

3

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

ARB.P. 406/2009

M/S HILLTOP TRAVELS

..... Petitioner

Through: Mr. M. Tripathi, Advocate with
Mr. A.K. Singh, Advocate.

versus

M/S CONVERGYS INDIA
SERVICES PVT. LTD.

..... Respondent

Through: Mr. Rajeev K. Virmani, Senior Advocate
with Ms. Rashmi Virmani, Advocate and
Ms. Srilekha Sridhar, Advocate.

%

Date of Decision : MAY 04, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) seeking reference to the Arbitrator of disputes between the petitioner and respondent.

2. According to Mr. M. Tripathi, learned counsel for petitioner, the

disputes between the parties cover the period April, 2002 to July, 2006.

3. On the other hand, Mr. Rajeev K. Virmani, learned senior counsel for respondent submits that petitioner has filed only three agreements which contain an arbitration clause. According to Mr. Virmani, the three agreements cover the following periods:-

- (i) 01st November, 2001 to 31st October, 2002.
- (ii) 01st November, 2002 to 31st October, 2003
- (iii) 26th July, 2005 to 25th July, 2006.

4. Mr. Virmani further submits that the petitioner's claims are stale and are barred by limitation. According to Mr. Virmani, these claims should have been agitated within three years of the accrual of the cause of action, that means, three years from the date of each bill.

5. Mr. Virmani lastly submits that parties have concluded the contract by recording satisfaction of all their mutual rights and obligations by executing full and final receipts against each bill.

6. In rejoinder, Mr. Tripathi, learned counsel for petitioner confines his claims to the three agreements which contain the arbitration clause namely 01st December, 2001, 22nd October, 2002 and 26th July, 2005.

7. He further submits that the claims are neither stale nor barred by limitation as all throughout the parties were making efforts to amicably resolve the matter. In this connection, he relies upon a judgment of the

Supreme Court in *Shree Ram Mills Ltd. vs. Utility Premises (P) Ltd.*

reported in (2007) 4 SCC 599 wherein it has been held as under:-

“30. Once we have come to the conclusion that the learned designated Judge was right in holding that there was a live issue, the question of limitation automatically gets resolved. This Court in Hari Shanker Singhania case held that till such time as the settlement talks are going on directly or by way of correspondence no issue arises and with the result the clock of limitation does not start ticking. This Court observed: (SCC pp. 667-68. Para 24)

“24. Where a settlement with or without conciliation is not possible then comes the stage of adjudication by way of arbitration. Article 137, as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/arbitration even where there is serious hope of the parties themselves resolving the issues. The learned Judges of the High Court, in our view have erred in dismissing the appellants’ appeal and affirming the findings of the learned Single Judge to the effect that the application made by the appellants under Section 20 of the Act, 1940 asking for reference was beyond time under Article 137 of the Limitation Act. As already noticed, the correspondence between the parties, in fact, bears out that every attempt was being made to comply with and carry out the reciprocal obligations spelt out in the agreement between the parties.”

These observations would clearly suggest that were the negotiations were still on, there would be no question of starting of the limitation period.”

31. According to Shri Salve, learned counsel appearing on behalf of the appellants the clock had started ticking against the respondents in relation to the agreement dated 27-4-1994 and they could have had only three years period for filing a suit as per Article 137 of the Limitation Act and as such the claim made with reference to that agreement cannot be arbitrable now in the year 2005. We do not agree. It is for this reason alone that we have given the complete history of the negotiations in between the parties. The things do not seem to have settled even by 19-1-2005 but that would be for the Arbitral Tribunal to decide. We

*only observe, at this stage, that the claim of the respondent cannot be said to have become dead firstly because of the settlement or because of lapse of limitation. What is the effect of MoU dated 19-1-2005; was the respondent justified in repudiating the said MoU; and what is the effect of repudiation thereof on the earlier agreement dated 27-4-1994 would be for the Arbitral Tribunal to decide. In **Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.** this Court had clearly held in para 10 that the Arbitral Tribunal can also go into the question of limitation for the claims in between the parties. We have discussed this subject only to hold that since the issue in between the parties is still alive, there would be no question of stifling the arbitration proceedings by holding that the issue has become dead by limitation. We leave the question of limitation also upon the Arbitral Tribunal to decide.”*

8. As far as the plea of accord and satisfaction is concerned, Mr. Tripathi submits that some of the receipts relied upon by the respondent are forged and fabricated.

9. Before I deal with the rival contentions, I may point out that the Supreme Court in **National Insurance Company Ltd. vs. Boghara Polyfab (P) Ltd.** reported in **(2009) 1 SCC 267** has clearly outlined the issues which have to be determined by this Court before making a reference under Section 11 of the Act, 1996. The relevant portion of said judgment is reproduced as under:

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

(emphasis supplied)

10. In view of the aforesaid, I am of the view that all the defences of the respondent including the plea that petitioner's claims are barred by limitation and/or are barred by principles of accord and satisfaction are left open to be determined by the Arbitrator. I may mention that I have adopted this approach keeping in view the observations of the Supreme Court in *National Insurance Company Ltd.* (supra) as well as keeping in view the fact that disputed questions of fact arise for determination while adjudicating the aforesaid two defences.

11. Since there is no dispute with regard to territorial jurisdiction of this Court as well as the arbitration clause contained in the three agreements dated 01st December, 2001, 22nd October, 2002 and 26th July, 2005, I refer the disputes for the periods (i) 01st November, 2001 to 31st October, 2002, (ii) 01st November, 2002 to 31st October, 2003 and (iii) 26th July, 2005 to 25th July, 2006 to Mr. Justice (Retd.) Anil Dev Singh, former Chief Justice of Rajasthan High Court, B-442, New Friends Colony, New Delhi, telephone Nos. 9810060203, 26931718, 41314106I as the sole Arbitrator.

12. The learned Arbitrator shall be entitled to fix his own fee schedule. The fees would be equally shared by both the parties.

13. Both the parties are directed to appear before the learned Arbitrator on 1^{4th} May, 2010 at 4:30 p.m.

14. Since date of hearing has been fixed in the presence of both the counsel, no notice would be required to be issued by the learned Arbitrator for the said date of hearing. The Arbitrator is requested to expeditiously adjudicate all the disputes between the parties.

15. It is also directed that the Arbitrator would saddle the parties with actual arbitration costs in case the Arbitrator comes to the conclusion that either of the parties has filed frivolous/vexatious claims or taken frivolous/vexatious defences.

16. Registry is directed to communicate a copy of this order to the learned Arbitrator.

17. With the aforesaid observations, present petition stands disposed of.

MANMOHAN,J

MAY 04, 2010

js