

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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OMP 340/2008 & ARB.APPL.14/2008

%17.02.2009

Date of decision: 17th February, 2009

PUNJ LLOYD LTD

.... Petitioner/Appellant

Through: Mr Amit S Chadha, Sr Advocate with
Mr Kunal Sinha and Mr Manish Jha,
Advocates

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Respondent

Through: Ms Padma Priya with Mr Sumit
Gehlawt, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. The petition as well as the appeal have arisen out of the order dated 5th March, 2008 of the Arbitral Tribunal constituted in terms of the agreement between the parties. On an application of the respondent herein and who is also the respondent before the Arbitral Tribunal, under Section 16 of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal has held claims No. 18 to 24 out of the claims preferred by the petitioner/Appellant against the respondent before the Arbitral Tribunal to be not arbitrable owing to mandatory provision of clause 67 of the agreement between the parties having not been followed by the petitioner/appellant.

2. Clause 67 of the agreement between the parties relates to settlement of disputes. Sub-clause (1) thereof provides that a dispute between the parties shall in the first place be referred to the Disputes Review Board (DRB) to be constituted in terms thereof; it further provides that if any party is dissatisfied of any recommendation of the DRB or the DRB fails to issue its recommendation within 56 days of the receipt of the request for recommendation, then that party shall within 14 days after receipt of recommendation or within 14 days after the expiry of the said period of 56 days, give notice to the other party of intention to commence arbitration as to the matter in dispute; such notice was agreed to, to establish the entitlement of the party giving the same to commence arbitration; it further provides that no arbitration in respect of the dispute shall be commenced unless notice is given; the said clause further provides that if no such notice is given within 14 days after receipt of recommendation, the recommendation shall become final and binding upon the parties. Sub-clause (3) of clause 67 provides that the disputes in respect of recommendations which have not become final and binding pursuant to sub-Section (1) shall be finally settled by arbitration as provided therein.

3. The admitted position in the present case is that the claims 18 to 24 were referred to the DRB on 19th November, 2005. In terms of the agreement, the DRB was required to give its recommendation on the said disputes within 56 days i.e., by 15th January, 2006. The DRB however for reasons which are not relevant for the present purposes, did not make any recommendation within the said period of 56 days and with the consent of the parties, the tenure of the DRB was extended from time to time, till 31st March, 2006. A meeting of the

DRB was fixed for 16th July, 2006. However, the chairman of the DRB cancelled the said date vide letter dated 24th June, 2006 with the stipulation that further dates would be fixed after getting consent letter from both the parties regarding extension of the tenure of the DRB. The respondent vide letter dated 27th June, 2006 of its General manager and Project Director and in pursuant to the communication with the Chairman DRB gave its consent to extend the tenure of DRB upto 31st July, 2006 with a further request to the DRB to confirm that decision in respect of all its disputes previously referred will be finalized by 31st July, 2006, so as to obtain the approval of the competent authority. The Chairman DRB vide letter dated 5th July, 2006 fixed the next hearing before the DRB on 28th to 30th July, 2006. The respondent, however, vide its letter dated 12th July, 2006 informed the DRB with copy to the petitioner/appellant that the proposal for extension of the tenure of DRB upto 31st July, 2006 had not been accepted by the competent authority of the respondent and thus requesting for postponement of the hearing fixed on 28th to 30th July, 2006. The DRB was also requested to communicate the recommendations of claims No. 18 to 24 for which hearings were already completed on the earlier dates. The Chairman DRB accordingly vide letter dated 17th July, 2006, in view of the letter aforesaid of the respondent conveying that extension of DRB beyond 31st March, 2006, had not been agreed to by the respondent, cancelled the hearing fixed on 28th to 30th July, 2006.

4. The petitioner/appellant vide letter dated 11th August, 2006 gave notice to the respondent of its intention for commencing of arbitration for the claims No. 18 to 24 aforesaid alongwith the other claims. The petitioner/appellant, vide the same letter, also appointed

its nominee arbitrator. The respondent vide letter dated 25th August, 2006 referred all the 24 disputes to arbitration. With respect to the claims 18 to 24 it was mentioned that the same were pending with the DRB and the tenure of the DRB was completed.

