S. RAJAN

*v.*

STATE OF KERALA AND ANOTHER

JULY 29, 1992

[P.B. SAWANT AND B.P. JEEVAN REDDY, JJ.]

*Arbitration Act, 1940—Section 20(1) read with Articles 137 and 113, Limitation Act, 1963—Application to appoint arbitrator—Period of limitation—Three years from the date when the right to apply accrues.*

*Arbitration Act, 1940—Section 20(1)—Application to appoint arbitrator—Court's power—Arbitration agreement specifies and names arbitrator—Court's direction to submit panels for appointment of arbitrator —Legality of.*

**On 19.2.1966 an agreement was entered into between the appellant-contractor and the respondent-State whereunder the appellant undertook to carry out certain work within a period of ten months. He did not complete the work within the period prescribed, whereupon the contract was terminated on 19.12.1968. The work was re-tendered and completed by another contractor.**

**Respondent-State took proceedings under the provisions of the Revenue Recovery Act for recovering the loss suffered on account of the appellant's failure to carry out the contracted work. A notice of demand was served upon him on 30.5.1974.**

**The appellant challenged the notice by way of a writ petition in the High Court, which was dismissed on 25.11.1978.**

**In the year 1983, the appellant applied to the respondent to refer the disputes between them to an arbitrator, which was refused in the year 1984.**

**Thereafter the appellant filed an application under Section 20 of the Arbitration Act before the Subordinate Judge, for the appointment of an arbitrator to decide the disputes between him and the State of Kerala.**

**The Subordinate Judge directed the parties "to submit their panels of arbitrator to be appointed within ten days from the date of the order"**

A for the purpose of the appointment of an Arbitrator to decide the disputes and differences between the parties.

Against the order of the Subordinate Judge, an appeal was filed by the respondent-State before the High Court.

B The Division Bench of the High Court allowed the appeal on the only ground that the very application under Section 20 was barred by Articles 137 & Article 113 of the Limitation Act, 1963.

The present appeal by special leave was filed by the contractor against the judgment of the High Court, contending that no period of C limitation was prescribed for making an application under Section 20 of the Arbitration Act either by that Act or the Limitation Act and that whenever differences or disputes arose between the parties, they could approach the court under section 20 of the Arbitration Act; that the appellant requested the Government to refer the disputes and differences D between them to arbitration in the year 1983 which was rejected in the year 1984; that the application under Section 20 filed in 1985 could not be said to be barred by limitation, even if Article 137 or 113 was held to apply; that if the three years' period of limitation was applied, it would lead to very serious consequences and many arbitration disputes would become E barred by time.

Dismissing the appeal, this Court,

HELD: 1.01. According to Article 137 of the Limitation Act, 1963 the period of three years' begins to run from the date when the "right to apply F accrues". [654F]

1.02. According to the Sub-section(1) of Section 20 of the Arbitration Act, the occasion for filling the application arises when a difference arises between the perties to which the agreement applies. In such a case, it is G open to a party to apply under this section instead of proceeding under Chapter-II. In other words, an application under Section 20 is an alternative to the proceedings under Chapter-II. [655 F-G]

1.03 Reading Article 137 of the Limitation Act, 1963 and sub- section (1) of Section 20 of the Aribitation Act together, it must be said that the H right to apply accrues when the difference arises or defferences arise, as

the case may be, between the parties. It is thus a question of fact to be determined in each case having regard to the facts of that case. [656B] A

1.04. The dispute had arisen in 1974 with the service of the demand notice. Only in the year 1983, did the appellant choose to request the Government to refer the dispute to the arbitrator in terms of the agreement which was rejected in the following year. [656E] B

1.05. The date on which notice of demand under the Revenue Recovery Act was served upon the appellant, namely, 30.5.1974 is the date on which the right to apply accrued in terms of Article 137 read with Section 20(1) and that therefore the application filed in the year 1984 was clearly barred by limitation. [656H] C

*Inder Singh Rekhi* v. *Delhi Development Authority,* A.I.R. 1988 S.C. 1007 and *Kerala State Electricity Board* v. *Amsom,* [1977] 1 S.C.R. 996, followed. D

*Town Municipal Council, Athani* v. *Presiding Officer, Labour Court,* [1970] 1 S.C.R. 51 over-ruled in [1977] 1 S.C.R. 996.

2.01. Only in cases where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the Court get the jurisdiction to appoint an arbitrator. [657D] E

2.02. This is a case where the agreement itself specifies and names the arbitrator. In such a situation, it was obligatory upon the Subordinate Judge, in case he was satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It was not open to him to ignore the said clause of the agreement and to appoint another person as an arbitrator. Only if the arbitrator, specified and named in the agreement, refuses or fails to act, the court gets the jurisdiction to appoint another person or persons as the arbitrator. [657C] F G

2.03. In the present case, there was no occasion or warrant for the Subordinate Judge to call upon the parties to submit panels of arbitrators. He was bound to refer the dispute only to the arbitrator named and specified in the agreement. [657F] H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No.2683 of 1992.

From the Judgment and Order dated 2.9.1991 of the Kerala High Court in M.F.A. No.1 of 1987.

