
(2001) 01 BOM CK 0051
In the Bombay High Court
Case No : Arbitration Appeal No. 64 of 2000

Prem Laxmi and Co.

APPELLANT

Vs

Tata Engineering and Locomotive Company Ltd.

RESPONDENT

Date of Decision : 08-01-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37

Citation : (2001) 2 BomCR 7

Hon'ble Judges : K.K. Baam, J

Bench : Single Bench

Advocate : S.P. Bharti, for the Appellant; Gaurav R. Joshi and H.N. Vakil, instructed by Mulla and Mulla and Craigie Blunt and Caroe, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Baam, J.—This appeal has been filed by the petitioner u/s 37 of the Arbitration and Conciliation Act, 1996 as it was contended on behalf of the respondents that the agreement between the Appellants/petitioners and the respondents did not contain an arbitration clause. A plea was taken on behalf of the respondents herein under sub-section (2) of section 16 of the Arbitration and Conciliation Act, 1996 that the Arbitral Tribunal did not have jurisdiction to determine the dispute between the petitioners and the respondents as the agreement between the petitioners and the respondents did not contain an arbitration clause.

2. The learned arbitrator, who was appointed in pursuance of the directions of this Court in the petition filed by the petitioners herein, being Arbitration Petition No. 232 of 1998, with liberty given to the parties to raise all contentions, factual and legal available under the provisions of the Arbitration and Conciliation Act, 1996 has, by his award dated 2nd July, 1999, held that the arbitral tribunal has no jurisdiction to adjudicate the dispute raised by the claimants, i.e., the Appellants/petitioners herein. It is this order which is challenged by the petitioners herein u/s 37 of the Arbitration and Conciliation Act, 1996.

3. It is contended on behalf of the petitioners that although the petitioners have made a reference to the arbitration clause in the correspondence exchanged prior to the matter being referring to arbitration, the same was not disputed nor denied by the respondents. This correspondence was exchanged sometime in March, 1997 and April, 1997. It is the case of the petitioners that by the letter of 12th September, 1997, for the first time, it was contended on behalf of the respondents herein that there was no arbitration clause contained in the agreement.

4. It is obvious from the arguments and the pleadings that the respondents challenged the existence of the arbitration agreement as a result of which the petitioners were required to file the petition in this Court seeking appointment of an arbitrator. The arbitrator was appointed, by consent, subject to the rights available to the parties to advance such arguments and raise such contentions as were legally available to them.

5. In the course of the arbitration proceedings conducted before the learned arbitrator, the respondents once again contended that the arbitration agreement did not exist between the petitioners and the respondents. In support of this contention, the respondents have filed affidavits of two of their officers, namely, the affidavit of Hosbet Rohinesh and Deepak Moolchand Garg.

6. The affidavit of Hosbet Rohinesh reflects that he is the Senior Deputy General Manager (Law) of the respondent-company i.e. Tata Engineering & Locomotive Company Limited, and he was, responsible for making necessary changes in the General Conditions of Sale of Goods as, realizing the difficulties faced in referring matters to arbitration, he had suggested to delete arbitration clause, i.e. Clause VIII, from the Telco's General Conditions of Sale of Goods pertaining to the sale of Excavators.

7. In his affidavit, Hosbet Rohinesh has set out the circumstances which induced him to make the necessary changes and the terms and conditions of sale were reprinted. In the affidavit, he has also relied upon the office communications and correspondence to this effect. He has deposed that acting upon his advice, the department had decided to delete the arbitration clause and incorporate "the Court Jurisdiction Clause" in the General Conditions of Sale. However, in the course of the reprinting, there was a clerical mistake that although the arbitration clause was deleted, in Clause VIII of the General Conditions of Sale, the heading "Arbitration" remained. However, the contents of this clause did not make any specific reference to arbitration, but the same referred to the jurisdiction of the Court to decide the dispute.

8. This witness has been cross-examined at length by the advocate for the petitioners herein, but in the course of the cross-examination, the petitioners have not been able to bring on record anything to show that the format was not revised as the witness has, in terms, stated that he had revised the format. The evidence of the witness also reflects that the revision of the terms and conditions

was made by him in the year 1989.

9. The respondents have also examined witness No. 2 Deepak Moolchand Garg. The evidence of this witness is very pertinent and relevant to decide this issue as he was working in the Marketing Department of the respondent-company in the year 1992. This witness was handling commercial part of the sales and he has deposed to the effect that he knew one Shri Rajesh Naidu of the petitioner-company, that he had discussions with Shri Rajesh Naidu and that the documents handed over to Shri Rajesh Naidu did not contain an arbitration clause. As regards the crucial document, namely. The General Conditions of Sale of Goods, which is Exhibit 2 to the affidavit in support, reference is invited on behalf of the petitioners to Clause VIII thereof, which contains the heading "Arbitration". However, a perusal of the contents of Clause VIII of the General Conditions of Sale of Goods did not suggest that the same can be construed as an arbitration clause, as the same refers to the fact that the contract has been entered into at Bombay and that disputes or differences arising from the contract shall be decided by the Court at Bombay.

