

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

+ **Date of Decision: 12.07.2010**

% **ARB.P. 437/2006**

M/S E.C. CONSTRUCTION PRIVATE LIMITED Petitioner
Through: Mr. Sandeep Sharma & Mr. Vikas
Sharma, Advocates

versus

M/S ROCKLAND INN Respondent
Through: Mr. Girdhar Govind & Ms. Noorun
Nahar Firdausi, Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? : No
2. To be referred to Reporter or not? : No
3. Whether the judgment should be reported
in the Digest? : No

VIPIN SANGHI, J. (Oral)

1. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Act") has been filed to seek the appointment of an arbitrator. The existence of an arbitration agreement between the parties, which is contained in clause 32 of the general conditions of the agreement dated 13.01.2001 is not disputed. Under the said agreement the petitioner contractor agreed to execute civil works for the respondent.

2. The only substantial issue raised by the respondent in response to the present petition is that the petitioner has not invoked the arbitration agreement by following the procedure prescribed therein and that the petition is barred by limitation.

3. Before proceeding further, it would be appropriate to set out the arbitration agreement between the parties. The same is contained in clause 32 of the agreement and reads as follows:

“32. SETTLEMENT OF DISPUTE : ARBITRATION

All disputes and differences of any kind whatsoever 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 whether before or after the determination, abandonment or breach of Contract) shall be referred to and settled by the Architects who shall state his 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 expected matters shall be excepted matters shall be final and without appeal as stated in the preceding Clause. But if either of the owner or the Contractor be dissatisfied with the decision of the Architects or any matter, question or dispute 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 (the owner of the Contractor) may within twenty-eight days after receiving notice of 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 Arbitration being a Fellow of the Indian Institute of Architects, one to be appointed each party, which Arbitrator shall before taking upon themselves the burden of reference appoint an Umpire.

The Arbitrator, the Arbitrators or 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 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 in the cost of and incidental to the reference and Award respectively shall be in the direction of the Arbitration, or arbitrators or the Umpire who may determine the amount thereof, or direct the same to be taxed as between attorneys and client or between attorneys and client 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. This submission shall be deemed to be submission to Arbitration within the meaning of the Indian Arbitration Act, 1940 or any statutory modification thereof. The Award of the Arbitrator or Arbitration Act, 1940 or any statutory modification thereof. The Award of the Arbitrator or Arbitrators or the Umpire; shall be final and binding on the parties. Such reference except as to the withholding by the Architects of any Certificates under Clause 29 in which the contractor claims to be entitled, shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works arising from any cause unless with the written consent of the owner. And the Contractor Provided always that the Owner shall not withhold the payment of an Interim Certificate, nor the Contractor, except with the Consent in writing of the Architects, in any way delay the carrying out of the work by reason of any such matter, question or dispute being

referred to Arbitration, but shall proceed with the work with all due diligence and hail, until the decision of the Arbitrator or Arbitrators or the Umpire to be given, abide by the decision of the Architects or the Umpire shall relieve the Contractor of his obligations to adhere strictly to the Architects instructions with regard to the actual carrying out of the works. The employer and the Contractor hereby also agree that the Arbitration under this Clause shall be a condition precedent to any right of action under the Contract.”

4. According to the petitioner, the petitioner executed the works under the contract and submitted its final bill to the architect M/s Design Centre on 11.07.2001. The petitioner submits that an amount of Rs.11,29,726/- was payable by the respondent in settlement of the bills after granting adjustment of payments received by the petitioner. It is claimed that the respondent, however, did not make aforesaid payment. Consequently, the petitioner issued a notice dated 22.10.2001 to the respondent calling upon the respondent to clear the outstanding dues within 15 days. The petitioner also stated that in case the dues are not cleared the petitioner would be compelled to appoint an arbitrator in terms of the agreement or to move the appropriate authority for appointment of an arbitrator since there is no named arbitrator. The respondent vide reply dated 12.11.2001 disputed the claim of the petitioner. The petitioner then preferred Arbitration Application No.257/2001 before this Court under section 11 of the Act. The respondent raised an objection in those proceedings that the petitioner had not invoked the arbitration agreement by following the procedure prescribed under the said agreement. This

petition was dismissed as withdrawn on 17.05.2002. Thereafter, the petitioner issued a communication dated 21.05.2002 to the architect M/s Design Centre. In this communication the petitioner alleged that the works under the contract had been completed and the final bill had been submitted on 11.07.2001. However, the same had not been settled. It was stated that against the running bills submitted by the petitioner, ad-hoc payments had been released to the petitioner. It was further asserted that despite several meetings with the architect, the architect had not granted the final certificate of payment as required under Clause 30 of the agreement. The petitioner further stated that it had issued notice dated 21.05.2002 to the respondent demanding payment, but the same had been disputed by them. The petitioner further stated:

“5. As required under clause 32 of the agreement since a dispute has arisen, you were to settle the same and to grant a decision in writing. You have not done the same.

