

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : Arbitration and Conciliation Act, 1996

FAO(OS) No. 37/2008

Date of Decision: 9th July, 2008

Sarvesh Chopra Builders Pvt. Ltd. Appellant
Through : Mr. Kirti Uppal, Advocate

versus

Union of India & Others Respondents
Through :

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SARIN

HON'BLE MS. JUSTICE VEENA BIRBAL

Veena Birbal, J.

1. The appellant, by the present appeal has assailed order dated 6.4.2007 of the learned Single Judge by which petition of the appellant under Sections 11(6) and 14(1) of the Arbitration and Conciliation Act, 1996 for appointment of independent sole arbitrator has been dismissed. The appellant has further prayed that an independent Sole Arbitrator be appointed to decide the disputes raised by the appellant.

2. Briefly the facts giving rise to the present appeal are that the parties entered into a contract by which the appellant was awarded earthwork in filling and cutting in embankment, strengthening, extension of bridges etc. vide award letter dated 21.11.1995. Subsequently Agreement No. 74-W/Acceptance/ DLI-RE/Ind Line /8/WA dated 12.1.1996 was executed between the parties which was to be governed by the General Conditions of the Contract, inter alia providing settlement of disputes by way of arbitration Under Clause 64 of General Conditions of Contract. Certain differences arose between the parties. It is alleged that contract was illegally terminated on 16.11.1996. The appellant vide letter dated 22.12.1996 invoked provisions of clause 64 and raised five claims for reference to arbitrators as per the agreement. The respondent vide its letter dated 11.7.1997 suggested a panel of arbitrators having four names with liberty to the appellant to choose one name as his arbitrator. The appellant nominated Sh. V. K. Sharma as its nominee arbitrator out of the four names. The respondent nominated Sh. A.K. Khanna as its arbitrator. Subsequently, Sh. A. K. Khanna resigned as arbitrator on 13.10.1997 and in his place, Sh. Gurdeep Singh was appointed. Sh. A.K. Kardam was appointed as the presiding arbitrator which was objected by the appellant.

3. As noticed above, the appellant had raised five claims. However, vide letter dated 4.8.1997, the respondents referred only three claims and accordingly appellant represented vide letter dated 5.11.1997 referring other claims for arbitration. Reminder was sent on 5.11.1997 and 20.12.2000. But no action was taken by respondent. No statement of claim was filed by the appellant before the arbitrator and the appellant filed arbitration application on the Original Side of this Court for appointment of an independent sole Arbitrator and for adjudication of all its claims to the tune of Rs. 21,20,000 with interest @ 18% p.a. The petition was filed on 11.12.2006 and was dismissed by the learned Single Judge on the ground that the respondent was justified in not referring some of the claims raised by the appellant as the same were outside the scope of the arbitration clause and the appellant could not have delayed filing the claim upto the date of filing of the petition. The learned Single Judge also noticed that the petition is otherwise liable to be dismissed on the grounds of delay and laches.

4. Out of the five claims, claims 1&2 are in respect of payment for items/works already measured/executed but not paid. Claim 3 was in respect of payment for material lying at the site. These claims were referred for the arbitration. The dispute was regarding last two claims i.e. claim 4 and 5 which were in respect of payment of business loss due to alleged failure of department in not considering petitioner's representation and for damages for loss of reputation and illegal termination of the contract by the respondent. The learned Single Judge held that claims no. 4 and 5 were beyond the scope of arbitration agreement between the parties in terms of clause 21.5 and could not have been referred to arbitration. Claims such as idle labour, loss of profit were expressly excluded by the agreement. Reference was made to Clause 21.5 of the agreement in this regard which reads as under:

“No claim for idle labour and or idle machinery etc. on any account will be entertained. Similarly, no claim shall be entertained for business loss or such loss.”

5. Counsel for the appellant, Mr. Kirti Uppal has argued that the learned Single Judge failed to appreciate that the delay was on the part of Arbitrators in not commencing the proceedings and the appellant were not at fault in not filing the statement of claim. The appellants had already raised their claims vide letter dated 22.12.1996. It was argued that the claims 4 and 5 were not outside the scope of arbitration clause and the respondent could not have refused to refer these claims for arbitration. It is further urged that the Presiding Arbitrator, Sh. R. K. Kardam had been appointed by the respondent of their own and not by the Arbitrators and the same was not in conformity with the terms of the agreement.

6. We have perused the records of the case and correspondence between the petitioner and the respondent.

Five claims raised by the appellant as is apparent from letter dated 22.12.1996 which are as follows :

“CLAIM NO. 1

Payment for items already measured,
But not paid Rs. 3,00,000/-

CLAIM NO. 2

Payment for works already executed,
But not measured Rs. 50,000/-

CLAIM NO. 3

Payment for material lying
at site Rs. 50,000/-

CLAIM NO. 4

Payment for business loss due to the
Failure of the Department, in not
Considering our representation, made
During the currency of contract
And arbitrarily terminating the
contract Rs. 7,00,000/-

CLAIM NO. 5

Damages for loss of our reputation
On account of illegal termination
Of our contract by the
Department Rs. 10,00,000/-”

7. The contention of the appellant that appointment of Presiding Co- Arbitrator is not in conformity with the terms of the arbitration agreement is belied by the letter of the appellant dated 14/20.12.2000 addressed to the respondent, wherein it is acknowledged that the Presiding Arbitrator was appointed by both the co-arbitrators. In so far as the contention that claims 4 and 5 were covered by the arbitration clause, we are of the opinion that the learned Single Judge has rightly held that these claims were specifically excluded by the agreement between the parties in view of Clause 21.5 (Supra).

8. We are also of the view that the learned Single Judge has rightly held that the appellants have themselves not filed any claim before the Arbitrators and the application is barred by delay. The appellant has argued that they had already raised their claims vide letter dated 22.12.1996 but perusal of the same shows that the letter was addressed to the respondent for invoking the arbitration clause and thereafter no formal statement of claim was filed by the appellant before the arbitrators till the time application was made before the Single Judge. The arbitrators were under no obligation to proceed with arbitration in the absence of the statement of claim or at least an intimation to them that the claim before the government was to be treated as the statement of claim. It is apparent that the appellant did not file any statement of claim before the Arbitral Tribunal and they cannot be allowed to take benefit of their own wrong.

9. The Courts, while dealing with arbitral disputes have to keep in mind that the parties are not permitted to raise any claim which is a dead one otherwise the whole purpose of Arbitration would be rendered futile. The appellant chose to keep silent for about nine years, i.e. arbitrator was appointed in 1997 and appellant approached learned Single Judge in 2006. No explanation has

been offered for silence since the last letter dated 22.12.2000 till the date of filing of the petition. This is a clear case of laches on the part of the appellant.

10. The present appeal is hereby dismissed as devoid of merits.

Sd./-
Veena Birbal, J.

Sd./-
Manmohan Sarin, J.

July 9, 2008