
(1995) 11 BOM CK 0020
In the Bombay High Court
Case No : Arbitration Suit No. 1285 of 1995

M/s. Kelkar and Kelkar

APPELLANT

Vs

Indian Airlines and another

RESPONDENT

Date of Decision : 01-11-1995

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1996) 2 BomCR 303 : (1996) 1 MhLj 854

Hon'ble Judges : S.M. Jhunjhunwala, J

Bench : Single Bench

Advocate : M. Puranik, for the Appellant; S.U. Kamdar and Ms. Pereira, instructed by Bhasin and Co., for the Respondent

Judgement

S.M. Jhunjhunwala, J.—This suit has been filed for an order u/s 20 of the Arbitration Act, 1940 (for short, "the Act") to file the arbitration agreement in this court and for an order of reference to arbitration in accordance therewith.

2. Briefly stated, the relevant facts are as under :

(i) Sometime in the year 1988, the 1st Defendants, being desirous of constructing their own building at Pune, invited tenders by public notice published on or about 12th May, 1988. In response to such tender notice got published by the 1st Defendants, the plaintiffs submitted their tender which was accepted by the 1st Defendants.

(ii) A contract was arrived at between the plaintiffs and the 1st Defendants for construction of building for the 1st Defendants at Pune which project was described as "construction of Airlines House at Pune" on the terms mentioned in the Notice dated 12th May, 1988 inviting tenders, in the tender dated 27th May, 1988, in the letter of acceptance dated 30th July, 1988 addressed by the 1st Defendants and in the formal agreement executed by and between the plaintiffs and the 1st defendants. The general conditions of contract formed part of the terms and conditions of the said contract between the plaintiff and the 1st

defendants.

(iii) As provided in the said general conditions of contract, except where otherwise provided for in the contract, all questions and disputes arising by and between the plaintiffs and the 1st defendants out of and/or in relation thereto are agreed to be referred to arbitration as provided therein.

(iv) According to the plaintiffs, since the plaintiffs have claim against the 1st defendants arising out of the said contract which has been disputed by the 1st defendants, the same is required to be referred to arbitration in accordance with the arbitration agreement entered by and between the plaintiffs and the 1st defendants as contained in the said general conditions of contract and as the 1st defendants have declined to refer the same to arbitration, the said arbitration agreement is required to be filed in this court. Hence, the present suit u/s 20 of the Act is filed.

3. Section 20 of the Act reads as under :

"20. Application to file in court arbitration agreement - (1) Where any persons have entered into arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

(5) Thereafter the arbitration shall proceed in accordance with and shall be governed by, the other provisions of this Act, so far as they can be made applicable." Accordingly, all or any of the parties to an arbitration agreement may apply under this section to have it filed in court and a reference made to arbitration. There are four essential conditions necessary to make the section applicable. They are :

- (i) the parties must have entered into an arbitration agreement;
- (ii) the agreement must have been entered into before a suit with respect to its subject matter is filed in court;
- (iii) a dispute or difference, contemplated in the agreement, must have arisen; and
- (iv) the court has jurisdiction in the matter.

Sub-sections (2) to (4) lay down the procedure to be followed by the court. When an application is filed u/s 20 of the said Act, and sub-section (5) makes the provisions of the remaining sections of the said Act applicable to the proceedings u/s 20 thereof. The scope of enquiry under this section very much limited. On an application being moved under this section, all that the court has to see is :

- (i) whether there is an arbitration agreement as between the parties;
- (ii) whether there exists dispute between the parties;
- (iii) whether the dispute disclosed by the parties is covered by such arbitration agreement.

If the answers to these questions are in affirmative, the court is to make a reference under this section. The court is not to look into the merits of the disputed claim and refuse to make a reference if in its opinion the claim is not justified. That would be a decision on merits within the exclusive jurisdiction of the arbitrator.

4. There is no dispute as to existence of the arbitration agreement between the parties for reference of disputes or differences arising out of or in relation to the said contract to arbitration. Mr. Kamdar, the learned Counsel appearing for Defendants, has, however, submitted that no reference to arbitration as per the arbitration agreement between the Plaintiffs and 1st Defendants can be made since in view of the two letters both dated 12th November, 1993 addressed by the Plaintiffs to the Regional Director of the 1st Defendants, the copies whereof are annexed as Exhs. 1 and 2 to the affidavit-in-reply of one D. B. Vaidya, Sr. Manager (Civil Engineering) of the 1st Defendants affirmed on 4th July, 1995, no arbitrable dispute is in existence between the Plaintiffs and 1st Defendants.