6. That you are hereby called upon to settle the dispute relating to the final bill within 15 days of receipt of this notice.”

5. This notice, according to the petitioner, was sent by registered AD post. The petitioner has placed on record the copy of the postal receipt dated 22.05.2002. However, it appears that the said notice was returned back undelivered with the remark to the effect that despite repeated visits, the addressee could not be found.

6. The petitioner then issued another communication dated 20.07.2002 to the respondent. In this communication the petitioner reiterated its earlier stand and further stated that vide registered notice dated 21.05.2002 the architect had been called upon to settle the dispute regarding the final bill. However, the architect had deliberately avoided the same. The petitioner sought to invoke the arbitration agreement contained in Clause 32 of the agreement. The petitioner nominated one Mr. Anil Kukrija as the sole arbitrator to decide the dispute amongst the parties. Since the petitioner did not receive any response from the respondent, the petitioner preferred Arbitration Application No.132/2003 before this Court on 13.05.2003. This petition was transferred by this Court to the District Court. However, on 15.09.2004 the District Court, by observing that the value for the purposes of jurisdiction was Rs.51,11,230/-, directed the return of the petition to be filed before the High Court. The order passed by this Court on 15.09.2004 reads as follows:

“15.09.2004

Present: None for the plaintiff
Defendant served but not present

Put up again.

Present: Shri Sharad Advocate for the
Plaintiff/Petitioner Shri Girdhar Govind
Advocate for the defendant/respondent.

Learned counsel for the defendant has pointed out that this court has no pecuniary Jurisdiction to try the petition as the valuation fixed by the plaintiff for the purpose of jurisdiction is

Rs.51,11,230/- which is beyond the Pecuniary Jurisdiction of this court. As it is for the plaintiff to fix the value for the purpose of jurisdiction which he has fixed at Rs.51,11,230/- the plaintiff has to be returned counsel for the plaintiff states that he will be filing the petition may appear before the Hon'ble High Court by the end of this month. Parties may appear before the Hon'ble High Court as and when the petition is filed before the Hon'ble High court. Plaintiff/petition be accordingly returned to be filed before Hon'ble High Court. File be consigned to records after necessary compliance."

7. The petitioner thereafter filed the present petition on 12.10.2006. I may note that the present petition is a fresh petition and not the one earlier registered as A.A. No.132/2003. The petitioner while filing the present petition did not seek the return of the petition earlier filed as A.A. No.132/2003, which stood transferred to the District Court. It is in this background that the issue of limitation has been raised by the respondent.

8. The submission of Mr. Sharma, learned counsel for the petitioner is that the arbitration agreement having been invoked, by virtue of section 43 read with section 21 of the Act, the arbitration proceedings are deemed to have commenced on the date the petitioner sent his request to the architect to forward the claims of the petitioner to the respondent in terms of the arbitration agreement, vide communication dated 21.05.2002 sent by registered AD post.

9. He further submits that the subsequent notice issued by the petitioner to the respondent on 20.07.2002 was also a clear and unequivocal invocation of the arbitration agreement between the parties, whereby the petitioner had nominated one Mr. Anil Kukrija as the sole arbitrator and sought the consent of the respondent for the same. Mr. Sharma submits that the arbitration, therefore, stood commenced on the issuance of the notice dated 21.05.2002 to the consultant architect and in any event, on 20.07.2002, when the notice of even date was issued to the respondent. He submits that on both these dates, the claims of the petitioner were alive, inasmuch as the architect had neither approved nor disapproved of the final bill submitted by the petitioner. Reliance has been placed by learned counsel for the petitioner on ***Milkfood Ltd. v. GMC Icecream (P) Ltd., 2004 (1) Arb. Law Reporter 613 (SC)***.

10. It is further submitted by learned counsel for the petitioner that a perusal of the arbitration agreement itself shows that the procedure prescribed by the parties was that the architect was first to be approached with whatever disputes or differences may have arisen. On him being approached, the architect was required to render his decision in writing in the form of a final certificate or otherwise. A party dissatisfied with the decision of the architect on any matter, (except on excepted matters), or with the withholding by the architect of any certificate claimed by the contractor, was required to give a

notice to the other party through the architect requiring that the matter in dispute be arbitrated upon.

