

(1997) 04 DEL CK 0001

In the Delhi High Court

Case No : Interim Application No. 9711 of 1995 and Suit No. 966 of 1995

Hindustan Steel Works Construction Ltd.

APPELLANT

Vs

Bhagat Construction Company Pvt. Ltd.

RESPONDENT

Date of Decision : 23-04-1997

Acts Referred:

Citation : (1997) 3 AD 797 : (1997) 1 ARBLR 668 : (1997) 67 DLT 32 : (1997) 41 DRJ 581

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : S.B. Ghosh, P.K. Sinha, D.P. Sharma and Ginny Jaitley, for the Appellant;

Judgement

M.K. Sharma, J.

(1) In a suit instituted by the plaintiff against the defendant registered as Suit No.966/1995 seeking for recovery of Rs.15 lacs from the defendant the defendant filed an application u/s 34 of the Arbitration Act which came up for arguments before me. I heard the learned counsel appearing for the parties and propose to dispose of the said application filed by the defendant u/s 34 of the Arbitration Act by this order.

(2) It is the case of the plaintiff in the plaint that in between 1967-1984 the plaintiff awarded various contracts to the defendants for execution of different civil engineering works relating to Bokaro Steel Plant at Bokaro Steel City in Bihar. It is further stated that during the aforesaid period the plaintiff made final payments to the defendants in respect of contracts entered between them in full and Final settlement of the said contracts except for 7 Contracts the particulars of which are given in para 4 of the plaint. It is stated that the disputes and differences having arisen between the plaintiff and the defendant in respect of the aforesaid seven contracts the same were referred to the sole arbitration of Mr. Justice A.C.Gupla, former Judge of the Supreme Court of India in pursuance of an order passed by Patna High Court, Ranchi Bench. It is stated that during

the pendency of the aforesaid arbitration proceedings before the sole arbitrator the plaintiff and the defendant mutually settled all their disputes in respect of and/or arising out of the aforesaid contracts. The terms and conditions of the aforesaid settlement have also been set out in the plaint and a copy of the said settlement arrived at on 22.11.1991 has also been filed in the suit and is on record. It is stated that settlement arrived at between the parties on 22.11.1991 was in the nature of a fresh agreement between the parties. Pursuant to the aforesaid settlement the defendant failed and/or neglected to perform its part of the terms of the aforesaid settlement and accordingly the plaintiff suffered losses/damages and is entitled to recover the same. Hence the present suit has been filed.

(3) The defendant in the application filed u/s 34 of the Arbitration Act has contended that this court has no jurisdiction to entertain the present suit of the plaintiff for want of territorial jurisdiction. It has also been averred in the said application that the agreement between the parties contained an arbitration clause which provides for resolution of the disputes between the parties in the event of any question or dispute arising under the aforesaid contract and in that view of the matter the suit filed by the plaintiff is liable to be stayed.

(4) The arbitration clause has been extracted in the application and the same relates to the seven contracts executed between the parties and referred to in paragraph 4 of the plaint. It is admitted in the said application that in Suit No.2/1988 the defendant filed an application u/s 34 of the Arbitration Act on or about 27.1.1989 and the Subordinate Judge, after hearing the parties stayed the suit, against which an appeal was preferred by the plaintiff to the Ranchi Bench of the Patna High Court and that during the hearing the plaintiff agreed that the matter be referred to a Single Arbitrator instead of 2 arbitrators. It is also admitted that during the pendency of the aforesaid proceedings before the Arbitrator a settlement/agreement came to be executed between the parties on 22.11.1991. It has been averred in the application that the plaintiff started arm-twisting and consciously left the defendant/applicant with no alternative but to accept a very small amount than admittedly due under pressure and coercion since otherwise the defendant was asked to go without any payment whatsoever. The aforesaid application was listed for arguments before me and on the said application I have heard the learned counsel appearing for the parties.

(5) The counsel appearing for the plaintiff submitted before me that the very action of the defendant in pleading in the application filed u/s 34 of the Arbitration Act that this court has no territorial jurisdiction to try and decide the present suit itself amounts to taking steps in the suit and Therefore, the application is liable to be rejected on that short ground alone in terms of the decisions and the law laid down by the Supreme Court. The other contention of the learned counsel for the plaintiff is that the earlier contract agreements containing arbitration clause stood superseded and stand substituted by the new settlement/agreement arrived at between the parties which solely governed their

rights and liabilities therein and the said settlement/agreement contained no arbitration clause. Accordingly, the application filed by the defendant is misconceived and is liable to be rejected.

