IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No. 70 of 2007
Date of Decision: November 12, 2009

M/s V.K.Aggarwal & Company ......Petitioner

Versus

Bhuma Niketan ....Respondent

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA.

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

Present: Shri Amit Rawal, Advocate, for the petitioner.

S/Shri D.D. Gupta & R.D. Gupta, Advocates, for the respondent.

HEMANT GUPTA, J.

The petitioner has sought appointment of an Arbitrator by invoking the jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 [for short `the Act'] for resolution of the dispute arising out of the agreement dated 12.1.1999.

The petitioner has averred that it is a registered partnership firm. The respondent was desirous of constructing a double storyed School Building at Safyabad, Narela, in the State of Haryana. The petitioner was awarded a contract for construction of the said building and in this regard an agreement was signed between the parties on 12.1.1999 at New Delhi.

The dispute between the parties arose even before the completion of the construction work. The petitioner issued a notice on 15.11.2001 to the respondent seeking to invoke Clause 12 of the contract agreement for appointment of an Arbitrator, as the respondent failed to make payment of the final bill within 15 days of the aforesaid notice. It is pointed out by the petitioner that the final bill in respect of the work performed was issued on 6.6.1999. The Architect of the respondent certified the said bill, but the payment has not been made. The petitioner has suggested the names of three qualified Arbitrators in its notice dated 15.11.2001. The petitioner earlier invoked the jurisdiction of the Delhi High Court on 13.05.2002 as the Arbitrator was not appointed. The said petition was withdrawn by the petitioner on 8.2.2006 with liberty to file the same in a Court of competent jurisdiction in view of the preliminary objection taken by the respondent that the said Court has no territorial jurisdiction. It was thereafter, the present petition was filed on 14.5.2007.

The respondent in the written statement has, inter-alia, raised an objection that the petition is hopelessly time barred and that agreement dated 12.1.1999 was by the respondent with M/s V.K.

Aggarwal & Company, Dehradun, whereas the petition has been filed by M/s V.K.Aggarwal & Company, New Delhi. It was pointed out that the registration certificate of the firm has not been produced. Therefore, the petitioner-firm has no locus standi to institute the present petition on behalf of M/s V.K. Aggarwal & Company, Dehradun, with whom there was an agreement. It was also submitted that before Delhi High Court, the written statement was filed in the year 2003 in which an objection was taken that Delhi High Court had no territorial jurisdiction, but the petitioner has withdrawn its petition for appointment of an Arbitrator from Delhi High Court only on 8.2.2006. Therefore, the prosecution of petition under Section 11(6) of the Act, before the Delhi High Court, cannot be said to be bona-fide. Thus, the time spent in such proceedings, cannot be excluded.

The petitioner has filed replication pointing out that the cause of action arose to the petitioner on 6.6.1999, when the petitioner submitted the bills to the respondent. It again arose to the petitioner on 21.10.2000, when the petitioner received a letter from the respondent, assuring that it is considering all the disputes. The petitioner also sought exclusion of time spent before the Delhi High Court from 13.5.2002 till 8.2.2006 while computing the period of limitation for filing the present petition before this Court.

It was pointed out that the firm M/s V.K. Aggarwal & Company, Dehradun was originally constituted by partnership deed dated 1.4.1998. Subsequently, the partnership firm shifted its head office to Delhi with effect from 1.5.2001. The firm was re-constituted vide partnership deed dated 1.4.2001. A copy of the aforesaid partnership deed has been produced as Annexure P.5, whereas the registration certificate in Form-I and Form-II, have also been produced as Annexures P.6, P.7 and P.8. Thus, it is sought to be canvassed that the disputes between the parties are referable to an Arbitrator, to be appointed by this Court.

The first question between the parties whether the petitioner, who has invoked the jurisdiction of this Court, is the firm, with whom the respondent has entered into an agreement for the purposes of construction of the building on 12.1.1999?

The documents on record, particularly the partnership deed Annexure P.5 dated 1.4.2001, the certificates from the Registrar of the Firms, Annexures P.6 to P.8, show the petitioner is now having its registered office at Delhi.

