

Sh. Rajesh Kumar Garg Vs. Mcd and anr.

Sh. Rajesh Kumar Garg Vs. Mcd and anr.

SooperKanoon Citation : sooperkanoon.com/693470

Court : Delhi

Decided On : Mar-14-2008

Reported in : 2008(2)ARBLR107(Delhi); 149(2008)DLT343; 2008(102)DRJ137

Judge : S.N. Aggarwal, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11, 11(6) and 43; [Limitation Act, 1963](#) - Schedule - Article 137; Revenue Recovery Act; [Arbitration Act, 1940](#) - Sections 20

Appeal No. : A.A. No. 23/2007

Appellant : Sh. Rajesh Kumar Garg

Respondent : Mcd and anr.

Advocate for Def. : P.L. Gautam, Adv.

Advocate for Pet/Ap. : B.P. Singh, Adv

Disposition : Application dismissed

Judgement :

S.N. Aggarwal, J.

1. These are four applications filed for appointment of arbitrator under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#).

2. All these applications are proposed to be decided by this common order because question of facts and law involved in all of them are identical.

3. Briefly stated the facts of these four cases are as follow: Case No. 1: A.A. No. 23/2007 titled Sh. Rajesh Kumar Garg v. MCD and Anr.

4. The MCD had awarded a contract to the applicant for improvement of Footpath in Patparganj Society in AC-43, Shahdara Zone vide work order No. 537 dated 20.02.1998. The tender amount was Rs. 15,06,513/- and the contract amount was Rs.44,51,745/-. The work was to be completed within five months. As per the applicant, the contract work was completed within the stipulated time period of five months where after the work was inspected by the officials of the MCD and measurements were taken in the Measurements Book. The applicant has alleged that the respondents have not made the final payment despite his representations dated 08.05.2003 and 05.05.2005. The applicant is stated to has sent a legal notice dated 18.09.2006 to the respondents demanding arbitration for adjudication of disputes regarding final payment but the respondents are stated to have not responded to the said legal notice and therefore, the applicant has filed an application under Section 11(6) for appointment of an arbitrator in terms of the arbitration clause contained in the work order.

Case No. 2: A.A. No. 24/2007 titled Sh. Rajesh Kumar Garg v. MCD and Anr.

5. The respondents had awarded a contract to the applicant described as CC Channel Back Lines, Blocks A & B, Surajmal Vihar, C-80, Shahdara Zone vide work order No. 434 dated 12.01.1998. The tender amount was Rs. 4,83,326/- and the contract amount was Rs. 4,97,830/-. In terms of contract between the parties, the work was to be completed within five months from the date of the work order. As per the applicant, he had completed the work within the stipulated time period of five months but the respondents did not make final payment under the said contract. The applicant sent a legal notice to the respondents on 18.09.2006 and demanded appointment of an arbitrator but the respondents did not respond to the said notice and therefore he has filed the present application for appointment of an arbitrator in terms of work order No. 434 dated 12.01.1998 for adjudication of disputes regarding final payment and return of security under the said work order.

Case No. 3: A.A. No. 390/2007 titled Sh. Om Prakash Singhla v. MCD and Anr.

6. The respondents had awarded a contract to the applicant for construction of Link Road in Saket, Block C-72 in Shahdara Zone vide work order No. 46 dated 09.06.2000. This work was for an amount of Rs. 1,79,117/- and was to be completed within two months of the date of the order. As per the applicant, he had completed the work within the stipulated time period of two months but the respondents did not make his final payment and therefore he sent a legal notice dated 12.06.2007 to the respondents and demanded appointment of an arbitrator. Since the respondents did not respond to his aforementioned legal notice, he filed the present petition seeking appointment of an arbitrator for adjudication of disputes under the above referred work order.

Case No. 4: A.A. No. 391/2007 titled Sh. Hari Om Verma v. MCD and Anr.

7. The respondents had awarded a contract to the applicant for improvement of Link Road from Main Mandawali Road to Moni Baba Mandir, New Chowk, Bhim House in Saket Block C-72 in Shahdara Zone vide work order No. 387 dated 01.01.2001. The tender amount was Rs. 1,98,171/- and the contract amount was Rs. 2,14,352/-. The work under the said work order was to be completed within two months. As per the applicant, he had completed the work within the stipulated time period of two months but the respondents did not make his final payment under the said work order and therefore he sent a legal notice dated 25.07.2007 to the respondents calling upon them to appoint an arbitrator for adjudication of disputes relating to final payment and since the respondents failed to respond to the said legal notice, the petitioner filed the present petition for appointment of an arbitrator in terms of above referred work order.

