

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.676/2006 & CM No.11747/2008

DELHI STATE INDUSTRIAL &
INFRASTRUCTURE DEV.
CORPN. LTD.

.....Appellant through

Ms. Anusuya Salwan &
Ms. Renuka Arora, Advs.

versus

ROAD MASTER INDUSTRIES
INDIA (P) LTD.

.....Respondent through

Mr. H.L. Tiku, Sr. Adv. with
Mr. Sanjay Goel & Ms. Naina
Kejriwal, Advs.

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Date of Hearing : March 30, 2011

Date of Decision : April 19, 2011

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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| 1. Whether 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 |

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order of the learned Single Judge,
which we shall reproduce below for facility of reference:-

1. Petition under Section 20 of the Arbitration Act 1940
seeks reference to an arbitrator of the disputes between
the petitioner and the respondent arising out of the
agreement dated 7.10.1976.
2. Petition has been filed in the year 1988.
3. It is stated in para 16 of the petition that vide letter
dated 28.7.1979, petitioner raised a demand against the

respondent arising out of the contract and that vide letter dated 11.8.1979 defendant refuted the demand.

4. A principal issue arises whether present petition is within limitation, for the reason, law is well settled. A party must move under Section 20 of the Arbitration Act 1940 within a period of 3 years when dispute surfaces.

5. A perusal of the petition shows that the chairman of the petitioner has appointed an arbitrator on 4.3.1980 which appointment was challenged by the respondent vide OMP No.91/1981. Vide decision dated 15.10.1985, appointment of arbitrator was set aside holding that the chairman of the petitioner could not appoint an arbitrator.

6. The present petition has been filed on 30.5.1987. It was returned under objections and was thereafter refiled in May 1988.

7. From a perusal of the petition it is to be noted that dispute arose when the consignment shipped abroad reached a wrong destination. This took place in the year 1977.

8. Thus, ex facie appointment of the arbitrator by the chairman of the petitioner in the year 1981 was at a point of time when claim had become barred by limitation.

9. Excluding time from 4.3.1980 till OMP No.91/1981 was decided on 15.10.1985 present petition would be hopelessly barred by limitation for the reason cause of action accrued in 1977.

10. Assuming that cause of action accrued on 11.8.1979, still, excluding time from 26.2.1980 till 15.10.1985, the petition would be barred by limitation.

11. Suit No.1056-A/1988 is accordingly dismissed as barred by limitation.

12. All pending IAs are disposed of as infructuous.

13. No costs.

August 31, 2006 PRADEEP NANDRAJOG, J.

2. What falls for a decision before us is whether the Petition under Section 20 of the Arbitration Act, 1940 (1940 Act for short) was barred from consideration by the principles of prescription. The 1940 Act did not specifically prescribe any period of limitation with regard to the preferment of a petition under Section 20 thereof for reference of disputes to an arbitrator. In these circumstances, it has been held that the residuary clause in the Limitation Act, 1963 (Limitation Act for short) would come into force. Accordingly, a petition under Section 20 of 1940 Act would require to be filed within three years of the arising out of the cause of action.

3. Learned counsel for the Appellant has sought to rely on *State of Goa -vs- Western Builders*, (2006) 6 SCC 239 as well as *Gulbarg University -vs- Mallikarjun Kodagali*, (2008) 13 SCC 539. Both the precedents relate to the manner in which the period of limitation has to be calculated with regard to Section 34 of the Arbitration & Conciliation Act, 1996 (1996 Act for short). *Gulbarg University* refers to *Western Builders* which, in turn, refers to *Union of India -vs- Popular Construction Company*, (2001) 8 SCC 470. The applicability of Section 5 of the Limitation Act to disputes under the Arbitration Act was neither doubted nor interfered with. However, in the context of Section 34 of the 1996 Act, it has been

definitively held that if objections came to be filed beyond three months and thirty days of the date on which the Award was served on the Objector, it would stand barred from consideration. It was held that Section 5 of the Limitation Act could be pressed into use so far as delay in the hiatus beyond three months but before thirty days thereafter is concerned. So far as **Western Builders** is concerned, it has not interfered or modified the **Popular Construction** dictum. The question that had arisen before the Court in the later case was that the Plaintiff/Petitioner had been bona fide prosecuting a remedy *albeit* in the wrong Court. Their Lordships held that the benefit bestowed by Section 14 of the Limitation Act had not been excluded even by the preemptory language contained in Section 34(3) of the 1996 Act. Since Section 14 had not been applied to the dispute in **Gulbarg University**, the Supreme Court had remanded the matter back to the trial Court for a fresh determination of facts.

