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M.C.D. and anr. Vs. Sh. Jasbir Singh, Prop. Jaseb Enterprises

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Court : Delhi

Decided On : Dec-17-2002

Reported in : 2003(1)ARBLR336(Delhi); 102(2003)DLT682

Judge : J.D. Kapoor, J.

Acts : Arbitration and Conciliation Act, 1996 - Sections 34; Limitation Act - Schedule - Article 115

Appeal No. : OMP Nos. 407, 408, 409, 410, 411, 412, 413 and 414/2002

Appellant : M.C.D. and anr.

Respondent : Sh. Jasbir Singh, Prop. Jaseb Enterprises

Advocate for Def. : Joy Basu and ; Vinod Kumar, Advs,

Advocate for Pet/Ap. : P.R. Monga, Adv

Disposition : Petitions dismissed

Judgement :

J.D. Kapoor, J.

1. With the introduction of Section 34 of the Arbitration and Conciliation Act, 1996, a sea change has occurred in the matter of challenging the Award. This Act has shrunken the grounds and limited the scope for challenging the Award to such an

extent that recourse to a Court against an Award is open only in following eventualities:-

(i) If the party challenging the Award furnishes proof that he was under some incapacity;

(ii) That the agreement was not valid under the law;

(iii) That he was not given a proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iv) That the Award deals with a dispute not referred to or not falling within the terms of the agreement;

(v) If the Award contains decisions on matters beyond the scope of the submissions to arbitration, only when if the decisions on matters submitted to arbitration can be separated from those not so submitted and in that case only that part of the arbitral Award which contains decisions on matters not submitted to arbitration is liable to be set aside;

(vi) If the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties;

(vii) If the subject matter of the dispute is found in the opinion of the Court not capable of settlement by arbitration under the law;

(viii) If the arbitral Award is in conflict with the public policy of India;

2. Before dealing with the objections filed by the petitioner on the anvil of the aforesaid tests, the facts may be recapitulated in brief. These are as under:-

3. Work of drainage system and construction of footpath on roads of A Block, New Friends Colony was awarded by way of written agreement on 20th December, 1991. Though it was to be completed within seven months but was actually completed on 30th September, 1995. However, the respondent approached the Court for appointment of an Arbitrator to adjudicate upon the disputes arising from the said work. This Court appointed an Arbitrator vide order dated 2nd May, 2001.

Award was returned on 9.9.2002.

4. Admittedly, the Award is based upon the findings of facts emanating from the documents filed by both the parties. What is now being agitated through this application is that the Award suffers from legal infirmity in as much as the claim raised by the respondent is barred by time and, thereforee, the Award is void ab initio. It is not for the first time that this plea has been taken in this Court. The point of limitation was raised by the petitioner before the Arbitrator who dealt with this matter extensively by referring to a series of communications exchanged between the parties, last of which being a letter dated 30.3.2000 in response to letter dated 18.3.2002 reiterating that the CPWD Manual Volume I was applicable whereas the petitioner opposed its applicability.

5. Apart from this aspect, another significant aspect considered by the Arbitrator was that though the work was completed in October, 1995 but the final bill was not prepared by the petitioners and consequently Respondent/claimant submitted the final bill in July, 1998 and due to indifferent and cavalier attitude of the petitioner it remained pending for long and within the prescribed limitation of three years, the respondent/claimant moved the petitioner for appointment of the Arbitrator way back in September, 1998 but in spite of that the petitioner did not respond and consequently the respondent moved the Court for appointment of Arbitrator in January, 2001.

6. The main plank of contention of learned counsel for the petitioner is that since the respondent had served letter dated 16th August, 2000, i.e. a legal notice in which a plea was taken that the petitioner has by its inaction deprived the respondent of legal right to approach the forum of arbitration for resolution of disputes and differences provided in the agreement by initially not appointing an arbitration, the respondent had waived his right to get the arbitrator appointed and therfore, the respondent was debarred or estopped from seeking appointment of the Arbitrator through the Court. I am afraid this understanding does not appear to be correct as it was through this legal notice itself that the respondent asked the petitioner to appoint an arbitrator in terms of Clause 25 within fifteen days failing which it would be constrained to approach the Court for appointment of the

Arbitrator.

