

(1992) 01 DEL CK 0049
In the Delhi High Court
Case No : Suit No. 1287A of 1985

K.K. Berry

APPELLANT

Vs

The Oriental Fire and General Insurance Company Ltd.

RESPONDENT

Date of Decision : 28-01-1992

Acts Referred:

Citation : (1992) 22 DRJ 315

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : P.C. Khanna, Sadhana Sharma, Ruchi Khanna, V.P. Chaudhary and Sushma Sachdeva, for the Appellant;

Judgement

Jaspal Singh, J.

(1) The facts are not disputed. Their impact is. First, the facts. On May 26, 1983 a fire broke out in the premises of the petitioner leading to lodging of two claims with the respondent. One in respect of the damage to the stocks and the other in respect of damage to the building, furniture and fixtures. Whereas the first claim was repudiated, on the other policy, the petitioner was paid a sum of Rs.2,47,733.00 against Form of Discharge and Claim Disbursement Voucher. Since the entire dispute seems to "have sprouted from these documents, let me reproduce the same. They run as follows: Claim No.83/10

THE Oriental Fire & General Insurance Company Ltd. Form Of Discharge For Fire Loss Received this 19th June, 1984 from The Oriental Fire & General Insurance Company, Limited the sum of two lakhs forty seven thousand seven hundred and thirty three only in full settlement of all claims upon the said Company for Loss of Damage and expenses sustained by fire and of all demands arising from the Fire which occurred on the 26th day of May, 1983 to property insured under policy No.21150/10182/02138 of the said Company, which claim is hereby discharged. And it is hereby declared and agreed that the sum insured by the said Policy shall stand reduced by the above amount in the proportion paid .under each item

thereof, until the date of the next renewal unless (by the consent of the Company) previously revived by endorsement on the Policy and payment of an appropriate additional premium to the said Company. Rs. 2,47,733.00 (Signature of the Insured) For Modern Electrical Mfg. Co. sd/- Proprietor"

Claim Disbursement Voucher:

"RECEIVED from the Oriental Fire & General Insurance Co. Ltd. the sum of Rupees Two lacs forty seven thousand seven hundred seventy three only in full and final settlement of fire claim No.21150/10/83/10. For Modern Electrical Mfg. Co. sd/- Proprietor"

(2) Before I come into grip with the contentions raised I may mention that the insurance Policy docs contain, and this was not disputed either, an arbitration agreement and since it holds the pivot, I may as well reproduce the same. Here it is:

"18.If any difference shall arise 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 an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act, 1940, as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrator and preside at their meetings."

(3) Having brought the background to the forefront, time now to deal with real issue. However, before I do that a word or two more. The petition is u/s 20 of the Arbitration Act. It is claimed that the amount paid was less than half of the actual damage caused to the building and that the insurance obtained being of rupees four lacs, the petitioner was entitled to receive the entire insured amount besides interest. It is also claimed that the respondent had compelled and coerced the petitioner by "threat of withholding the entire payment to accept a smaller amount" and was "forced to relinquish the balance payment under coercion." The respondent Insurance Company has, expectedly denied the presence of any compulsion, coercion, force or threat. The amount paid, according to it, was arrived at after thorough investigation and was voluntarily accepted by the petitioner in full and Final settlement of the claim.

(4) The position of the warring camps being as narrated above, stage is Finally set for the finale.

(5) It was contended on behalf of the respondent company that the claim having been settled fully and finally and the liability of the company having thereby been extinguished, the arbitration agreement could not be invoked merely by alleging the satisfaction as having been obtained under compulsion, coercion force or threat. The only remedy, it was argued, lay in a suit for declaration. And, in support, my attention was drawn to a judgment emanating from the Madhya Pradesh High Court and reported as Hindustan Steel Ltd. Bhilai v. Ramdayal Dau & Co. 1972 Mplj 46 which, to be fair to the respondent supports-it to the hilt. In the said case, the non-applicant company entered into a contract with the applicant company for construction of some quarters. After the work had been completed and the measurements taken, final bills were prepared and payments were made against the following endorsement:

"CERTIFIED that the final bill, measurements and recoveries thereon are accepted in full and final settlement of this contract. Further it is certified that we have no other claims whatsoever in respect of this work after payment of this Hand Receipt."