5. The respondent thereafter moved the application under Section 16 of the Act before the Arbitral Tribunal contending that the Arbitral Tribunal had no jurisdiction to decide the claims 18 to 24 for the reason of the petitioner/appellant having not issued the notice of its intention to refer the said disputes to arbitration within 14 days of the expiry of the 56 days period.

6. The respondent has contended that the notice ought to have been given within 14 days of 15th January, 2006 i.e., on the expiry of the first 56 days of the constitution of DRB. Alternatively, it is contended that in any case the notice ought to have been given within 14 days of 12th July, 2006 on which date the respondent had communicated that the competent authority of the respondent was not willing to extend the term of the DRB. Conversely it is argued by the senior counsel for the petitioner/appellant that since the respondent had agreed to extension of time of the DRB till 31st July, 2006 and from which the respondent had subsequently retracted, the notice given on 11th August, 2006 was within the stipulated time of 14 days.

7. The Arbitral Tribunal decided the application of the respondent under Section 16 of the Act in favour of the respondent. It was held that there was no unequivocal consent of the respondent to extend the term of the DRB till 31st July, 2006. The Arbitral Tribunal held

that the notice given by the petitioner/appellant was beyond the time provided in the arbitration clause and thus held that the tribunal had no authority to examine and adjudicate upon the said claims 18 to 24. I am informed that arbitration proceedings qua the other claims of the petitioner against the respondent arising out of the same agreement are pending before the Arbitral Tribunal.

8. The petitioner/appellant after the order dated 5th March, 2008 (supra) of the Arbitral Tribunal first filed the OMP under Section 43(3) of the Act for extension of time for commencement of arbitral proceedings and thereafter filed the appeal challenging the order of the Arbitral Tribunal aforesaid on the application under Section 16 of the Act. The respondent has filed a reply to the OMP as well as the appeal.

9. The senior counsel for the petitioner/appellant has argued that in the facts and circumstances hereinabove stated, the delay, if any, in giving the notice of intention of arbitration not only is miniscule but attributable to the respondent and the petitioner will suffer undue hardship if deprived of the claim without its adjudication. The order of the tribunal was also challenged on merits for the contentions made therein and as recorded therein and which did not find favour with the tribunal.

10. This court had on 16th December, 2008 itself when the hearing commenced inquired from the senior counsel for the petitioner/appellant as to whether clause aforesaid in the agreement requiring notice of intention to arbitrate to be given within 14 days and forfeiture of right of arbitration upon failure to give such notice

was not in contravention of Section 28 of the Indian Contract Act as amended w.e.f. 1997. The senior counsel for the petitioner/appellant fairly stated that the said plea was neither taken before the Arbitral Tribunal nor in the memorandum of appeal nor was this ground taken in the OMP. It was urged that the petitioner on other grounds urged, was entitled to the relief. The counsel for the respondent had sought adjournment on that date and has also made submissions with respect to Section 28 of the Contract Act, which being a pure question of law, can be taken up even though not pleaded.

11. The counsel for the petitioner/appellant has also argued that the respondent itself had referred the claims aforesaid to arbitration and was therefore estopped from contending that the same were not referable. The counsel for the respondent has urged that the provisions of Section 43(3) can be availed of only before reference to the arbitration and not after the order on an application under Section 16. With respect to the arguments of the petitioner/appellant that the respondent was estopped, it was urged that the respondent of its own could not have refused to refer the disputes to arbitration even though not arbitrable according to the respondent and the said plea could be decided by the Arbitral Tribunal only and for which purposes the application under Section 16 was immediately filed. It was further contended that the period of 14 days could not be computed from 31st July, 2006 inasmuch as prior thereto, on 12th July, 2006 itself notice was given by the respondent of its competent authority having not agreed to extension of time till 31st July, 2006.

