

(1999) 11 GAU CK 0004
In the Gauhati High Court
Case No : M.A. (F) No. 82 of 1993

Union of India (UOI)

APPELLANT

Vs

Raj Brothers

RESPONDENT

Date of Decision : 25-11-1999

Acts Referred:

Arbitration Act, 1940 — Section 24, 39, 39(4)
Evidence Act, 1872 — Section 115

Citation : AIR 2000 Guw 132 : (2000) 1 GLT 286

Hon'ble Judges : A.P. Singh, J

Bench : Single Bench

Advocate : Debashish Sur, for the Appellant; D.K. Bhattacharyya and B.M. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

A.P. Singh, J.—The present appeal u/s 39 of the Arbitration Act, 1940 has been filed for challenging the judgment and order dated 16-11-92 passed by Shri K. K. Nag, Assistant District Judge, Sonitpur, Tezpur in T. -- (Arb) No. 24 of 1991 directing the defendant No. 2, Chief Engineer, Shillong Zone to appoint an arbitrator within a period of one month. It was further directed that the said arbitrator must be appointed within the stipulated time failing which the Court shall appoint an arbitrator.

2. Brief facts of the case are that the plaintiff M/s. Raj Brothers is a registered partnership firm having its registered head office at Calcutta and branch office at Tezpur. It engages in the business of contract work for construction of road, building etc. The plaintiff was allotted contract by the Chief Engineer, Shillong Zone on behalf of the President of India for provision of Technical Accommodation including necessary services. The contract agreement being No. CE (RCP)/97 of 82-83 under the Chief Engineer (RCP) Sufdarjung Aerodrome, New Delhi and a formal contract agreement was signed between the plaintiff and Chief Engineer. According to the stipulations in the contract the appellant was

under the obligation to supply Schedule "B" stores to him to enable him to proceed with the performance of the contract work. However on account of non-supply of Schedule "B" stores and non-payment of R.A.R. bills he suffered huge loss. Periodical Bills were submitted including for the losses where claims in respect of the losses were made with def. No. 3 from time to time requesting him to pay the same who assured the plaintiff at every occasion that the claims in respect of the losses and extra cost will be paid to him at the time of the payment of the final bill. However the def. No. 3 failed to include the claims of losses and extra costs in the final bill. Plaintiff at first signed the final bill under protest reserving his right to the claim but def. No. 3 by his letter dated 30-3-89 informed the plaintiff that the payment of the bill will not be made until the plaintiff withdrew the endorsement made by him in the final bill. Def. No. 3 also requested the plaintiff to withdraw the endorsement with a view to keep good relation with the department in future days to come. Hard pressed for the need of money to pay the workers etc. plaintiff removed the endorsement of protest and received the payment of the final bill on 31-3-89. Thereafter the plaintiff by his letter dated 3-4-89 informed def. No. 3 that he had withdraw his endorsement of protest from the final under duress and compulsion and will soon be preferring his claim for the losses. By letter dated 4-4-89 the plaintiff lodged his claim with the Chief Engineer with the provision that if the payment of claims were not made within 15 days the matter (Claims) will be treated as disputed. No attention however, was paid to the appellants claims as by letters dated 23-5-89 and 25-5-89 defendant No. 3 refuted plaintiffs claim. The Plaintiff thereafter by letter dated asked the Chief Engineer to appoint arbitrator under the terms of the contract. Getting no response in that regard from the Chief Engineer an application under Sections 2-8-20 of the Arbitration Act was filed by the Plaintiff in the Civil Court with the prayer that the Chief Engineer may be directed to file the arbitration agreement in the Court and to direct the defendants to refer the dispute with regard to the claim between the appellant and the respondent for arbitration failing which the Court may itself appoint an arbitrator with regard to the disputed claims for adjudication by an arbitrator as per the arbitration agreement.