(6) The next contention of the learned counsel for the plaintiff is that since the defendant himself has raised an allegation of fraud against the plaintiff in respect of the subsequent settlement/agreement the plaintiff has an option to have the matter decided by the Civil Court to vindicate its conduct in the regular trial in the Civil Court and in that view of the matter this application is liable to be dismissed.

(7) The counsel appearing for the defendant, on the other hand, submitted before me that raising the plea of territorial jurisdiction in the application filed by the defendant u/s 34 docs not amount to taking any steps in the suit and Therefore, the application cannot be thrown out on the said ground as contended by the plaintiff. The learned counsel further submitted that the settlement arrived at between the parties on 22nd day of November, 1991 did not give rise to any fresh contractor agreement and that the same was in continuation of the earlier contracts executed between the parties which subsisted and contained an arbitration clause and in that view of the matter there being a valid and subsisting arbitration clause between the parties any dispute arising thereto could be resolved only through the process of arbitration and not through the present suit.

(8) The counsel further submitted that even if there be allegation of fraud in the suit this court has ample power and jurisdiction to stay the suit in view of the arbitration agreement between the parties. In the light of the aforesaid submissions of the learned counsel for the parties let me examine the correctness and validity of the rival contentions.

(9) Section 34 of the Arbitration Act provides that when there is an arbitration agreement between the parties covering the disputes in question a proceeding in the suit could be stayed. However, in order to enable a party to obtain stay under the aforesaid section certain conditions arc required be fulfilled .Some of the aforesaid conditions arc that the proceedings must be commenced by a party to an arbitration agreement against other party to (he agreement and that the legal proceedings i.e. the suit, which is sought to be stayed must be in respect of a matter agreed lobe referred. The further condition is that the applicant for stay must be a party to the legal proceedings of the suit and that the applicant must have taken no steps in the proceedings after appearance. The other conditions arc that the applicant must satisfy that the applicant was at the time when the proceedings Were commenced ready and willing to do everything necessary for the proper conduct of the arbitration and that the court must be satisfied that there was no reason why the matter should not be referred to arbitration. In Rachappa Gurudappa Bijapur Vs. Gurudiddappa Nurandappa and Others, , it is held that Section 34 requires that the application for stay of legal proceedings must be filed before the Filing of the written statement or taking any other step

in the proceedings. It was further held that in order to be entitled to stay u/s 34 of the Act it is imperative to find out whether "any other step in the proceedings" have been taken before making an application for stay apart from written statement. What are some other steps mentioned in the section have also been amplified in the said decision holding that the same must be indisputably be such steps as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. It was further held that the expression "taking any other steps in the proceedings" does not mean that every step in the proceedings would come in the way of enforcement of the arbitration agreement. Therefore, the issue that arises for my consideration is as to whether the action on the part of the defendant in raising the plea of want of territorial jurisdiction of this court to try and decide the suit would amount to taking action in the suit. According to the learned counsel for the plaintiff, since the defendant wanted the suit to be dismissed on the ground of want of territorial jurisdiction the same definitely amounted to taking an action in the suit inasmuch as the defendant desired that the suit itself be dismissed.

(10) Admittedly, in the present case no written statement has been filed by the defendant and that the defendant has filed the aforesaid application u/s 34 of the Arbitration Act raising a plea that the suit be dismissed for want of territorial jurisdiction. In *General Electric Co. Vs. Renusagar Power Co.*, it has been held by the Supreme Court that a step in a proceeding which would disentitle the defendant from invoking section 34 of the Arbitration Act should be a step in aid of the progress of the suit or submission to the jurisdiction of the court for the purpose of adjudication of the merits of the controversy in the suit. It is further held that the step must be such as to manifest the intention of the party unequivocally to abandon the right under the arbitration agreement and instead to opt to have the dispute resolved on merits in the suit. The following passage from the aforesaid decision having a bearing on the present case is quoted:

"One of the grounds urged was that the Mirzapur Court had no territorial jurisdiction. Another ground was that the plaint was insufficiently stamped. Yet another ground was that the plaint disclosed no cause of action. Everyone of the objections was in the nature of a preliminary objection to the trial of the suit on the merits of the dispute between the parties. Every one of the objections was what may be called a threshold objection pleaded as a bar to any further hearing of the suit. None of the objections invited an adjudication on the merits of the controversy. We do not think that we can accept the argument nor are we able to derive any assistance from the cases cited. We are of the views that an invitation to the court to reject a plaint or dismiss a suit on a ground not touching the merits of the controversy between the parties, but a ground such as insufficiency of the court fee paid, maintainability of the suit, territorial jurisdiction etc. is really to enable the proceeding before the arbitrator to go on and far from an election to abandon arbitration and continue the suit. Every threshold bar to a suit set up by a defendant is a step to allow the arbitration to go on. It is a step in aid of arbitration and not in aid of the progress of the suit."

(11) In the light of the aforesaid law laid down by the Supreme Court the invitation by the defendant to dismiss the suit on the ground of want of territorial jurisdiction could not be said to be asking for an adjudication upon the merits of the controversy and as a matter of fact the same is designed to prevent the court from touching upon the merits of the controversy. Consequently, the said action cannot be said to be an action in aid or progress of the suit. Consequently the submission of the learned counsel for the plaintiff that the very action of the defendant in raising the plea of want of territorial jurisdiction in the application filed u/s 34 should be interpreted as a step taken in the suit stands rejected.

(12) The next issue that arises for my consideration is whether the subsequent/ agreement arrived at between the parties on 22.11.1991 substituted the earlier contracts between the parties which contained an arbitration clause. If the finding on the aforesaid issue is that the parties agreed to arrive at a settlement/ agreement in supersession and/or substitution of the earlier contract it would be necessary to look into whether the subsequent settlement/agreement contained any arbitration clause and whether in terms thereof the suit is required to be stayed. It is admitted position between the parties that during the pendency of the arbitration proceedings between the parties they arrived at a settlement which was reduced into writing on 22.11.1991. The said agreement stipulates that the plaintiff and the defendant mutually settled all their disputes in respect and/or arising out of and/or concerning the aforesaid contracts on terms and conditions appearing in the said agreement. It is further stipulated that the plaintiff would pay to the defendant a sum of Rs-1,88,35,357.10 as per details given in Annexure "C" in full and Final settlement of all disputes and/or claims (whether referred to in arbitration agreement or not) in respect of and/or arising out of and/or concerning the contracts aforesaid. The payment schedule of the aforesaid amount was also set out in the said settlement/agreement. The learned counsel appearing for the defendant however, drew my attention to clause 4 of the said agreement wherein it was stipulated that immediately after signing of the aforesaid agreement the contractor and plaintiff would file a joint petition to the sole arbitrator withdrawing from the arbitration and intimating that all the disputes have been amicably resolved between the petitioner and the defendants whereupon this agreement would come into force and effect. Relying on this clause the learned counsel for the defendant submitted that the parties intended that the agreement/settlement would come into force and effect only after filing of the joint petition by the parties hereto before the sole arbitrator withdrawing from the arbitration and intimating that all disputes have been amicably resolved between the parties. The learned counsel submitted that no such action was taken by any of the parties and Therefore, the settlement/agreement was never brought into force and effect.

(13) Admittedly however, the present settlement/agreement between the parties was arrived at as far back as on 22.11.1991 during the pendency of the arbitration proceedings. It is also not disputed that after the aforesaid settlement was arrived at between the parties there had been no further proceeding before

the arbitrator in respect of the disputes referred to the said arbitrator. Under such circumstances I have no hesitation in my mind in coming to the conclusion that the arbitration proceedings before the sole arbitrator had come to an end after the disputes have been amicably resolved between the plaintiff and the defendant under the settlement/agreement dated 22.11.1991. Accordingly, natural consequence is to hold that the settlement/ agreement arrived at between the parties on 22.11.1991 came into force and was given effect to by the parties, having thereafter not pursuing the said arbitration proceedings at all. The parties having arrived at a settlement under the settlement/agreement with regard to their subsisting disputes and having acknowledged in writing the full and final satisfaction of all their disputes, there was accord and satisfaction by accepting final settlement of the claims. In the case of P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., it was held as follows:

"IT is not shown to us that the Chief Construction Manager was competent to acknowledge the liability or an authority to refer the liability or an authority to refer the dispute for arbitration. So neither his letter binds the respondent nor operates as an estoppel. Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. In Russell on Arbitration, 19th Edn. page 396, it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defense". Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration."