5. Admittedly, the Plaintiffs did write the first letter dated 12th November, 1993 to the Regional Director of the 1st Defendants recording the withdrawal of their claims mentioned under the head additional claims in their 10th R.A. Bill/Final bill dated 11th May, 1992. Admittedly, the Plaintiffs did write also the second letter dated 12th November, 1993 to the Regional Director of the 1st Defendants acknowledging receipt of two cheques bearing Nos. 323932 and 324644 dated 29th October, 1993 and dated 12th November, 1993 for Rs. 4,67,750.10 and Rs. 1,16,129/- respectively in full and final settlement of all their claims towards the work of construction of the said Airlines House at Pune. These letters though ought to have been disclosed by the Plaintiffs in the plaint filed, for reasons best

known to the Plaintiffs, have not been so disclosed. There is no averment in the plaint to the effect that the Plaintiffs did receive the said cheques as mentioned in the said second letter dated 12th November, 1993 from the 1st Defendants in full and final settlement of their claims against the 1st Defendant for construction of the said Airlines House at Pune. No doubt, the perusal of the plaint filed establishes that in this regard there is suppression of material fact by the Plaintiffs. That apart, the questions still emerge is whether, in view of the said two letters admittedly, addressed by the Plaintiffs to 1st Defendants, there exists arbitrable dispute between the Plaintiffs and 1st Defendants has remained in existence so as to entitle the Plaintiffs to relief in the suit.

6. Existence of dispute or difference is essential condition for arbitrator's jurisdiction. Once there is settlement of the claims made, there remains no pending dispute and the question of arbitration thereafter does not arise. Admittedly, the Plaintiffs had addressed the said two letters on 12th November, 1993 to the 1st Defendants unconditionally withdrawing their claims mentioned under the head Additional claims in their 10th R.A. Bill/Final Bill dated 11th May, 1992 and acknowledging receipt of Rs. 4,67,715.10 and Rs. 1,16,129/-, from the 1st Defendants in full and final settlement of their all claims towards the work of construction of the said Airlines House at Pune i.e., the work required to be carried out by the Plaintiffs under the said Contract. These payments not unilateral on the part of the 1st Defendants. No doubt, after receipt of these payments in full and final settlement of their all claims under or in respect of the said contract the Plaintiff did write a letter to the 1st Defendants recording that the said two letters dated 12th November, 1993 were issued under duress and their claims were still outstanding. However, it was nothing but an afterthought on the part of the plaintiffs as the full and final satisfaction was acknowledged by the Plaintiffs in writing and the amounts were received unconditionally. Thus, there is accord and satisfaction by final settlement of the claims. The subsequent allegation of "duress" is an afterthought and a device to get over the settlement of dispute and acceptance of payment. Accordingly, I hold that the Plaintiffs having unconditionally withdrawn their additional claims, acknowledged the settlement and received the said amounts in full and final settlement of all their claims, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration. In this, view, I am supported by the decisions of the Hon'ble Supreme Court in the case State of Maharashtra v. Nav Bharat Builders 1994 Suppl. (3) SCC 83, and in the case of M/s. P. K. Ramaiah & Co. v. Chairman and Managing Director, National Thermal Power Corpn. 1994 Suppl. (3) SCC 125 . on which reliance has been placed by Mr. Kamdar, Mr. Puranik has put reliance on the decision of the Hon'ble Supreme Court in the case of Union of India (UOI) and Another Vs. L.K. Ahuja and Co., in support of his submissions that in view of the letter also dated 12th November, 1993 addressed by the Plaintiffs to the 1st Defendants though subsequent to the said two letters dated 12th November, 1993 and receipt of the said amounts in full and final satisfaction of all claims of the Plaintiffs there exists arbitrable dispute. In this case, Hon'ble

Supreme Court while laying the general law held that if the bill was prepared by the department, the claim gets weakened. That was not a case of accord and satisfaction but one of pleading bar of limitation without prior rejection of the claim. The ratio of the said judgment is not applicable to the facts of the present case.

7. In the circumstances, the suit, being devoid of any merit, is dismissed at the admission stage itself. There shall, however, be no order as to costs.

8. Suit dismissed.