

(1993) 06 BOM CK 0026

In the Bombay High Court

Case No : Appeal No. 352 of 1988 in Suit No. 175 of 1986

Shree Construction Company

APPELLANT

Vs

Mumbai Postal Karamchari Co-operative Housing Society Ltd.
and another

RESPONDENT

Date of Decision : 22-06-1993

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1994) 2 BomCR 207 : (1993) 95 BOMLR 694 : (1994) 1 MhLj 353

Hon'ble Judges : Sujata V. Manohar, J;N.D. Vyas, J

Bench : Division Bench

Advocate : Shri Virendra, V. Tulzapurkar and J.S. Soloman, for the Appellant;
Shri M.K. Nesari and V.K. Damle, for the Respondent

Judgement

Sujata Manohar, J.—The appellants are the original plaintiffs. The 1st respondent who is original defendant No. 1, is Co-operative Housing Society. The appellants filed this suit u/s 20 of the Arbitration Act for a declaration that under an Agreement dated 25.12.1981, which was entered into between the appellants and the 1st respondents, there is a valid and subsisting Arbitration Agreement as contained in Clause 19 of the said agreement under which the disputes between the appellants and the 1st respondents relating to the said contract dated 25.12.1981 are required to be referred to the sole arbitration of Mr. M. S. Belekar, an Architect as provided in that clause, and for other reliefs. A learned Single Judge of this court by his judgment and order dated 7.1.1988 has dismissed the Arbitration Petition/Suit with no order as to costs. Hence the appellants have filed the present appeal.

2. Under the agreement of 25.12.1981, the appellants agreed to construct a residential building for the 1st respondents on the terms and conditions set out in that agreement. The appellants were required to carry out this work as per the drawings, specifications and schedule of quantities laid down therein. They were required to work under the supervision of the Architect Mr. M. S. Belekar or such

other person as may be nominated for that purpose by the 1st respondents. Under the conditions of contract specified in that agreement, the appellants were required to carry out the work in accordance with the directions and to the satisfaction of the Architect in accordance with the drawings, general specifications and detailed description and further oral or written instructions of the architect. Under Clause 14 of the conditions of Contract the Architect was required to issue interim certificates after ascertaining the work done and in the manner set out in that clause and the Employer was required to make payment accordingly after deducting all amounts paid to the appellant on account of this work. Clause 19 of the conditions of Contract is as follows :

"19. In all questions which from time to time during the progress of the work arise as to payment for any part of work or extra work to be made by or any deduction to be made from whole cost of said work or any interpretation of any works, plans or other specifications or any matter whatsoever relating to the Contract shall be referred to the sole arbitration of the Architect whose decision will be legal, final and binding on both the Employer and the Contractor".

3. Under the said agreement, the appellants carried out construction work and from time to time submitted their interim bills which were paid in accordance with the certificate granted by the architect. The appellants were to complete the construction by June 1983 but the time for completion was extended from time to time. It was ultimately extended upto 30th August, 1985. There were several disputes between the parties as a result of which in May 1985, the 1st respondents took possession of the construction work. There was also litigation between the parties in the City Civil Court in this connection which is not directly relevant to the present appeal.

4. The appellants submitted their final bill to the Architect on 26th October, 1985. The claim of the appellant was to the tune of about Rs. 17,00,000/-. The final bill as certified by the Architect on/or about 26th March, 1986 was for payment of about Rs. 24,870/-. The total amount certified by the Architect was Rs. 28,61,670/- out of which Rs. 28,36,800/- having been already paid, the balance amount payable as per the final certificate was Rs. 24,870/-.

5. In respect of the dispute relating to the work done by the appellants under the Contract and the amounts due and payable by the 1st respondents to the appellants, the appellants, by their letters, dated 30th April, 1986, informed the 1st respondents they were not satisfied with the final certificate dated 25th March, 1987 issued by the Architect which certified the total work carried out at Rs. 28,61,670/-. By the said letter the appellants, after setting out the various disputes between the parties in connection with the said work and the claims of the appellants in respect of the said work, stated that the agreement of 25.12.1981 contains an arbitration clause under which it is agreed that such disputes are required to be referred to the sole arbitration of the Architect Mr. M. S. Belekar. However, in view of the fact that the Architect had already formed his views and expressed his opinion on the interim certificates and final certificate

dated 25.3.1986, they called upon the 1st respondents to agree to the revocation of the authority of Mr. M. S. Belekar as the sole arbitrator and asked for the appointment of an independent person as the sole arbitrator.

6. Thereafter, the appellants filed the present suit on or about 17.11.1986 in which they have prayed for a declaration that there is a valid and subsisting arbitration agreement between the parties and have asked for revocation of the authority of Mr. Belekar as the sole arbitrator and have prayed that the court should appoint such other person as it may deem fit as an arbitrator in the place of Mr. M. S. Belekar for other reliefs.