The Supreme Court came to the aforesaid conclusion after discussing various decisions, particularly the decision reported in Damodar Valley Corporation Vs. K.K. Kar, . In Damodar Valley Corporation (supra) the Supreme Court held that although there was alleged payment as final satisfaction of the contract, yet as the respondent did not give any receipt accepting the settlement of the claim, the payment was unilateral, so the dispute still subsisted and Therefore, it was arbitrable dispute and the reference was valid.

(14) The learned counsel appearing for the defendants heavily relied upon the ratio of the decision in Damodar Valley Corporation (Supra). But in my considered opinion the facts of the said case are clearly distinguishable from the facts of the present case. In the present case the defendant also accepted the settlement of the claim under the settlement agreement wherein the case of Damodar Valley Corporation the payment was unilateral. In that view of the matter the ratio of the decision in Damodar Valley Corporation is not applicable to the facts of the present case.

(15) 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 the Supreme Court in *The Union of India Vs. Kishorilal Gupta and Bros.*, . In that case the following principles have been laid down:-

"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 maybe 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 may categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In these case 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."

In paragraph 8 of the said judgment it has also been held that an arbitration clause however, comprehensive in terms, can be operative only if the contract is in existence. Under point No.6 however, it was stated that when a question of breach of contract inter alias is raised after the termination of the contract, it is the performance of the contract that comes to an end on termination of the contract, but the same remains in existence for certain purposes in respect of disputes arising under it or in connection with it. After considering the ratio of the decisions in *Kishori Lal Gupta's* case (supra) and *Damodar Valley Corporation* case (Supra) the Supreme Court in the aforesaid decision came to the conclusion that the arbitration clause would perish in case either there is a substitution of the contract or in case of rescission or substitution of the contract.

(16) Having considered the ratio of the aforesaid decisions of the Supreme Court in the context of the facts of the present case particularly the stipulations made in the settlement/ agreement, I am of the opinion that the parties to the settlement/agreement did intend to give rise to a new contract by substituting the earlier seven contracts by recording accord and satisfaction and laying down terms and conditions for payment in respect of the disputes that arose between the parties and in that view of the matter the arbitration clause contained in the earlier contract agreement between the parties and extracted in para 4 of the plaint sloop perished by substitution of the new contract in the nature of settlement/agreement. The settlement/agreement arrived at between the parties on 22.11.1991 does not contain any arbitration clause and Therefore, if any

dispute arises in respect of any of the terms of the said agreement relating to payment or non-payment of the dues as envisaged therein and/or enforcing the terms of the same contract the same is to be decided through the medium of a Civil Suit and not through arbitration proceedings.

(17) Besides, the defendant in application u/s 34 of the Arbitration Act has pleaded that the settlement arrived at on 22.11.1991 between the parties was the outcome of coercion exercised by the plaintiff. In this context I may appropriately refer to the decision of the Andhra Pradesh High Court in Muthavarapu Venkateswara Rao Vs. Dr. N.Subbarao, Air 19S4 Ap 200, wherein after discussing various judgments it was held that in an application for stay u/s 34 of the Arbitration Act in a case involving allegations of fraud, the person against whom fraud is alleged has an option to have the matter decided by the Civil Court to vindicate his conduct in a regular trial in the civil court. If the party charged is the plaintiff against whom such allegations have been made the plaintiff is equally entitled to have the matter decided by the Civil Court. However, a plaintiff who alleges fraud against the defendant cannot insist on a trial in Court unless the plaintiff makes out a prima facie case that the defendant has played fraud.

(18) In the facts and circumstances of the present case the defendant in paragraph 8 of the application filed u/s 34 of the Arbitration Act has specifically pleaded coercion against the plaintiff, and Therefore, in the light of the ratio of the aforesaid decision of the Andhra Pradesh High Court, with which I respectfully agree, the plaintiff is entitled to have the matter decided by the Civil Court inasmuch as an option is available to him to have the matter decided by the Civil Court to vindicate his conduct in a regular trial before the Civil Court. The plaintiff in the present case has exercised the said option for trial of the dispute through the medium of the present suit to vindicate his right in the trial and Therefore, considering all the aforesaid factors, in my considered opinion the present application has no merit and the same stands dismissed.

(19) Let the defendant file its written statement within 4 weeks, replication, if any, shall be filed before the next date. List this matter before the appropriate court on 22.7.1997.