

(2009) 05 DEL CK 0425

Delhi High Court

Case No: Arbitration Petition No. 246 of 2005

Chander Kant and Co.

APPELLANT

Vs

The Vice Chairman, DDA and
Others

RESPONDENT

Date of Decision: May 26, 2009

Acts Referred:

- Arbitration Act, 1940 - Section 8
- Arbitration and Conciliation Act, 1996 - Section 11(5)
- Contract Act, 1872 - Section 28
- Limitation Act, 1963 - Article 137

Hon'ble Judges: A.P. Shah, C.J; Neeraj Kishan Kaul, J

Bench: Division Bench

Advocate: R. Rajappan, for the Appellant; Geeta Mehrotra, for R-1 to 3 and Puneet Taneja, for the Respondent

Final Decision: Allowed

Judgement

Ajit Prakash Shah, C.J.

This is a petition u/s 11(5) of the Arbitration & Conciliation Act, 1996 for appointment of an arbitrator to adjudicate the disputes between the parties. The petitioner had entered into a contract with the respondents/DDA for construction of 256 numbers L.I.G. Houses at Kondali/Gharli, Delhi as per letter dated 10.9.1985 under agreement No. 13/EE/HDXII/DDA/85-86. The contract was to be completed on or before 19.9.1986, i.e., within twelve months. The work was completed on 11.10.1990. The final bill was released on 7.11.2002 after withholding various amounts. The petitioner raised several claims and disputes with the DDA. The agreement contained an arbitration clause. The petitioner invoked the arbitration clause vide notice dated 17.6.2004. The respondents failed to respond to the notice of the petitioner and, hence, the petitioner has approached this Court u/s 11(5) of the Arbitration & Conciliation Act for appointment of an arbitrator.

2. The petition is opposed by the DDA mainly on the ground that it is barred by virtue of Clause 25 of the agreement. According to the respondents, the requirement of this Clause is that on the final bill being ready for payment, the arbitration clause should be invoked within 90 days thereafter. Failure to make demand for arbitration within 90 days would result in forfeiture or waiver of the right.

3. When this petition was placed before one of us (the Chief Justice), it was contended on behalf of the petitioner that Clause 25 dealing with the period of limitation is invalid in view of the amended provisions of Section 28(b) of the Indian Contract Act. In this connection, reliance was placed on the judgment of Mohd. Shamim, J. in [Hindustan Construction Corporation Vs. Delhi Development Authority](#), and that of M.K. Sharma, J. (as he then was) in Kalyan Chand Goyal v. Delhi Development Authority 1999 (3) Arb. LR 79 (Delhi) as well as two judgments of [Explore Computers Pvt. Ltd. Vs. Cals Ltd. and Another](#), and in [Pandit Construction Company Vs. Delhi Development Authority and Another](#), On behalf of the respondents/DDA, however, it was contended that these decisions no longer hold good in view of the recent judgment of the Supreme Court in [P. Manohar Reddy and Bros. Vs. Maharashtra Krishna Valley Dev. Corp. and Others](#), wherein a similar clause in the contract was held to be valid and binding. As the issue is of some importance it was deemed appropriate to refer the matter to a larger bench.

4. The question that thus falls for our consideration is whether there can be such limitation of a period of 90 days in view of the amended provisions of Section 28(b) of the Indian Contract Act read with Article 137 of the Limitation Act. Clause 25 of the agreement which is material for our purpose reads as follows:

CLAUSE 25 Except where otherwise provided in the contract all questions and disputes relating to the specifications, designs drawings and instruction herein before mentioned and as to the quality in workmanship or materials used on the work out of or relating to the contract designs drawings, specifications estimates, instruction, orders or these conditions or otherwise concerning the words or the execution or 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 dispute of difference. The arbitrator to whom the matter is originally referred being transferred or vacating his 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 reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding 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.

(emphasis supplied)

5. Section 28 of the Indian Contract Act before amendment read as follows:

Section 28. Agreements in restraint of legal proceedings, void - Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1 - Saving of contract to refer to arbitration dispute that may arise - This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. Exception 2 - Saving of contract to refer questions that have already arisen - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to reference to arbitration.

6. Section 28 was amended by Indian Contract (Amendment) Act, 1996 (Act 1 of 1997) with effect from 8.1.1997 and amended Section 28 reads as follows:

28. Agreements in restraint of legal proceedings, void - Every agreement,

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or,
- (b) 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, is void to that extent.

