**Oriental Structural Engineers Ltd. Vs. Rites and anr.**

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**SooperKanoon Citation** : sooperkanoon.com/700391

**Court** : Delhi

**Decided On :** Sep-25-1998

**Reported in** : AIR1999Delhi303; 1999(48)DRJ234

**Judge** : M.K. Sharma, J.

**Acts** : Arbitration and Conciliation Act, 1996 - Sections 43; Limitation Act, 1963 - Schedule - Article 137; Code of Civil Procedure (CPC) - Order 2, Rule 2

**Appeal No.** : A.A. No. 10 of 1996

**Appellant** : Oriental Structural Engineers Ltd.

**Respondent** : Rites and anr.

**Advocate for Def.** : Arvind Chaudhary, Adv. for Respondent No. 1

**Advocate for Pet/Ap.** : R.K. Watel, Adv

**Disposition** : Petition dismissed

**Judgement** :
ORDER

**P.K. Sharma, J.**

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996, filed by the petitioner praying for filing of the arbitration agreement in this Court

and to refer the claims of the petitioner as set out in paragraph 20 of the petition to an independent arbitrator to be appointed by this Court. The aforesaid claims sought to be referred by the petitioner relates to claim of the petitioner of an amount of Rs. 16,21,149/- on account of short payment for lead in earth work items and also for payment of interest at 18% per annum on the aforesaid amount from the date of completion of work up to the date of payment and Rs. 10,000/- towards cost of the arbitration proceedings.

2. The petitioner entered into a contract with the respondent No. 1 for extension of runway 147 32 for a length of 485 on at C. A. Bhubaneswar, under contract dated 28-4-1989. The aforesaid work was executed by the petitioner in terms of the agreement and completed the same on 15-9-1990. The petitioner thereafter submitted its final bill for the said works and the said final bill was prepared and finalised by the respondent No. 1 in September, 1992 and intimation regarding the same was received by the petitioner on 8-9-1992.

3. As certain differences and disputes arose between the parties with regard to the claims of the petitioner arising out of and in relation to the aforesaid contract and the final bill, the petitioner sought for a reference of the aforesaid disputes in terms of clause 25 of the Agreement between the parties. The respondent No. 2 referred the said differences and disputes to arbitration. The arbitrator in terms of the aforesaid reference entered into the reference and made and published his award on 20-3-1995. However during the pendency of the aforesaid reference before the arbitrator, the petitioner wrote a letter to the appointing authority of the respondentNo. 1 vide its letter dated 4-12-1992 to refer its claim of extra lead in earth work executed by the petitioner stated to have been inadvertently omitted to be included in the final bill. The aforesaid claim of the petitioner was not included in the final bill submitted by the petitioner to the respondent No. 1 and it is stated that the said claim was inadvertently not included in the final bill and, thereforee, was also not paid to the petitioner.

However, subsequently, when the petitioner raised the aforesaid claim in its letter dated 4-12-1992, the same was referred to the arbitrator by the appointing authority of the respondent No. 1. The arbitrator, however, while giving his award

recorded his findings in respect of the aforesaid claim of the petitioner for an amount of Rs. 16 lacs on account of short payment in lead in earth work items. The same was dealt with by the arbitrator as his findings in respect of Claim No. 3. While giving his award, the arbitrator held that most of the earth work was completed well before July, 1990 and measurements of items of carriage was recorded by 17-7-1990 and the whole contract work was completed on 15-9-1990 and the claimant submitted his own final bill on 21-10-1991.

The arbitrator found that the quantity taken by the petitioner in that bill and the quantity as finally shown in the bill passed by the respondent are the same and the said bill was passed on 8-9-1992. From the documents in record, particularly, on the reading of the letter dated 18-9-1992, the arbitrator found that even in the said letter dated 18-9-1992, which relates to passing of final bill, no complaint was made by the petitioner about anything being wrong in the measurement of item of carriage referred to above. On consideration of the documentary evidence and the submission of the petitioner, the arbitrator came to the conclusion that it is an admitted fact that the petitioner never lodged the aforesaid claim with the respondent but, straightway requested the Director, HAA on 4-12-1992 to refer the aforesaid claim to the arbitrator. The arbitrator held that if the petitioner wanted payments left out from the final bills prepared and submitted by themselves, the word 'final' would cease to have any meaning and would become redundant and further there was no assertion of right by the petitioner and rejection thereof by the respondent before it could qualify to be termed as a dispute only for the resolution of which the provisions of arbitrators exists in the Contract.

