(2009) 03 BOM CK 0033

In the Bombay High Court

Case No : Arbitration Petition No. 36 of 2007

Kabra Extrusiontechnik Ltd. APPELLANT

Vs

National Insurance Company Ltd. A Government of India and Divisional In-Charge National Insurance Co. Ltd. RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 11, 11(6)

Citation : (2009) 111 BOMLR 1701 : (2009) 4 MhLj 124

Hon'ble Judges : Swatanter Kumar, C.J

Bench : Single Bench

Advocate : Ragesh S. Mehta, . instructed by Purnima G. Bhatia, for the Appellant; S.M. Vidyarthi, for the Respondent

Final Decision : Allowed

Judgement

Swatanter Kumar, C.J.—The Petitioner had taken a Fire and Special Perils Policy of Rs. 56.74 crores, Exhibit "A" to the Petition. The premium of Rs. 9,57,771/ was paid and the policy became effective from 1st August 2004. The arbitration clause, namely, Clause 13, of the Policy reads as under:

13. If any dispute or difference shall arises as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitration to be appointed in writing by the parties to or if they cannot agree upon a single arbitration within 30 days of any party invoking arbitrators, the same shall be referred to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinabove provided, if the Company has disputed if not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained.

2. On 2nd/3rd August 2004, there were heavy rains in and around Daman and there were un-manageable floods. Water from the Daman dam was released to prevent adverse effect on it and due to which large number of areas of Daman were under water to the extent of 18 feet above the ground level. Several factories, buildings, plants were damaged. Amongst others, the factory, building, plant and machineries and goods of the Petitioner were also under water which caused tremendous loss to the Petitioner. Resultantly, on 3rd August 2004, the Petitioner gave an intimation to the Respondents and lodged its claim for Rs. 20,86,20,974/- under the Policy. The Respondents appointed Bhatawadekar & Co., and Mehta & Padamsey Pvt. Ltd. as joint Surveyors. On 5th August 2004, the Surveyors visited the site and prepared their interim report and on 21st September 2005 submitted their final survey report. Against the claim of the Petitioner for the above amount, in the final survey report, the Surveyors recommended Rs. 16,11,59,530/-. It may also be noticed that vide an interim report the Surveyors had recommended payment of Rs. 8 crores as interim payment. After submission of the survey report, the amounts due to the Petitioner were not cleared. Thus, vide letter dated 4th November 2005 the Petitioner requested the Respondents for settling the claim which was followed by reminders. Some on account payments were made and on 31st January 2007 the Respondents made the final payment, thus making a total payment of Rs. 15,31,28,520/-. On or about 30th January 2007, the Respondents issued a format of declaration which was to be furnished by the Petitioner before the payment to it could be released. This format stated that the payment of Rs. 15,31,28,529/- was being offered was accepted by the Petitioner in full and final settlement of the claim. This declaration was submitted and the final payment was thereafter released in favour of the Petitioner totalling to Rs. 15,32,84,353/-. Vide letter dated 7th February 2007 the Petitioner acknowledged the receipt of the said payment and raised a protest that the deduction of the claim in any case to the extent of Rs. 80,43,634/- was unjust and unfair and that amount had been approved by the Surveyors and asked for the reasons for which the claim was denied. Not only this, the Petitioner was also called upon to file a declaration which was filed on a stamp paper stating that to be full and final settlement and that it will not raise any claim. With reference to its earlier correspondence, vide its letter dated 26th February 2007, the Petitioner invoked the arbitration agreement and requested that its claim settlement be referred to Arbitration in accordance with the arbitration clause. Vide letter dated 14th March 2007, the Respondents expressed inability to participate in the arbitration proceedings as, according to them, the matter was fully and finally settled and no arbitration could lie in face of the No Claim Certificate. In fact, even vide their

letter dated 16th August 2007, the Respondents also stated that the payment had been accepted unconditionally and as such no claim can be referred to Arbitration. Despite invocation of the arbitration clause by the Petitioner, the Respondents having failed to act, the Petitioner filed the present Petition u/s 11(6) of the Arbitration and Conciliation Act, 1996.

3. In the reply filed on behalf of the Respondent - Insurance Company - the main stand is that in face of the discharge voucher and declaration having been filed in full and final settlement, the Petitioner cannot invoke the arbitration clause. It is also averred that the payments were made on account and thereafter the final payment was made as a consequence of the discussions and meetings held between the parties on 8th November 2006 and 9th November 2006. Thus, the Petitioner is estopped from raising any claim and in fact, according to the Respondents, the claim raised is incorrect and is not maintainable. The Respondents have relied upon the judgments of the Supreme Court in the case of P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., , and in the case of Nathani Steels Ltd. v. Associated Constructions in support of their defence.

4. Before I proceed to discuss the merits of the case with regard to the contentions raised, it will be useful to refer to the judgment of the same date in the case of Ashoka Buildcon Pvt. Ltd v. Maharashtra State Road Development Corporation Ltd. and Anr. Arbitration Petition No. 24 of 2007, where some of the identical pleas were raised before the Court and after referring to the judgments of the Supreme Court as well as this Court, the Court took the following view:

10. This Court in the case of National Insurance Co. Ltd. (supra) had, after detailed discussion on the subject and referring to the judgment of the Supreme Court, held as under:

7. The learned Counsel appearing for the applicant, while relying upon the judgment of the Supreme Court in the case of Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, , argued that the dispute with regard to the recording of full and final settlement or complete discharge is a question of fact, which can be gone into by the arbitral tribunal itself and in that regard arbitration clause can be invoked for reference of that dispute. In that case the Supreme Court was concerned whether accordance of satisfaction under the contract itself can be referred to the arbitration and the question was answered in the affirmative by the court and the court held as under:

Normally, an accord and satisfaction by itself would not affect the arbitration clause for even when rights and obligation of the parties are worked out, the contract does not come to an end, inter alia, for the purpose of determinatino of disputes arising thereunder, and, thus, the arbitration agreement can be invoked; but if the dispute is that the contract itself does ot subsist, the question of invoking the arbitration clause may not arise. But in the event it be held that the contract survives, recourse to the arbitration clause may be taken.