4. Section 14 of the Limitation Act reads thus:-

14. Exclusion of time of proceeding bonafide in court without jurisdiction.

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in

good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub- section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.- For the purposes of this section,-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

5. It is manifestly clear from a bare reading of this Section that the period during which the Plaintiff has bona fide prosecuted another civil proceedings in a Court not possessing jurisdiction

would be excludable while computing the period of limitation. However, sub-section(2) of Section 14 extends those benefits to an applicant, in contradistinction to a plaintiff alone. In other words, the alleviation is available both to the plaintiff and to the applicant. So far as the present case is concerned, the Appellant had appointed an Arbitrator on 26.2.1980. The Respondent disputed this appointment within six days, that is, on 4.3.1980. The Arbitrator, however, entered upon the Reference after the expiry of almost one year, on 23.2.1981. Immediately thereupon, it is the Respondent who, in February, 1981, invoked Section 33 of the 1940 Act, that is, to determine the existence of an Arbitration Agreement and/or the effect of the Arbitration Clause. On 15.10.1985, the Petition came to be allowed, the consequence of which was that the appointment of the Arbitrator and all proceedings pursuant thereto, stood completely nullified. This narration manifests that it was not the Appellant before us who had filed any suit or application; on the contrary, it was the Respondent who had done so, and in the event, successfully. Had the Appellant assailed the Order allowing the application under Section 33 of the 1940 Act, it would have been a moot or arguable question whether the benefit of this provision would have enured to it. Section 14 of the Limitation Act, therefore, cannot be invoked by the Appellant who was neither the Plaintiff nor the Appellant in the Section 33 proceedings. The definition of the word 'prosecute'

in Black's Law Dictionary, Eighth Edition is – (1) “To commence and carry out a legal action; (2) To institute and pursue a criminal action against a person. (3) To engage in; carry on”. In Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition 2005, with regard to the meaning of the term “prosecute” reference is made to *Somshikharswami Shidlingswami –vs- Shivappa Mallappa Hosmani*, AIR 1924 Bom 39 and *Pridhadinomal Methumal –vs- Mt. Chuti*, AIR 1933 Sind 379 in order to formulate its definition viz. – “The expression ‘prosecuting’ is generally applicable to proceedings by a person as a plaintiff or an applicant, and not to proceedings in which such person is merely resisting, as a defendant or respondent, the claim of another”. In our opinion, Section 14 of the Limitation Act cannot be availed or even invoked by the Appellant.

6. Even if one were to assume that Section 14 of the Limitation Act comes to the succor of the Appellant, it must be borne in mind that the provision excludes time but does not extend time. This interesting question of law came to be analysed by one of us the Division Bench, in *Bharat Sanchar Nigam Ltd. –vs- Haryana Telecom Ltd.*, 2010(7) AD (Delhi) 331 as well as in *The Executive Engineer (Irrigation & Flood Control) –vs- Shree Ram Construction Co.*, 2010 (10) AD (Delhi) 180.

7. Proceedings on the presumption that the advantage of Section 14 is available to the Appellant, the relevant period of

exclusion would be from February 1981 to 15.10.1985. During this period, time stood still as if in suspended animation in the legendary Bermuda Triangle. It is contended by Mr. H.L. Tiku, learned Senior Counsel for the Respondent that the cause of action must be taken to have arisen on 2.3.1978 when the last consignment was shipped in terms of the Agreement dated 7.10.1976 between the parties. The admitted position is that the Claim of the Appellant was made in writing on 28.7.1979.