8. Ms. Gautam appearing on behalf of the respondents has opposed the appointment of arbitrator in all the above four cases on the ground of limitation. She has relied upon two unreported orders of this Court in Arb. P. No. 264/2007 titled Rajinder Kumar Goel v. MCD and Anr. decided on 28.11.2007 and A.A. No. 267/2007 titled Rajinder Kumar Goel v. MCD and Anr. decided on 28.11.2007. In both these cases, this Court had dismissed the petition for appointment of arbitrator on the ground of limitation on similar facts. However, Mr. Singh, the

learned Counsel appearing on behalf of the petitioners/contractors has relied upon another judgment of this Court in Sham Sunder v. MCD 133(2006) DLT 545 where also the facts were identical to the facts of the present case but in that case the Court directed appointment of an arbitrator treating the petition within limitation holding that the limitation to apply under Section 11(6) would apply from the date of legal notice issued by the contractor to the respondent for invoking the arbitration clause.

9. The counsel for the parties have relied upon two divergent views of this Court on the point of limitation and therefore it becomes necessary to examine the law applicable in the present case to ascertain whether the applications filed for appointment of arbitrator are within limitation or not.

10. The counsel for both the parties invited attention of this Court to the observations made by the Hon'ble Supreme Court in para 39 of its judgment in S.B.P. & Co. v. Patel Engineering Ltd. and Anr. : AIR 2006 SC450 which are as under:

It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these

aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the Court at various stages of the proceedings before the arbitral tribunal.

11. A glance to the above observations of the Hon'ble Supreme Court would suggest the scope of the order under Section 11 to be passed by the Chief Justice or his designate. The Chief Justice or his designate has to decide the issues regarding territorial jurisdiction and the existence of the arbitration agreement between the parties and whether such party has approached the Court for appointment of the arbitrator within limitation period or not. The question of limitation normally is a mixed question of law and facts. In case the Chief Justice or his designate finds that the claims sought to be referred to the arbitrator are ex-facie time barred then reference of such dispute for arbitration would be exercise in futility. The Hon'ble Supreme Court in *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.* (2007) 4 SCC 599 has noted with approval the above observations of the Hon'ble Supreme Court in *M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. and Anr.'s case* (Supra) and has discussed in para 27 of its judgment that the Chief Justice or his designate has to record his satisfaction that prima facie the issue has not become dead by lapse of time or that any party to the agreement has not slept over his right beyond the time permitted by law to agitate the issue covered by the agreement.

12. Section 43 of the [Arbitration and Conciliation Act, 1996](#) provides that the provisions of Limitation Act would apply to the arbitration in the same manner as they apply to claims before the Court. The law is well settled through a catena of judgments both of Hon'ble Supreme Court and also of the various High Courts that the provisions of Article 137 of the Limitation Act applies to application for appointment of an arbitrator under Section 11(6) of the Act. Reliance in support of this view is placed upon the judgments of the Hon'ble Supreme Court in *Major (Retd.) Inder Singh Rekhi v. DDA* : [1988]3SCR351 ; *Kerala State Electricity Board v. T.P. K.K. Amson and Besom* : [1977]1SCR996 and *Town Municipal Council,*

Athani v. Presiding Officer, Labour Court : (1969)IILLJ651SC .

13. Article 137 of the [Limitation Act, 1963](#) is a residuary Article and deals with limitation in cases not specifically provided for in the other articles. As per Article 137, the limitation is three years from the date of accruing of cause of action. In other words, the period of three years prescribed under Article 137 will start from the date when the right to apply for arbitration accrues. Though in work contracts, a right to get payment would normally arise on completion of the work but that is not enough for making an application for appointment of arbitrator under Section 11. The question of limitation has to be decided on the basis of facts of a given case.

