet the situation to defeat the claim on the bar of limitation. Therefore, we do not think that we can examine the matter in the light suggested now by the learned senior counsel for the appellant when no foundation has been laid in the course of the proceedings before the Arbitrators either in the pleadings or in the evidence. We are, Therefore, of the view that the High Court was justified in dismissing the appeal against the decree passed in terms of the award.

17. The plea of limitation taken by the learned Counsel for the petitioner is that a total amount of approximately Rs. 8.23 crores was the value of the work done as per the respondent's case. It is submitted that out of this amount, the value of the work done up to 16.09.1994 (a date, three years prior to the date of filing of the respondent No. 1's Section 11 application on 16.09.1997) in respect of which payments were made before that date, was Rs. 5.63 crores. Therefore, according to the petitioner, the value of the work in respect of which the claim could at all have been made would be approximately Rs. 2.60 crores (Rs 8.23 crores - Rs. 5.63 crores = Rs. 2.60 crores). Consequently, it was contended on behalf of the petitioner that if the alleged excess payment in respect of Rs. 8.23 crores has been computed at approximately Rs. 1.71 crores, then, proportionately, even if the award were to be sustained on merits, the only amount which could be awarded keeping in view the law of limitation would be approximately Rs. 50 lakhs. Such a viewpoint cannot be accepted. When a party takes up the plea of limitation and / or time barred claims, it must do so with precision. The court, also, before it can come to the conclusion as to whether a claim is time barred has to know the exact extent of the claim which falls within the zone of limitation and that which falls outside such zone. Specific pleas have to be taken and the issue of time barred claims cannot be decided on assumptions and on applying principles of proportionality. Thus, even de hors the question that in an arbitration by consent, the plea of limitation cannot be raised (See: National Building Construction Corporation Limited Vs. Decor India Pvt. Ltd.,), the petitioner's arguments on the issue of time barred claims cannot be

accepted.

18. On the issue of agency, I find that this impinges upon the merits of claim No. 1. The arbitral tribunal has considered the evidence on record and has returned the finding thereon. The question as to whether the said architect acted as an agent of the respondent or not is not relevant at this stage. The arbitral tribunal has concluded that the certification was false and that on account of this, the respondent was entitled to the sum of Rs. 1,71,23,246/- which had been paid in excess by it to the petitioner. Such findings cannot be challenged in a petition u/s 34 of the said Act inasmuch as that would entail this Court sitting as a court of appeal. In any event, as pointed out earlier, the petitioner itself in its reply to the respondent No. 1's claim before the arbitral tribunal had taken the stand that the said architect was not an agent of the respondent. It cannot be permitted to submit to the contrary at this stage.

19. Finally, on the question of the decision making process of the arbitrators, it is apparent that one of the arbitrators did not agree with the other two. The so-called notification which has purportedly been signed only by the presiding arbitrator is now of no consequence inasmuch as the entire issue with regard to arbitrability of claim No. 1 has been discussed and decided in the award itself which has been signed by the arbitrators. This objection on the part of the petitioner is also unacceptable.

20. In view of the foregoing, no ground for interference with the impugned award is made out. The petition is dismissed. No costs.