It was finally held that as there was no dispute, no award is given in respect of the aforesaid claim. The aforesaid award passed by the arbitrator was made a Rule of the Court and the petitioner did not choose to challenge the aforesaid part of the award before the Court at the time of the same being made a Rule of the Court.

4. However, on 31-3-1995, the petitioner served a notice on the respondent No. I to make payment of Rs. 16,21,1497- for the work executed on account of lead for earth work by the petitioner, that is, the subject matter of the aforesaid claim No. 3. By the aforesaid notice, the petitioner called upon the respondent No. 1 to settle

the said claim within a period of eight weeks and in case the said claim is not accepted, the petitioner would seek reference to the claim to arbitration under Clause 25 of the Contract.

5. The respondent No. 1 sent a reply to the aforesaid letter contending, inter alia, that the aforesaid claim was already referred to arbitration and was fully agitated before the Arbitrator and was duly considered by the arbitrator before coming to his conclusion for making his award. Thereafter, the petitioner sent a letter to the respondent No. 1 by its letter dated 3-5-1995 calling upon him to refer the same to the competent authority for adjudication of the disputes through arbitration as the respondent is disputing the claim. Since no action was taken for such reference by the respondent No. 1, the present petition has been filed.

6. Mr. R. K. Watel, counsel appearing for the petitioner submitted that a bare reading of the award passed by the arbitrator in respect of Claim No. 3 would indicate that the arbitrator did not pass any award as no dispute was raised by the petitioner till that date. He submitted that a letter was sent to the appointing authority under Clause (25) for referring the aforesaid Claim No. 3 as a dispute to the arbitrator in pursuance of which the aforesaid dispute was referred to the arbitrator, but, still the arbitrator held that there was no dispute and, thereforee, there could not be any award. Thus, according to the learned counsel for the petitioner there was no finding with regard to the merit of the aforesaid claim and this Court is thus fully empowered to make a reference of the aforesaid dispute for adjudication by an independent arbitrator.

7. The respondents, however, in their reply took up a plea that the aforesaid claim of the petitioner is also barred by limitation. In view of the aforesaid objection taken by the respondents, the petitioner submitted that the said claim is not barred by limitation as reference to the aforesaid dispute was sought for, as early as 1992, and the said claim was also referred to the arbitrator and that since the arbitrator did not pass any award in respect of the same holding that there was no dispute, a notice was again served on 31-3-1995 that is, immediately after the award was passed by the arbitrator contending that that now the dispute has been raised. In support of his contentions, the learned counsel relied upon the decisions of the

Supreme Court in Union of India v. L.K. Ahuja and Co., : [1988]3SCR402 , Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority; : [1988]3SCR351 , G. Ramachandra Reddy & Co. v. Chief Engineer, Madras Zone, Military Engineering Service; reported in : [1994]3SCR808 and Maharaj Singh v. Vulcan Insurance Co. Ltd.; : AIR1972 Delhi182 .

8. On the other hand, the learned counsel appearing for the respondents submitted that in the reference made to the arbitrator, the present claim raised by the petitioner was also a claim which was referred to the decision of the arbitrator. It was further submitted that on the evidence on record, the arbitrator found that the aforesaid claim of the petitioner cannot be entertained. According to him, the petitioner could not have raised his claim after preparation of the final bill and payment of the same as the word 'final' would mean finality with regard to all claims. He also submitted that since the arbitrator has given an award in respect of Claim No. 3 holding that if the contractor wanted payments left out from the final bills prepared and submitted by themselves the word 'final' would cease to have any meaning and would become redundant, the said findings are conclusive findings and on the merit of the case and thus, the said award having been made a Rule of the Court and the petitioner having not agitated the award passed by the arbitrator in respect of the aforesaid claim cannot seek for reference of the said dispute through the present petition.

9. In support of his contention, the learned counsel relied upon a decision of the Supreme Court in K. V. George v. The Secretary to Govt., Water and Power Deptt., Trivandrum; : AIR 1990 SC53 , Muhammad Hafiz v. Mirza Muhammad Zakariya; reported in AIR 1922 PC 23, S. Rajan v. State of Kerala, : [1992]3SCR649 and Bansal Construction Co. v. I. O. C. Ltd., : AIR1993 Delhi76 .

