**SUPREME COURT OF INDIA**

Asia Resorts Limited

Vs.

Usha Breco Limited

C.A.No.7391 of 2001

(D.P. Mohapatra and K.G. Balakrishnan JJ.)

30.10.2001

**JUDGMENT**

**K.G.Balakrishnan, J.**

Leave granted. The appellant constructed a hotel resort by name Timber Trail Heights at Bansaar in Himachal Pradesh. This place is at a high altitude of 5000 feet from sea level and in order to ensure a quick access for the visiting tourists to this resort, the appellant wanted to have a passenger ropeway system and for that purpose, the appellant entered into a contract with the respondent, by name, Usha Breco Limited. The respondent completed the work relating to ropeway system and handed over the same to the appellant on 27.4.1988. Initially, the ropeway system was being operated and maintained by the employees of the respondent, but later on the appellant absorbed those workers as its own employees. According to the appellant, right from the beginning, the ropeway system was not functioning well and it did not meet the specification required by the appellant. The appellant had been making a request to the respondent to rectify the defects but the latter failed to rectify the same. The appellant also alleged that the respondent did not cooperate with the appellant for getting clearance from the Himachal Pradesh Ropeway Inspector. The Inspector did not approve the ropeway system for the installed capacity. The appellant alleged that the works undertaken by the respondent were defined in the annexure to the agreement and as per the agreement, the ropeway system must have a capacity for carrying on 150 passengers per hour and it was further stipulated that within 8 hours of operation per day, the total capacity of passengers must be 1200 per day and according to the appellant, based on such representation, assurance and agreement, the appellant invested huge amount for the ropeway system. The appellant later realized that only 800 passengers would be able to reach the destination through the ropeway system per day and this, according to the appellant, caused heavy financial loss. The appellant issued a notice to the respondent but the latter did not accede to their request. Ultimately, on 16.6.1993, the appellant issued a notice to the respondent intimating that it would be constrained to file a petition under Section 20 of the Arbitration Act, 1940 (for short the Act). Clause 15 of the agreement provided for arbitration and the appellant filed a petition under Section 20 of the Act on 30.11.1993. The respondent filed a reply contending that the petition filed by the appellant was barred by limitation. The respondent contended

that the appellant had issued notice on 17.4.1990 through its advocate intimating the respondent that they would take legal action against them. It was contended by the respondent that the petition filed under Section 20 of the Act on 30.11.1993 was more than 3 years after the issuance of notice. The respondent alleged that the subsequent notice on 16.6.1993 was issued beyond the period of 3 years from the earlier notice. The respondent also contended that there was no subsisting agreement between the parties and all matters relating to the contract were concluded and the minutes also were recorded on 12.4.1988. The learned Single Judge before whom the application under Section 20 was filed rejected the contention urged by the respondent herein and held that the petition under Section 20 was filed in time. The learned Single Judge was of the view that parties had made correspondence regarding the disputes till 1993 and therefore, the petition under Section 20 of the Act was within limitation. The learned Single Judge also observed that a letter written on 6.4.1993 by the respondent to the appellant would amount to acknowledgment under Section 18 of the Limitation Act and on that basis also, the petition for arbitration was held to have been filed within time. This order was challenged before the Division Bench. After an elaborate consideration of the whole matter, the Division Bench came to the conclusion that the petition filed by the appellant under Section 20 of the Act was barred by limitation and there was no acknowledgment on the part of the respondent to extend the period of limitation. This judgment of the Division Bench is challenged before us. We heard Mr. R.F. Nariman, learned senior Counsel for the appellant and Dr. A.M. Singhvi, learned senior Counsel for the respondent. The Counsel for the appellant submitted that the appellant gave notice on 17.4.1990 to the respondent informing them of the difficulties encountered by the ropeway system and making a request to rectify the same. The disputes and differences between the parties arose after 17.4.1990. Thereafter, there was mutual consultation, which lasted up to 1993 until it ultimately failed and then alone the cause of action arose for filing petition under Section 20 of the Act. It was also argued that the notice sent on 17.4.1990 was not sent with the intention of initiating arbitration proceedings, rather the appellant wanted to intimate that they would initiate criminal action against the respondent. The Counsel for the respondent, on the other hand, contended that the appellant issued notice on 17.4.1990 for which a definite reply was given on 17.5.1990 and, therefore, the cause of action, if any, had arisen and the petition filed after a period of 3 years from that date was barred by limitation. The counsel for the appellant argued that in view of the arbitration clause contained in the agreement, the petition under section 20 of the Act could be filed only after making a bona fide attempt to resolve the differences by mutual consultations and according to the appellant, these mutual consultations continued even after the notice dated 17.4.1990 and by the notice sent on 16.6.1993 the agreement between the parties was terminated and the cause of action arose for filing of a petition under Section 20 of the Act. The arbitration clause contained in the agreement is as follows : If at any time any question, dispute and difference whatsoever shall arise between ARL and UBL in relation to or in connection with this Agreement, both parties agree to resolve such differences by mutual consultation failing which either party may give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred for the final determination of a single arbitrator, if agreed upon or to two arbitrators one to be appointed by ARL and another by UBL; or in case of disagreement between the said two arbitrators to the final arbitration of an Umpire to be appointed by the said two arbitrators and that the award of the sole arbitrator or