Learned counsel for the respondent has vehemently argued that the documents Annexures P.6 to P.8 show the name of the firm as M/s V.K. Aggarwal & Sons, Dehradun, whereas the name of the petitioner disclosed in the petition is M/s V.K. Aggarwal & Company. Therefore, it cannot be said that M/s V.K. Aggarwal & Company, is the same firm as M/s V.K. Aggarwal & Sons. The question whether the petitioner is the same firm in respect of which documents Annexures P.6 to P.8 have been produced is a question which need not be decided by this Court at this stage. From the documents on record, it appears that Vikram Aggarwal; Vikas Aggarwal and Mukul Aggarwal are the partners of the firms M/s V.K. Aggarwal & Company and M/s V.K. Aggarwal & Sons. Whether M/s V.K. Aggarwal & Sons, is a separate firm than M/s V.K. Aggarwal & Company, is a question of fact, which can be determined and resolved by an Arbitrator, if so appointed in respect of the disputes between the parties. Prima-facie, it appears that the partners of the petitioner are the same as in M/s V.K. Aggarwal & Sons. The partnership firm is nothing but a compendious name of all the partners. Therefore, if the partners are same in so called new firm, the difference in name, may not be really relevant. But I leave this question to be decided by an Arbitrator, if so appointed by this Court.

As per the petitioner, the final bill was submitted on 6.6.1999, whereas the present petition has been filed before this Court on 14.5.2007. It is pleaded by the petitioner as well that the cause of action arose to the petitioner on 6.6.1999. In the notice Annexure P.3 dated 15.11.2001, the petitioner has communicated that it has stopped the work in the end of April, 1999 and the final bill was submitted on 6.6.1999, with a request that the payment of the same be made immediately. In view of such factual position, the following three questions arise in respect of the question of limitation in filing the present application for consideration of this Court:-

i) Whether the cause of action to seek adjudication by an Arbitrator arises on serving of a notice under Section 11(6) of the Act on 15.11.2001 or on submission of final bill on 6.6.1999?

ii) Whether the communication dated 21.10.2000 (Annexure P.2) amounts to acknowledgment of debt?

Question No.1

Whether the cause of action to seek adjudication by an Arbitrator arises on serving of a notice under Section 11(6) of the Act on 15.11.2001 or on submission of final bill on 6.6.1999?

The petitioner has filed the petition before the Delhi High Court on 13.5.2002, which was withdrawn on 8.2.2006. The present petition was filed before this court on 14.5.2007. The question raised are being examined with the presumption that the time spent in prosecuting the proceedings before the Delhi High Court, is to be excluded.

The petitioner has not completed the work in terms of the contract agreement. However, a final bill dated 6.6.1999 was submitted claiming specific and ascertained amount. Therefore, the cause of action to claim the said amount arose on the aforesaid date in terms of Article 18 and Article 113 of the Limitation Act, 1963. The provisions of Limitation Act, 1963, apply to arbitration as it applies to proceedings in the Court in terms of Section 43 of the Act.

Article 18 of the Limitation Act deals with the price of work done by the plaintiff for the defendant at his request where no time for payment has been fixed. The period of three years as mentioned in column No.2 beings to run from the date work is done. Therefore, the cause of action to claim specific amount arose to the plaintiff in respect of the claim of the work performed on the date when work was performed and in any case when the final bill was submitted by the petitioner. Article 113 of the Limitation Act is residuary Article for filing of suit when no period of limitation is provided elsewhere in the Schedule. The time of three years begin to run when right to sue accrues as discussed above.

Question No.2.

Whether the communication dated 21.10.2000 (Annexure P.2) amounts to acknowledgment of debt?

The argument of learned counsel for the petitioner is that the communication dated 21.10.2000 (Annexure P.2) amounts to acknowledgment of debt. The respondent, in the aforesaid communication, has communicated to the following effect:-

> “Your letter dated 16th October, 2000, has been received by Maharaj Shree. He has told us to inform you that we are considering all the points raised in your letter which includes closure of the work also. In this matter, the moment we reached any conclusion, we will inform you.”

