
(2002) 09 RAJ CK 0039

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 19 of 1996

Lloyds Steel Industries Ltd.

APPELLANT

Vs

Oil India Ltd.

RESPONDENT

Date of Decision : 19-09-2002

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (2003) 2 CivCC 468 : (2003) 2 WLC 224 : (2003) 2 WLN 20

Hon'ble Judges : Prakash Tatia, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prakash Tatia, J.—This appeal is against the order dated 23.12.1994 passed by the learned Additional District Judge No. 1, Jodhpur in Civil Misc. Case No. 17/93 by which the learned Additional District Judge No. 1, Jodhpur dismissed the application u/s 20 of the Arbitration Act, 1940 filed by the appellant against the respondent.

2. Brief facts of the case are that the appellant and respondent No. 1 both are Companies incorporated under the Companies Act, 1956. The respondent carries on its business of extracting natural oil/gas and allied products. The respondent desired to award a contract for charter-hire of an on-shore drilling Rig in the region of Rajasthan. The appellant was one of the parties who gave the bid for the said contract. It is alleged by the appellant in his application u/s 20 of the Arbitration Act that before letter of intent was issued by the respondent, certain meetings took place, at which the representatives of the appellant were present and discussions were made for finalising the terms and conditions which were to be incorporated in the contract. The respondent, by telegram dated 30.5.1990, awarded the contract to the appellant for the charter hire of one 1400-155 HP on shore drilling Rig to be deployed in the Rajasthan. By said letter of intent, the appellant was required to furnish a performance guarantee by way of a bank guarantee of Rs. 98.30 lacs which was gone by the appellant.

3. The appellant in para No. 10 of the application u/s 20 of the Arbitration Act demonstrated the reasons in support of the appellant's contention that the contract between the parties was dependent upon the regulations of the Government of India and was also dependent upon the approval from the various Ministries and Departments of the Union of India which were, according to the appellant, were not within the control of the appellant. The appellant tried its best to complete the work at his end and, in pursuance of that, issued advertisement for purchase of a requisite Rig on 28.4.1990 but no response was received by the appellant upto 12.6.1990, i.e. for 45 days. The appellant also submitted application to the Ministry of Industries to obtain capital goods clearance for the import of a second hand drilling Rig and an application was also made to the ICICI for financial assistance by way of foreign currency loan for importing the Rig and another application was made on 13.9.1990 to the SCICI for foreign currency loan. This way, the appellant tried to justify that there was no fault of the appellant at any point of time and since the appellant duly complied with all the terms and conditions on its part entitling it to extension of time and/or suspension of its obligation under the contract by reason of the subsistence of the Force Majeure conditions and the applicability of the Force Majeure clause in the said contract. It is further submitted by the appellant that the appellant submitted notice as required under Clause 37.4 of the contract stating reasons for beginning of Force Majeure conditions.

4. It is said that ultimately, the Government of India issued actual licence on 6.3.1991 for import of the drilling Rig and, by the end of March, 1991, the appellant obtained all necessary permissions and sanctions and were in a position to open the letter of credit for import of the Rig but suddenly, the Reserve Bank of India, issued notification dated 19.3.1991 suspending foreign exchange transactions for the import of capital goods under any circumstances whatsoever. According to the appellant due to aforesaid unforeseen reasons, which were completely beyond the control of the appellant and which came to the cause of the Government regulations and actions, the appellant was unable to open the letter of credit for import of drilling Rig and to import the same and mobilise the same as provided by the contract.

5. According to the appellant, despite availability of reasons for not taking the action against the appellant, despite the fact that the appellant was entitled for the benefit of suspension of time for completion of the terms of the contract, the respondent invoked the bank guarantee on 2.5.1991, upon which the appellant filed the civil original suit for grant of injunction before the Bombay High Court which was ultimately dismissed on 12.6.1991. After dismissal of the suit by the Bombay High Court, the respondent terminated the contract by notice/letter dated 27.6.1991 which is the date after the decision dated 12.6.1991 of the Bombay High Court. Therefore, the Bombay High Court had no occasion to examine the validity of the termination of the contract by the respondent and since the respondent failed to appoint any arbitrator, the appellant moved application u/s 20 of the Arbitration Act.

