

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**FAO No.2129 of 2008 (O&M)
Date of decision: 28.10.2015**

State of Haryana and another ... Appellants

Vs.

M/s Mehta Construction Company and another... Respondents

FAO No.2130 of 2008 (O&M)

State of Haryana and another ... Appellants

Vs.

M/s Mehta Construction Company and another... Respondents

FAO No.2131 of 2008 (O&M)

State of Haryana and another ... Appellants

Vs.

M/s Mehta Construction Company and another... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Hitesh Pandit, Addl. A.G.Haryana
for the appellants.

Mr. Sumit Gupta, Advocate
for respondent No.1.

AMIT RAWAL J. (Oral)

This order of mine shall dispose of three appeals, bearing No.2129, 2130 and 2130 of 2008.

Mr. Hitesh Pandit, learned Additional Advocate General, Haryana submits that claim of the Contractor for seeking reference of the appointment of Arbitrator was ex facie time barred. In essence, the claims were settled way back in the year 2000. However, the application for appointment was filed on 25.02.2005 and the Arbitrator was appointed on 24.08.2005, thus, the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 1996 Act) are attracted. The order of appointment dated 24.08.2005 was challenged by filing writ petitions bearing Nos.2223, 2266 and 2906 of 2006 and the said writ petitions were dismissed on 15.02.2006. The aforementioned order was assailed by the department before the Hon'ble Supreme Court by filing Special Leave Petition bearing No.13485 of 2006 and the Hon'ble Supreme Court vide judgment dated 09.04.2007 dismissed the same. The Hon'ble Supreme Court vide order dated 09.04.2007 dismissed the Special Leave Petition by giving observations that in case, department is aggrieved may file a review petition before the High Court. However, no such review petition was filed. Instead, the objections vis-a-vis claim of the Contractor being barred by law was raised before the Arbitrator. The Arbitrator has not referred any document, much less, dealt with and arrived at a categoric finding

that whether the claim of the contractor was within limitation.

Learned State counsel has drawn the attention of this Court to the Award, whereby, the said objections were raised by taking the aid of provisions of Article 137 of the Indian Limitation Act. He further submits that the Arbitrator had not assigned any reason, how and why the claim was within limitation which was assailed by filing objections. Even the objecting Court relied upon the letter dated 17.11.2003 to submit that in case department refers the claim of the contractor, therefore, found that claim was not time barred. He further submits that there is no such letter on record before the Arbitrator therefore, there is total mis-direct and illegality.

Mr. Sumit Gupta, learned counsel appearing on behalf of respondent No.1 submits that not only letter dated 17.11.2003 has been proved, even letter dated 16.10.2003 written by Executive Engineer Division, Indri Water Service Division, Karnal addressed to the Contractor. He further submits that department is liable to certain damages vis-a-vis non-performance of work/loss suffered, as well as, expenses as and when the matter would be put up before the Arbitrator.

In support of his aforementioned contention, he relied upon the judgment of the Hon'ble Supreme Court in M/s Shree Ram Mills Ltd. vs. M/s Utility Premises (P) Ltd. **2007(2) R.C.R (Civil) 721** to contend that where the parties are loggerheads throughout, despite the claim and Arbitrator was appointed after a gap of almost

03 years, would not be a ground to throw the claim of the contractor being barred by law of limitation.

I have heard learned counsel for the parties and appraised the paper book.

Before referring to the rival contentions of learned counsel for the parties, it would be apt to reproduce the order dated 09.04. 2007 of the Hon'ble Supreme Court, which reads thus:-

“Head learned counsel for the parties.

We have perused the orders passed by the High Court.

No ground of delay appears to have been raised before the Division Bench. Learned counsel for the petitioner submits that this was the only ground raised in the Writ Petition before the High Court. If that be so, he may file a proper review petition before the High Court. There is no ground to interfere in this Special Leave Petition. Consequently, the Special Leave Petition is dismissed.”

The department instead of filing review vis-a-vis limitation before the Arbitrator, filed the objections and the Arbitrator in its Award declined the same by observing as under:-

“The matter had been considered by me (the Arbitrator) taking full account of the objection raised by the respondent Executive Engineer and reply thereto by the petitioner/claimant vide his rejoinder dated 4.4.2006 in reply to statement of defence. Since the respondent

Executive Engineer had failed to appoint the Arbitrator on the asking of the petitioner/claimant for settlement of the disputes, the petitioner/claimant went to the Court of Law. After having heard the parties and after having gone through the record, Sh. Nawab Singh, Ld. District Judge, Rohtak appointed me as an Arbitrator to enter upon the reference and to adjudicate the dispute between the parties arising out of Agreement entered upon between the parties. Therefore, the plea of the respondent Executive Engineer that the claims are time barred is not tenable. The SLP filed by the respondent Executive Engineer in the Apex Court has also been dismissed.”