11. Mr. Sharma submits that the requirement under the agreement was that in the event of the architect not issuing the certificate as desired by the contractor, the arbitration agreement had to be invoked by giving notice to the respondent, through the architect. Mr. Sharma submits that the arbitration agreement stood invoked firstly upon issuance of the notice dated 21.05.2002 to the architect and thereafter on 20.07.2002 upon issuance of notice to the respondent, keeping in view the fact that the architect avoided to receive the notice sent to it on 21.05.2002. The petitioner was in a helpless situation and presented with an impossible situation. There was sufficient compliance of the arbitration agreement by the petitioner. Mr. Sharma has also placed reliance on the decision of the Supreme Court in ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., 2008 (10) JT 448*** to submit that the issue of limitation should be left to be determined by the arbitral tribunal. Reliance has also been placed on the decision of this Court in ***Yogesh Kumar Gupta v. Miss Anuradha Rangarajan, 139 (2007) DLT 71.***

12. Mr. Sharma submits that under section 16 of the Act, the arbitral tribunal is entitled to determine its jurisdiction. Consequently, the issue as to whether the invocation of the arbitration agreement is

proper or not should also be left for the determination of the arbitral tribunal itself.

13. According to the respondent the aspect of limitation in relation to the present petition has to be tested by ignoring the factum of filing of the earlier petitions as well as the order dated 15.09.2004, inasmuch, as the petitioner had not taken back the earlier filed petition (A.A. No.132/2003) from the District Court in compliance of the order dated 15.09.2004. It is submitted that the cause of action, if any, arose in favour of the petitioner in the year 2001 and since the present petition has been filed after over 5 years thereafter, it is barred by limitation. It is also the submission of respondent that the petitioner has not followed the procedure prescribed under the agreement. Consequently, it cannot be said that the petitioner served an effective notice invoking arbitration. It is argued that under the agreement the petitioner was obliged to serve a notice on the respondent through the architect requiring that the matters in dispute be arbitrated upon. Such notice should have specified the matters which were in dispute. It is submitted that the communication dated 21.05.2002 addressed to the architect, merely accused the architect of not issuing the final certificate of payment in terms of clause 30 of the agreement. It fell short of putting the respondent to notice of the claim for arbitration and the same did not specify the matters which were in dispute. It is further submitted that the said notice dated 21.05.2002 was never served on the architect. Consequently, the question of failure of the

architect or the respondent to respond to the said notice did not arise. Mr. Girdhar Govind submits that the return of the registered envelope containing the notice dated 21.05.2002 on account of the addressee not being found despite repeated visits does not tantamount to service of the notice on the architect. No presumption of service can be raised in law since registered envelope was, as a matter of fact, returned undelivered to the addressee. In this regard reference is made to Sections 114 of the Evidence Act and Section 21 of the General Clauses Act.

14. Having heard learned counsel for the parties, I am of the view that the present application deserves to be allowed and the arbitrator should be appointed to adjudicate the disputes between the parties on merit. The issues with regard to the claim being within limitation as also the issue as to whether the tribunal has jurisdiction and competence to adjudicate the disputes on account of arbitration agreement not being duly invoked should also be left to be finally decided by the arbitral tribunal. However, for the present purpose of entertaining this application, I may examine the two issues raised by the respondent.

15. The petitioner had entered into an agreement with the respondent in January 2001. The final bill was submitted on 11.07.2001. A notice of demand was issued by the petitioner on the respondent on 22.10.2001. In this notice of demand addressed to the

respondent, the petitioner had specifically made reference to clause 32 of the agreement which contains the arbitration agreement. It was claimed that an amount of Rs.11,29,714.26 is payable in terms of the bill submitted by the petitioner. The petitioner further stated that in case the aforesaid amount is not paid within 15 days of the notice, the petitioner shall be compelled to appoint the arbitrator in terms of the arbitration agreement.

16. Therefore, the existence of the dispute with regard to payment claimed by the petitioner as also the intention of the petitioner to resort to the process of arbitration was clearly evinced by this notice.

17. The respondent, in its reply dated 12.11.2001, denied the claim made by the petitioner and stated that the bill submitted by the petitioner had not been finally verified by the architect. The petitioner then filed the first arbitration application being AA No.257/2001 on 06.11.2001. This further evinces the petitioner to invoke the arbitration agreement. This petition was dismissed as withdrawn on 17.05.2002.

18. The petitioner thereafter issued a notice to the architect squarely accusing the architect that despite submission of the final bill on 11.07.2001, the same had not been settled. The architect was also accused of not granting the final certificate of payment in terms of clause 30 of the agreement. A reference was made to clause 32 of the agreement which deals with arbitration. This notice was sent by

registered AD post to the architect and was returned undelivered, with the remark "*not found on repeated visits*".

19. The submission of learned counsel for the respondent that this notice cannot be said to be in terms of the arbitration agreement, because it was never served on the architect, in my view, cannot be accepted. It is not the respondents case that the architect's office was not situated at the address to which the notice was sent, or that the notice had been sent to wrong address. It remains a mystery as to why the notice sent to the architect's office with the correct address had been returned with the aforesaid remark. The possibility of the architect avoiding the receipt of the notice can certainly not be ruled out.