12. I do not find any merit in the contention of the petitioner that the respondent having referred the disputes to arbitration was

disentitled / estopped from taking the plea aforesaid. The decision whether the disputes are arbitrable or not is to be taken by the arbitrator and not by the respondent. The respondent would have, while referring the disputes, done the same without prejudice to its contention that claims 18-24 were not arbitrable for the delay in giving the notice of arbitration but having not stated so cannot deprive the respondent of taking the said plea before the Arbitral Tribunal.

13. The claims 18 to 24 are otherwise arbitrable as per the agreement between the parties. The Arbitral Tribunal has however held that they are not so arbitrable because the agreement between the parties provides that they shall not be so arbitrable (as distinct from that they shall be barred) unless notice of intent to commence arbitration is given within the time fixed by the agreement. The Arbitral Tribunal held that the petitioner/appellant had not given the notice within the time fixed by the agreement. The tribunal noticed Section 28 of the Contract Act but held the same not coming to the rescue of the petitioner/appellant owing to the dicta of Apex Court in **National Insurance Co Ltd Vs. Sujir Ganesh Nayak** AIR 1997 SC 2049.

14. Section 28 of the Contract Act, as amended on 8th January, 1997 deals with agreements, (a) by which any party thereto is restricted absolutely from enforcing its rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, and/or (b) which limit the time within which it may thus enforce its rights; and/or (c) which extinguish the rights of any party thereto, or discharge any party thereto from any liability under or in respect of

any contract on the expiry of a specified period as to restrict any party from enforcing its rights.

and declares such contracts to be void.

15. Unfortunately the tribunal did not notice the amendment w.e.f. 8th January, 1997 of Section 28 and thus relying upon **National Insurance Co.** (supra) (which itself, though pronounced on 21st March, 1997 i.e., soon after the amendment, does not deal with the amended Section 28) held that the parties could provide for forfeiture or waiver of rights. Prior to the amendment, the contracts of the category in clause (c) in para 14 hereinabove were not covered by the ambit of Section 28. That is why the courts, as in **National Insurance Co.** (supra) had held that parties could agree/provide for forfeiture of rights. The amendment was brought about to get over such interpretations of Section 28 as existing earlier.

16. This court in **Pandit Construction Company Vs. DDA** 143 (2007) DLT 270 has held that **National Insurance Co.** and yet another dicta of the Apex Court in **Wildlife Institute of India Vs. Vijay Kumar Garg** (1997) 10 SCC 528 also pronounced soon after the amendment on 2nd May, 1997, do not deal with the amended Section 28 and hence not good law. Thus the arbitration clause in a DDA contract providing that if the contractor does not make demand for arbitration within 90 days of receiving intimation of bill being ready for payment, the claims of the contractor will be deemed to have been waived and absolutely barred and DDA discharged and released from liabilities in respect of those claims was held to be in teeth of Section 28 as amended and not barring the claim of the contractor.

17. Though the aforesaid is enough for interfering with reasoning given by the Tribunal with respect to Section 28, but I find that there is a difference in clause 67 of the NHAI contract and the DDA contract in **Pandit Construction Co.** (supra). It is felt necessary to deal with the said difference also since NHAI is involved in a large number of arbitrations.

18. It will be seen that while the DDA clause, after requiring demand for arbitration to be made within 90 days, provided the consequence of claim being deemed to have been waived and for DDA to stand discharged of liability, clause 67 of NHAI contract, after requiring for notice of intention to commence arbitration to be given within 14 days, while in the case of recommendation having been made by DRB provides the consequence of such recommendation becoming final and binding, does not provide for any consequence as of such claim being waived or extinguished or of other party being discharged in the case of no recommendation having been made by DRB, but only bars commencement of arbitration without such notice.

19. We are in this concerned with the latter category of cases, where no recommendation has been made by DRB on claims 18 to 24. The contract bars commencement of arbitration without notice within agreed time.