Section 18 of the Limitation Act, 1963, contemplates that for the purposes of the said section, the acknolwedgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to setoff, or is addressed to a person other than a person entitled to the property or right.

In Food Corporation of India v. Assam State Cooperative Marketing & Consumer Federation Ltd. And others, (2004) 12 Supreme Court Cases 360, the question as to what amounts to acknowledgment within the meaning of Section 18 of the Limitation Act, 1963 came up for consideration. Reference was made to Shapoor Freedom Mazda v. Durga Prosad Chamria, AIR 1961 Supreme Court 1236 and Lakshmirattan Cotton Mills Co. Ltd. V. Aluminium Corpn. of India Ltd., (1971)1 SCC 67. In the said case, letters Exhibits 8 and 9 acknowledged receipt of Rs.2 crores, but also contained a dispute regarding liability of the Federation to pay the amount relating to settlement of account. It was held that a plea of acknowledgment must relate to present subsisting liability though the exact nature or the specific character of said liability may not be indicated in words. The words in use in acknowledgment must indicate the existence of jural relationship between the parties, such as that of debtor and/or creditor. The intention to attend such jural relationship must be apparent.

A Division Bench in Yadvindra Industris (Drinks & Agencies) (P) Ltd. v. Ulka Advertising (P) Ltd., 1995(3) Recent Revenue Reports 555, _considered the communication which reads as under:-

> "This is to confirm that we have received your bills amounting to Rs.1,24,952.34 till 30.6.84. Regarding balance of Rs.90,952.34 shown in your statement our representative will contact your office to clarify discrepancy if any.

> As discussed with your Mr. Shamin Uddin today we shall let you known the payment schedule in one month's time. We regret the delay in clearing the amount."

The Court found that the first part of the letter acknowledges the receipt of bills. The second part relates to the balance of Rs.90,000/-- odd amount, but there is no acknowledgment or admission or the fact that the said amount is due. The third part relates to intimation of the schedule of payment in a month's time. It was held that the said letter does not amount to acknowledgment.

In the present case, the letter Annexure P.2 indicates receipts of a communication dated 16.10.2000 and that the points raised are being considered including closure of the work. It may be noticed that the work was not completed by the petitioner. The letter dated 16.10.2000 in the aforesaid communication has not been produced by the petitioner. In the notice dated 15.11.2001, Annexure P-3, it has been averred by the petitioner that repeated requests and reminders were issued including the one on 16.10.2000. It is stated to the following effect:-

> "7. That it is regretted that the payment of the said final bill has not been made to my client inspite of repeated requests and written reminders dated 29.9.2000, 16.10.2000, 11.11.2000, 20.11.2000, 30.11.2000 and 8.2.2001 and your assurance dated 21.10.2000. Then there was no dispute in respect of the said final bills, there is no reason why you should not make the payment of the same."

In my opinion, the communication dated 21.10.2000 cannot be said to be acknowledgment of liability. It only acknowledges receipt of letter and that the issues raised shall be considered. There is no admission of relationship of debtor or creditor. The issue of closure of work alone was to be examined, which cannot said to bear acknowledgment of liability sufficient to extend the period of limitation.

Learned counsel for the petitioner has vehemently argued that in fact, the cause of action arose to the petitioner on the refusal of the respondent to appoint an Arbitrator in terms of its notice dated 15.11.2001. It is argued that if the period spent before the Delhi High Court is excluded, then the present petition is within the period of limitation. Reliance is placed upon Morena Mandal S.S. K. Ltd. v. New India Assurance Co. Ltd., (1999) 5 Supreme Court Cases 697, and Utkal Commercial Corporation v. Central Coal Fields Ltd., (1999)2 Supreme Court Cases 571.

Section 8 of the Arbitration Act, 1940 [for short referred to as `the Old Act'] dealt with the appointment of an Arbitrator without the intervention of the Court, whereas the reference to an Arbitrator was required to be made under Section 20 of the said Act.

