
(2013) 11 BOM CK 0045
In the Bombay High Court
Case No : Arbitration Petition No. 405 of 2013

M/s. Chadalavada Infratech Ltd. and Shri Ch. Ravindrababu
Chadalavada Managing Director of M/s. Chadalavada
Infratech Ltd. APPELLANT

Vs

Tata Capital Financial Services Ltd. and Shri Samala Surendra
Reddy RESPONDENT

Date of Decision : 25-11-2013

Acts Referred:

Citation : (2013) 11 BOM CK 0045

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Yatin Khochare, for the Appellant; Simil Purohit, instructed by . MDP, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this petition filed u/s 34 of the Arbitration and Conciliation Act, 1996, petitioners seek to impugn the arbitration award dated 4th January, 2013 made by the learned arbitrator directing the petitioners to pay a sum of Rs. 13,89,93,546/- with interest thereon at the rate of 24% per annum till payment and/or realisation. It is not in dispute that the petitioners did not appear before the learned arbitrator though notice was received by the petitioners. No written statement was filed by the petitioners before the learned arbitrator. Learned arbitrator has rendered an ex-parte award. Learned counsel appearing for the petitioners submit that the petitioners do not dispute the liability of the petitioners to pay to the respondents as claimed but seeks to make payment in installments commencing from January 2014. It is submitted that since the petitioners never disputed the liability there is no arbitrable dispute between the parties. Learned counsel submits that for the purpose of appointment of arbitrator, an existing arbitrable dispute must exist. Merely because there is existing claim of the petitioners, the matter could not be referred to the arbitration. The learned arbitrator did not have jurisdiction to entertain the

claims made by the petitioners. Learned counsel placed reliance on the judgment of Madhya Pradesh High Court in support of his submission in case of Dilip Construction Company vs. Hindustan Steel Ltd. delivered on 28th February, 1973 and in particular paragraph (12) thereof which reads thus:-

12. The weight of authority is clearly in favour of the view that unless there is repudiation of a claim, there can be no dispute in respect thereof. In Chandmull Goneshmull Vs. Nippon Munkwa Kabushiki Kaisha, , the buyer wanted a variety of information from the sellers to enable him to judge whether the goods supplied were or Were not according to the contract. Amongst other things, he demanded production of shipment samples. The sellers declined to comply with the request. But there was at no stage an assertion by the buyer that the goods had not been supplied according to the contract and consequently there was not and could not be a repudiation by the sellers of any such assertion. It was held by Mookerjee and Fletcher, JJ. that there was no "dispute" which could be and had been validly referred to arbitration. While repelling the contention similar to the one made before us, Mookerjee, J. stated:

It has been argued before us that this is an unduly narrow construction of the arbitration clause and that the terms "difference" and "defect" need not be restricted to "difference" or "defect" in. quantity or quality only. We are disposed to accede to this contention, but, even then, the appellant is not entitled to succeed, unless he proves that there was a dispute as to difference or a dispute as to defect. Now, a dispute implies an assertion of a right by one party and a repudiation thereof by another. In the case before us, the parties never reached that stage.

In Dawoodbhai Abdulkader Vs. Abdulkader Ismailji, the plaintiff was the sub-partner of the defendant in a certain business. The deed of sub-partnership incorporated all the articles, covenants, conditions and obligations contained in the principal partnership agreement between the defendant and his partner which were not inconsistent With the terms of the agreement. There was a clause in the deed of principal partnership which provided, inter alia, that any dispute or difference arising between partners with regard to the construction of any of the articles contained in the agreement or to any divisions of goods or things, related to the said Partnership or the affairs thereof, shall be referred to arbitration in the manner therein mentioned. The plaintiff called upon the defendant to make up the accounts and to pay him the amount found due at the foot thereof. The defendant did not pay and the plaintiff filed a suit praying that the defendant may be ordered to render a true and complete account of the profits earned by the partnership business and of the amount due to the plaintiff, and to pay the same to him. The defendant thereupon took out a summons for an order to stay further proceedings to enable the parties to refer to arbitration. It was held by Wadia, J., that as there was no dispute between the parties but mere failure to pay, the suit was maintainable and could not be stayed. The principles deducible from these authorities are-

- (i) The existence of a difference or dispute is an essential condition for the arbitrator's jurisdiction to act under an arbitration clause in an agreement;
- (ii) The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. A dispute implies an assertion of a right by one party and repudiation thereof by another;
- (iii) A failure to pay is not a difference, and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment.

Learned counsel also invited my attention to clause 23 of the agreement which records arbitration agreement in support of his submission that the claims could not have been referred to arbitration and also in support of his submission that the arbitrator ought to have been appointed by consent of both parties and not unilaterally by the respondents.

Clause 23 of the loan agreement reads thus:-

23. ARBITRATION

In the event of any dispute or differences arising directly or indirectly out of this Agreement or otherwise, the Parties undertake to use all reasonable endeavours to resolve such disputes amicably. If disputes and differences cannot be settled amicably, then all disputes and differences arising between the Parties hereto in connection with this Agreement or the interpretation hereof or anything done or omitted to be done pursuant hereto or the performance or non-performance of this Agreement shall be referred to the Arbitration. Such disputes, differences and/or claims arising out of those presents or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by Arbitration to be held at Mumbai in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof or any statute enacted for replacement therefore and shall be referred to the sole arbitration of a person to be appointed by TCL. The expenses of the arbitration shall be borne in such manner as the arbitrator may determine. In the event of death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, TCL shall appoint a new arbitrator. The award including interim award/s of the arbitration shall be final, conclusive and binding on all parties concerned. The Arbitrator shall not give any reason for his award including interim award/s. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings and shall conduct the arbitration proceedings in such manner as he considers appropriate. The Arbitration shall be governed by the Arbitration & Conciliation Act, 1996 or such other law relating to Arbitration as may be in force in India at the relevant time.