10. The award passed by the arbitrator in respect of claim No. 3 has been made a Rule of the Court and thus the findings of the arbitrator also to the effect that no dispute was raised by the petitioner in respect of the aforesaid claim has attained finality. Still the claim sought to be raised by letter dated 31-3-1995 would be within the period of three years of limitation prescribed under Article 137 of the Limitation Act as the starting point of limitation period shall have to be computed

from 1-9-1992 when the final bill was passed. Thus the petition is within limitation and the objection of the respondent on that count has no merit.

11. Now coming to the other aspect, it is seen that the claim in respect of payment for lead in earth work items was not included in the final bill submitted by the petitioner and, thereforee, question of making payment in respect of the said claim could not be considered by the respondents at the time of making payment of the final bill which was passed on 8-9-1992. Even subsequent thereto, the petitioner wrote a letter to the respondent No. 1 on 18-9-1992 in which also no complaint was made in respect of any measurement of item of carriage or short payment in respect of extra lead work.

12. It is stated by the counsel appearing for the petitioner that the aforesaid lapse came to the notice of the petitioner only subsequently and immediately on learning about the aforesaid mistake, a claim was raised by the petitioner in his letter dated 4-12-1992 to the respondents requesting for adjudication of the aforesaid claim also by the same arbitrator. It is also disclosed from the records that prior to seeking reference to the aforesaid claim, the petitioner did not place the said claim before the competent authority for making payment in respect of the same and accordingly, the arbitrator while publishing his award came to the conclusion that without raising the claim and repudiation of the said claim, no dispute could be said to have arisen and, thereforee, no reference could be made. But while doing so also the arbitrator has held that such a claim could not have been raised by the petitioner after submission of the final bill and payment of the said bill after finalisation. Thus, that was a decision given by the Arbitrator on merit in respect of which a proceeding was filed in this Court for making the award a Rule of the Court in pursuance of which, the award was made a Rule of the Court.

13. The petitioner did not choose to challenge the aforesaid part of the award in the said proceedings. It is not disputed that in terms of the final bill issued by the petitioner, the respondents made payment out of which, certain disputes arose and in terms of the award passed by the arbitrator in respect of the said disputes, the award has also been made a Rule of the Court. Thus, in respect of the aforesaid claim, there is full and final satisfaction of the contract upon the award in

respect of claim No. 3 being made a Rule of the Court notwithstanding subsequent protest and raising a further dispute and also imposition of condition now relating to the acceptance of such payment. Upon acceptance by the contractor of payment, the contract stood discharged and extinguished in so far as it relates and/or concerns the claims of the contractor.

14. My attention was drawn to the decision of this Court in M/s. Bansal Construction Co. : AIR1993 Delhi76 (supra) and I respectfully agree with the ratio laid down in the aforesaid decision that in accordance with the clause in the contract, the arbitration clause stood discharged and could not be invoked. Reference may also be made to the decision of the Supreme Court in K. V. George : AIR 1990 SC53 (supra) wherein the Supreme Court after considering the decision of the Privy Council in Muhammad Hafiz AIR 1922 PC 23 (supra) held that the second claim petition before the arbitrator is barred under the provisions of Order 2, Rule 2 of the Code of Civil Procedure since the present contract stood discharged and because all issues arising out of the termination of the Contract could have been raised in the first claim petition which is filed before the arbitrator by the petitioner. Since the same was not done, the present second petition for referring the dispute to the arbitrator is barred under the provisions of Order 2, Rule 2, C. P. C. In my opinion, the aforesaid decision of the Supreme Court is fully applicable to the facts and circumstances of the present case.

15. This matter could also be looked into from another angle. The petitioner accepted the payment as per the award and the same has become final and binding. With the aforesaid acceptance of payment received without protest and without challenging the award there was accord and satisfaction by final settlement of the claims of the petitioner including claim No. 3. Thus the ratio of decisions of the Supreme Court in P. K. Ranjaiah & Co. v. Chairman and M. D., NTPC, reported in : 1994(1)SCALE1 and in State of Maharashtra v. Nav Bharat Builders, reported in , laying down that where full and final satisfaction is acknowledged by a receipt in writing the amount was received unconditionally there is accord and satisfaction by final settlement of all claims. In the present case, the petitioner received the awarded amount in terms of the award unconditionally and without protest and thus there is total accord and satisfaction

and the contract stood discharged and extinguished.

16. On the basis of the aforesaid findings I find no merit in this petition and is accordingly dismissed.