In The Union of India v. Shri Om Parkash, (1976) 4 Supreme Court Cases 32, it was found that the Old Act, provided for three kinds of Arbitration: (i) arbitration without intervention of the Court dealt with in Chapter-II; (ii) arbitration with the intervention of the Court, where there is no suit pending dealt with in Chapter-III; and (iii) arbitration in suits covered by Chapter-IV. The intervention of

Court is not contemplated upto the stage of filing of the Award unless occasion arises, requiring the Court to remove the Arbitrator under Section 11 of the Old Act. Section 8 of the Old Act only empowers to appoint an Arbitrator, where the parties do not concur in the appointment. Referring to Section 20 of the Old Act, the Court held to the following effect:-

> "This section confers power on the court to order the agreement to be filed and, further, to make an order of reference to the arbitrator appointed by the parties, or, where the parties cannot agree upon an appointment, to an arbitrator appointed by the court. Sub section (1) of Section 20 makes it plain that the provisions of the section can be availed of only if no proceeding under Chapter II has been initiated. Section 8 does not contain any provision empowering the court to make an order of reference to the arbitrator as one finds in sub-section (4) of Section 20. Thus it seems clear that the court in the instant cases had no jurisdiction, after appointing an arbitrator under Section 8(2), to proceed further to make an order referring the disputes to the arbitrator."

It is, thus, apparent that the aforesaid provisions of the Old Act, dealt with the reference to an Arbitrator through the intervention of the Court in terms of Section 20 of the Old Act. Appointment of an Arbitrator is to be made under Section 8 of the said Act, when the reference has been made to an Arbitrator by the parties without intervention of the Court. However, the scope of Section 11 of the Act, is materially different from the provisions of appointment of an

Arbitrator under the Old Act. Now the reference to an Arbitrator as well as appointment of an Arbitrator, both fall within the ambit of Section 11 of the Act.

In Panchu Gopal Bose v. Board of Trustees for Port of Calcutta, (1993)4 SCC 338, the Supreme Court held that the provisions of Limitation Act, 1963 would apply to the arbitration and cause of action for such purpose shall be determined to have accrured to the parties in respect of any such matter at the time when it should have accrued but for the contract of arbitration.

The judgment in Morena Mandal's case [supra], deals only with Section 8(2) of the old Act. A perusal of the judgments does not show that the notice seeking appointment of an Arbitrator was issued after the cause of action to recover the amount arose to the appellant therein. There is no reference to an Arbitrator as the appointment of an Arbitrator was sought through the intervention of the Court, without seeking recourse to filing of the agreement under Section 20 of the Old Act. The aforesaid judgment relies upon an earlier judgment in Utkal Commercial's case. In Utkal Commercial's case, the appellant therein has nominated its Arbitrator and thereafter, an application was filed by the appellant under Section 8 of the Old Act. The learned trial Court appointed an Arbitrator and such Arbitrator gave his award. In a revision against an order appointing an Arbitrator under Section 8 of the Old Act, an argument was raised that such an application is barred by limitation. The Court concluded that cause of action to seek appointment under Section 8 of the Old Act, arises when there is a failure to concur in the appointment of an Arbitrator.

Though, in the aforesaid judgment reliance is placed upon on Inder Singh Rekhi v. Delhi Development Authority, (1988) 2 SCC 338, but that is a case of filing of arbitration agreement and reference to the arbitration under Section 20 of the Old Act. It was held that for reference under Section 20 of the Old Act, there must not only be an entitlement to money, but there must be a difference or dispute. It was found that the final bills were not prepared, therefore, the cause of action will arise when assertion under Section 30 of the Old Act was filed within three years of assertion of the claim. The issue raised in Utkal Commercial Corporation's case (supra), was of filing of an arbitration agreement and reference to Arbitrator was not sought under Section 20 of the Old Act. The appointment of Arbitrator alone was in dispute, which falls within the scope of Section 8 of the Old Act and that there is no corresponding provision to the said provision in the new Act.