After dealing with the contention of learned counsel for the parties and as well as, referring letter dated 17.11.2003, it would be apt to reproduce the relevant paragraphs of the finding given by the District Judge, Rohtak:-

“30. Now coming to the next contention of the learned Govt. Pleader that the Arbitrator had failed to adjudicate upon the issue that the claim filed by the respondent No.1 was time barred and was filed much after three years of the settlement of the final bills in the year 2000. I am of the considered opinion that the contention is also sans merits for the reasons that the matter was alive on

17.11.2003 when the request for appointment of the Arbitrator for the settlement of the dues as per the final bills was forwarded by the Executive Engineer, Construction No.21, Rohtak to his counter part at Jhajjar for information and necessary action. When the department had failed to take any action, the respondent was compelled to approach the Court and the then District Judge, Rohtak vide order dated 24.08.2005 had appointed the present Arbitrator to adjudicate upon the dispute between the parties. The order passed by Sh. Nawab Singh, District Judge, Rohtak was upheld by the Hon'ble High Court and also by the Hon'ble Apex Court. The letter sent by the respondent No.1 on 28.05.2000, 23.06.2000 and other letters including the letter dated 09.03.2002 were not taken care of by the department and therefore, it does not lie in the mouth of the petitioners to agitate that the claim filed by the respondent No.1 seeking adjudication through the Arbitrator was barred by limitation. The law laid down in the State of West Bengal Versus M/s A Mondal AIR 1985 Calcutta 12 and Group General Manager © M/s Oil and Natural Gas Corporation Karailkal Versus M Gouthamchand Gothi AIR 1998 Madras 363 would not come to the rescue of the petitioners because in both the cases it was laid down

that the Arbitrator was liable to decide whether the claim referred to him was time barred.

31. In the case in hand, this aspect of the matter was dealt with by the Arbitrator and it was held that the contract entered into between the parties was not fixed price contract. The matters in dispute were arbitrable before the Arbitrator. The plea of the Executive Engineer that the claim could not be heard and adjudicated upon under Article 299 of the Constitution of India was not tenable because the adjudication of the claims raised by the respondent had remained within the jurisdiction of the Arbitrator.”

Even letter dated 16.10.2003 addressed to the Contractor by the Executive Engineer would reveal that the matter was alive and the department suffered loss. The contents of the letter reads thus:-

“The above cited work was allotted to you with a time limit of two months to be completed on dated 07.07.2002 vide T/O Agreement No.5 dated 8.5.2002. The work was stopped by you on dated 31.5.2002 without any warning or intimation to the department. Thereafter you did not start the work although you applied for extension of time limit upto 31.03.2003 vide your letter No.MCC/KNL/Br./Indri/29 dated 26.08.2002. Accordingly, extension for time limit was granted upto 31.12.2002 vide

T/O No.6770-71 dated 14.10.2002. In the meantime, on the basis of your letter No.MCC/KNL/DE dated 17.12.2002 the contract was terminated vide T/O letter No.527-29/33-A Dated 10.02.2003. The termination of the said contract on your request has caused heavy losses to the department as per details recorded below for which you remain responsible to compensate.

1. Losses caused to the department on a/c of preparation of document for call of bid, including expenditure incurred on the staff engaged in this process which all turned wasteful on termination of contract on your request.

2. Losses suffered by the department on a/c of supervision of work for which no useful output was received.

3. Losses suffered on a/c of re-preparation of documents of drawing etc for renewal of the bid and other allied expenditure incurred by the department after the termination of said contract on your request.

4. Losses suffered by the department on a/c of setting right of wasteful/unplanned work done by you at site.

5. Loss of goodwill/image of the Haryana Govt./department the said work was an important work and Govt. image/goodwill is strongly linked up with timely

completion of such projects but due to your failure to complete the said work the Govt. has suffered irreparable losses. The compensation for such loss of goodwill is required to be paid by you.

6. *Compensation in terms of interest on the above claims or other claims which shall be put up before the learned Arbitrator shall also be borne by you.*

The above position is brought to your notice and department shall be at liberty to take action as deemed fit.”

Keeping in view all the factual aspects of the matter, I am of the view that claim of the Contractor could not be thrown out on the ground of limitation by taking the aid of provisions of Article 137 of the Limitation Act, 1963 as prior to lodging of the claim by the Contractor, even the Executive Engineer had allegedly claimed the loss vide letter dated 16.10.2003. Vide letter dated 17.11.2003, the Executive Engineer Rohtak had forwarded the claim of the Contractor to the Executive Engineer, Jhajjar. This aspect had been noticed by the objecting Court. In my view, filing of application for seeking appointment of Arbitrator on 25.02.2005 would not be barred by law of limitation as the claim was alive in the year 2003 and the same is squarely covered by the judgment of the Hon'ble Supreme Court in M/s Shree Ram Mills Ltd's case (supra) in paragraph 30, which reads thus:-

“Once we have come to the conclusion that the learned Designate Judge was right in holding that there was a live issue, the question of limitation automatically gets resolved. This Court in Hari Shanker Singhania's case (supra) 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:

“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's 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 a 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 where the negotiations were still on, there would be no question of starting of the limitation period.”

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has now been raised in the aforementioned appeal has already been answered by the Hon'ble Supreme Court in catena of judgments wherein it has been laid down that until and unless the award suffers from illegality as statutorily prescribed under Section 31 (3) of the Act, the same cannot be interfered with. In this context I intend to refer the judgments of Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49 and Navodaya Mass Entertainment Ltd. vs. J. M. Combines (2015) 5 SCC 698.** In the aforementioned judgment the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only in these circumstances it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embarked on a path by substitution in its own view. It is not the case of the appellant that the award is against the

public policy or has violated the principles of judicial approach, much less against the statute and other provisions of Section 34 of the Act. It is now a settled law that the Arbitrator is the sole judge of quality and quantity of the evidence before him and decided on the basis of the available evidence.

In my view, no error of law arises from the award. The award is perfect and justified and all the objections filed against the same were wholly misconceived.

There is no merit in the aforementioned appeals.

The appeals are accordingly dismissed.

(AMIT RAWAL)
JUDGE

October 28, 2015
savita