8. It may be noticed that the above judgment pronounced by the Supreme Court is prior to the law enunciated by the Supreme Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . However, that itself would be of no prejudice to the interest of the applicant. There can be very serious dispute with regard to the genineness and effect of the discharge voucher to be construed as full and final settlement, leaving no scope for subsisting any further dispute.

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The question of coercion and undue influence should be kept open in the facts and circumstances of the case and parties should be permitted to lead evidence before the Arbitrator even on this issue.

11. This judgment of the Court was assailed before the Supreme Court, where the Supreme Court, in addition to the above, while dismissing the Appeal, held as under:

18. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or under influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings u/s 11 of the Act or by the arbitral Tribunal as directed by the order u/s 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant.

19. We may next examine some related and incidental issues. Firstly, we may refer to the consequences of discharge of a contract. When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remainsneither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are not outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no due certificate as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the charge voucher/ certificate cannot thereafter make any fresh claim or revive any settled claim. Nor can he seek reference to arbitration in respect of any claim. When we refer to a discharge of contract by an agreement

signed by both parties or by execution of a full and final discharge voucher/ receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party who has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/ undue influence practiced by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable.

20. While discharge of contract by performance refers to fulfilment of the contract by performance of all the obligations in terms of the original contract, discharge by `accord and satisfaction'' refers to the contract being discharged by reason of performance of certain substituted obligations. The agreement by which the original obligation is discharged is the accord, and the discharge of the substituted obligation is the satisfaction. A contract can be discharged by the same process which created it, that is by mutual agreement. A contract may be discharged by the parties to the original contract either by entering into a new contract in substitution of the original contract; or by acceptance of performance of modified obligations in lieu of the obligations stipulated in the contract. The classic definition of the term `accord and satisfaction'' given by the Privy Council in Payana Reena Saminathan v. Pana Lana Palaniappa 41 IA 142 (reiterated in Kishorilal Gupta) is as under:

The `receipt'' given by the appellants and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the `receipt''. It is a clear example of what used to be well known as common law pleading as `accord and satisfaction by a substituted agreement''. No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.

12. In the case of M/s.Ambica Construction (supra), the Supreme Court relied upon the judgment of that Court in Reshmi Constructions, Builders & Contractors (supra), where the Court, while applying Maxim "Necessitas non habet legem", in respect of issuance of No Claim Certificate took the view that it could no longer be said that such a clause in the contract would be an absolute bar to a contract rising claims which are genuine, even after submission of such No Claim Certificate.

5. In light of the above stated principles, reference to certain specific facts as averred by the Petitioner particularly in paragraphs 18 and 19 of the Petition would be relevant. It has been stated therein that in the month of January 2007

the Petitioner was orally informed that the final installment of the claim would be paid within next few days in furtherance to which the Petitioner, vide letter dated 19th January 2007, had empowered Mr. Yogesh M Dave, Deputy General Manager to accept the payment, but the payment was not forthcoming. On 30th January 2007 the Respondents had asked for filing of the declaration as per the format given and at no point of time the amount was mutually decided, but the declaration was obtained under compulsive circumstances and the Petitioner had no choice but to submit the declaration as large amounts were due from the Respondents. The amount in paragraph 4 of the declaration was kept blank which was ordered to be filled in subsequently, the amount being Rs. 15,32,84,353/-.

6. In reply to these two paragraphs, the allegations are denied by the Respondent and it is stated that the Petitioner was aware of the amount and declaration was necessary before the payment was released. It is denied that the amount was informed to them telephonically. Be that as it may, the fact of the matter is that the format of the declaration was furnished by the Respondents to the Petitioner. The parties are at serious dispute with regard to the manner and method adopted for filing of declaration and as to whether the declaration was as a result of a free will and voluntary action on the part of the Petitioner. Another important facet of the case is that the Surveyors had approved the claim of the Petitioner to the extent of Rs. 16,11,59,530/- and there is no explanation on record including the reply as to why the balance claim was denied and the reasons thereof. As already noticed, from the judgment of the Supreme Court in the case of Nathani Steels Ltd. (supra), the Respondents can hardly derive any advantage as there the Court had arrived at a finding of fact in that case that the settlement was not questioned and was valid in law. As such, in face of the legal settlement, reference to arbitration was not possible.

7. In the case of National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd (supra) the Supreme Court reiterated the principle that when reference is made to a discharge of a contract by agreement signed by the parties or by execution of a full and final discharge voucher/receipt by one of the parties, such reference is to an agreement or discharge voucher which is validly and voluntarily executed. (Emphasis supplied). A voucher issued on account of compulsion, more so when the company is in dominant position to require execution of documents under the threat of non payment of legal dues payable to the Petitioner, would have the effect of rendering the document being executed involuntarily. These matters in any case can be gone into in a greater detail after the parties have been granted opportunity to lead evidence before the Arbitrator. At this stage, the Court is only concerned whether the arbitration agreement between the parties is existing and binding. In fact, the plea of extinguishment of liability has not even been raised in the present Petition and the settlement voucher by itself would not have the effect of taking away right of making an arbitration reference.

8. Consequently, this Petition is allowed leaving the parties to bear their own costs. Mrs. Justice Sujata V. Manohar, former Judge of the Supreme Court, is

hereby appointed as Sole Arbitrator to enter upon the reference and adjudicate the dispute between the parties.