In Asia Resorts Ltd. v. Usha Breco Ltd., (2001)8 Supreme Court Cases 710, it was found that cause of action for filing of a petition under Section 20 of the Old Act arose in response to a notice to rectify the defects so controverted on 17.5.1990, therefore, the petition filed in 1993 was beyond the period of limitation. It was held to the following effect:-

> "**15.** There is not much controversy that the residuary Article 137 of the Limitation Act applies so far as the period of limitation is concerned for an application under Section 20 of the Arbitration Act, 1940. The residuary Article 181 of the Limitation Act, 1908 was replaced by Article 137 in the Limitation Act, 1963. Earlier, Article 181

was applicable only in respect of application to be filed under the Civil Procedure Code. This article was replaced by Article 137 in the Limitation Act, 1963 in a modified form. By insertion of Article 137, it cast a wider net so as to include any application for which no period of limitation was provided elsewhere in that division. The third division of the Limitation Act, 1963 deals with various applications to be filed under various special statutes. The definitions of "applicant" and "application" are also inserted in the Limitation Act, 1963. Therefore, it is clear that the intention of the legislature was to provide a residuary article prescribing period of limitation for filing petitions and applications under the various special laws. This Court in *Kerala SEB* v. *T.P. Kunhaliumma, (1976) 4 SCC 634,* held that Article 137 would apply to any petition or application filed under any Act to a civil court and it cannot be confined to applications contemplated by or under the Code of Civil Procedure. In *Major (Retd.) Inder Singh Rekhi* v. *Delhi Development Authority, (1988) 2 SCC 338, Union of India* v. *L.K. Ahuja and Co., (1988) 3 SCC 76, Steel Authority of India Ltd.* v. *J.C. Budharaja, Govt. and Mining Contractor, (1999) 8 SCC 122* and *Union of India* v. *Vijay Construction Co., AIR 1981 Del.193,* this Court held that the period of limitation for filing application under Section 20 of the Arbitration Act, 1940, is as prescribed under Article 137 of the Limitation Act.

16. Under Section 20 of the Act, the cause of action for filing an application may arise whenever "a difference has arisen to which the agreement applies". Regard must be had to the relevant arbitration clause in the agreement. If any specific terms are used in the arbitration clause, that would govern the parties as to when a petition for reference of arbitration shall be filed in the court".

In Visakhapatanam Port Trust v. Continental Construction Company, 2009(4) Supreme Court Cases 546, the appellant recovered an amount of Rs.74,810.38p from the running bill on 8.8.1974. The Court held that the contractor ought to have given notice calling upon the appellant to appoint an Arbitrator within three years therefrom and apply to the Court within this time. It was held to the following effect:-

> "17. In the backdrop of the aforesaid legal position, let us now turn to the facts. On 8.8.1974, VPT recovered an amount of Rs.74,810.38 being the cost of 500 jack rods from running Bill No. 21 tendered by the contractor. The dispute with regard to claim of Rs.74,810.38, thus arose on that date. The contractor ought to have given notice calling upon VPT to appoint an arbitrator within three years therefrom or apply to the court within this time. However, it was after ten years on 22.9.1984 that the contractor appointed its arbitrator and called upon VPT to appoint its arbitrator."

In view of the above, I am of the opinion that cause of action to seek the appointment of Arbitrator under Section 11 of the Act does not arise with serving of notice seeking appointment of an Arbitrator under section 11(5) of the Act. The cause of action to seek dispute would arise in the same manner in which the limitation is to be computed for raising of a claim before the civil Court. Whether the claim of the petitioner was within the period of limitation is required to be determined on the date of filing of application under section 11(6) of the Act. The period of limitation is not to commence from the date of serving of notice but would run on the date when right to claim accrues to the plaintiff as is before the civil Court.

Since section 11(5) of the Act provides a notice of 30 days before a petition for appointment of an Arbitrator can be filed in the court, therefore, such period of 30 days alone are to be excluded in computing the period of limitation as contemplated under section 15(2) of the Limitation Act.

Therefore, the present petition for seeking appointment of Arbitrator is beyond the period of limitation. Hence, the same is dismissed.

[HEMANT GUPTA]
JUDGE

November 12, 2009
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