
(1979) 12 DEL CK 0010
In the Delhi High Court
Case No : First Appeal No. 76 of 1979

Bank of Baroda

APPELLANT

Vs

Uttam Singh Dugal and Co. Ltd.

RESPONDENT

Date of Decision : 13-12-1979

Acts Referred:

Citation : (1980) 17 DLT 265 : (1980) RLR 293

Hon'ble Judges : S.B. Wad, J;Rajinder Sachar, J

Bench : Division Bench

Advocate : R.P. Bhat, P.G. Gokhale, B.L. Watel and C.R. Soma Sekharan, for the Appellant;

Judgement

Rajinder Sachar, J.

(1) This is an appeal against the impugned order of April 19, 1979 of the learned single Judge by which on an application vide Section 20 of the Arbitration Act he directed the arbitration agreement to be placed on the record and further directed that disputes I to 3 mentioned in the letter dated 14th of June 1974 written by the contractor to the bank be referred to the Arbitration.

(2) An agreement was entered into between the appellant and the respondent by which the respondent-contractor agreed to built a building for it. The terms and conditions were reproduced in a written agreement. Clause 37 of the agreement provided for settlement of disputes by the arbitration. Disputes having arisen between the parties, the respondent said that the matter be referred to the arbitration. On the refusal of the appellant to agree, the respondent filed an application u/s 20 of the Arbitration Act seeking that the matters listed in the letter of 14th of June 1974 be referred to the arbitration. The learned Judge has referred the matter at claim I to 3. He has, however, refused to refer claims 4 and 5. The appellant is aggrieved against the order of reference and has filed an appeal. The respondents have also filed cross objections against the refusal of the learned Judge to refer claims 4 and 5 to the arbitration. Clause 37 provides

for referring the disputes in the first instance to the Architect who shall give his decision in the form of certificate. Certain expected matters cannot be referred to arbitration. It is, however, common case between the parties that the disputes which are sought to be referred are not amongst the ^ excepted matters. Clause 37 also provides that either the employer or the contractor is dissatisfied with the decision of the Architect on any matter, either party may within 28 days after receiving notice of such a decision give a written notice to other party through the architect requiring that such matter in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration for final decision. The employer and the contractor also agreed that arbitration under this clause shall be a condition precedent to any right of action under the contract.

(3) The contractor submitted his final bill sometime in May 1971 claiming an amount of Rs. 22,40,915.26. Quite sometime passed before the final certificate was given by the architect on 24-8-1973. The architect's final certificate certified that an amount of Rs. 4,25,000.00 was admissible to be paid to the respondent contractor against their final bill in full and final settlement inclusive of the release of earnest money and security deposit. We may mention that the earnest money and security comes to Rs. 3,75,000.00 . Thus an amount of Rs. 50 thousand was given by the final certificate against a final bill of over 22 lakhs sent by the respondent.

(4) The respondents wrote to the appellant on 7th of September 1973 pointing out that their final bill was of the sum of Rs. 22,40,915.26 and that it was not found how this claim of Rs. 4,25,000.00 had been worked out. Para 4 after making a grievance was as follows :

"IN the circumstances of the matter it is only just and proper that the dispute regarding our final bill is referred to arbitration in terms of the contract between the parties."

The contractor also asked for release of the earnest money and security. Some further correspondence took place in the month of October, in which the respondents informed the appellant bank that the matter should be settled, while reserving their right to recover the bill through arbitration or otherwise according to law. It appears however, that no mutual settlement was arrived at and the respondent wrote on June 14-6-1974 giving notice to the appellant bank making a claim of an amount of Rs. 51.35.972.00 . Claim No. 1 related to the amount of Rs. 21,90)915.00 on account of the balance on account of final bill; claims 2 and 3 were on account of amount on interest. Claims 4 and 5 were towards compensation on account of the alleged loss suffered on account of prolongation of contract caused by acts and/or omission in breach of contract obligations on the part of the bank and on account of increased cost of material, and expenditure for labour and other miscellaneous expenses.

(5) Various issues were framed ut it was only issue Nos. 7 and 8, which were argued before the learned Judge and before us too.

(6) Issue No. 7. The first argument made was that the notice which was sent both in September 1973 and June 1974, were sent direct to the appellant and not through the Architect, as was mentioned in Clause 37. We feel that this objection has no merit because the purpose is to intimate to the other side and the mere fact that the notices were not routed through the architect, does not make the notices bad.

(7) Thee next serious contention by Mr. M. R. Bhatt, learned counsel for the Bank raised was that if a party wants arbitration. Clause 37 requires that the party must within 28 days after the receiving of the notice of the decision by the architect, give written notice to the other party about matters being referred to arbitration. The argument is that as on 24th August, 1973 final decision was given by the architect, reference to arbitration must be sought within 28 days there from. The learned Judge has held that the letter of 7th of September 1973 was such a notice as this was within 28 days, clause 37 is complied with. Now a reference to the letter of 7th of September 1973 shows that at that point of time, there was even a reservation by the respondent as to the jurisdiction of the architects to proceed with the matter of determination of the final bill. No doubt, in para 4 it was indicated that the disputes regarding the final bill be referred to arbitration in terms of the contract between the parties, yet it is arguable whether this letter is a written notice, as required by clause 37. Further by its letter dated October 16, 1973 the respondent asked the appellant that they shall be presenting the Pay order for payment not in full and final settlement of their dues but in part payment and subject to their right to recover the balance of their dues, either through arbitration or otherwise according to procedure established by law. These would make the claim that definite notice asking for arbitration had been sought a little uncertain and ambiguous. Mr. Watal, of course, argued that once the respondent had asked for arbitration of his final bill as mentioned in the letter of 7th of September 1973, he had asked for a reference within 28 days from the certificate given by the architect. Mr. Watal's contention was that mere fact that there was no figure mentioned or details given is of no consequence, as substance of the claim was there. In the alternative, he had also argued under issue No. 8 that in any case, the respondent should be given the benefit of Section 37(4) of the Arbitration Act which provides that where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of the opinion that 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.