7. It is pertinent to mention that earlier part of the notice which is contained in para 6 to the effect that by its inaction, the petitioner has deprived the respondent of his legal right to approach the forum of arbitration for resolution of disputes and differences can not be read in isolation. It is nothing but an expression of anger of the respondent about the indifferent and non-chalant attitude of the petitioner. What has to be seen is the pith and substance of the notice and the sence it conveys. This notice was not a notice asking the petitioner to make payment due to him but a notice asking the petitioner to appoint an Arbitrator for deciding the disputes as agreed by way of Clause 25 of the agreement. Through this notice neither the respondent had waived his right to get the disputes decided through Arbitrator nor had he given any such impression to the petitioner even in the earlier part of the notice referred to above.

8. Notice is clear and does not suffer from ambiguity. The intention was loud and clear. Respondent had invoked the clause of arbitration and requested the petitioner to appoint the Arbitrator within fifteen days. Any communication has to be given a purposeful meaning and one part here and one part there can not be segregated or isolated for the purpose of deriving undue advantage or unjust meaning. The communication or letter has not to be read piecemeal in order to gloss the purpose and object. Had the object been ambiguous and had the respondent waived his right to get the dispute adjudicated through arbitration rightly or wrongly or even on ill framing of the para by counsel, it was meaningless for the respondent to ask the petitioner to appoint the Arbitrator within fifteen days. Thus, neither does this notice suffer from any infirmity nor does the findings of the arbitrator that limitation started running from 16th May, 2000, when respondent sent the proforma in response to letter dated 30th March, 2000 of the petitioner.

9. Contention of learned counsel for the petitioner that the cause of action arose only in 1995 is difficult to accept as by then neither the final bill was prepared by the respondents nor the final bill submitted in July 1998 was dealt with by the petitioner. The reliance upon Gannon Dunkerley & Co. Ltd. v. Union of India : 1970 CriLJ741 by learned counsel appears to be misplaced as in this very judgment the

plea was taken that the period of limitation under Article 115 of the Limitation Act in respect of claim for compensation for the breach of any contract is considered three years and it commences to run when the contract is broken or where there are successive breaches but if there is a claim for enhanced rate becuase of change of circumstances or such rates do ont arise out of the contract, such a scheme cannot be brought within the ambit of compensation for breach of contract.

10. Obviously the facts of two cases are not akin and limitation aspect of the matter has to be ascertained on the strength of its own facts. It is needless to say that the findings of the Arbitrator should not be interfered with even if it is erroneous either on facts or on some legal proposition. The legal misconduct of the arbitrator as emphasised by learned counsel for the petitioner is not of a kind which needs intervention by this Court. It is a settled law that unless and until the arbitrator proceeds on such legal proposition which when considered subsequently is found to be wholly unsound, the allegation of legal misconduct cannot sticl.

11. In the instant case, the question of limitation was considered by the Arbitrator on the basis of facts and various letters exchanged between the parties. Thus, the finding of the Arbitrator in this regard is partly finding of fact and partly finding of law. If awards are interferred on such premises, the very object of choosing common forum by the parties for deciding their disputes would stand furstrated. The parties choose their Arbitrator not only for their confidence in the competence but faith in his integrity.

12. I have discussed this matter in detail that it does not fall within the ambit of Section 34, though learned counsel for the petitioner has laid great emphasis on this aspect as all other objections were nothing but a feeble attempt to bring them within the net of Section 34 of the Arbitration and Conciliation Act, whereas the fact remains that none of the objections which challenge finding of fact based upon the documents can seek its sustenance from any of the ground contemplated under Section 34 of the Act which is available to the party for the purpose of challenging the Award.

13. In view of the fore-going reasons, all the above petitions stand dismissed as identical question of facts and law have been agitated.

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