20. What was the petitioner/contractor then expected do in these circumstances? In my view, the petitioner was well advised to then issue a notice to the respondent brining to its notice that the notice issued to the architect dated 21.05.2002 under clause 32 of the agreement had been avoided by them. The petitioner further proceeded to nominate an arbitrator and sought the respondents consent. That not having been granted, the petitioner preferred the second arbitration application being A.A. No.132/2003 on 13.05.2003. Therefore, in my view, the second Arbitration Application being A.A. No.132/2003 was maintainable.

21. Considering the fact that the agreement itself was entered into in January 2001 and the final bill was submitted on 11.07.2001, even if the factum of the filing of the earlier arbitration application (A.A. No.257/2001) were to be ignored, this arbitration application (AA 132/2003) was certainly filed within the period of limitation. This Court under some misconception and/or mistake, transferred the arbitration application to the Court of the District Judge. Upon the mistake being noticed, the District Court passed an order dated 15.09.2004 directing that the petition be returned to the petitioner for being filed before this Court. That petition has not been re-filed. However, the present fresh petition has been filed being A.A. No. 437/2006 on 12.10.2006.

22. Firstly, in my view, on a plain reading of section 21 of the Act, the arbitration stood commenced when the petitioner issued the notices dated 21.05.2002 to the architect, and 20.07.2002 to the respondent [See **Yogesh Kumar Gupta** (supra)]. Consequently, the arbitration is deemed to have been commenced, if not earlier, on 20.07.2002 at the latest.

23. There is another aspect of the matter. The transfer of the second arbitration petition (AA No.132/2003) by this Court to the District Court was a mistake of the Court. It was not a mistake of the petitioner. Why then, the petitioner be made to suffer for the mistake of the Court? Had the said petition not been so mistakably transferred, it

would have been dealt with by this Court, without any issue of limitation arising, or being raised. The District Judge ought to have retransferred the same petition rather than requiring the petitioner to seek a return of the petition and to refile the same before this Court. After all, the petition had originally been filed in this Court and had been erroneously transferred to the Court of the District Judge.

24. In any event, since the arbitration stood commenced on 21.05.2002/20.07.2002 (by resort to section 21 of the Act), even if the factum of the filing of the second arbitration application (AA 132/2003) were to be ignored, this petition would not be barred by limitation.

25. I also find merit in the submission of the learned counsel for the petitioner that the issue with regard to limitation should be left for the determination by the arbitral tribunal finally [see **National Insurance Co. Ltd** (supra)]. My determination, as aforesaid, on the issue of limitation is only for the purpose of consideration of the issue whether the arbitral tribunal should at all be constituted or not. In my view, there is sufficient merit in the petitioner's submission that the present petition cannot be rejected at this stage and that the aspect of limitation should be left for the determination by the arbitral tribunal.

26. I have already observed that the petitioner appears to have duly invoked the arbitration agreement. However, even this issue can be agitated before the arbitral tribunal finally. I find merit in the petitioners submission that the architect did not act in terms of the

arbitration clause by issuing a certificate as desired by the petitioner in terms of clause 30. The architect also apparently avoided to accept the notice issued under clause 32. The petitioner was not remediless in that situation. In my view, the petitioner rightly sent the notice dated 20.07.2002 to the respondent invoking the arbitration agreement. Pertinently, the arbitration agreement had to be invoked by sending notice to the respondent. The only rider was that the notice had to be channelized through the architect with the necessary claim. Learned counsel for the petitioner has pointed out that the claim of the petitioner was only the amount under the final bill. Therefore, there was no question of the petitioner detailing its claims any further. In para 3 to 6 of the notice dated 21.05.2002 as well as in para 4 to 6 of the notice dated 20.07.2002, the petitioner had clearly set out that the dispute was with regard to non-payment of the final bill. That having been done, there was no need for the petitioner to state anything further in the notice.

27. For the aforesaid reasons, I allow this application and appoint Mr. Rohit Kumar, Advocate, Chamber No. 411, Lawyers Chamber, Delhi High Court (Tel:23385161), as the sole arbitrator to adjudicate the disputes between the parties. The learned arbitrator shall also determine the issue with regard to limitation as also the issue with regard to his competence in the light of the submission of the respondent that the arbitration agreement has not been duly invoked

by the petitioner, if raised by the respondent, without in any way being influenced by any observations made by me in this order.

28. The learned arbitrator shall be free to fix his own fee subject to a maximum of Rs.75,000/-. The arbitral award shall be rendered by the learned arbitrator, preferably within eight months from the date of the first hearing. A copy of this order be sent to the learned arbitrator for his information.

VIPIN SANGHI, J.

JULY 12, 2010
rsk/sr