B P.S. Poti and Ms. Malini Poduval for the Appellant.

G. Viswanatha Iyer and M.A. Firoz for the Respondent.

The Judgment of the Court was delivered by

C **B.P. JEEVAN REDDY, J.** Heard Counsel for the parties.

Leave granted.

The Civil Appeal is directed against the judgment of a Division Bench of Kerala High Court allowing the appeal preferred by the State of D Kerala and setting aside the order of the learned Subordinate Judge, Thiruvanathapuram. On an application made under Section 20 of the Arbitration Act by the appellant, the learned Subordinate Judge had directed the appointment of an Arbitrator to decide the dispute and differences between the parties. He directed both the parties "to submit E their panels of arbitator to be appointed within ten days from the date of the order" for that purpose. A Division Bench set aside the said order on the ground that the very application under Section 20 was barred by limitation.

An agreement was entered into between the appellant and the State F of Kerala on 19.2.1966 whereunder the appellant undertook to carry out certain work within a period of ten months. He did not complete the work within the period prescribed whereupon the contract was terminated on 19.12.1968 and the work retendered. It was completed by another contractor. State of Kerala took proceedings under the provisions of the Revenue G Recovery Act for recovering the loss suffered by the State on account of the appellant's failure to carry out the work in accordance with the contract. A notice of demand was served upon him on 30.5.1974. The appellant challenged the said notice by way of a writ petition in the High Court of Kerala which was dismissed on 25.11.1978. In the year 1983, he applied to the Government of Kerala to refer the disputes and differences between H them to an arbitrator. This was refused in the year 1984, whereupon the

appellant filed the application under Section 20 of the Arbitration Act before the learned Subordinate Judge. He prayed for the appointment of an arbitrator to decide the disputes arising between him and the State of Kerala. In their written statement the State raised several objections including limitation and *resjudicata.* An objection was also raised as to the maintainability of the said application. It was submitted that according to clause (3) of the contract. the Superintending Engineer, (B&R) South Circle, Trivandrum is the named arbitrator. In that view of the matter, it was submitted, the appellant's request for appointing an arbitrator by the court is inadmissible and liable to be rejected.

The learned Subordinate Judge concluded that here is a case where certain claims were put forward by the plaintiff which were denied by the defendants. (In the State of Kerala, an application under Section 20 is registered as a suit). Since there is a clause in the agreement providing for arbitration, the disputes and differences arising between the parties ought to be referred. He rejected the various objections raised by the State. The operative paragraph of the judgment reads:

> "In the result the disputes and differences mentioned in para 10 of the plaint are hereby ordered to be referred to an arbitrator for arbitration. Both parties are directed to submit their panels of Arbitrator to be appointed within 10 days from this date."

The State of Kerala filed an appeal which has been allowed by the Division Bench, as stated hereinabove, on the only ground that the very application under Section 20 was barred by Articles 137 (and also under Article 113) of the Limitation Act, 1963. The High Court held that the three year's period of limitation prescribed by the said Articles commenced on 30.5.1974 when the notice demanding the payment of loss suffered by the Government was served upon the appellant. The present application is filed in the year 1985, he held, was clearly barred. In this appeal the correctness of the said view is questioned.

Sri P.S. Poti, learned counsel for the appellant contended that no period of limitation is prescribed for making an application under Section 20 of the Arbitration Act either by that Act or the Limitation Act and that whenever differences or disputes arise between the parties, they can approach the court under the said provision. He submitted that the appellant

A requested the Government to refer the disputes and differences between them to arbitration only in the year 1983 which was rejected in the year 1984. The application under Section 20 filed in 1985 cannot be said to be barred by limitation, even if Article 137 or 113 is held to apply. Learned counsel submitted that if the three years' period of limitation is applied, it will lead to very serious consequences and many arbitration disputes would B become barred by time.

So far as the applicability of Limitation Act to an application under Section 20 of the Arbitration Act is concerned, it is no longer *res integra*. In *Inder Singh Rekhi* v. *Delhi Development Authority,* A.I.R. 1988 S.C. 1007 it has been held by this court that Article 137 of the Limitation Act, 1963 C applied to an application under Section 20 of the Arbitration Act. It was so held following the decision in *Kerala State Electricity Board* v. *Amsom,* [1977] 1 S.C.R. 996 which overruled the earlier decision of this court in *Town Municipal Council, Athani* v. *Presiding Officer, Labour Court,* [1970] 1 S.C.R. 51. It is true that under the Limitation Act 1908, it was held that D Article 181 of that Act does not govern and application under Section 20 of the Arbitration Act but as has been pointed out in *Kerala State Electricity Board* the new Act makes a difference to the position. By virtue of the definitions of the words 'applicant' and 'application' contained in Sections 2(a) and 2(b) of the Limitation Act 1963, the new Act, it was held, governs all petitions and the applications under the special laws so long as they are E filed in a Civil Court. It was this principle which was followed in *Inder Singh* and it was held that Article 137 governs the applications under Section 20. In this view of the matter, we cannot agree with Sri Poti that no period of limitation is prescribed for making an application under Section 20.