Exception 1 : Saving of contract to refer to arbitration dispute that may arise -This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2: Saving of contract to refer questions that have already arisen -Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

7. Before the amendment of Section 28 in 1997, the agreements reducing the period of limitation were distinguished from those which did not limit the time within which a party might enforce his rights, but which provided for a release or forfeiture of rights if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, outside the scope of the present section, were binding between the parties. Thus, in National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, the Supreme Court drew a clear distinction between the agreement which in effect curtails the period of limitation and an agreement which provides for the forfeiture or the waiver of the right itself if no action is commenced within the period stipulated by the agreement. The first was held to be void as offending u/s 28 but the later was held not to be a clause which shall fall within the mischief of the Section 28. It was, thus, held that curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within the specified time is permissible and can be enforced. This view was reiterated in Wild Life Institute of India, Dehradun v. Vijay Kumar Garg, (1997) 10 SCC 528 Earlier the Supreme Court in the case of The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another, had taken the same view.

8. The 1997 Amendment to the Section now also prohibits clauses which seek to extinguish the rights of any party thereto, or discharge any party 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. The amendment gave effect to the 97th report of the Law Commission of India. The effect of the amended Section 28 was considered by the learned single judges of this Court in Shri J.K. Anand Vs. Delhi

Development Authority and Another, and Union of India (UOI) Vs. Simplex Concrete Piles India (P) Ltd., in which similar causes were held to be not valid in view of the amended provisions of Section 28(b) of the Contract Act. In Explore Computers Pvt. Ltd. v. Cals Ltd. and Anr. (supra), Sanjay Kishan Kaul, J considered the decision of Supreme Court in National Insurance Co. Ltd. v. Sujir Ganesh Nayak and Co. (supra) and other decisions and held as follows:

48. The effect of the amendment of Section 28 thus made it clear that any clause extinguishing the right of a party or discharging any party from the liability in respect of any contract on expiry of specific period so as to restrict the time period would be void.

53. On a conspectus of the aforesaid judgments, two aspects have to be noted. The first is that it is the terms of the bank guarantee which have to be given due weight and the second is the distinction which is sought to be carved out in National Insurance Company Ltd. Case between a clause curtailing the period of limitation being void u/s 28 of the Contract Act and a clause which provides for forfeiture or waiver of a right if no action is commenced within the period stipulated by the agreement. Insofar as the second aspect is concerned, it cannot be lost sight of that the judgment in National Insurance Company Ltd. Case was delivered on 23.3.1997 and thus related to the provisions of Section 28 as it stood prior to the amendment because that was the substantive law in force at the time when the cause of action had arisen. The amendment to Section 28 was made with effect from 8.1.1997 and it is not disputed that the cause of action in respect of the subject matter in the present suit arose after the amendment. Sub-clause (b) of the amended Section 28 deals with the clauses which extinguish the rights of any party thereto or discharge any party from any liability being void under the said section. Thus, the scope of Section 28 has been widened whereby clause (a) deals with the position prior to the amendment alone and clause (b) is in addition.

54. In view of the amended section coming into force, the distinction sought to be carved out earlier by the legal pronouncements would not hold good.

55. In my considered view it is not open for defendant No. 2 to contend that if any suit or claim is not filed within one month of the expiry of the bank guarantee, the right of the plaintiff to institute any legal proceedings itself is extinguished. Such a plea would fly in the face of the amended Section 28 as defendant No. 2 cannot be discharged from the liability nor can the rights of the plaintiff be extinguished by inclusion of the clause providing so. I am thus of the considered view that to the extent there is restriction on any suit or claim being filed by the plaintiff beyond a period of one month from the expiry of the bank guarantee, the said clause would not prohibit the plaintiff from instituting the suit as it would be barred by the provisions of the amended Section 28 of the Contract Act.

9. We are in respectful agreement with the view taken by the learned Judge. In our opinion, in view of the amendment, the distinction which was drawn earlier has been obliterated and the clauses providing for extinction or discharge of the rights of the parties on the expiry of the specified period are also covered by inserting Clause (b) in Section 28 of the Contract Act.