the said Umpire as the case may be shall be final and binding on both the parties and the said arbitration proceedings shall be governed by the provisions of the Indian Arbitration Act, 1940 and the rules thereunder, to be read together with all statutory amendments or modifications of the said Act. It is true that from the above arbitration clause it is clear that parties should have made an effort to settle the differences by mutual consultations and only on failure of such attempt steps could have been taken by the parties for making a reference to the arbitrator, but the notices issued between the parties hardly give any indication that these mutual consultations for resolution of differences continued upto 1993. A perusal of the notice sent by the appellant on 17.4.1990 to the respondent and the reply received from the latter would show that the cause of action had arisen for filing of a petition under section 20 of the Act as early as on 17.5.1990. The material portion of the notice sent by the appellant has been extracted in the impugned judgment. Suffice it to say that in the notice dated 17.4.1990, it is made out in unmistakable terms that the appellant was of the view that the respondent had committed a serious breach of the agreement and therefore the respondent was called upon to do the needful within 30 days from the date of that notice, failing which the appellant would take legal action against the respondent in court of law. In the notice, it was stated that the performance of the passenger ropeway was not to the satisfaction of the appellant and the respondent had supplied the equipment which was capable of working up to sixty per cent capacity and that the respondent had charged hundred per cent money. It was also stated that the appellant had spent Rs.70 lakhs and due to the delay in delivery of the equipment, the appellant had suffered liquidated damage to the tune of Rs.3.50 lakhs. The appellant further stated that the project costing Rs.206 lakhs should have been completed in the month of March, 1987, but it was not ready even in April, 1988 and on that account the appellant had suffered damage to the extent of Rs.37 lakhs at the construction stage. In the notice, it was mentioned that the respondent committed the offence of cheating punishable under section 420 IPC as there was dishonest intention on the part of the respondent from the very inception of the contract and that the respondent committed extortion by putting the appellant in fear of not completing the project. It is, however, pertinent to note that the appellant did not specifically state in the notice that it would initiate criminal prosecution against the respondent. The contention of the appellants counsel that the notice sent by the appellant was not as a prelude to filing of a petition under section 20 of the Arbitration Act but only to initiate criminal action, is belied by the absence of such a warning in that notice. The tenor of the notice dated 17.4.1990 is that the appellant wanted the respondent to give a final reply in the matter and to settle all claims of the appellant. The respondent sent a detailed reply to the notice sent by the appellant wherein all the allegations were denied. The respondent denied the claim made by the appellant in its entirety and it was stated that the appellant issued the notice with a view to delay the payment of about Rs.6 lakhs which was due to the respondent. The appellant was told in clear terms that the respondent was not prepared to accede to the claim made by the appellant. The crucial question is whether any mutual consultation between the parties to resolve the differences as envisaged under the arbitration clause had taken place even after the reply sent by the respondent on 17.5.1990. The appellant would contend that there was further correspondence between the parties during this interregnum. To substantiate this contention, the appellant relies on the letter written by the appellant on 24.3.1993 to Usha Martin Industries Ltd. and also a letter written by the respondent to the appellant on 6.4.1993. In the letter dated 24.3.1993, it is stated that

