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(2006) 08 GAU CK 0037

In the Gauhati High Court

N.K. Trading Company — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 08-08-2006

Acts Referred:
Arbitration Act, 1940 — Section 10, 20, 8

Citation : (2007) 2 GLT 785

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—This Revision is directed against the judgment and order dated 27.06.2002 passed by the learned Additional Deputy Commissioner, Shillong, in FAO No. 1(T) of 2002 overturning the judgment and order dated 25.02.2000 passed by the learned Assistant to Deputy Commissioner, Shillong, in (Arb) Misc. Case No. 8(T)/1996 referring the disputes raised by the respondent to a sole arbitrator appointed by a Court.

2. I have heard Mr. S.R. Sen, the learned senior counsel assisted by Mrs. P.D.B. Baruah, the learned Counsel for the petitioner and Mr. S.C. Shyam, the learned Central Government Counsel, appearing for the Union of India and others.

3. For better appreciation of the controversy involved in the revision, it will be necessary to notice briefly the facts of the case as set out in the petition. The petitioner, a partnership firm carrying on the occupation of engineering and contract works in different parts of the region, entered into a contract agreement with the respondent for provision of OTM Accommodation for FSD at Panitala in Shillong vide CA No. CESZ/PANI/07/OF/88-89 in the year 1989. In the contract agreement, there is an arbitration clause stipulating that all disputes arising out of the execution of the contract are to be referred to the sole Arbitrator to be appointed by the Engineer-in-Chief, Kashmir House, New Delhi. It is alleged by the petitioner that in the course of executing the assignment, he faced a number

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of obstacles such as delay in handing over the work site, payment of running bills, etc., but that did not deter him from carrying out the work assigned to him and the work was duly completed by him whereupon he submitted his final bill along with the "No Objection Certificate" under protest. According to the petitioner, instead of releasing the payment, the respondent requested the petitioner to withdraw the protest note from the No Claim Certificate, which he finally obliged. The petitioner further alleges that this did not also satisfy the respondent, who further demanded that the note "Under Protest" be also be withdrawn by him from the Final Bill itself. Apparently, this disagreement compelled the petitioner to invoke the said arbitration clause by requesting the respondent to appoint an arbitrator to adjudicate the dispute raised by him together with the list of claims vide his letter dated 28.04.1995. When the respondent failed to respond to this request even after the lapse of eight months of the receipt of the letter, the petitioner approached the learned Assistant to Deputy Commissioner under Sections 8 and 10 of the Arbitration Act, 1940 ("the Act" for short) for appointment of an arbitrator. The learned Assistant to Deputy Commissioner registered the case as (Arb) Misc Case No. 8(T) of 1996 and, after hearing the parties, passed the judgment and order appointing the sole Arbitrator.

4. Aggrieved by the said judgment and order, the respondent preferred an appeal before the learned Additional Deputy Commissioner in FAO No. 1(T) 2000, who, after hearing the parties, passed the impugned judgment and order. The appellate Court observed that the Trial Court did not discuss the issues raised by the Union of India and that in terms of Clause 65(A) of IAFW 2249 of the Agreement, no further claim shall be made by the contractor after submission of the final bill, and this shall be deemed to have been waived and extinguished; that the petitioner (herein) had sought for the appointment of the Arbitrator only after 13 months of the payment of the final bill, which has the effect of wiping out all the contractual obligations between the contracting parties thereby keeping the disputes so raised beyond the pale of arbitration and that once the final bill was accepted by the petitioner under protest or not, the right to claim any amount becomes a subject matter of a civil Court and not an arbitrable matter. The Appellate Court was, therefore, of the view that when the final bill was paid to the petitioner, the matter should have ended there and, inasmuch as the petitioner referred to the matter again after the lapse of 13 months, there was no justification for referring the dispute to an Arbitrator. It was on the basis of the aforesaid findings that the appellate Court came to the conclusion that the appeal filed by the Union of India had merit and accordingly set aside the judgment and order dated 25.02.2002 of the Trial Court. The validity of the decision of the appellate Court is now under challenge in this revision.

5. Mr. S.R. Sen, the learned senior counsel for the petitioner submits, that the appellate Court has fallen into gross error of law in overlooking the settled law, that it is for the Arbitrator to interpret the clauses of the Contract Agreement entered between the parties and certainly not for the Court to decide and inasmuch as the appellate Court proceeded to interpret Clause 65(A) of the

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Agreement and held, by a process of interpretation, that the said clause barred the petitioner from raising the disputes for arbitration, it exceeded its jurisdiction. The learned senior counsel also assails the finding of the appellate Court that the trial Court ought to have decided first as to whether it was a fit case for appointment of an arbitrator and thereafter decide as to whether it had the jurisdiction to appoint a sole arbitrator, inasmuch as the settled position of law is that the function of the Court is to appoint an arbitrator in the event there exists a clear dispute between the parties: it is for the arbitrator to decide the arbitrability and maintainability of the claim and not for the Court.