10. The contention of the DDA's counsel that the decisions of this Court no longer hold good in view of the decision in P. Manohar Reddy's case is misconceived. That decision is clearly distinguishable on facts. In that case Clause 54 of the contract provided that if the contractor considers any work demanded of him outside the requirements of the contract, he shall promptly ask the Executive Engineer, in writing, for written instructions or decisions. Thereupon, the Executive Engineer shall give his written instructions or decision within a period of 30 days of such request. If the Executive Engineer fails to give his decision in writing within a period of 30 days after being requested, or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the contractor may within 30 days after receiving the instructions or decision, appeal to the upward authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. It was further provided that if the contractor is dissatisfied with this decision, the contractor within a period of 30 days from receipt of the decision shall indicate his intention to refer the dispute to arbitration as per Clause 55 failing which the said decision would be final and conclusive. Clause 55 of the contract provided that all the disputes or differences in respect of which the decision has not been final and conclusive as per Clause 54 shall be referred for arbitration to a sole arbitrator appointed in the manner prescribed by that clause. It is thus seen that Clause 54 of the contract did not seek to forfeit or extinguish the right of the contractor but it merely provided that failure to make a demand for arbitration within the specified time would make the decision final and conclusive and consequently such claim will not be referable to arbitration under Clause 55 of the contract. In other words, the claim would fall in excepted category. The argument before the Supreme Court was that the limitation for raising a claim as envisaged under Clause 54 was not applicable to the case and in view of the fact that the claim was rejected only on 26.2.1992 by the appellate authority, the period of 30 days ought to have been counted therefrom and it was also argued that u/s 8 of the Arbitration Act, the court was concerned only with the question as to whether there was a triable issue. Repelling the argument, the Supreme Court held as follows:

18. The arbitration clause, thus, could be invoked only in a case where the decision has not become final and conclusive as per Clause 54.

19. A plain reading of the aforementioned provisions clearly shows that Clause 54 does not envisage raising of a claim in respect of extra or additional work after the completion of contract. The jurisdiction of the civil court u/s 8 of the Act or u/s 20 thereof can be invoked if the disputes and differences arising between the parties

was the one to which the arbitration agreement applied.

20. The contractual clause provides for a limitation for the purpose of raising a claim having regard to the provisions of Section 28 of the Contract Act. It is no doubt true that the period of limitation as prescribed under Article 137 of the Limitation Act would be applicable, but it is well settled that a clause providing for limitation so as to enable a party to lodge his claim with the other side is not invalid.

11. In P. Manohar Reddy's case the Supreme Court had no occasion to consider the effect of the insertion of Clause (b) in Section 28 by Amending Act 1 of 1997. The Court did refer to the judgments in Vulcan Insurance Co. Ltd. v. Maharaj Singh and Wild Life Institute of India, Dehradun v. Vijay Kumar Garg but it was obvious that the observations were made in the context of unamended Section 28 of the Contract Act. It is also seen from the judgment that the cause of action had arisen in that case on 29.10.1991 on which date the appellant's claim was rejected. It is thus clear that the Court considered the case in the light of the unamended provisions of Section 28 of the Contract Act.

12. The next contention raised by learned Counsel appearing for DDA is that the contract was executed prior to the amendment to Section 28 and, therefore, the case would be governed by unamended Section 28 of the Contract Act. In support of his submission, she placed reliance on the judgment of V.S. Aggarwal, J. in Continental Construction Limited Vs. Food Corporation of India and Others, where learned judge observed in paragraph 11 as under:

Section 28 of the Contract Act as reproduced above was introduced on the recommendation of the Law Commission in order to remove the anomalies created by the earlier Act. The position of law settled before the amendment was that Section 28 would invalidate only a clause in an agreement which restricts a party from enforcing his right absolutely or which limits the time within which he may enforce his right. Section 28 before the amendment does not come into operation when contractual term spell out an extension of a right of a party to sue or spell out the discharge of a party from the liabilities. It is true that the argument of the applicant's learned Counsel as per the amended provisions of Section 28 of the Act would come to his rescue but the snag in the argument is that Section 28 of the Contract Act as amended is not retrospective in its operation. The present contract between the parties had been arrived at before the amendment and even the work executed before that. Consequently, the provisions of the amended provisions of Section 28 of the Contract Act will not have a role to play, so far as the present dispute is concerned. In that view of the matter the said argument so much thought of will be of little avail.

13. In our opinion, the aforesaid observations are not of any assistance to the counsel for the DDA. That was a case where not only the contract was arrived at between the parties before the amendment but even the work was executed before

the amendment. In the present case, it is not in dispute that though the contract may have entered into before the amendment to Section 28 starting right from the preparation of the final bill everything has happened after the amended provision came into play and thus the amended provision would certainly apply to the contract in question. In the present case, the final bill was released only in 2002 and, thus, the provisions of amended Section 28 are clearly attracted.

14. In the result, we allow the petition. Considering the fact that under Clause 25 Engineer Member, DDA was empowered to appoint any person as arbitrator including an employee of the DDA and that no specific qualification was prescribed for the appointment of the arbitrator Sh. Dinesh Dayal, retired District Judge is appointed as a sole arbitrator to adjudicate upon the disputes between the parties. The fee of the arbitrator is fixed at Rs. 1,25,000/- (rupees one lac twenty five thousand), to be borne by both the parties equally. The petition stands disposed of accordingly.