10. It is urged on behalf of the petitioners that this meant that at the time when arbitration matters are referred to an arbitrator, the award of the arbitrator is to be filed in Bombay. So far as this argument is concerned, I find it difficult to read these lines in Clause VIII of the General Conditions of Sale of Goods, as the same is silent on referring the dispute to arbitration or filing award in the Court at Bombay. This Clause clearly reflects that the jurisdiction was to be in the Court at Bombay. The fact that there was a change in the General Conditions of Sale of Goods is deposed to by witness Hosbet Rohinesh and the factum of the documents, which were handed over to Shri Rajesh Naidu of the petitioner-company did not contain an arbitration clause, has been deposed to by the witness Deepak Moolchand Garg. He has been cross-examined. However, so far as the petitioners are concerned, they have not led evidence of Shri Rajesh Naidu to support their contention that the document, which was handed over to the petitioners, did contain the arbitration agreement as referred to in the petition.

11. It is urged and contended on behalf of the petitioners that no opportunity was given to the petitioners to lead evidence as, at that time when evidence of the respondents was led and they were examined, Shri Rajesh Naidu of the petitioner-company was not in Bombay and the application for adjournment was declined. However, if the petitioner's contention is to the effect that the agreement contained an arbitration clause, then in view of the fact that the same was denied by the respondents, the petitioners could have filed an affidavit of their witness to support this contention and the witness could have been made available for cross-examination. However, till 17th June, 1999, no affidavit was filed on behalf of the petitioners. On the contrary, the record reflects that on 17th June, 1999, after the respondents' witnesses were cross-examined, there is an endorsement to the effect that Mr. Joshi who represented the respondents herein closed his case. Shri Bharti, who represented the petitioners herein, stated that

the claimants were not leading any oral evidence as regards the preliminary issue.

12. On behalf of the petitioners, reliance is placed upon the letter dated 21st June, 1999 wherein the petitioners have submitted a quotation received by Shri Dinkar A. Kothari of M/s. Kothari Construction Services, Worli. This quotation was received from M/s. Tata Engineering & Locomotive Co. Ltd. for the sale of Excavator Model Ex 100 (Backhoo). By this letter, the petitioners herein submitted a copy of the terms and conditions of sale and the general conditions of sale of goods, which contained Clause No. VIII under the heading "Arbitrations and Warranty Stipulations".

13. No doubt, the petitioners have also filed an affidavit of the said Shri Dinkar A. Kothari of M/s. Kothari Construction Services, Worli, who is a third party to the dispute between the petitioners and the respondents, which affidavit and the documents were sought to be filed after the petitioners closed their case and stated that they are not leading any oral evidence as regards the preliminary issue. So far as the petitioners before the Court are concerned, it is urged on their behalf that the learned arbitrator did not consider this evidence and hence there was a gross misconduct on the part of the learned arbitrator. For that purpose, reliance has been placed on behalf of the petitioners on the ruling in the case of Lotus Investments and Securities Vs. Promod S. Tibrewal and another, , wherein it is held that non-consideration of evidence, namely material documents and tape-recorded evidence, was not considered and no date for closing the proceedings was intimated. It was held in that case that the same amounted to misconduct on the part of the learned arbitrator.

14. So far as this ruling is concerned, the same would not apply to the facts of the present case inasmuch as, in the present case, the evidence which was sought to be produced by the petitioners was, firstly, a third party evidence, and secondly, it was evidence which was sought to be produced after the petitioners had closed their case. The affidavits were affirmed by the respondents as far back as on 2nd June, 1999. The petitioners could have adduced evidence to contradict the evidence disclosed by the respondents in their affidavits. They were not required to wait to produce evidence to support their contentions till after the evidence is concluded.

15. So far as the award of the learned arbitrator is concerned, the same is a reasoned award and the same cannot be faulted with. Hence in view of the fact that Clause VIII of the General Conditions of Sale of Goods, which contained arbitration clause, has been deleted and substituted as far back as in 1989, the petitioners having not examined himself to support the contention that the general terms and conditions, which were handed over to the petitioners, contained arbitration clause, adverse inference is required to be drawn in view of the evidence produced by the respondents.

16. Hence so far as the petition is concerned, the same is devoid of any merit

and deserves to be dismissed. The petition is accordingly dismissed.

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