20. What is to happen in such a case. Is the party who has failed to give the notice and which under the contract is barred from commencing arbitration, to institute a suit for adjudication of its claims. If that were to be so, does it not vest a discretion in the party

to the contract to, if opting for arbitration, to give the notice and if not, to avoid giving the notice. Further, what effect does such an interpretation have on the efficacy of the arbitration agreement or even the validity thereof.

21. In **Wellington Associates Ltd Vs. Kirit Mehta** AIR 2000 SC 1379, though exercising powers under Section 11 Arbitration Act, it was said for an arbitration clause to constitute an arbitration agreement within the meaning of Section 7, arbitration should be agreed to be resorted to mandatorily and as a sole remedy, without requiring any fresh consent of the parties. In the present case, in the eventuality with which we are concerned, if the interpretation as flowing from the impugned order is to be adopted, the party in the case of no recommendation from DRB will have an option of arbitration or civil suit as aforesaid. Of course if the option of arbitration is exercised and notice within agreed time given, the other party will mandatorily join in arbitration.

22. The Apex Court in **Jagdish Chander Vs. Ramesh Chander** (2007) 5 SCC 719 also held that consensus *ad idem* to refer the disputes to arbitration is required and not a mere hope to have disputes settled by arbitration. The Division Bench of this court in **U.O.I. Vs. Bharat Engineering Corpn.** ILR (1977) 2 Delhi 57 was faced with a question, “can there be an “arbitration agreement” which reserves the right of reference to only one party? Or, in other words, which only one party can invoke?” Justice T.P.S. Chawla concluded that the provisions of the 1940 Act did not visualize an arbitration agreement which only one party can invoke and hence that the law, neither Indian, nor English, nor American does not

contemplate an arbitration agreement which is contingent or conditional or confers an option. There was thus held to be no arbitration agreement where similar clause as in this case existed.

23. Another Full Bench of this court in **Ved Prakash Mithal Vs. U.O.I.** AIR 1984 Delhi 325 was faced with a clause of arbitration of administrative head of Chief Engineer of CPWD and further provided that if for any reason that was not possible, the matter is not to be referred to arbitration at all. The question arose whether in the face of such agreement, the court was empowered to appoint the arbitrator. The judgment of Division Bench in **Bharat Engineering Corp.** (supra) was not cited before the Full Bench. The Full Bench held that the purpose of Section 20 of the 1940 Act was to effectuate the intention of the parties of arbitration of disputes and the parties could not have agreed to exclude the power of court under Section 20.

24. I do not find any change in the 1996 Act to make the dicta of Division Bench or Full Bench inapplicable. Read in that light, either clause 67 which as aforesaid, read literally leaves discretion in party to opt for either arbitration or civil suit has to be held to be not an arbitration agreement as held by the Division Bench or has to be given effect to. I find the latter of the two options to be more in consonance with amended Section 28 of the Contract Act. The requirement of giving notice of intention to arbitrate within 14 days, else there will be no arbitration, restricts absolutely from enforcing right under the contract by usual legal proceedings in the ordinary tribunal, and/or limits the time within which rights may be enforced. The words used are “ordinary tribunal” and not “ordinary courts”.

So even though failure to give notice restricts right of arbitration only and not right of approaching the court but the parties having agreed to arbitration, the ordinary tribunal would be the arbitral tribunal and not the court.

25. In **U.O.I. Vs. M/s D.N. Revri** AIR 1976 SC 2257 it was laid down that a contract must be interpreted in such a manner as to give efficacy to the contract rather than invalidate it.

26. In my view the intention of parties would be best served by upholding the arbitration clause rather than derogating the same.

27. I have also wondered that if under the amended Section 28 of the Contract Act, any clause of the contract barring arbitration unless some step to commence arbitral proceeding is taken within a time fixed by the agreement, is void, why Section 43(3) in the 1996 Act. Was the legislative intent to make the benefit of Section 28 of Contract Act available in arbitration clause only on proof of hardship and empower the court only to relieve against such forfeiture and not allow the Arbitral Tribunal to apply Section 28.