14. In *S. Rajan v. State of Kerala and Anr.* : [1992]3SCR649 , an agreement was entered into between the applicant and State of Kerala on February 19, 1966 whereunder the appellant undertook to carry out certain work within a period of ten months but he did not complete the work within the period prescribed whereupon the contract was terminated on December 19, 1968 and the work was retendered. It was completed by another contractor. State of Kerala took proceedings under the provisions of Revenue Recovery Act for recovering the loss suffered by the State on account of the appellant's failure to carry out the work in accordance with the contract. A notice of demand was served by the State on the appellant on May 30, 1974 calling upon the appellant to pay the assessed amount of loss. The appellant challenged the said notice by way of writ petition in the High Court of Kerala which was dismissed on November 25, 1978. In the year 1983, he applied to the Government of Kerala to refer the disputes and differences between them to an Arbitrator. This was refused in the year 1984 whereupon the appellant filed an application under Section 20 of the Arbitration Act. On these facts, it was held by the Hon'ble Supreme Court that the application filed for appointment of arbitrator was barred by limitation under Article 137 of the [Limitation Act, 1963](#) since the right to apply for arbitration had accrued to the appellant in 1974 when notice demanding assessed loss was served upon the appellant. Hence it may be seen from the Judgment of the Supreme Court in *S. Rajan's* case (Supra) that the Supreme Court does not say that the limitation for filing an application for appointment of an arbitrator under Section 11 would start from the date of service

of legal notice demanding arbitration. The ratio of judgment in S. Rajan's case (Supra) is that the limitation for filing an application under Section 11 would start on the date of accrual of cause of action. In that case, cause of action accrued when the State made a demand upon the contractor to pay the assessed loss since the contract work was got completed from another contractor.

15. In Major (Retd.) Inder Singh Rekhi v. DDA : [1988]3SCR351 , the DDA vide its letter dated 05.10.1976 had accepted the tender of the appellant for construction of 240 Janta Houses at the estimated costs of Rs. 24,49,262/-. The work was to commence on 15.10.1976 and was required to be completed by 14.07.1977. By a subsequent extension of time, the work was finally completed on 02.04.1980 and the houses so constructed were allotted to several people. Between February 1983 to December 1985 the appellant sent several letters to the respondent requesting it to finalize the bills. The first of such letters was written by the appellant on 28.02.1983. Thereafter, the appellant finally sent a notice to the DDA on 04.09.1985 and requested it to release his security of Rs. 1 lac and refer the dispute relating to final bills for arbitration. The DDA failed to do so. In January 1986 the appellant filed an application under Section 20 of the [Arbitration Act, 1940](#) for directions from the Court for referring the dispute to the arbitration. It was on these facts that the Supreme Court held that the application filed by the appellant for appointment of an arbitrator was within time computing the limitation from the date of first letter written by the appellant on 28.02.1983 requesting the DDA to finalize his bills. It may be seen that letter dated 28.02.1983 written by the appellant was within limitation of three years of the date of completion of the work completed on 02.04.1980. The application for appointment of an arbitrator was filed in January 1986 which was also within limitation of three years reckoned from the date of first letter dated 28.02.1983. On these facts, it cannot be said that the Supreme Court has held that the limitation for filing of application under Section 11 would start from the date of service of legal notice. The limitation for filing of an application under Section 11 starts from the date of accrual of cause of action.

16. In Hari Shankar Singhanian and Ors. v. Gaur Hari Singhanian and Ors. : AIR 2006 SC2488 , the facts of the case were that a partnership firm was formed by three brothers of a family. The family owned considerable amount of immovable

property which was brought into the firm's business. In 1987, the partnership firm was dissolved by way of dissolution deed as a family settlement. Under the dissolution deed, Clause 13 enabled the parties to go for arbitration in case there was a dispute between them. As disagreement between the parties took place as to the division of the assets involved in the partnership firm, the distribution of the said immovable properties could not be effected by 31.05.1987 as contemplated by the deed of dissolution. Ultimately in February 1988, the three groups each appointed a nominee to work out an arrangement whereby distribution of the said immovable properties of the said dissolved firm could be made and effected in the manner acceptable to all. The nominees held several meetings but no agreement of distribution could be arrived at. Further, there were numerous letters written by both the parties to find a way to settle the dispute pertaining to the division of assets. The last letter that was exchanged in this regard was a letter dated 29.09.1989. On 08.05.1992 a plaint under Section 20 of the [Arbitration Act, 1940](#) was filed before the High Court by the appellants. On these facts the Supreme Court found the petition to be within time holding that the right to apply under Section 20 accrued to the appellants only on the date of last correspondence between the parties and the period of limitation was reckoned from the date of last communication which was on 29.09.1989. In para 24 of its judgment in Hari Shankar Singhania's case (Supra), it was observed by the Supreme Court as follows:

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.