7. It is urged by the 1st respondents that the final certificate which is issued by the Architect is equivalent to an arbitration award under Clause 19 and hence there is no further scope for an arbitration. In this connection the respondents have relied upon the correspondence between the architect as well as the parties in connection with the final bill. In the course of correspondence, the Architect has asked both the sides to place before him various points on which his decision was required for the purpose of finalising the bill. He had, thereafter, finalised the bill. It is submitted that this amounts to an arbitration Award. This submission cannot be accepted. The Architect was clearly required to certify the final bill of the appellants in respect of the work carried out by them. As per the conditions of the Contract between the appellants and the 1st respondents, payment was to be made by the 1st respondents to the appellants on their bills as certified by the architect. It for the purpose of granting such a certificate the Architect considers points which are at issue between the parties in connection with the construction work, which he is required to certify, this cannot be considered as an arbitration. And the final certificate given by him cannot be considered as an Award. In this connection a reference may be made to Keating on "Building Contracts", 5th Edition, at page 386 where it is stated. "The granting of certificates in a building contract is not an arbitration for the purposes of the Arbitration Act, unless express words show that the certificates were intended to be given only after arbitration proceedings". A reference may also be made to Halsbury's Laws of England, Volume 4, paragraph 1202 where it is stated that a certificate is not akin to the award of an arbitrator. Even a stipulation that the certifier shall act as "exclusive judge" does not make a certificate an award. In paragraph 1200 of the said volume, it is observed that the principal purpose of a certificate is to secure payment to the contractor of sums properly due to him under the contract or to express approval of the work that has been done. Such a certificate, therefore, cannot be construed as an award. The fact that the same architect is nominated as an arbitrator to decide disputes, does not make any difference to this position. The function of certifying bills is distinct from acting as an arbitrator.

8. It was next submitted that since the certificate issued by the Architect is a final certificate, it is binding on the parties. It cannot, therefore, form a part of the disputes which can be referred to arbitration under Clause 19 of the conditions of contract. This submission also is without any substance. Clause 19

is in very wide terms. It refers to all questions which, from time to time, may arise during the progress of the work as to payment for any part of the work or extra work or any deduction to be made or in connection with any matter whatsoever relating to the contract. Therefore, simply because a final certificate issued by an architect, it cannot be said that if there is any dispute regarding this final certificate as between the parties, the dispute cannot be referred to arbitration. In this connection, learned advocate for the 1st respondents relied upon a decision of the Supreme Court in the case of M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project and another, . In the case before the Supreme Court there was an independent clause in the contract under which it was provided that if there are any disputes relating to the rates of payment the decision of the Superintending Engineer shall be final. In view of this clause, the Supreme Court said that the dispute regarding rates would not fall within the arbitration clause because under the former clause, the decision of the Superintending Engineer in that connection was made final.

9. The 1st respondents also relied upon a decision of the Calcutta High Court in the case of Gannon Dunkerley and Co. Vs. Union Carbide (India) Ltd., . In that case the building contract contained a clause by which all disputes except those left to the sole discretion of the Architect were to be referred to arbitration. The court said that the parties will not be allowed to question the finality of the decision of the Architect in respect of the matters in which the decision of the Architect had become final and binding. Both these judgments, do not have any application to the present case because in the agreement which is in question before us, there is no such clause which excludes from the ambit of the arbitration agreement those matters which have to be decided by the Architect. Far from making a certificate of the architect final and binding, Clause 15 of the conditions of Contract says, "No certificate of the architects shall of itself be conclusive evidence that any work or materials to which it relates are in accordance with the contract". There is, therefore, no substance in the contention that once the Architect has given his final certificate, any disputes in connection with the work carried out cannot be referred to arbitration under Clause 19.

10. It is also submitted by the 1st respondents that Clause 19 will operate only while the work is in progress. Once the work has come to an end, Clause 19 will not be attracted. The 1st respondents lay emphasis on the words "in all questions which from time to time during the progress of the work arise as to payment". These words, in our view, do not support the contentions of the 1st respondents. The above phrase merely refers to disputes which may arise during the progress of the work. If such disputes have arisen during the progress of the work as also if there are other disputes regarding work as set out in Clause 19, these can all be referred to arbitration. There is nothing in Clause 19 which would indicate that reference to an arbitrator can be made only while the work is in progress. The entire Clause 19 refers to the kinds of disputes which can be referred to arbitration. It does not prescribe any time limit within which such

reference has to be made. The disputes can be referred to arbitration even after the work has come to an end.

11. The 1st respondents sought to derive support from a decision of the Kerala High Court in the case of C.T. Chacko Vs. Kerala State Electricity Board, . In the case before the Kerala High Court, there was a clause in the contract which stated, "There shall not be any reference to arbitration of any dispute or claim, once the work is completed or contract is terminated and in case work is stopped unilaterally or abandoned by the contractor". The terms of that contract, therefore, clearly prohibited reference to arbitration once the work was completed or a contract was terminated. Such is not the present case. This decision also, therefore, has no application.

12. In these circumstances, looking to the clear wordings of Clause 19 of the conditions of the contract, there is a valid and binding agreement between the parties to refer all disputes which are covered by that clause to the sole arbitration of the architect.

13. The contention of the appellants, however, that the Architect should not act as an arbitrator because the Architect has already made up his mind as he has given the final certificate, cannot be accepted. While entering into the above agreement both the parties were aware that the bills and the work had to be certified by the architect from time to time in order that the Appellants may receive payment. Nevertheless the parties did agree that if there were any disputes relating to the work, they would be referred to the sole arbitration of the Architect. The Architects, however, by their letter dated 19.2.1987 have informed the appellants that they are preoccupied with other matters and they are not interested in doing arbitration work in this case. In view thereof, we had asked both the parties whether they would like to agree upon the name of any other Architect before whom they can go for arbitration. The appellants have suggested the name of Mr. Roshan H. Namavati, an Architect and Valuer. The 1st respondents, without prejudice to their rights and contentions herein, have concurred in Mr. Namavati being appointed as the sole arbitrator.

14. In view thereof, Mr. R. H. Namavati is appointed as sole arbitrator in terms of Clause 19 of the said contract to arbitrate in the disputes between the parties in accordance with the existing agreement. Appeal is accordingly allowed and the judgment and order of the learned Single Judge is set aside. Petition is accordingly made absolute in terms of prayers (b), (c) and (d) and Mr. R. H. Namavati is appointed as an arbitrator in the place and stead of Mr. M. S. Belekhar to arbitrate upon the disputes between the parties thereto.

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15. Appeal allowed.