6. The respondent-non-applicant submitted detailed reply before the Court below principally stating that one of the essential condition mentioned in NIT was that successful tenderers will be required to mobilise the Rig within six months from the date of issue of letter of intent. The appellant's tender was accepted because of the reason that the appellant projected in his tender that it will mobilise the Rig within the stipulated time and in the meeting which took place between the appellant's representatives with the respondent's representatives, again the appellant projected and affirm its ability to mobilise the Rig within the stipulated period. According to the respondent, time factor was the essential condition of the contract looking to the important nature of the project undertaken by the respondent. In meeting dated 5.4.1990 also, between the representatives of the appellant and the respondent, it was recorded in the minutes of the meeting that Rig was to be mobilized within a period of six months from the date of issuance of letter of intent. In the letter of intent dated 30.5.1990 it was further made clear that Rig was to be mobilized within a period of six months from 30.5.1990. The bank guarantee was also required to be furnished in order to force the appellant to adhere to the time-schedule prescribed in the letter of intent and in the event of not adhering that time-schedule, the respondent was entitled to invoke the bank guarantee. According to the respondent, the appellant again, in its letter dated 16.10.1990, assured the respondent that the appellant will stick to the time limit mentioned in the notice inviting tender and the appellant categorically admitted that in the event of non-mobilization of Rig, the respondent would be entitled to invoke the performance security guarantee and cancel the contract. The respondent, in its reply before the Court below, narrated the fact in detail showing that the time was the essence of the contract which was in full knowledge of the appellant and every care was taken to see that the time-schedule should not be disturbed by putting condition of furnishing of bank guarantee of Rs. 98.30 lacs. The respondent also submitted that in fact the appellant was not vigilant fully and did not care to mobilize the Rig and the appellant has not given any reason for moving the application to ICICI as late as on 13.9.1990. It was further submitted by the respondent that the appellant had not given any notice as required by Clause 37.4 of the contract, therefore, the appellant is not entitled for the Force Majeure clause. It was also submitted that the appellant was required to mobilise the Rig within the period of six months i.e. by 30.11.1990 and the Reserve Bank of India has suspended the foreign exchange transaction for import of capital goods with effect from 19.3.1991, therefore, also the appellant was no entitled to seek extension of time nor the appellant was entitled for taking benefit of Force Majeure clause.

7. In additional pleas, the respondent submitted that the appellant's conduct disentitles it from moving application u/s 20 of the Arbitration Act. The appellant has chosen to invoke jurisdiction of civil Court by filing a suit against the respondent at the Bombay High Court seeking a declaration that invocation of bank guarantee by the respondent is fraudulent, malafide, illegal and wrongful. Therefore, once the appellant has approached the Civil Court with respect to the

same very contract under which now the appellant is seeking for appointment of arbitrator, the appellant is precluded from seeking relief for appointment of arbitrator. It is also submitted that since the matter has already been adjudicated by the Bombay High Court, therefore, the petition of the appellant is barred by principles of res judicata because of the fact that the appellant is claiming all the rights which are dependent upon his entitlement of benefit of Force Majeure which had already been decided against the appellant by the Civil Court of competent jurisdiction, that is Bombay High Court, therefore, the appellant cannot indirectly seek relief which had been denied by the competent Civil Court. It was also submitted that the present petition u/s 20 of the Arbitration Act has been filed after two years of the termination of the contract, therefore, the appellant has not proved his readiness and willingness to get the matter decided by the arbitrator.

8. The learned trial Court dismissed the application of the appellant holding that the dispute raised by the appellant involves the questions which have already been decided by the Bombay High Court in a suit filed by the appellant against the respondent, therefore, the issues are barred by res judicata and further held that now there is no dispute in existence and, therefore, the matter cannot be sent to arbitrator.

9. The learned Counsel for the appellant assailed the order of the trial Court dated 23.12.1994 and submitted that the Bombay High Court decided the suit on 12.6.1991 whereas the contract was terminated by the respondent on 27.6.1991 after the decision of the Bombay High Court, therefore, dispute and challenge with respect to the validity and legality of the order of termination dated 27.6.1991 was not in existence when the suit was decided nor it could have been a subject matter in the suit filed by the appellant before the Bombay High Court. The appellant only sought relief of injunction by contending that the said bank guarantee was not given for the purpose of mobilisation of Rig but it was for the performance of the contract itself and on that ground the appellant sought declaration from the Bombay High Court in the aforesaid suit that the invoking of the bank guarantee by the respondent Oil India Limited is fraudulent, malafide, illegal and wrongful, therefore, the respondent be restrained from invoking the bank guarantee. Whereas, at present, the questions for determination which are required to be referred to the arbitrator are that whether the appellant was entitled for extension of time and suspension of its obligation and whether the termination of contract by the respondent is legal or not and these disputes were neither raised nor could have been raised before the Bombay High Court.