17. From the above judgments of the Hon'ble Supreme Court, the legal position that emerges is that an application for appointment of an arbitrator under Section 11 can be filed within three years from the date of accrual of cause of action. When cause of action to apply under Section 11 accrues is to be seen in the light of the terms and conditions of the contract between the parties.

18. Clauses 7 & 9 of the contract between the parties are relevant and the same are reproduced here-in-below:

CLAUSE 7

Payment on Intermediate Certificate to be Regarded as Advances

No payment shall be made for work, estimated to cost Rs. Twenty Thousand or less till after the whole of the work shall have been completed and certificate of completion given. For works estimated to cost over Rs. Twenty thousand the interim or running account bills shall be submitted by the contractor for the work executed on the basis of such recorded measurements on the format of the Department in triplicate on or before the date of every month fixed for the same by the Engineer-in-Charge. The contractor shall not be entitled to be paid any such interim payment if the gross work done together with net payment/adjustment of advances for material collected, if any, since the last such payment is less than the amount specified in Schedule 'F', in which case the interim bill shall be prepared on the appointed date of the month after the requisite progress is achieved. Engineer-in-Charge shall arrange to have the bill verified by taking or causing to be taken, where necessary, the required measurements of the work. In the event of the failure of the contractor to submit the bills, Engineer-in-Charge shall prepare or cause to be prepared such bills in which event no claims whatsoever due to delays on payment including that of interest shall be payable to the contract. Payment on account of amount admissible shall be made by the Engineer-in-Charge certifying the sum to which the contractor is considered entitled by way of interim payment at such rates as decided by the Engineer-in-Charge. The amount admissible shall be paid by 10th working day after the day of presentation of the bill by the contractor to the Engineer-in-Charge of his Asstt. Engineer together with the account of the material is issued by the department, or dismantled materials, if any.

All such interim payments shall be regarded as payment by way of advances against final payment only and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be rejected, removed, taken away and reconstructed reerected. Any certificate given by the Engineer-in-Charge relating

to the work done or materials delivered forming part of such payment, may be modified or corrected by any subsequent such certificate(s) or by the final certificate and shall not by itself be conclusive evidence that any work or materials to which it relates is/are in accordance with the contract and specifications. Any such interim payment, or any part thereof shall not in any respect conclude, determine or affect in any way powers of the Engineer-in-Charge under the contract or any of such payments be treated as final settlement and adjustment of accounts or in any way vary or affect the contract.

Pending consideration of extension of date of completion interim payments shall continue to be made as herein provided, without prejudice to the right of the department to take action under the terms of the contract for delay in the completion of work, if the extension of date of completion is not granted by the competent authority.

The Engineer-in-Charge in his sole discretion on the basis of a certificate from the Asstt. Engineer to the effect that the work has been completed up to the level in question make interim advance payments without detailed measurements for work done (other than foundations, items to be covered under finishing items) upon lintel level (including sunshade etc.) and slab level, for each floor working out at 75% of the assessed value. The advance payments so allowed shall be adjusted in the subsequent interim bill by taking detailed measurements thereof.

CLAUSE 9

Payment of Final Bill

The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate completion furnished after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-Charge, will, as far as possible be made within the period specified hereinunder, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge or his

authorised Asstt. Engineer, complete with account of materials issued by the Department and dismantled materials.

(i) If the Tendered value of work is up to Rs.5 lakhs : 3 months

(ii) If the Tendered value of work exceeds Rs.5 lakhs : 6 months

19. Mr. Singh the learned Counsel appearing on behalf of the applicants had referred and relied upon Clause 25 of the agreement and relying upon the same, he had argued that the applications filed for appointment of arbitrator are within limitation because the applicants did not receive any intimation from the Engineer-in-Charge of the respondents that their final bills were ready for payment. It was contended by the learned Counsel that the applicants could have filed an application for appointment of arbitrator within 120 days of receiving the said intimation from the Engineer-in-Charge of the respondents. The relevant portion of Clause 25 of the agreement is extracted here-in-below:

CLAUSE 25

Settlement of Disputes & Arbitration...It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the MCD shall be discharged and released of all liabilities under the contract in respect of these claims.