8. It is possible that some doubt may be entertained as to whether Limitation for the purposes of Section 20 commences differently to that regarding ordinary civil suits. The Limitation Act prescribes, in the context of civil disputes, that the computation of limitation must commence from the date on which the cause of action first arises. So far as Section 20 is concerned, it arises "when the period to apply accrues". ***Oriental Building & Furnishing Co. -vs- Union of India***, AIR 1981 Delhi 293 is a Single Bench decision of this Court which appears to laid down that it is only when parleys have come to a futile end that Limitation for the purposes of Section 20 commences to run. Same observations can be found in the decision of the Division Bench in *Shah Construction Company Ltd., Bombay -vs- Municipal Corporation of Delhi*, AIR 1985 Delhi 358 on a concession made by the parties (See paragraph 16).

9. We are in entire and respectful agreement with the Division Bench ruling in *Union of India -vs- M/s. **Vijay Construction Co.***, Meerut, AIR 1981 Delhi 193 where it was observed that the “right to apply under Section 20 accrues to a party to the contract containing arbitration clause on the date when the contract was rescinded by the other party thereto and the limitation thereof has to be counted from that date and not from the date of service of notice when that party to arbitration agreement serves a notice on the other party thereto requiring the appointment of an arbitrator”. The later Division Bench Judgment follows ***Vijay Construction***. In AIR 1990 SC 1918, their Lordships held that the period started to run from the date of the issuance of the notice of demand and that the date on which one of the parties had applied to the government to refer disputes between them to arbitration was irrelevant. In *State of Orissa -vs- Sri Damodar Das*, AIR 1996 SC 942, their Lordships observed as follows:-

5. *Russell on Arbitration* by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the “cause of arbitration” accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

“Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.”

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

10. Our research would not be complete without reference to ***Hari Shankar Singhania –vs- Gaur Hari Singhania***, AIR 2006 SC 2488 since it makes a reference to the Single Bench decision in ***Oriental Building & Furnishing Co.***, with which respectfully we are unable to concur. A holistic reading of the Judgment will show that only a passing reference had been made by their Lordships to this Judgment. The gravamen and ratio of ***Hari Shankar Singhania*** case is that where family disputes are concerned, if efforts to reconcile differences are underway, the cause of action should not be seen as having arisen. It is only when these differences are finally found to be irreconcilable that the cause of action arises. The conclusive is to be found in ***Punjab State –vs- Dina Nath***, AIR 2007 SC 2157 as will be evident from a reading of the following paragraphs therefrom:

24. Accepting the principles laid down in *S. Rajan* this Court in *Hari Shankar Singhania v. Gaur Hari Singhania* again reiterated the principle that an application under Section 20 of the Act for filing the arbitration agreement in court and for reference of the dispute to arbitration in accordance therewith is required to be filed within a period of three years when the right to apply accrues and that the said right accrues when difference or dispute arises between the parties to the arbitration agreement. Keeping the principles in mind, let us now examine as to when difference or dispute arises between the parties to the arbitration agreement, when the right to apply accrues. As noted herein earlier, demand notice was served on the appellants by the respondent on 16-4-1990 and the application under Section 20 of the Act was filed on 13-11-1990 which is admittedly within the period of limitation as contemplated under Article 137 of the Limitation Act.

25. The Additional District Judge, Roopnagar, Punjab, held on the question of limitation in filing the application under Section 20 of the Act that the cause of action did not arise when notice of demand was served but arose when the respondent first acquired either the right of action or the right to require that arbitration takes place upon the dispute concerned.

26. Keeping the decisions of this Court in *S. Rajan* and *Hari Shankar Singhania* in mind, in our opinion, the view of the Additional District Judge was totally erroneous. In the aforesaid two decisions, it was held that the right to apply accrued for the difference arising between the parties only when service of demand notice was effective, which should be the date for holding that the difference

had already arisen between the parties. Such being the settled law, we are of the view that the application under Section 20 of the Act was clearly filed within the period of limitation.