According to Article 137, the period of three years' begins to run F from the date when the "right to apply accrues". The question is when did the right to apply under Section 20 accrue in this case. Section 20 reads as follows:

> "20. *APPLICATION TO FILE IN COURT ARBITRATION* G *AGREEMENT.*
>
> (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or H any of them, instead of proceeding under Chapter II, may apply

to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. A

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants. B

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed. C

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court. D

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable." E

According to Sub-section (1) where an arbitration agreement has been entered into before the institution of any suit with respect to subject-matter of such agreement, and where difference has arisen to which the agreement applies, either or both the parties can apply to the Court that the agreement be filed in Court. According to the Sub-section, the occasion for filing the application arises when a difference arise between the parties to which the agreement applies. In such a case, it is open to a party to apply under this section instead of proceeding under Chpater-II. In other words, an application under Section 20 is an alternative to the proceedings under Chapter-II. Sub-section (2) is procedural. So is Sub-section (3). Sub-section (4) provides that after hearing the parties and on being satisfied that the agreement should be filed, "the Court *shall* order an agreement to be filed and *shall make an order of reference to the arbitrator* F G H

A *appointed by the parties, whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator, an arbitrator appointed by the Court."*

Reading Article 137 and Sub-section (1) of Sub-section (20) together, it must be said that the right to apply accrues when the difference arises or differences arise, as the case may be, between the parties. It is thus a B question of fact to be determined in each case having regard to the facts of that case. The question in the present case is when should the difference between the parties be said to have arisen. According to the High Court the date on which notice of demand under the Revenue Recovery Act was served upon the appellant namely 30.5.1974 is the date on which difference C must be held to have arisen between the parties, if not earlier. Sri Poti, however, says that it is not so and that it must be held to have arisen only when the appellant applied to the Government to refer the disputes between them to the arbitrator in terms of the agreement and the Government refused to do so. We find it difficult to agree with the learned counsel. The agreement was entered into in 1966. It was terminated on 19.12.1968. D The work was re-tendered and it was completed through another contractor. The State then worked out the loss suffered by it on account of the appellant's failure to carry out the work in accordance with the agreement and called upon the appellant to pay the same through the demand notice dated 30.5.1974. It is relevant to notice that this demand notice was questioned by the appellant by way of writ petition in the High Court of E Kerala which was dismissed on 25.11.1978. Thus, the dispute had arisen in 1974 with the service of the demand notice. Only in the year 1983, did the appellant choose to request the Government to refer the dispute to the arbitrator in terms of the agreement which was rejected in the following year. Neither the arbitration clause nor a copy of the agreement is placed before us. Therefore, we cannot say whether the arbitration clause con- F templates that a reference to arbitration can be made only by the Government and not by the appellant. Assuming that such was the requirement of the arbitration clause, even so it must be held that the very request in 1983 was very much belated and cannot, in any event, be treated as the date on which the right to apply accrued. The differences had already arisen G between the parties following the service of the demand notice. The challenge to the said demand notice made by the appellant by filing a writ petition in the Kerala High Court is the demonstrable proof of the dispute. Accordingly, we agree with the High Court that 30.5.1974 is the date on which the right to apply accrued in terms of article 137 read with Section 20(1) and that therefore the application filed in the year 1985 was clearly

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barred by limitation.

We also think it appropriate to point out that the learned Subordinate Judge was not justified in directing the parties to submit their repective panels of arbitrator so as to enable him to appoint an arbitrator or arbitrators, as the case may be, out of such panels. Clause (3) of the agreement (extracted in the the Counter Affidavit filed by the State of Kerala in this court, the correctness whereof is not questioned by the learned counsel for the appellant) says that "the arbitrator for fulfilling the duties set forth in the arbitration clause of the Standard Preliminary Specification shall be the Superintending Engineer, Building and Roads Circle, Trivandrum:. Thus, this is a case where the agreement itself specifies and names the arbitrator. It is the Superintending Engineer, Building and Roads Circle, Trivandrum. In such a situation, it was obligatory upon the learned Subordinate Judge, in case he was satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It was not open to him to ignore the said clause of the agreement and to appoint another person as an arbitrator. Only if the arbitrator specified and named in the agreement refuses or fails to act the Court, does the court get the jurisdiction to appoint another person or persons as the arbitrator. This is the clear purport of Sub-section (4). It says that the reference *shall* be to the arbitrator appointed by the parties. Such agreed appointment may be contained in the agreement itself or may be expressed separately. To repeat, only in cases where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appointment an arbitrator. It must, accordingly, be said that in the present case, there was no occasion or warrant for the learned Surbordinate Judge to call upon the parties to submit panels of arbitrators. He was bound to refer the dispute only to the arbitrator named and specified in the agreement. This aspect, however, has become academic now in view of the fact that the very application under Section 20 has been held by us to be barred by limitation. Even so we thought it necessary to emphasise this aspect in view of the numerous instances noticed by us where courts ignore the arbitrator specified in the agreement and appoint a different person as the arbitrator.

For the reasons given above, the appeal fails and is dimissed with costs.

V.P.R. Appeal dismissed.