6. Per contra, Mr. S.C. Shyam, the learned CGC, while supporting the impugned judgment and order, contends that the disputes raised by the petitioner for arbitration pertain to a list of fifteen claims in respect of some extra works allegedly undertaken by him for which no work orders were ever issued by the respondent, which are untenable in law and, as such, they cannot be referred for arbitration. According to the learned CGC, the claims made by the petitioner in this behalf are an after-thought and baseless. He further points out to the fact that the matter was revived by the petitioner only after 13 months of the receipt of the final bill amply demonstrates that the disputes raised by him are an after-thought and not genuine. He thus contended that there is no merit in this revision petition, and the same is liable to be dismissed. The learned Senior counsel cited the decisions rendered in: (a) Genuine Paints & Chemical v. Union of India 1989(2) SCC 183; (b) Ravindra Anand Desmukh v. CIDC AIR 1989 Bom 284 ; (c) Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, ; (d) PK Ramaiah & Co. v. Chairman & MD, NTPC, 1994 Supp (III) 126 ; (e) Union of India v.L.K. Ahuja & Co. (1988) 2 SCC 76 , (f) Damodar Valley Corporation Vs. K.K. Kar, ; (g) Union of India (UOI) Vs. Kishorilal Gupta and Bros., and (h) Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash , in support of his various contentions.

7. On perusing the impugned judgment and order and after hearing the counsel for both the rival parties, the sole question which falls for consideration in this case is whether there is improper exercise of jurisdiction by the appellate Court in holding that once the final bill was paid to the appellant, his act of raising arbitration matter after a lapse of 13 months of the receipt thereof is ill-conceived and not tenable in law. The law is now well settled from a catena of the decisions rendered by the Apex Court that when there is voluntary and unconditional written acceptance of payment in full and final settlement of the contract, the subsequent claims made by a contracting party for further amounts in respect of the same is not an arbitrable dispute See P.K. Ramaiah and Co. v. Chairman & MD, NTPC (supra). The case of the respondent, which is not disputed, is that he, despite many obstacles, completed the work on 26.11.1992 and submitted his final bill along with the "No Demand Certificate" under protest, but he had to withdraw the note "Under Protest" from the "No Claim Certificate" on the request of the respondents herein, and when this still did not satisfy the respondents, who again insisted that the remark "Under Protest" be altogether

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deleted by the petitioner from the final bill itself, he was compelled to file an application u/s 20 of the Act. It is, however, admitted by the appellant that the issue concerning reference to arbitration was raised by him only after 13 months of the receipt of the final bill. What then would be the effect of this belated reference? At this stage, it will be illuminating to note the statement of the petitioner in his additional affidavit, which at para 13 and 14 suggested that he had to withdraw the remark in question to enable him to receive the payment and, as such, the withdrawal of the remark was made by him "under compelling circumstances."

8. Reshmi Constructions (supra), a case cited by the learned senior counsel for the petitioner, was a case where the parties to the appeal entered into an agreement for a project and upon completion of the project, the respondent submitted the final bill, which was allegedly not accepted by the appellant. Thereafter, the appellant itself prepared the final bill and forwarded the same along with a printed format being a "No Demand Certificate", which was then signed by the respondent. However, on the same day, a letter dated 20.12.90 was written by the respondent to the appellant stating therein, inter alia, that the alleged final bill was signed by them under coercion, under undue influence and under protest only without prejudice to their rights and claims whatsoever. Thereafter, the respondent invoked the arbitration clause and filed an application u/s 20 of the Act before a Civil Court, which dismissed the application, but the High Court subsequently allowed the appeal. The matter ultimately reached the Apex Court on further appeal. The Apex Court at paras 18 and 27 held that, normally, an accord and satisfaction by itself would not affect the arbitration clause for even when rights and obligations of the parties are worked out, the contract does not come to an end, inter alia, for the purposes of determination of disputes arising thereunder, and, thus, the arbitration agreement can be invoked but if the dispute is that the contract itself does not subsist, the question invoking the arbitration clause may not arise. But, it was held further therein, in the event, it be held that the contract survives, recourse to the arbitration clause may be taken. On the question of withdrawal of the remark "Under Protest", this is what the Apex Court says in the same judgment:

Necessitas no habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain, who is in a stronger position. Although it may not be strictly in place but the Court cannot shut its eyes to the ground reality that in a case where a contractor has made a huge investment, he cannot afford not to take from the employer the amount due under the bills, for various reasons, which may include discharge of his liability towards banks, financial institutions and other persons. In such a situation, public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts. A case, where a party has had to succumb to the pressure of the other party to the bargain who is in a stronger position, has to be made out and

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proved before the arbitrator for obtaining an award. Even correspondences marked as "without prejudice" may have to be interpreted differently in different situations.

9. Taking cue from the aforesaid observations of the Apex Court, the learned senior counsel for the petitioner would like to contend that the petitioner in the instant case also was compelled to withdraw the remark in question as that course of action was the only option open to him to somehow receive the payment, particularly, when he was dealing with a party to the bargain, who was in a stronger position. In my opinion, the instant case is clearly distinguishable on facts. As noted earlier, the instant case, the petitioner took some 13 months to make his claims and opt for arbitration. This conduct on this part is hardly consistent with his claim that he had to withdraw his aforesaid remark only for the purpose of getting early payment of his final bills. If this version of the petitioner is taken at its face value, what prevented him from raising the dispute immediately after receiving the payment of the final bill? Under the circumstances, I find force in the contention of the learned CGC that the dispute sought to be raised by the petitioner in the arbitration is not a genuine dispute and is merely an afterthought. On the other hand, the appellant in Reshmi Constructions (supra) was found to have shot off the letter repudiating his signing of the final bill on the same day itself. In my judgment, this aspect of the matter makes all the difference.

10. In the view that I have taken, I do not find any improper exercise of jurisdiction by the learned Additional Deputy Commissioner in reversing the judgment and order of the learned Assistant to Deputy Commissioner, Shillong.

11. For what has been stated in the foregoing, this revision petition has no merit and is, accordingly, dismissed. However, on the facts and circumstances of the case, the parties are directed to bear their own costs.

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