10. The learned Counsel for the appellant further submits that, while deciding application u/s 20 of the Arbitration Act, the Court is required to see whether there exists arbitration agreement or not and whether dispute has arisen between the parties to the agreement or not and whether the dispute falls within the arbitration clause or not. If the Court is satisfied that there is an arbitration agreement in existence, there is a dispute with respect to the subject matter

covered under the Arbitration Act, then the Court is required to appoint the arbitrator and the Court has no jurisdiction to decide itself the dispute or even the Court has no jurisdiction to decide whether there is dispute or not. The arbitrator has jurisdiction to decide whether there is dispute or not as well as whether the dispute raised falls within the scope of arbitration clause provided under the contract between the parties and the judgment of the Bombay High Court has no relevance on the grounds mentioned above.

11. The learned Counsel for the respondent supported the order passed by the trial Court and submitted that the entire claim of the appellant is based upon his right to put and mobilise the Rig under contract and his right to put and mobilise the Rig is not subsisting after the decision of the Bombay High Court against the appellant and the appellant cannot mobilise the Rig to discharge his obligation under the contract. When the Bombay High Court negated the appellant's right for extension of time for mobilisation of the Rig, the appellant cannot mobilise the Rig, therefore, nothing survives except passing of the formal order of termination of contract. The entire claim of the appellant raised in the present application u/s 20 of the Arbitration Act was dependent upon his rights which were already raised by the appellant before the Bombay High Court. The application is barred by principle of *res judicata* and it is also submitted that looking to the conduct of the appellant, he is not entitled for seeking relief of appointment of arbitrator as the appellant himself has chosen to move the Civil Court for relief against the invocation of the bank guarantee by the respondent under the contract. Therefore, the appellant who had a choice to proceed with the arbitration clause, proceeded with other remedy by filing of the suit with respect to the one of the grievances under the contract which was also covered by clause of arbitration, therefore, the application of the appellant deserves to be rejected.

12. A careful scrutiny of the facts reveals that there is no dispute with respect to the fact of issuance of the letter of intent dated 30.5.1990 in favour of the appellant. There is no dispute with respect to the existence of Force Majeure clause in the agreement. There is also no dispute with respect to the fact that the bank guarantee was invoked by the respondent and before invocation of bank guarantee Civil Original Suit No. 1624/91 was filed by the appellant before the Bombay High Court which was dismissed on 12.6.1991 and, thereafter, the respondent issued notice of termination of the contract on 27.6.1991. The agreement contained an arbitration clause is also an admitted position.

13. Hon'ble the Apex Court in the case of *Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak*, , which was relied upon by the learned Counsel for the appellant, held that:

The words of Sub-section (4) of Section 20 leave a wide discretion in the Court to consider whether an order for filing the agreement should be made and a reference made accordingly. It is not desirable to lay down in general terms what would be sufficient cause which would entitle a Court to refuse to order the

agreement to be filed and thus refuse to make an order of reference. The Court will have to decide on the facts of each case whether sufficient cause has been made out for not ordering the agreement to be filed and not making the order of reference.

(Emphasis supplied)

Another judgment relied upon by the learned Counsel for the petitioner is delivered in the case of *The Vulcan Insurance Co. Ltd. v.*

The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another, wherein Hon''ble the Apex Court held that:

If the difference which had arisen between the parties was the one to which the arbitration clause in question applied then the application u/s 20 could not be dismissed on the ground that the claim would not ultimately succeed either on facts or in law.

Another judgment is also of the Supreme Court delivered in the case of *Damodar Valley Corporation Vs. K.K. Kar*, wherein the Hon''ble Apex Court held that:

The question whether the termination was valid or not and whether damages are recoverable for such wrongful termination did not affect the arbitration clause, or the right of the respondent to invoke it for appointment of an arbitrator and repudiation by one party alone does not terminate the contract. As the contract subsists for the determination of the rights and obligations of the parties, the arbitration clause also survives.

