(2013) 07 P&H CK 0883

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 15553 of 2013

Sab Industries Ltd. APPELLANT

Vs

Greater Mohali Area Development Authority RESPONDENT

Date of Decision : 22-07-2013

Acts Referred:

Citation : (2014) 1 PLR 164

Hon'ble Judges : Rameshwar Singh Malik, J

Bench : Single Bench

Judgement

Rameshwar Singh Malik, J.—The short but important question of law that falls for consideration of this Court in the present writ petition is, whether a party to an agreement, after executing the work thereunder and drawing benefits therefrom, can be allowed to turn around and say that one clause of the agreement being onerous, was illegal. Facts first. Petitioner is a class ''A'' contractor. Petitioner entered into an agreement with the respondent authorities for executing the work of widening of peripheral roads of Sector-62, SAS Nagar (Mohali), including public health services and maintenance thereof for five years, vide agreement No. 11 dated 18.9.2008. The agreement executed between the parties was containing various terms and conditions, which were of course binding between the parties. The agreement contained clause 25A - ''Disputes and Arbitration'' for the purpose of settlement of disputes and differences, if any, which may arise between the parties. It is further pleaded case of the petitioner that work was successfully executed and completed on 31.10.2009 as per Annexure P-2. The total work done was for an amount of Rs. 13.50 crores. Petitioner submitted its final bill for payment vide Annexure P-3. Dispute arose between the parties, as the petitioner was demanding more payment, whereas the stand taken by the respondents was that for the work done, payment has already been made and nothing was due, Petitioner was intimated in this regard vide communication dated 11.1.2013 (Annexure P-4). Consequently, as per clause 25-A of the agreement pertaining to Disputes and Arbitration'', petitioner invoked the arbitration clause vide its application dated 31.1.2013 (Annexure P-5).

Respondent No. 3, vide impugned communication dated 3.5.2013 (Annexure P-6) directed the petitioner to deposit the requisite amount, in accordance with sub-clause (viii) of above-said clause 25-A of the agreement, so as to proceed further.

2. Feeling aggrieved against the impugned communication dated 3.5.2013 (Annexure P-6), petitioner has approached this Court by way of instant writ petition, thereby alleging that sub-clause (viii) of clause 25-A pertaining to ''Disputes and Arbitration'' contained in agreement between the parties was onerous, hence illegal.

3. Learned counsel for the petitioner submits that sub-clause (viii) of clause 25-A of the agreement was against the law and public policy, besides being unreasonable, as both the parties were not equal in bargaining power. He further submits that petitioner was compelled to enter into an agreement and was made to sign on dotted lines, in order to have business with the respondents. The petitioner, being at the receiving end, was not in a position to exercise its free will before signing the contract. Thus, the impugned sub-clause (viii) of clause 25-A was illegal on the face of it. He further submits that the above-said sub-clause (viii) of arbitration clause 25-A was liable to be struck down and cannot be enforced against the petitioner, it being against the public policy. To buttress his arguments, learned counsel for the petitioner relies upon the judgment of the Hon''ble Supreme Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . He finally prays for setting aside the sub-clause (viii) of Arbitration Clause 25-A and the impugned communication dated 3.5.2013 (Annexure P-6) issued by respondent No. 3, by allowing the present writ petition.

4. Having heard the learned counsel for the petitioner, after careful perusal of the record of the case and giving thoughtful consideration to the contentions raised, this Court is of the considered opinion that no interference is warranted at the hands of this Court, while exercising its writ jurisdiction under Articles 226/227 of the Constitution of India. To say so, reasons are more than one, which are being recorded hereinafter.

5. It is the own pleaded case of the petitioner that Agreement No. 11 came to be executed between the parties, as far back as on 18.9.2008. Sub-clause (viii) of Arbitration Clause 25-A was admittedly one of the conditions of the agreement, duly signed and executed between the parties. It is also a matter of record that work done by the petitioner was for an amount of Rs. 13.50 crores. In the very nature of things, it is established on record that petitioner was a businessman and the contract was a commercial transaction. It is neither pleaded nor argued case of the petitioner that the Contract was executed between the parties, was signed by an illiterate or ignorant person on behalf of the petitioner-company, which claims itself as class ''A'' contractor. Having said that, this Court feels no hesitation to conclude that, the petitioner after having executed the agreement with the respondent authorities, carrying out the work as per the terms and

conditions of the agreement besides drawing financial benefits therefrom running into crores of rupees, cannot be allowed to turn around and say that one of the conditions of the agreement was onerous, hence illegal.