28. In my view that could not be the legislative intent. The proximity of dates of amendment to Section 28 of the Contract Act notified on 8th January, 1997 and the 1996 Arbitration Act notified on 19th August, 1996 appears to be the reason. At the time of drafting and notification of the 1996 Act the interpretation of law as under the un-amended Section 28 of the Contract Act was in force and Section 43(3) was intended to be a remedy therefor. However, after the amendment of Section 28 of the Contract Act, the same has to be

given full effect by the Arbitral Tribunal also and without proof of any hardship.

29. I may also notice the recent judgment of the Apex Court in **P Manohar Reddy Vs. Maharashtra Krishna Valley Dev. Corp** MANU/SC/8480/2008 relied upon by the counsel for the respondent. In the said judgment, the Apex Court upheld a contractual clause providing for limitation for the purposes of raising a claim and further held the said clause to be not invalid. Reliance was placed on **Wild Life Institute of India** (supra) which judgment as aforesaid has been considered by this court in **Pandit Construction Company** (supra) and held to be not considering the amendment to Section 28 of the Act.

30. The counsel for the respondent also relied on **Dr E Muralidharan Vs. Venkataraman and Company** 2006 (3) Arbitration Law Reporter 477 Madras holding that the courts under Section 43(3) can extend the time before referring the dispute to the arbitrators or at least before the award is passed and not thereafter. However, the senior counsel for the petitioner/appellant, in this regard drew attention to a judgment of this court in **National Highways Authority of India Vs. PNC Construction Co Ltd** 121 (2005) DLT 511 in which case the application under Section 43 (3) was entertained during the pendency of the arbitration proceedings. Reliance was also placed on **Sterling General Insurance Company Ltd Vs. Planters Airways Pvt Ltd** AIR 1975 SC 415 and **Bank of Baroda Vs. Uttam Singh Dugal & Co.** 17 (1980) DLT 265 on undue hardship. Even though, I have held that Section 43(3) after the amendment to Section 28 of the Contract Act is otiose but I may

mention that even otherwise in the facts of the present case, the jurisdiction under Section 43(3) would have been exercised. The facts set out show that the term of the DRB was being extended from time to time beyond the first period of 56 days also. The petitioner/appellant acted on respondent's representations that the DRB was in session as borne out from the record and is therefore estopped from averring that even though it had represented that the DRB was in session but the time of 14 days for giving notice of intention to arbitrator has expired. The respondent NHAI is involved in large scale of activity of construction/development of the highways in the country and is awarding a large number of works/contracts. Clause 67 is a standard term of its contract. It appears to have been felt and rightly so that before commencing arbitration attempt should be made for mediation/conciliation. The same is through constitution of DRB. Though DRB has been given a time of 56 days to make the recommendation but the said time is contractual and there is nothing preventing the parties from extending the said time. Once the parties have represented to each other that the said time has been extended, then the parties are expected to act on the same and any other interpretation would be negating the settlement machinery provided for in the agreement itself. I thus find that the time of the DRB in the present case was represented to be extended till 31st July, 2006. However, one cannot lose sight of the notice dated 11th July, 2006 given by the respondent communicating its decision for not agreeing to further extension of time. The respondent is right in contending that the period of 14 days ought to have run not from 31st July, as contended by the petitioner but upon receipt of its notice. On such calculation, the petitioner did not give the notice within 14 days which ought to have

been given within 14 days of 11th July, 2006 i.e., by 25th July, 2006. The notice was, however, given on 11th August, 2007. There was thus a delay of 17 days in giving the notice. Since the parties had been extending the time from time to time the time limit of 14 days could not be of essence and no prejudice is shown to have been suffered by respondent. Other claims of the petitioner/appellant are stated to be pending adjudication before the Arbitral Tribunal and it is just that all claims which would necessarily involve same question of facts are decided together.

31. I, therefore, allow both the appeal and the OMP. The claims 18 to 24 of the petitioner against the respondent are held to be arbitrable and the petitioner/appellants are entitled to have the same adjudicated through the Arbitral Tribunal already constituted and to whom the said claims were referred. However, in the facts and circumstances aforesaid, the parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

February 17, 2009
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