(6) Subsequently the non-applicant called upon the other side to appoint an Arbitrator under clause 61 of the Contract, as it was claimed that certain dues with interest thereon remained to be recovered. The matter was actually referred to arbitration but subsequently the applicant company took the objection u/s 33 of the Arbitration Act that inasmuch as there had been full and final settlement of the contract, it stood fully settled and discharged- leading to the extinguishment of the arbitration agreement. The allegation of the contractors was that the endorsement pertaining to the discharge of the contract had been made under duress, pressure and out of fear of harassment with regard to other contracts. The High Court held:

(W)HERE the contract has come to an end by mutual agreement as having been completely satisfied, the arbitration clause must also be deemed to have been extinguished along with the contract. The allegation that the contract was put an end to under duress, pressure and out of fear cannot be enquired into by the arbitrator. This is a matter within the jurisdiction of the Civil Court."

(7) In support of the conclusion arrived at, the Court relied upon the judgment of the Supreme Court in The Union of India Vs. Kishorilal Gupta and Bros., and referred, in particular, to the following passage extracted from it:

"(I)An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (ii) 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; (iii) The contract may be non est in the sense that it never came legally into existence or it was void ab initio; (iv) though the contract was validly executed, the party may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities there under; (v) 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 latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (vi) between the two, fall many categories of disputes in connection with the 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 subsists for certain purposes the arbitration clause operates in respect of these purposes."

(8) With utmost respect, I find myself unable to subscribe to the view taken. Even the pronouncement of the Supreme Court which has been used as a bastion, has not been, if I may say so, properly appreciated for, with respect, the dispute fell neither in the first category nor in the second. The case, it appears, related to a dispute in connection with the performance or discharge of a contract and as such the arbitration clause could not be taken to have become inoperative.

(9) True, in the present case, on receipt of payment the claimant executed Form of Discharge and Claim Disbursement Voucher showing that the amount had been received in full and final settlement of the claim. But then the assertion is that the documents were got executed under threat, pressure and coercion. This itself is a matter which is to be decided by the arbitrator. (See Arun Construction Company, vs. Union of India, 1980 Raj L R 307. The claimant also asserts that under the contract he is entitled to more. In order to be entitled to ask for a reference u/s 20 of the Arbitration Act, there must be an entitlement and a difference or dispute in respect of the same. What is important is that there is a claim under the Contract and whether it does subsist is a matter which is arbitrable.

(10) It is not a case where the contract itself ceases to subsist on account of its either having been substituted by a new contract or by rescission or alteration. It is a case where difference has arisen between the parties to the contract with regard to the quantum of the amount payable. The so-called full and final settlement of the claim relates to the performance or discharge of the contract. Since one party is claiming that by acceptance of the amount paid as full and final settlement of the claim has brought to an end any dispute or difference with regard to the quantum of the amount payable and the other side is insisting that more amount is actually payable and that the documents evidencing receipt of lesser amount in full and final settlement of the claim were got executed under pressure or coercion etc., the arbitration clause is not brought to an end. On the contrary the questions raised fall within its purview. I am finely of the view that neither, in view of the questions raised, the obligations are annihilated nor do they cease to be enforceable under the arbitration clause. In Union of India (UOI) and Another Vs. L.K. Ahuja and Co., , it was observed:

"In order to be entitled to ask for a reference u/s 20 of the Act, there must be an entitlement to money and difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitral .

I bank on these words. The objection, I hold, has no merit.

(11) As the record would show as many as six issues were framed on February 28, 1986 while on July 27, 1988 yet another issue was framed. They are as under:

1. Whether the petitioner is a sole proprietor of the concern Modern Electrical Manufacturing Corporation? If not to what effect? 2. Whether the receipt of the sum of Rs.2,47,733.00 by the petitioner firm from the respondent company allegedly in full and final settlement of the insurance claim was under coercion? 3. Whether the plea subject matter of issue No.2 can be raised by the respondent in this petition? 4. Whether the petition is competent without the petitioner first obtaining a declaration to the effect that the endorsement on the receipt of payment as being in full and final satisfaction as a result of coercion? 5. Whether the claim of the insured has become unenforceable against the respondent and the liability of the respondent stands extinguished for the reason of the petition having been filed more than 12 months after the date of the happening of the loss or damage? 6. Relief. Additional issue: (1)Whether the contract, the form of discharge and the receipt obtained from the petitioner was unfair, unconscionable and against public policy, if so, what is the effect on this suit.(objected to)

(12) The objection leading to the framing of issue No. I was given up while it was agreed that as far as issue No.5 is concerned the objection leading to it is to be decided by the Arbitrator. In view of what has been discussed by me in the preceding paragraphs, issue No.4 goes against the respondent. With regard to issues No-2,3 and 4 and additional issue No.(1) the disputes raised have to be referred to the Arbitrator. In short thus the petition is allowed. The disputes and differences are referred to the sole arbitrator to be appointed in terms of clause 18 of the Insurance policy.