

R.K. Aneja Vs. Delhi Development Authority

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Court : Delhi

Decided On : Jan-27-2000

Reported in : 2000IIIAD(Delhi)629; 2000(1)ARBLR214a(Delhi)

Judge : S.K. Mahajan, J.

Acts : [Arbitration Act, 1940](#) - Sections 20

Appeal No. : Suit No. 2451/93

Appellant : R.K. Aneja

Respondent : Delhi Development Authority

Advocate for Def. : Ms. Ansuya Salwan and ; Ms. Ruchi Grover, Advs.

Advocate for Pet/Ap. : Mr. Harish Malhotra and; Mr. Ashwani Sood, Advs

Judgement :

ORDER

S.K. Mahajan, J.

1. This order will dispose of suit filed by the petitioner under Section 20 of the Arbitration Act for filing arbitration agreement in Court and for reference of disputes thereafter to the Arbitrator.

2. The Facts in short are:

3. That an agreement was entered into between the parties for construction of certain dwelling units under the Self Financing Scheme of respondent No. 1. Certain disputes having arisen between the parties the plaintiff sought those disputes to be referred to an Arbitrator. For this purpose, notice dated 15/4/1992 was given to the Respondent. This notice was received by respondent No.1 on 6/5/1992. The respondent in reply to the notice stated that intimation of the readiness of the final bill was conveyed to the plaintiff on 21/1/1992 and as the plaintiff has not invoked arbitration within 90 days from the date of such intimation, all his rights under the agreement had extinguished and consequently the petition was not maintainable. On such refusal of the respondent to refer the matter to Arbitrator this petition was filed. In reply to the petition the respondent has besides other objections taken an objection of the petition being barred by limitation inasmuch as the rights of the petitioner were alleged to have been extinguished as no demand for arbitration was made within 90 days from the date of intimation of the readiness of the final bill. On the pleadings of the parties this Court framed the following issues:

'1. Whether the matter cannot be referred to arbitration on account of the petitioner having applied for appointment of the arbitrator after expiry of 90 days of receiving the final payment?

2. Whether the petition is barred by Order 2, Rule 2 and Section 11 CPC?

3. Relief.'

4. Insofar as issue No. 2 is concerned no arguments have been advanced by any of the parties as to why the petition was barred by Order 2, Rule 2 or by Section 11 CPC. Even otherwise I find that during the time when the contract was being executed certain disputes were referred to an arbitrator for adjudication in accordance with law. The disputes which are now sought to be referred have arisen after the execution of the contract and consequently filing of the earlier petition for reference of disputes while the contract was under execution will have no effect on the present petition. In my view, therefore, the petition is not barred by Order 2, Rule 2 or by Section 11 CPC.

5. To appreciate the rival contention as to whether the right of the petitioner to get the matter referred to an Arbitrator had extinguished on the expiry of 90 days of receiving the intimation from the Engineer-in-charge that the bill was ready for payment or as to whether 90 days have at all expired from such date, it will be useful to refer to arbitration agreement between the parties which is in the following terms:

'CLAUSE 25: Settlement of disputes by arbitration.

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instruction herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other questions claim, right, matter or thing whatsoever, in any way arising out of relating estimates, instruction, orders or these conditions or otherwise concerning the works or the execution of failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer Member, Delhi Development Authority at the time of dispute. It will be no objection to any such appointment that the arbitrator so appointed is a Delhi Development Authority employee that he had to deal with the matters to which the contract relates and that in the course of his duties as Delhi Development Authority employees he had expressed view on all or any of the matters in disputes of difference. The arbitrator to whom the matter is originally referred being transferred or vacating the office or being unable to act for any reason, such Engineer Member, Delhi Development Authority as aforesaid at the time of such transfer, vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor it is also a term of this contract that no person other than a person appointed by such Engineer Member, Delhi Development Authority as aforesaid should act as arbitrator and, if for any reason that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000/- (Rupees fifty thousand) and above, the arbitrator will give reason for the award.

Subject as aforesaid the provisions of the [Arbitration Act, 1940](#) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause. It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

It is also a term of the contract that if the contractor(s) does/do not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Engineer-in-Charge that the Bill is ready for payment, the claim(s) of the contractor(s) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of all liabilities under the contract in respect of those claims.'

6. Under clause 25 of the agreement it is only when a demand is not made for arbitration in respect of claims in writing within 90 days of the receiving the intimation from the Engineer-in-charge that the bill was ready for payment, the claim of the contractor would be deemed to have been waived and absolutely barred and the DDA would be deemed to have been discharged and released of all the liabilities under the contract in respect of those claims. Under the amendment to Section 28 of the Contract Act, made in 1997, an agreement which extinguishes the rights of any party thereto or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights would be void to that extent. Mr. Malhotra, therefore, argues that in view of the amended Section 28 of the Contract Act, the agreement as contained in Clause 25 of the agreement extinguishing the right of the plaintiff on his having not made a claim in writing within 90 days of the receiving of the intimation from the Engineer-in-charge that the bill was ready for payment was void to that extent and no benefit can be derived from the same by the defendant. In support of his contention he refers to the judgment of this Court in Hindustan Construction Corporation v. Delhi Development Authority, 1999 (1) Arb LR 272. In the said case the Arbitrator while adjudicating upon the disputes between the parties had held that as the arbitration was not invoked within 90 days from the date of the intimation of the final bill being

ready for payment, the petitioner was not entitled to invoke arbitration agreement and consequently no award was made in favor of the petitioner in that case. The Arbitrator had not decided the claims on merits at all. The learned Single Judge in the aforesaid case after referring to Section 28 of the Contract Act held that in the circumstances of that case the petitioners were entitled to succeed in that case and the award was set aside and the Arbitrator was directed to decide the claim of the petitioner on merits.