6. Since the entire case of the petitioner revolves around the alleged onerous sub-clause (viii) of Clause 25-A of the agreement, it would be appropriate to reproduce it here and the same reads as under:--

viii) It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the disputes based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit at call" for ten percent of the amount claim ED, on a scheduled bank in the name of the Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, shall be fortified and paid to the other party.

7. It was a pure and simple commercial transaction between the parties. Petitioner-company accepted the terms and conditions of the agreement, including the impugned sub-clause (viii) of Clause 25-A of the agreement with open eyes and sound mind, so as to execute the work of construction of road and public health services with a view to earn profit running into crores of rupees.

8. In such a given fact situation, as in the present case, the judgment of the Hon''ble Supreme Court in Brojo Nath Ganguly''s case (supra) will not be applicable, being clearly distinguishable on facts. Brojo Nath Ganguly was an employee working in the said company. He, being an employee of the company, was always at the receiving end and was never enjoying level playing field. He was not having any equal bargaining power with his employer. He was a poor employee, whereas his employer was a rich organisation. Under those entirely different set of facts, the Hon''ble Supreme Court rendered the above-said cited judgment in Brojo Nath Ganguly''s case (supra).

9. Further, even in the Brojo Nath Ganguly''s case (supra) itself, the Hon''ble Supreme Court made the clear distinction in this regard that the principle of law laid down in Brojo Nath Ganguly''s case (supra) will not apply, where the bargaining power of the contracting parties was equal or almost equal. That principle will not apply where both the parties were businessman and the contract was a commercial transaction, as in the present case. However, it would be appropriate to refer to the relevant observations made by the Hon''ble Supreme Court in this regard, from para 90 of the judgment and the relevant extract thereof reads as under:--

...This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations "in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be this principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today''s complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.

10. Further, it is the settled principle of law that peculiar facts of each case are to be examined, considered and appreciated first, before applying any codified or judge made law thereto. Sometimes difference of one circumstance or additional fact can make the world of difference, as held by the Hon''ble Supreme Court in Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, .

11. Recapitulating the facts of the present case and respectfully following the law laid down by the Hon''ble Supreme Court in the judgments noted above, it is unhesitatingly held that the petitioner company having entered into an agreement with open eyes, which was a commercial transaction, with the object to earn financial benefit, cannot be permitted to find fault with one of the clauses of the same contract alleging the same as onerous, illegal and against the public policy simply because it was not suitable to the petitioner. In this view of the matter, it is held that the impugned sub-clause (viii) of Clause 25-A of the agreement was neither illegal nor against the public policy. Thus, the answer to the question posed above at the very outset, is and has to be an emphatic ''No'' and the same is decided accordingly.

12. The view taken by this Court also finds support from the Constitution Bench decision of the Hon''ble Supreme Court in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, which was followed in Panna Lal and Others etc., etc., Vs. State of Rajasthan and Others, , State Bank of Haryana and Others Vs. Jage Ram and Others, , Assistant Excise Commissioner and Others Vs.

Issac Peter and Others, and State of Orissa and others Vs. Narain Prasad and others, etc. etc., .

13. The authoritative pronouncement of law made by the Hon''ble Supreme Court in the above-said judgments fell for consideration before a Division Bench of this Court in CWP No. 19932 of 2011 (M/s. M.P.S. Ltd. and another v. State of Haryana and others with other connected cases, decided on 15.5.2009 and the relevant observations which can be gainfully followed here in this case, are extracted as under:--

We have given our careful consideration to the submissions made at the Bar and perused the record. Two questions arise for our consideration. These are -

Question No. I Whether the petitioner-liquor contractors can maintain the present writ petitions for avoidance of their contractual obligations especially when they have unconditionally accepted the stipulations enumerated in the contracts and drawn benefits offered to them under the same.