11. The pleadings in the Petition under Section 20 of 1940 Act as well as the Appeal are unhappily vague. A reading of paragraphs 9 and 10 of the Section 20 Petition under the 1940 Act filed by the Appellant indicates that two consignments exported by the Respondents were 'over-shipped'. In order to salvage or mitigate damages, expenses were allegedly incurred by the Appellant owing to its officials have to travel to Nigeria. Details of this event are not forthcoming from a reading of the Petition, and even more regretfully from any of the pleadings or arguments of the Respondents. However, this much is certain that the cause of action for the present claim had already arisen on 28.7.1979 when the Appellant had made a written demand on the Respondent. Three years period within which the Appellant could have preferred an application under Section 20 of the 1940 Act would have expired on 27.7.1982. The Petition under Section 33 was filed in February, 1981 and, therefore, one year six months and three days had already elapsed, on that date one year five months and twenty seven days remained. Operation of Section 14, assuming it to be available to the Appellant, would enable it to have filed the Section 20 Petition under 1940 Act by 22.5.1987 days. The Petition

came to be filed on 29.5.1987, by which date it was barred by limitation, even applying Section 14 of the Limitation Act.

12. The above narration discloses the recalcitrance and obduracy of the Appellant in not approaching the Court under Section 20 of the 1940 Act for the appointment of an Arbitrator in the way of the Respondent's stand that the Appellant was not competent to appoint the Arbitrator. Had the Appellant resorted to Section 20, the damages that it had allegedly incurred as a result of bringing the entire subject consignment back to Nigeria, could have been adjudicated upon. Instead, it went to the extent of disputing the Respondent's action under Section 33 of the 1940 Act. Having been ill advice to pursue obdurate stand, assuming that the advantage of Section 14 of the Limitation Act was available to him, it was essential to move the Court within three years of 28.07.1979 after excluding the period in which the Section 33 Petition remained pending. Since the cause of action must be deemed to have arisen on 28.07.1979, if not earlier in normal circumstances, the Section 20 Petition would be required to be filed before 27.07.1981. The exact date on which the Respondent filed the Section 33 Petition cannot be ascertained. We shall extend all benefit to the Appellant by assuming that this petition was filed on 01.02.1981. Since it was allowed on 15.10.1985, a period of one year five months and twenty seven days was available from the date on which Section 33 Petition was allowed.

The time to file an application under Section 20, therefore expired on 22.5.1987.

13. It will bear repetition that the Claim which is now sought to be resurrected is already over thirty-five years old or stale. The pleadings made available to us are awfully vague, indicating that if arbitration were to commence, nothing substantial would be proved. Mr. Tiku, learned Senior Counsel for the Respondent, relies on ***Competent Placement Services (Regd.) -vs- Delhi Transport Corporation***, 2010 (120) DRJ 3232(DB) in support of his argument that the refiling of the Petition after the efflux of almost one year should not be condoned. Ms. Anusuya Salwan, learned counsel for the Appellant, however, rightly submits that the provisions pertaining to the period within which refiling must be carried out were not in vogue in 1988 and, therefore, the rigours of ***Competent Placement Services (Regd.)*** would not obtain. Mr. Tiku's objection that the Appellant had not even bothered to file an application under Section 5 of the Limitation Act for condoning the delay in refiling, therefore, also loses all substance. It will indeed be a dismal day when a Court is compelled to order commencement of proceeding of a dispute which had arisen as far back as in circa 1978. Our decision, however, does not rest only on these pragmatic considerations.

14. The learned Single Judge has excluded time from 4.3.1980 till 15.10.1985 to arrive at the conclusion that the Petition was

time-barred. Assuming that Section 14 of Limitation Act applies, the period to be excluded would commence on the date on which the Petition/application under Section 33 of the 1940 Act had been filed, that is, February, 1981, ending on 15.10.1985, the day when it was allowed. Even if one were to further exclude the period which spent in obtaining a Certified Copy of that Order, time would unquestionably commence rerunning on 25.11.1985 when the Certified Copy was received. Since the Petition under Section 20 of 1940 Act was filed on 29.5.1987, seven days already expired from the date on which the cause of action to file Section 20 Petition under 1940 Act had arisen. We must clarify that the cause of action does not start on the date when a claim is repudiated; it arises when the dispute actually arises. Adjudged from any standpoint, therefore, the Petition under Section 20 of 1940 Act is hopelessly barred by limitation. The dispute needs burial, even if thirty-five years too late.

15. Appeal is dismissed with no order as to costs. CM No.11747/2008 is also dismissed.

(VIKRAMAJIT SEN)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

April 19, 2011