20. It is an admitted case of the applicants that they had completed the contract work within the scheduled time and that they had given legal notice demanding arbitration after more than 6-8 years of completion of the work by them. It is not their case in the applications that the final bills were not prepared by the respondents and that since the final bills were not prepared by the respondents, dispute did not arise between them till they served a legal notice upon the respondents after more than 6-8 years of the completion of the work. The applicants have not pleaded any such fact in their applications from which it may

be said that they were vigilant or were serious in finalizing of their bills under the work orders. They all slept over the matter for a long time of 6-8 years after completing the work till legal notices were served by them upon the respondents prior to filing of the applications under consideration. A plain reading of Clause 9 of the agreement reproduced above would show that it was incumbent upon the applicants to have submitted the final bill within three months of completion of work or within one month of the date of completion certificate furnished by the Engineer-in-Charge, whichever was earlier. The payment of final bill was to be made by the respondents within three months in case the tendered value of the work was up to Rs. 5 lacs and within six months if the tendered value of the work exceeded Rs. 5 lacs. In the event of failure of the respondents to make the final payment within the stipulated time period mentioned in Clause 9 of the agreement, the disputes arose at that point of time regarding final payment to which applicants were entitled. Reliance placed upon Clause 25 by the counsel for the applicants appears to be misplaced. What is provided in Clause 25 of the agreement is that if the contractor would fail to make a demand for appointment of arbitrator in respect of any claim in writing within 120 days of his receiving the intimation from the Engineer-in-Charge that the final bill was ready for payment, then the applicants would be deemed to have been waived all claims contrary to the final bill. This does not mean that where the Engineer-in-Charge has not given any intimation that the final bill is ready for payment, the applicants could wait indefinitely on the belief that the limitation has not started to run. In the opinion of this Court the applicants could have filed an application under Section 11 within three years after expiry of six months' time stipulated for final payment in Clause 25 of the contract. In view of the same, with respect, I do not agree with the view taken in Sham Sunder's case (Supra) where it is held that the limitation would start from the date of issuance of legal notice for demanding arbitration. In Sham Sunder's case (Supra), the relevant clauses of the contract were not considered and even the relevancy of the judgments referred therein has not been discussed. In the facts and circumstances of the case, I tend to agree with the view on the point of limitation taken by this Court in the two cases of Rajinder Kumar Goel referred above.

21. Reverting to the facts of the case in hand, it may be seen that in two out of four cases under consideration the work was completed by the applicants in 1988 and the payment was also received in 1988. The legal notice demanding arbitration in those two cases was sent by the applicants after about 8 years of the completion of the work on 18.09.2006 and the applications for appointment of arbitrator under Section 11 were filed on 12.01.2007. In the third case, the work was completed in the year 2000 whereas notice demanding arbitration was sent on 12.06.2007 i.e. after about 7 years of the completion of the work and when dispute arose regarding payment. In the fourth case, the work was completed in the year 2001 and the notice demanding arbitration was sent by the applicant after more than 6 years on 25.07.2007. The facts of these cases would show that the applicants had slept over their right, if any, under the work orders for a long time ranging between 6-8 years. In terms of the contract between the parties, the final bill was required to be submitted by the applicants to the respondents within three months of the completion of the work. The terms of the contract further show that it was not obligatory upon the respondents to prepare the final bill and under the circumstances, the applicants cannot take advantage of their own lapse in the matter and seek appointment of the arbitrator for reference of alleged disputes after expiry of 6-8 years from the date cause of action for the same accrued. The alleged claims of the applicants have become stale and are hopelessly barred by limitation.

22. For the foregoing reasons, all the four applications filed for appointment of arbitrator are held to be barred by time and are therefore dismissed on the ground of limitation. The parties are left to bear their own costs.

23. A copy of this order be kept in the files of all the four cases disposed of by this common order.