(8) In the view that we are going to take of the relief under Section. 37(4) to be given to the respondent we think it unnecessary to say whether the letter of 7th of September 1973 did ask for reference to arbitration in terms of clause 37. There is, however, no doubt that the letter of 14th of June 1974 does comply fully with all requirements of clause 37, but for the period of 28 days, which, however, can be extended u/s 37(4) of the Act.

(9) In *Sterling General Insurance Co. Ltd. v. Planters Airways Pvt. Ltd.* (1975) 1 S.G C. 603 the court has laid down that a liberal view of the words "undue hardship" is called for. In that case, a truck loaded on 29th of June 1971 never reached the destination. The claims were filed on July 1, 1971. The insurance company by its letter of February 1973 disclaimed the liability and the claimant asked for- grounds and only sought to invoke the arbitration clause on August 17, 1973. Clause 12 of the insurance policy provided that if the Company shall disclaim liability to the insured for any claim here- under and such claim shall not within three calendar months from the date of such disclaimer have been preferred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder. The Supreme Court found that time was properly extended by High Court, notwithstanding clause 12. In the present case also in the arbitration clause it has been mentioned that the arbitration under this clause is a condition precedent to any right of action under the contract. The result will be that if it is held that 7th of September 1973 was not a notice asking for arbitration and it was only by June 1974 notice that arbitration is being asked which is beyond time and benefit of Section 37(4) is not given to the respondent and will be deprived of all rights to have his claims adjudicated not only by arbitration but also by any other means including suits etc. This would cause hardship. As the Supreme Court has said in considering this question all the relevant circumstances have to be taken into account, the amount of stake, or whether there is any prejudice to the other side by delay. Stakes involved are high, only Rs. 50.000.00 against a claim of over Rs. 22 lakhs have been awarded by the architect. One cannot also ignore that there were serious differences between the parties leading even to the filing of suit for injunction by the respondent. Final bill by the contractor had been submitted on May 1971 and it was not until 24th of August, 1973 that the architect gave his final certificate. The Contractor was pursuing his remedy all through. He was dealing with a nationalised bank and was entitled to assume that no unreasonable or technical stand in the matter of adjudication of claim will be put forward by the appellant. The question of any prejudice to the appellant does not arise because the matter has yet to be examined on merits by the arbitrator. Surely the appellant has no vested right to even have the matter examined in terms of the agreement by arbitrator. Nothing has been urged to underrate any prejudice to the appellant by the delay.

(10) We are, Therefore, satisfied that this is a case in which the respondents were entitled to be given the benefit of Section 37(4) of the Act. It is apparent

that the final bill was sent in May 1971. The matter remained pending with the architect for over two years and the respondent at no stage gave any indication that he was not going to press his claim which he has submitted in his final bill. In that view there could have been no occasion for the appellant at all to be under the impression that the controversy had been settled and, Therefore, by extending the time no prejudice at all is likely to be caused to the appellant. We would Therefore, give the benefit of Section 37(4) and extend the time up to date of the receipt of the notice dated 14-6-1974 sent by the respondent. We were told that in pursuance of the order of the learned single Judge the parties had appointed the arbitrators and as we are extending the time and as the arbitrators have already been appointed, they shall be deemed to have been appointed in pursuance of the extension granted by us today and it will not be necessary to appoint them afresh.

(11) . Proceedings under the arbitration were stayed by the order of this court dated 25-5-1979. As we are now dismissing the appeal the result will be that there will be no stay of arbitration proceedings which can now continue. We also grant four months" time from today to the arbitrators to give his award.

(12) The learned Judge has referred to claims I to 3 in the notice of 14th of June 1974. Cross-objections have been filed against the refusal to refer the claim Nos. 4 and 5. We do not feel that the respondents are entitled to the grant of benefit of Section 37(4) of the Act for claims 4 and 5. The reason is that though loosely and vaguely the respondent had atleast referred to the claim I on account of the final bill and asked for reference to the arbitration in his letter of 17th of September 1973 which was within 28 days, we have extended the time. But there was no mention at all of claim Nos. 4 and 5 in his letter of 17th of September 1973 and they were introduced for the first time in the notice of June 19 74. There is no Explanation at all as to why such a claim if it was to be seriously put forward were not mentioned in the letter of 17th of September 1973. To allow these claims to be put forward after a lapse of one year would prejudice the appellant. We are, not, Therefore, inclined to give the benefit of Section 37(4) as regards claims No. 4 and 5.

(13) Though far different reasons we agree with the order ultimately passed by the learned single Judge and find no ground to interfere with the same. The result is that both the appeal and cross objections are dismissed. Parties to bear their own costs.