14. In view of the above decisions, it is clear that the words of Sub-section (4) of Section 20 leave a wide discretion in the Court to consider whether an order for filing the agreement should be made or not it is to be decided according to the facts of each case whether sufficient cause has been made out for not ordering the agreement to be filed and making the order of reference, as held in the case of *Abdul Kadir Shamsuddin Bubere*, (supra). Here in this case, the contention of the learned Counsel for the respondent is that this is a fit case in which the Court should refuse the discretion for ordering filing of the agreement and making reference to the arbitration because of the reasons stated in the preceding paras.

15. In addition to above, another important aspect of the matter is that what is the effect of the decision given by the Bombay High Court in Civil Original Suit No. 1024/91 filed by the appellant against the present respondent which was decided on 12.6.1991 by the Bombay High Court. Whether the decision given by the Bombay High Court decided the controversy or any issue which is again being raised by the appellant and, if so, whether the application of the appellant is barred by principle of *res judicata*? Another question is whether any issue decided by the Bombay High Court in the suit filed by the appellant constitutes sufficient ground for refusal of discretion against appointment of arbitrator? It has been held by the Hon''ble Apex Court, in the *Vulcan Insurance Company's*, case (supra) that application u/s 20 of the Arbitration Act cannot be dismissed on

the ground that claim would not ultimately succeed. Therefore, scope for the Court in this matter is limited to find out whether from the case set up by the appellant, whether any subsisting "difference" between the parties exists or not.

16. As stated above, the contention of the appellant in the application u/s 20 as well as in the appeal is that the appellant is entitled to extension of time and/or suspension of obligation under the contract by invoking the Force Majeure clause and, if it is found so, then the notice of termination of contract on the basis of alleged failure of appellant to mobilise the Rig within six months" period given by the respondent was dishonest, wrongful and illegal. From a bare perusal of the decision of the Bombay High Court, it is clear that question of entitlement of extension of time and suspension of obligation under the contract of the appellant was very much directly involved in the civil original suit filed by the appellant and decided against the appellant by the Bombay High Court in its decision dated 12.6.1991. The Bombay High Court in its above referred judgment, held as under:

The Government regulation relied upon by Mr. Cooper came into force from 19.3.1991 whereas as per the said letter dated 16.10.1990, the time for mobilisation of Rig package in any event expired on 15.3.1991. There is no question of plaintiffs being entitled to invocation of force majeure contained in the said contract.

17. Therefore, this point has already been decided by the Bombay High Court that the appellant is not entitled to avail the benefit under the force majeure clause and bound by the letter dated 16.10.1990 and the period provided from mobilisation of Rig expired on 15.3.1991. The benefit under Force Majeure Clause was claimed by the appellant to challenge respondent"s action by which respondents invoked the Bank Guarantee in the suit filed in Bombay High Court and this very plea of benefit under Force Majeure Clause has been set up by the appellant to challenge the action of the respondent by which the respondent cancelled the contract awarded to the appellant. After the decision of the suit by the Bombay High Court, following findings recorded against the appellant that, (i) the appellant is bound by his letter dated 16.10.1990, (ii) period for mobilisation of Rig expired on 15.3.1991 and (iii) the appellant is not entitled to avail the benefit of Force Majeure Clause, are binding upon the appellant and the appellant cannot reagitate these issues before the arbitrator.

18. It is relevant to mention here that the appellant in his entire appeal, narrated all the facts to prove that the appellant was not responsible for the delay caused in mobilisation of Rig and it was beyond the reasonable control of the appellant. The appellant complied with all terms and conditions on its part entitling it to extension of time or suspension of its obligation under the contract by reason of subsistence of Force Majeure condition and applicability of Force Majeure clause in the said contract. It was the notification of the Reserve Bank dated 19.3.1991 suspending all foreign exchange transaction in the import of capital goods under any circumstance whatsoever and the plaintiff in no way could foresee that two

government changes, which were absolutely political turmoil and acute foreign exchange crisis which brought the entire government machinery to a grinding halt. It is also stated that the respondent by telegram dated 27.6.1991 wrongly alleged the defaults and failure on the part of the appellant to mobilise the Rig within the specified period of six months from 30.5.1990. The sum and substance in the entire appeal is only the availability of grounds for extension of time or suspension of period to discharge contractual obligation under the contract and is the only reason on the basis of which the appellant submits that the letter of termination of contract issued by the respondent dated 27.6.1991 is illegal and the termination of the contract by the defendant is only the dispute according to the appellant. Though the entire appeal contains facts and grounds with respect to alleged right of the plaintiff under the Force Majeure Clause but one of the portions from the appeal is relevant to be quoted here, which reads:

