
(2007) 03 BOM CK 0085

In the Bombay High Court

Case No : Civil Revision Application No. 1 of 2007

Haryana Prathmik Shikshan Pariyojana Parishad

APPELLANT

Vs

Century Coolers

RESPONDENT

Date of Decision : 08-03-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8

Citation : (2007) 3 ARBLR 249 : (2007) 4 BomCR 355

Hon'ble Judges : Pangarkar C.L., J

Bench : Single Bench

Advocate : Inderjit S. Sidhu, for the Appellant; M.G. Bhangade and V.V. Bhangade, for the Respondent

Final Decision : Allowed

Judgement

Pangarkar C.L., J.—This revision is filed. by the applicant/ defendant being aggrieved by the fact that its application u/s 8 of the Arbitration and Conciliation Act was rejected by the Civil Judge (Sr. Dn.), Nagpur.

2. The facts giving rise to this revision, in short, are as follows - The non-applicant/ plaintiff is a Manufacturer of Cooler as well as Almirahs. It entered into an agreement of supply of 1022 almirahs valued at Rs. 3625/- each to the defendant. The order was placed with the plaintiff by the defendant on 20.5.2000. The goods were to be delivered within thirty days from the date of signing of the contract. In pursuance of the said agreement, terms were reduced to writing and the said contract was signed by the parties. The plaintiff had furnished a bank guarantee of Rs. 1,85,238/- on 24.5.2003. The same was valid up to 31.8.2004. It is alleged that the defendant all of a sudden encashed the bank guarantee and terminated the contract. It is contended that there was no grievance of the defendant any time that the goods were not delivered and not according to the agreed quality. It is also contended by the plaintiff that the Act of defendant in encashing the bank guarantee is illegal. Plaintiff seeks to recover Rs. 3 lakhs and odd.

3. The defendant appeared in the suit and filed an application u/s 8 of the Arbitration and Conciliation Act, alleging therein that there is an arbitration Clause in the agreement entered into by the parties and in view of that Clause, the matter needs to be referred to the Arbitrator. It is contended that the plaintiff had supplied 350 almirahs and price thereof has already paid to the plaintiff. It is contended further that the plaintiff itself failed to adhere to the terms of contract for which the defendant was constrained to terminate the contract and invoke the bank guarantee. It is contended that since there is an agreement to refer the dispute to the Arbitrator, the Civil Courts should keep its hands off and refer the dispute to the Arbitrator. The application was resisted by the plaintiff and it was contended that there was no cause of action for encashing the bank guarantee. In fact, there was no need to terminate the contract. It is the defendant who had failed to adhere to the conditions of the contract.

4. The learned judge of the lower Court, after hearing the parties, found that since the plaintiff had contended that there was a termination of contract and since no contract was subsisting, the matter could not be referred to Arbitrator. Holding so, he rejected the application.

5. I have heard the learned Counsel for the applicant and the non-applicant.

6. It is not in dispute that the plaintiff had entered into a contract of supply of Almirahs to the defendant. It is also not in dispute that the plaintiff did supply the part of the agreed quantity and subsequently a dispute arose. Further it is not in dispute that the defendant invoked the bank guarantee and encashed it. It is further not in dispute that cost of 380 almirahs supplied is already paid to the plaintiff. The plaintiff has instituted suit for wrongfully encashing the bank guarantee and non-fulfillment of the contract.

7. The learned Counsel for the applicant/ defendant contended that even if the contract is terminated or deemed to be terminated, the Arbitration agreement always subsists and can always be enforced. In fact, it has to be said that the question of referring the dispute to Arbitration arises only when there is some breach of the contract or the agreement. It is only for the resolution of the dispute that the parties resort to Arbitration. If all terms of agreement or contract are strictly followed, there will be no necessity to go to the Arbitration. Therefore, it is only when one party says that there has been breach or that the contract stands terminated dispute, will be required to be referred to the Arbitration. Shri Sidhu, the learned Counsel for the applicant, relied upon a decision of the Supreme Court in M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, . It is observed as follows -

7. Learned Attorney General submitted that, as to when on termination of an agreement, arbitration Clause would also cease to be operative, has been well explained by a three-judge bench of this Court in The Union of India Vs. Kishorilal Gupta and Bros., . In that case Subba Rao, J., as he then was, speaking

for the majority stated at pages 513 to 514 (of S.C.R.): (at P. 1370 para 10 of A.I.R.s) of the report that the discussion of the law on the subject led to the emergence of the following principles in this regard:

(1) An arbitration Clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it;

(2) however comprehensive the terms of an arbitration Clause may be, the existence of the contract is a necessary condition for its operation, it perishes with the contract;

(3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio;

(4) though the contract was validly executed, the parties may put an end to it as if it had never existed any substitute a new contract for solely governing their rights and liabilities thereunder,

(5) in the former case, if the original contract has no legal existence, the arbitration Clause also cannot operate, for along with the original contract, it is also void, in the case, as the original contract is extinguished by the substituted one, the arbitration Clause of the original contract perishes with it, and

(6) between the two fall many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In these cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract Act subsists for certain purposes, the arbitration Clause operates in respect of these purposes.

8. The learned Judge of the lower Court has rejected the application, as stated earlier, on the ground that since the contract has been terminated and is not subsisting, on the basis of that contract, the matter could not be referred to Arbitration. This observation of the learned lower Court, therefore, was not correct.

9. The question needs to be considered whether the matter needs to be referred u/s 8 of the Arbitration and Conciliation Act. The learned Counsel for the non-applicant contended that if, according to the applicant, the non-applicant had failed to Act according to the terms of the contract with regard to quality or otherwise, it was bound by the terms of the agreement. It would be appropriate to reproduce here Clause 28 of the contract.

28. Statement of Disputes -

28.1 The Purchaser and the supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract.

28.2 If, after thirty (30) days the parties have failed to resolve their dispute or

difference, by such mutual consultation then either the purchaser or the supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of the matter in dispute, and no arbitration, may be commenced unless such notice is given.

28.3 Any dispute or difference in respect of which a notice of intention to commence arbitration has been given in accordance with the clause shall be finally settled by arbitration. Arbitration may be commenced prior to or after delivery of the Goods under the contract.

28.2.2 Arbitration proceedings shall be conducted in accordance with the rules of procedure specified in the SCC.

Clause 28 says that if parties are not in a position to amicably settle the dispute by direct negotiation, then after thirty days either party may give notice for commencement of the arbitration. In this case, the defendant did not give any notice to the plaintiff to commence the Arbitration even after the dispute was not settled through direct negotiation but encashed the bank guarantee. The bank guarantee, according to the Clause 7, could have been encashed if non-supply had resulted into loss. It was rightly contended that the bank guarantee could not be encashed without first determining the quantum of loss. This loss also could be a question which could be decided by the Arbitrator. Shri Bhangade, the learned Counsel for the non-applicant, contended that when it was found by the defendant that the dispute cannot be resolved by direct negotiation, he should have given notice of intended Arbitration but instead of doing that it unilaterally encashed the guarantee and has shown its disinclination to go to the Arbitration and this amounts to waiver. He submitted that when the defendant wants the Arbitration agreement to be enforced, he too should have initially gone to the Arbitration itself. But instead of doing that he, without resolving the dispute through Arbitrator, encashed the guarantee. He submitted that this amounts to approbation and reprobation. He submitted that the defendant now, therefore, cannot seek to invoke the arbitration clause. The learned Counsel relied on a decision of Karnataka High Court, reported in Ramakrishna Theatre Limited Vs. General Investments and Commercial Corporation Limited, . It is observed by the Karnataka High Court that a right once waived by a party in respect of the course to be adopted for settlement of a dispute is lost forever and cannot be reclaimed or re-agitated later on.

10. It has to be said that although the defendant has encashed the guarantee without going to the Arbitrator, it cannot be said that he has waived his right to invoke the arbitration cause. Where a Law permits that an Arbitration can be invoked, even after the breach of the contract, there is no reason why this arbitration Clause cannot be invoked even by the person who himself committed the breach. In fact, the courts are not left with any alternative but to refer the matter to arbitration when the provisions of Section 8 of the Arbitration and Conciliation Act are invoked by any party when there exists an arbitration

agreement. The Apex Court in a case reported in Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, , observed that where Arbitration Clause exists Court has mandatory duty to refer the dispute to the Arbitration once an application u/s 8 is filed. In this case, there exists an arbitration agreement and an application u/s 8 is made. In view of what has been observed by the Supreme Court, the lower Court had no other option but to refer the dispute to arbitration. The lower Court, therefore, to my mind, fell in error in holding that since the contract was terminated and cancelled, the arbitration agreement also came to an end. The revision has, therefore, to be allowed. The revision is allowed. The dispute between the parties stands referred to the Arbitrator u/s 8 of the Arbitration and Conciliation Act.