14. Again, under somewhat identical circumstances, another Division Bench of this Court in the case of S.K. Jain Vs. State of Haryana and Another, , while considering exactly similar clause of arbitration agreement in para 4 and 6 of the judgment, held as follows:--

4. We have thoughtfully considered the submissions made by learned Counsel and are of the view that there is no merit in this petition. It is well settled that once an agreement has been entered into by free will of the parties then it is binding on them unless it is shown to be against law. It was in 1861 when Sir Henry Maine in his famous work ''Ancient Law'' had evolved a comparative conclusion that the movement of progressive societies "has hitherto been from status to contract". This association of progress with the ''contract'' continually displacing ''status'' made the individual as the unit of society of which all civil laws take account. In other words, contract, and not those forms of reciprocity in rights and duties which have their origin in ''status'', became the judicial foundation of the relationship between one person and another. "Starting, as from one terminus of history", said Maine, "We seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals". On the subject of Negro Servitude, for instance, Maine showed how the status of slave came to be superseded by the contractual relation of the servant in his master. It was considered virtually certain that the science of Political Economy would fail to correspond with the facts of life if it were not true that Imperative Law had abandoned the largest part of the field which it once occupied, and had left then to settle rules of conduct for themselves with a liberty never allowed to them till then. The law, thus, came to permit individuals unprecedented freedom of contract. Similar view has been echoed by a Division Bench of Bombay High Court in the case of Lakhaji Dollaji and Co. Vs. Boorugu Mahadeo Rajanna, . Speaking for the Bench Beaumont C.J. observed that it would be "a startling thing to say that person sui juris are not at

liberty to enter into such a contract of bailment as they may think fit". In the case of Central Bank of India Ltd. Vs. Hartford Fire Insurance Co. Ltd., , the concept of freedom of contract has been reflected in para 5 which reads as under:

(5)...Now it is common place that it is the Court''s duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the Court has to do. The Court must give effect to the plain meaning of the words however it may dislike the result....

The aforementioned view has been followed and accepted by a Constitution Bench in the case of General Assurance Society Ltd. Vs. Chandumull Jain and Another, , Hon''ble Mr. Justice M. Hidayatullah, speaking for the Bench has, in para 11, observed as under:

....In interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties, because it is not for the Court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being.

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Moreover, their Lordships of Hon''ble the Supreme Court in Rajesh Construction Company (supra) upheld a similar clause by observing as follows:

20. Clause 29 specifically stipulates as indicated herein earlier, that if any dispute arises between the parties the party seeking invocation of the arbitration clause, shall first approach the Chief Engineer and on his failure to arbitrate the dispute, the party aggrieved may file an appeal to MPL Com, tailing which, the Corporation shall constitute an Arbitration Board to resolve the disputes in the manner indicated in Clause 29. However, before doing so, the party invoking arbitration clause is required to furnish security of a sum to be determined by the Corporation.

21. In this case, admittedly, the security has not been furnished by the respondent to the Corporation. We, in fact, asked Mr. Sharma, appearing on behalf of the respondent to ascertain on the date of the hearing of the appeal, whether the security deposit was made or not. On instruction, Mr. Sharma informed us that such security has not yet been deposited. Such being the position even today, we hold that the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish security as envisaged in Clause 29(d) of the contract. Therefore, we are of the opinion, that on account of non-furnishing of security by the respondent, the question of constituting an

Arbitration Board by the Corporation could not arise at all. Accordingly, we hold that the High Court was not justified in appointing a retired Chief Justice of a High Court as Arbitrator by the impugned order.

This issue has earlier been considered by a Division Bench of this Court in the case of National Building Construction Corporation Limited v. State of Haryana and another, 2007 (2) R.C.R. (Civil) 120, CWP No. 19065 of 2006, decided on 9.1.2007 which comprised one of us (M.M. Kumar, J.). There the validity of a similar clause was also upheld. The Division Bench dealing with a similar clause has held that there is a laudable object underlying insertion of clauses in standard form contract because it discourages filing of frivolous claims by contractor.

15. Reverting to the facts of the present case and respectfully following the above exhaustive and authoritative exposition of law on the subject, it is held that the petitioner-company was hot a poor employee, hence not entitled to invoke the writ jurisdiction of this Court. It was a rich organization doing business running into crores of rupees. It was not the compulsive necessity of the petitioner-company to enter into an agreement with the respondent. The petitioner-company, doing the business on a large scale, cannot be expected to be ignorant or illiterate. Had there been no dispute between the parties about the payment for the work executed by the petitioner-company, all these conditions including the impugned sub-clause (viii) of clause 25-A of the agreement would have perfectly worked. Thus, in the given fact situation of the instant matter, the present one has not been found to be a case, warranting interference at the hands of this Court, while exercising its writ jurisdiction under Articles 226/221 of the Constitution of India.

16. No other argument was raised.

17. Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the instant writ petition is misconceived, bereft of merit and without any substance. Thus, it must fail. No case for interference has been made out. Resultantly, the present writ petition stands dismissed, however, with no order as to costs.