2. Learned counsel submits that even after invoking arbitration agreement by the respondents, respondents vide letter dated 20th November, 2012, had called

upon the petitioners to pay atleast one installment as committed by the petitioners immediately in order to avoid strict legal implications and consequences. It is submitted that in response to the said letter, the petitioners have deposited Rs. 10 lacs with the respondents. It is submitted that the respondents have accepted the said payment. There was thus no dispute between the parties which could be referred to the arbitration.

3. Lastly the learned counsel submits that the learned arbitrator has awarded interest at the rate of 24% per annum which is exorbitant and could not be more than reasonable interest allowed by this court and by the Supreme Court.

4. Per Contra, Mr. Purohit, learned counsel appearing for the respondents invited my attention to clause 23 of the agreement in support of his submission that even if there is a claim arising out of the said agreement entered into between the parties, the same has to be settled by arbitration. It is submitted that it is not necessary that there must be a dispute and/or differences as a condition precedent for referring the said dispute to arbitration.

5. Learned counsel invited my attention to the judgment of this court delivered on 30th September, 2013 in case of Nissan Copper Ltd. and Anr. vs. L & T Finance Ltd. in Arbitration Petition (L) No. 674 of 2013. This court has considered the identical clause and has also adverted to the judgment of the Madhya Pradesh High Court referred to and relied upon by the learned counsel appearing for the petitioners and has held that the dispute was clearly arbitrable upon the claim of the respondents. I do not propose to take a different view. Clause in question in this petition and in the case of Nissan Copper (supra) are identical.

6. On perusal of the correspondence on record, it is clear that the respondents had been demanding their dues from the petitioners from time to time. Notice dated 20th November, 2012 was addressed by the respondents without prejudice to their rights and contentions. It is recorded in the said notice that the respondents were constrained to call upon the petitioners to pay outstanding due amount to regularize the loan account or atleast pay one installment as committed by the respondents immediately in order to avoid strict legal implications and consequences. It was made clear that the said notice was sent without prejudice to the other legal rights initiated or proposed, proceedings pending/proposed by the respondents.

7. It is not in dispute that after payment of Rs. 10 lacs by the petitioners in response to the said without prejudice notice, petitioners did not make any further payment. In my view, since the petitioners did not make any further payment, though there was demand for payment of entire amount, dispute between the petitioners and the respondents had arisen and thus the respondents were entitled to refer such dispute to arbitration by invoking clause 23 of the agreement entered into between the parties. Be that as it may, a perusal of clause 23 of the agreement clearly indicates that even in case of claim of the respondents and/or the petitioners, such claim also could have been

referred to arbitration and has to be settled by arbitration. In my view, there is no merit in the submission made by the learned counsel appearing for the petitioners that since there is no denial of the claim by the petitioners, there was no dispute and thus arbitrator could not have been appointed under clause 23 of the arbitration agreement read with section 7 of the Arbitration and Conciliation Act, 1996. Non payment of dues on demand having been raised amounts to dispute which can be referred to arbitration.

8. On perusal of the letter dated 21st June, 2012 addressed by the petitioners to the learned arbitrator it indicates that the petitioners had requested the learned arbitrator to fix the arbitration meeting in the third week of July, 2012 to enable him to appear before the learned arbitrator either in person or through authorised representative. No objection has been raised by the petitioners about the arbitrability of the disputes referred to the learned arbitrator or regarding the appointment of the learned arbitrator in the said letter or by filing an application u/s 16 of the Arbitration and Conciliation Act, 1996. The petitioners thus cannot be allowed to raise this objection for the first time in this proceeding under Arbitration and Conciliation Act, 1996.

9. A perusal of clause 23 of the agreement would indicate that the right to appoint an arbitrator exclusively vest in the respondents. The respondents have thus rightly exercised their right to appoint an arbitrator. In my view, there is no merit in the submission made by the petitioners that the arbitrator could not be appointed by the respondents unilaterally. Parties are governed by the agreement entered into between the parties.

10. In so far as issue of interest raised by the petitioners is concerned, the agreement entered into between the parties provide for interest @ 36% per annum in addition to interest @ 16% per annum agreed by the petitioners under the agreement entered into. The learned arbitrator however has considered 24% interest per annum. From perusal of the award, it is clear that the learned arbitrator has awarded interest at 24% per annum from 1st July, 2012 on the awarded sum. Considering the rate of interest awarded by the learned arbitrator, I am of the view that in the interest of justice, rate of interest can be reduced to 12% per annum from the date of award till payment and is ordered accordingly. Learned arbitrator has considered all the documents produced by the petitioners and also the relevant facts and has rendered award in favour of the respondents. No interference is warranted with the impugned award except to the extend of reduction of rate of interest. Except modification of interest, petition is dismissed. No order as to costs.