The principal question is whether the plaintiff was entitled for the extension of the time and suspension of its obligations or not. Further, the question of so called termination of the contract is also part of the dispute between the parties, which can only be adjudicated by the Arbitrator.

19. Not only this but the grounds raised in the memo of appeal in four paras, out of which in para Nos. (ii) and (iii) of the grounds, the contention of the appellant is that the appellant is entitled for extension of time in view of the subsistence of the Force Majeure condition and availability of Force Majeure Clause in the contract whereas para No. (i) of the ground can be said to be formal in nature as, in this para, the appellant submitted that the order passed by the Court below suffers from error apparent on the face of record and is illegal and the Court below committed illegality in applying the principle of res judicata and in para No. (iv) of the grounds of the memo of appeal, it is stated that the Court is bound to refer the matter to the arbitrator and the Court below had no jurisdiction to enter into the merit of the dispute.

20. In the light of the judgment of the Hon''ble Apex Court, it is clear that the Court, while deciding the application u/s 20 of the Arbitration Act, is not supposed to decide the matter on merit of the dispute and when the Court found that there is difference between the parties on any issue which is covered under the arbitration clause containing in the contract then the Court should not dismiss the application u/s 20 on the ground that the claimant would not ultimately succeed either on fact or in law. Therefore, this Court need not to enter into the merit of the dispute raised by the appellant. Even in the light of the judgment delivered by Hon''ble the Apex Court in the case of Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, , the Court has wide discretion to consider whether the order for filing the agreement should be made and a reference be made to the arbitrator to settle the difference/dispute between the parties. In the light of above decision, we have to find out whether there is any difference/dispute is in existence between the parties? The difference or dispute which could be referred for adjudication must be a "difference or dispute in

existence" and not merely an allegation of existence of non-existent dispute is sufficient to refer the matter to the arbitrator. Issues which have already been decided by the Bombay High Court, they are the decided issues and cannot be made subject matter of issue either in Court of law or before the arbitrator. The Bombay High Court considered all the submissions of the appellant, who was plaintiff before the Bombay High Court, with respect to the initiation of the period of contract, time period available for mobilisation of Rig and whether it will start from the commencement of well being spudded and when the period will expire and, thereafter, recorded the findings mentioned in the preceding paras of this judgment, which clearly shows that the above points are no more in existence as "dispute between the parties to the contract",. Therefore, the contention of the learned Counsel for the appellant by which the learned Counsel for the appellant submitted that the Court is required to see whether there exists arbitration agreement or not and whether the dispute has arisen between the parties to agreement or not and whether the dispute falls within the arbitration clause or not, itself shows that before passing the order of filing of the agreement in the Court and making reference to the arbitrator, the Court must record satisfaction that there exist dispute between the parties to the agreement. Here in this case, the appellant, from his own pleadings in the application u/s 20 of the Arbitration Act and submissions in the memo of appeal, failed to prove the existence of any dispute between the parties to the agreement. The facts relating to the alleged dispute clearly show that the dispute has been settled once for all by the decision of the competent Court. When the very foundation of the alleged difference or dispute between the parties is based upon the claim which the claimant cannot claim then this can be not only a just ground to refuse reference of alleged dispute to the arbitrator but it is desirable that such non-existent dispute should not be referred to the arbitrator otherwise it may frustrate the very object of enacting the provisions of the arbitration clause and Arbitration Act which are meant for getting early decision over the dispute. If the proper discretion of refusal to refer the matter to the arbitrator will not be exercised, it will lead to creating a dispute., Therefore, not only the application of the appellant-applicant is barred by the principle of res judicate but it was wide discretion exercised by the Court below in dismissing the application inasmuch as the Court below did not permit the appellant to inject life in the dead dispute.

21. Therefore, there is no force in the appeal of the appellant and the same is hereby dismissed.