

(2011) 03 P&H CK 0390

High Court Of Punjab And Haryana At Chandigarh

Case No: Arbitration Case No. 196 of 2006

A.V. Cottex Limited

APPELLANT

Vs

National Insurance Company
and Others

RESPONDENT

Date of Decision: March 30, 2011

Acts Referred:

- Arbitration Act, 1940 - Section 20
- Arbitration and Conciliation Act, 1996 - Section 11(6), 12(2), 21, 43, 43(1)
- Limitation Act, 1963 - Article 137, 14, 20, 36, 37

Hon'ble Judges: Hemant Gupta, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Hemant Gupta, J.

The Petitioner has sought appointment of an Arbitrator by this Court u/s 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act')

2. The Petitioner Company obtained a Fire Insurance policy from the Respondents on 15.1.1998 covering the fire risk with interim protection with effect from 16.1.1998 to 15.1.1999. The policy was issued for a total sum of Rs. 458.2 lacs. On the intervening night of 25/26 May, 1998, unfortunately fire broke out in the factory premises of the Petitioner. In the said incident, two open end machines along with stocks and spares were completely damaged. The Petitioner lodged a claim with the Respondents on 28.5.1998 claiming total sum of Rs. 45.46 lacs. The Insurance Company released a sum of Rs. 4,35,246/- only.

3. Initially, the Petitioner filed a complaint before the National Consumer Dispute Redressal Commission, New Delhi on 25.5.1999. The said complaint was returned to the Petitioner with liberty to seek remedy before the Civil Court or any other forum, as may be permitted under law, vide order dated 16.1.2002. The SLP was dismissed

without issuing any notice on 26.4.2002. It was thereafter on 2.4.2003, the Petitioner filed a petition for appointment of an Arbitrator in terms of Clause 13 of the agreement for referring the dispute to an Arbitrator before the learned District Judge. The said application was returned on 2.4.2004 for presentation before this Court as the subject matter of jurisdiction was more than Rs. 25 lacs as in terms of the Rules, then applicable, such an application was maintainable before this Court only.

4. It is the case of the Petitioner that it has nominated Justice N.C. Kochhar (Retd.) as an Arbitrator in terms of Clause 13 of the agreement. Since the Respondents have not agreed for the Arbitrator nominated by the Petitioner, therefore, the Arbitrator is to be appointed in the manner mentioned in such Clause 13 by this Court.

5. In the written statement, it has been pointed out that the claim of the Petitioner on account of fire was paid in full and final settlement for Rs. 4,35,346/- in the year 1998 and that the claim of the Petitioner regarding appointment of an Arbitrator is highly belated and liable to be dismissed. It is also pointed out that there is no need for appointment of an Arbitrator as the claim of the Petitioner was accepted by way of full and final settlement.

6. Learned Counsel for the Respondents, has raised a preliminary objection that the present petition for seeking appointment of an Arbitrator, is beyond the period of limitation from the date the cause of action has accrued to the Petitioner i.e. from the day when final payment was made. It is contended that the loss was assessed and payment made on 8.10.1998, therefore, any dispute in respect of such loss has to be raised within a period of three years in terms of Article 137 of the Schedule to the Limitation Act, 1963, which contemplates a period of three years from the date of accrual of cause of action, if there is no other specific period of limitation. It is contended that the Petitioner has not pleaded that it was prosecuting the remedy before the National Consumer Disputes Redressal Commission, New Delhi, with a bona-fide and in a diligent manner and the period spent in prosecuting such remedy be excluded for determining the period of limitation. It is contended that even if the period of one year seven months and twenty two days in prosecuting the complaint before the National Consumer Disputes Redressal Commission and one year and one day before the learned District Judge, is excluded from consideration by granting benefit of bona-fide prosecuting the proceedings before the wrong Forum in terms of Section 14 of the Limitation Act, 1963, still the present petition presented before this Court on 29.9.2005, is beyond the period of limitation.

7. On the other hand, learned Counsel for the Petitioner has relied upon Sections 21 and 43 of the Act, to assert that the arbitration proceedings have commenced within a period of three years with the serving of notice seeking appointment of arbitrator, therefore, the Respondents cannot take benefit of not appointing Arbitrator in terms of the agreement and an Arbitrator be appointed by this Court for settlement of disputes between the parties.

8. The primary question, which is required to be considered, is whether the cause of action for seeking appointment of an Arbitrator arises on the date of the final payment or when notice seeking appointment of an Arbitrator was issued.

9. Before considering the respective contentions, it would be advantageous to reproduce the relevant statutory provisions:

Article 137 of the Limitation Act, 1963.

Article	Period of Limitation
137 Any other application for which no period of limitation is provided elsewhere in this Division.	Three years. When the right to apply accrues.

Sections 21 and 43 of the Arbitration and Conciliation Act, 1996.

21. Commencement of arbitral proceedings Unless otherwise agreed by the parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent.

xxx 43. Limitations

(1) The Limitation Act, 1963 (36 of 1963), shall, apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.