We are looking forward for the implementation of your decision to increase the capacity of our passenger ropeway system and we assure you that we will release the payment in your favour as agreed immediately. This letter was, in fact, not sent to the respondent, but probably to a sister concern of the respondent. We would assume that it was sent to the respondent as we see a reply by the respondent on 6.4.1993 on record. In the letter dated 6.4.1993, the respondent makes a complaint that the minutes of the discussion held on 19th and 20th March, 1993 with the Executive Director of M/s Usha Martin Industries Ltd. were not properly recorded. In the absence of any other material, it is difficult to discern whether this correspondence would amount to any effective mutual consultations between the parties. The Division Bench has rightly held that these letters hardly make any acknowledgement under Section 18 of the Limitation Act. There is not much controversy that the residuary article 137 of the Limitation Act applies so far as the period of limitation is concerned for an application under Section 20 of the Arbitration Act, 1940. The residuary article 181 of the Limitation Act, 1908 was replaced by Article 137 in the Limitation Act, 1963. Earlier, Article 181 was applicable only in respect of application to be filed under the Civil Procedure Code. This Article was replaced by Article 137 in the Limitation Act, 1963 in a modified form. By insertion of Article 137, it cast a wider net so as to include any application for which no period of limitation was provided elsewhere in that division. The third division of the Limitation Act, 1963 deals with various applications to be filed under various special statutes. The definitions of applicant and application are also inserted in the *Limitation Act, 1963*. Therefore, it is clear that the intention of the legislature was to provide a residuary article prescribing period of limitation for filing petitions and applications under the various special laws. This Court in *Kerala State Electricity Board vs. T.P. Kunhaliumma*[1] held that Article 137 would apply to any petition or application filed under any Act to a civil court and it cannot be confined to applications contemplated by or under the Code of Civil Procedure. In *Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority*[2]; *Union of India and Another vs. M/s. L.K. Ahuja and Co.*[3]*; Steel Authority of India Ltd. vs. J.C. Budharaja, Government and Mining Contractor*[4]*; and Union of India and another vs. M/s. Vijay Construction Co.*[5], this Court held that the period of limitation for filing application under Section 20 of the Arbitration Act, 1940, is as prescribed under Article 137 of the Limitation Act. Under Section 20 of the Act, the cause of action for filing an application may arise whenever a difference has arisen to which the agreement applies. Regard must be had to the relevant arbitration clause in the agreement. If any specific terms are used in the arbitration clause, that would govern the parties as to when a petition for reference of arbitration shall be filed in Court. In the instant case, the arbitration clause states that all parties would resolve such differences by mutual consultation failing which either party must give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred for the final determination. The appellant issued notice to the respondent and a definite reply was received by the appellant. It is clear that cause of action for filing had arisen, the moment the appellant received the reply notice denying the claims made by the appellant. Therefore, the Division Bench has rightly held that the application was barred by time. The appellant herein has filed an application under Section 5 of the Limitation Act praying that the delay in filing the application under Section 20 of the Act be condoned. Section 5 of the Limitation Act says any appeal or any application, other than application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908,

may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. The applicant can show sufficient cause for not filing the application in time. It appears that this Court had no occasion to consider whether Section 5 of the Limitation Act, 1963 could be applied in the case of an application to be filed under Section 20 of the Arbitration Act, 1940. The Division Bench of the High Court of Delhi in Union of India and another vs. M/s. Vijay Construction Co. AIR 1981 Delhi 193 held that the benefit of Section 5 of the Limitation can be availed by the applicant for an application under Section 20 of the Arbitration Act. Going by the provision contained in Section 5 of the Act, we are also of the view that in an appropriate case the court can extend the benefit of the said Section. The counsel for the appellant contended that a prayer was made before the High Court for condoning the delay, if any, but the same was rejected. As per the Arbitration clause, the disputes between the parties could be referred to a single arbitrator if agreed to by both the parties but in case of disagreement both the parties can appoint one arbitrator each and in case of disagreement between the said two arbitrators there is a provision that an umpire also could be appointed by the two arbitrators. In the instant case, the learned Single Judge straightaway appointed the arbitrator. Though there was a cause of action for the appellant to initiate proceedings under the Arbitration Act for appointment of an arbitrator, the appellant failed to do so. The letter written by the respondent on 6.4.1993 indicates that the respondent had some proposal for consideration. Having regard to the nature of disputes between the parties, we are of the view that the delay caused in filing the application by the appellant was not willful and hence is liable to be condoned. However, in the facts and circumstances of the case we are also of the view that the delay shall be liable to be condoned only upon payment of costs. Accordingly, the delay in filing the application under Section 20 of the Arbitration Act is condoned on condition that the appellant pays a sum of Rs.20,000/- to the respondent within a period of one month. The said sum of Rs.20,000/- shall be deposited with the Registrar General of this Court on or before 1st December, 2001 and on such deposit the respondent would be at liberty to withdraw the same. For payment of cost as stated above, the appeal would stand allowed and the matter would be remitted to the High Court to be proceeded with in accordance with the provisions of the Arbitration Act, 1940, read with relevant arbitration clause in the agreement between the parties. In case the appellant fails to deposit the said amount of Rs.20,000/- within the stipulated period, the appeal would be deemed to have been dismissed without further reference to the Court. I.A. Nos. 1 to 4 would stand allowed. The appeal is disposed of in the aforesaid terms.

[1]*AIR 1997 SC 282*
[2]*1998(2) SCC 338*
[3]*1988(3) SCC 76*
[4]*1999(8) SCC 122*
[5]*AIR 1983 Delhi 193*