7. Ms. Salwan, appearing for DDA has submitted that firstly this judgment is not applicable to the facts of the present case inasmuch as no decision has been given in that case as to whether amended Section 28 will have retrospective effect or will affect only those agreements which had been entered into after the amendment of Section 28. On the first question that clause in the agreement is valid and is not void she has referred to the judgment reported as National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co. & Another, AIR 1997 SC 2094 and Wild Life Institute of India Vs . Vijay Kumar Garg, : (1997)10SCC528 . It was held by the Supreme Court in these cases that in view of the provisions in the arbitration clause the liability of the opposite party will cease if no claim of the contractor was received within 90 days of the receipt by the contractor of the intimation that the bill was ready for payment. According to the Supreme Court this clause operates to discharge the liability of the appellants (opposite party) on the expiry of 90 days as set out therein and is not a clause providing the period of limitation. The claim having not been made within 90 days of even receipt of the amount under the final bill it was held by the Supreme Court that all rights of the contractor had extinguished. The Court in these cases was not dealing with the amended Section 28 of the Contract Act.

8. After having heard counsel for the parties and after having perused the record I am of the view that it is not necessary for this Court to decide in this case the question as to whether Section 28 as amended will have retrospective or prospective effect, as in my opinion, this petition can be decided on its own facts.

9. In this case though the date on which notice was alleged to have been sent is 15th April, 1992 but it is not disputed that the notice was received in the office of

the DDA only on 6th May, 1992. The only question, therefore, in dispute is as to when the intimation of the readiness of the final bill was received by the petitioner. In this case, the final bill has been filed on record by DDA itself and it has been signed by the contractor on 25.1.1992. The date of the intimation of the readiness of the final bill for payment is, therefore, not later than 25.1.1992. From this date the invocation is clearly beyond the period of 90 days. However, from the record, I find that in spite of the preparation of the final bill the work was continuing and was completed only on 31.3.1993. In the petition under claim No. 2 what has been stated by the plaintiff is that he was entitled to certain sum being the expenditure incurred on account of overhead and establishment due to the prolongation of the period of contract from 24.11.1987 to 31.3.1993. This is not disputed in the written statement by the defendant. Even in the notice of invocation which has been filed as Annexure P-1 to the petition it is stated that the plaintiff was entitled to certain expenditure having been incurred on overhead and establishment due to the prolongation of the period of contract from 24.11.1987 to 30.6.1992 when the establishment was likely to be free. This date was mentioned as 30.6.1992 because notice was given on 15.4.1992, however it is claimed that in fact the work was completed only on 31.3.1993. In reply to this notice it is not stated by the DDA in its communication dated 4.5.1993 that the work had come to an end on 13.9.1991. The date on which reliance is being placed regarding completion of work is the Measurement Book which shows that the work was completed on 13.9.1991. The case of the plaintiff, however, is that in spite of Measurement Book having been signed on 13.9.1991 this work continued up to 31.3.1993. Even some payments for the work which had continued up to 31.3.1993 have been made to the plaintiff on 11.4.1993 which fact is also not denied by the defendant.

10. Though it is the contention of the defendant that after 90 days from the date of the intimation of the readiness of the final bill for payment to the plaintiff all rights of the plaintiff would extinguish and the plaintiff would not be entitled to make any claim under the agreement, However, I find that even in the case of *Wild Life Institute of India v. Vijay Kumar Garg* (supra) on which reliance has been placed by the defendant, the Supreme Court has held that the dispute having been raised for the first time by the contractor 10 months after the receipt of the amount under the final bill, the defendant cannot raise any dispute under the agreement as all his

rights would stand extinguished under the agreement. The Supreme Court has, therefore, taken the date from which limitation would start as the date of last payment and not the date of the final bill. Even in the judgment reported as M/s. Ram Nath Mehra & Sons v. Union of India & Another, AIR 1982 Del 164 this Court while dealing with similar matter has held as under:

'Where the arbitration clause in the contract for building work with Govt. provided that the claim for appointment of arbitrator in terms of the clause for settlement of claims would be barred if not made within 90 days from the date of intimation by Govt. that final bill was ready and even after such intimation the Govt. continued to withhold certain amounts and making payments, the bill cannot be said to be final and the limitation for demand for arbitration under the arbitration clause as well as under Article 137 would run from the date of last payment.'

11. In this case it is held by this Court that limitation would run from the date of last payment. In the present case as the last payment was made on 11.4.1993, in my opinion, the defendant could not refuse to appoint an Arbitrator on the plea that the arbitration agreement was invoked after 90 days of the preparation of the final bill. In my view, there was no justification for the defendant not to appoint an arbitrator on receipt of the notice from the plaintiff.

12. There is no other ground taken by the defendant as to why the Arbitrator could not be appointed. There being thus an arbitration agreement in existence between the parties and the parties having agreed to refer the disputes to an Arbitrator, I allow this petition and direct the arbitration agreement to be filed in Court and further direct the Engineer-Member of Delhi Development Authority to appoint an Arbitrator within two weeks of the receipt of intimation of this order.

13. In the peculiar facts and circumstances of this case I leave the parties to bear their own costs. Let a copy of this order be given duly to the learned counsel for the parties for intimation to the Engineer-Member, Delhi Development Authority for compliance.