(3) Where an arbitration agreement to submit further disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

10. Learned Counsel for the Petitioner has vehemently argued that as the cause of action to seek appointment of an Arbitrator arises when the Respondents have failed to appoint an Arbitrator after serving of a notice dated 2.7.2002, therefore, the present petition filed on 29.9.2005 seeking appointment of an Arbitrator, is within the period of limitation after excluding the period spent before the National Consumer Disputes Redressal Commission, New Delhi and the learned District Judge.

11. The first question which is required to be determined is as to when the cause of action arose to the Petitioner. Firstly, the cause of action arose to the Petitioner when the fire broke out in the factory premises of the Petitioner i.e. on the intervening night of 25/26.5.1998. As a consequences of the said fire, an amount of 4,35,246/- was paid by the Respondents to the Petitioner on 8.10.1998. The right to claim balance amount, if any, crystalised on the payment of the said amount on 8.10.1998. The Petitioner, instead of moving an application for appointment of an Arbitrator in terms of the agreement between the parties, chose to invoke the jurisdiction of the National Consumer Disputes Redressal Commission, New Delhi. Such proceedings remained pending for a period of two years and seven months.

12. The period spent in such proceedings can be excluded in terms of Section 14 of the Limitation Act, 1963 only if the Petitioner is able to establish that it was bona-fide and with due diligence prosecuting such proceedings before the wrong forum. Section 14 of the Limitation Act, read as under:

14. Exclusion of time of proceeding bona fide in court without jurisdiction -

(1) In computing the period of limitation for any suit the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of the appeal or revision, against the Defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

13. There is no plea in the entire petition that the Petitioner was prosecuting the proceedings before the National Consumer Disputes Redressal Commission, New Delhi, in a bona-fide manner and with due diligence and thus, the period so spent, should be excluded. In the absence of any such plea, the period spent in

prosecuting the proceedings before the National Consumer Disputes Redressal Commission, New Delhi, cannot be excluded, for the purposes of determining the period of limitation. Therefore, the cause of action arose on 8.10.1998 to the Petitioner, whereas the present petition has been filed on 29.9.2005 i.e. after 6 years 11 months and 21 days.

14. The period spent in prosecuting the proceedings before the learned District Judge in terms of the Rules framed by this Court under the Act, alone can be excluded. Even if such period of one year and one day is excluded, still the present petition has been filed after 5 years 11 months and 20 days. Therefore, the present petition is barred by limitation.

15. In terms of Section 43(1) of the Act, the provisions of the Limitation Act, 1963, are applicable to arbitration as it applies to the proceedings in the Court, therefore, the provisions for determining the period of limitation before the Civil Court are mutatis-mutandis applicable to the proceedings of the arbitration.

16. The Hon"ble Supreme Court in [State of Orissa and another etc. Vs. Sri Damodar Das](#), has held that the period of limitation for commencing an arbitration runs from the date on which the cause of action accrued that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. It was held to the following effect:

5. Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

6. In Law of Arbitration by Justice Bachawat at p. 549, commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be

put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) "action" and "cause of arbitration" should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application u/s 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the Respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.

7. In [Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta](#), this Court had held that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question is when the cause of arbitration arises in the absence of issuance of a notice or omission to issue notice for a long time after the contract was executed? Arbitration implies to charter out timeous commencement of arbitration availing of the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after a considerable lapse of time, would be a harassment to the opposite party. It was accordingly held in that case that since the Petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12(2)(b) of the Act.

17. Though the aforesaid judgment is in the context of considering an application u/s 20 of the Arbitration Act, 1940 wherein there was no specific provision to apply the provisions of the Limitation Act, 1963 to the proceedings before the Court, but Sub-section (1) of Section 43 of the Act, specifically provides that the Limitation Act, 1963 shall apply to the arbitration proceedings as it applies to the proceedings in the Court. Thus, the period of limitation prescribed under the Limitation Act, 1963, would be mutatis-mutandis applicable to the proceedings under the Act.

18. I do not find any merit in the argument raised by the learned Counsel for the Petitioner that the arbitration proceedings commences from the date of notice

served in terms of Section 21 of the Act. Section 43(2) of the Act contemplates that an arbitration shall be deemed to be have commenced on the date referred to in Section 21 of the Act. Section 21 of the Act, in respect of the commencement of arbitration proceedings, seems to be in reference to determine the applicability of the Act in terms of Section 85 of the Act. Such fiction is not relevant for the purpose of determining the starting period of limitation. The cause of action to seek appointment of an Arbitrator arises when the dispute arises. Once the dispute is raised in terms of the Act, only then it can be said that arbitral proceedings are pending. Since the claim of the Petitioner was not raised within the period of limitation, it cannot be said that with the serving of a notice demanding appointment of an Arbitrator, the arbitration proceedings are pending. If that be the interpretation, the stale claims even after 20 years can be said to be pending after a notice is served. Such is not the intention of the legislature contemplating applicability of the Limitation Act, 1963 to the proceedings under the Act.

19. In view of the above, the present petition is dismissed being barred by limitation.