3. Defence taken up by appellant in the trial Court was that no dispute in regard to any of the Plaintiff claims subsisted for being referred for arbitration in view of the certificate of final settlement given by the Plaintiff at the time of making payment of the final bill. This however, was denied by the respondent with the contention that final settlement of the claims and certificate in respect thereof was given by him under coercion and duress hence such certificate of final settlement given by him did not prevent him from making the claim for the losses and extra costs incurred on account of non-supply of Schedule "B" stores. The contention of the respondent has been upheld by the trial Court. The trial Court decreed the suit and issued the direction to the appellant for referring the dispute in regard to plaintiff respondents claims to the arbitrator within a period of one month failing which it reserved to itself the power to pass necessary order

to refer the matter of dispute for arbitration to the arbitrator. Aggrieved by the said order and direction, present appeal has been filed by the defendants u/s 39 of the Arbitration Act.

4. At the outset, Mr. D. K. Bhattacharyya, learned senior advocate appearing for the respondent along with Mr. B. M. Choudhury, advocate raised preliminary objection against the maintainability of the appeal on the ground that the order impugned in the appeal is not an appellable order hence, the appeal is incompetent. I am not impressed from the contention of the learned counsel on this point. Filing of appeal is covered by Sec. 39. Appeal is maintainable u/s 39 against any of the order which fall within its various clauses including Clause (iv) of Section 39, Clause (iv) provides for an appeal against an order for the filing or refusing to (the) filing of any arbitration agreement. In view of the fact that the trial Court has granted the relief by means of the impugned order against the defendants requiring it to file the arbitration agreement in the Court hence, the order under challenge in this appeal is covered by Clause (iv). The present appeal having been filed against such order is therefore competent. I find no legal justification whatsoever in the objection raised by Sri Bhattacharyya against maintainability of the appeal. In my opinion in view of Clause (iv) of Section 39 of the Arbitration Act, the appeal is maintainable. The preliminary objection of Sri Bhattacharya is accordingly rejected.

5. Mr. Debasis Sur, learned Additional Central Govt. Standing Counsel has put in appearance on behalf of the appellants. He assailed the Impugned order with the contention that the trial Court committed grave illegality in passing the impugned order totally ignoring the law laid down by the Supreme Court in P. K. Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corpn. 1994 (3) SCC 126 . On the contrary it has wrongly placed reliance on another Judgment of the Supreme Court in Union of India (UOI) and Another Vs. L.K. Ahuja and Co., According to Mr. Sur, once respondent gave certificate of final settlement and accepted the payment of the final bill as was prepared by appellants nothing under the Contract or under the arbitration agreement was left to be settled by the arbitrator. Above contention of Mr. Sur is based on the judgment of the Supreme Court in M/s. P. K. Ramaiah (supra).

6. Mr. D. K. Bhattacharyya, learned senior advocate however maintained that the judgment and order under appeal is liable to be upheld as it suffers with no illegality. Sri Bhattacharyya contended that it is not open for the Civil Courts while entertaining application u/s 2/8/20 of the Arbitration Act, to judicially deal with the question as to whether certificate of final settlement of the claims as given by the plaintiff respondent for receiving payment of the final bill as prepared by defendants would prevent the plaintiff respondent from putting up additional claims on the plea that the said certificate of settlement of accounts was obtained from the plaintiff by the defendant under duress and by taking resort to unfair means, In support of his above contention Shri Bhattacharyya placed strong reliance on Union of India (UOI) and Another Vs. L.K. Ahuja and

Co., . He maintained that despite giving the certificate of full and final settlement of claims by the plaintiff-respondent there may still remain certain claims for adjudication in respect whereof he could make demand for arbitration. For this reason it will be within the domain of arbitrator to look into those claims vis-a-vis the alleged certificate of full and final settlement of the claims. Mr. Bhattacharyya further contended that the trial Court in the circumstances was legally justified in referring the matter of disputed claims to the arbitrator and for that purpose requiring the appellant to appoint an arbitrator to allow the matter to be adjudicated by the arbitrator.

7. In view of the trial contention made by the learned counsel for the parties and in the light of the Judicial precedents cited by them in support of their respective contentions, it is necessary to properly appreciate the law laid down by the Supreme Court in this context. However, before that I would like to give my own appreciation of the matter.

8. Once a person gives a certificate of final settlement of his contractual claims it will be rather unfair on his part to go back on his words so as to ask for settlement of some new claims allegedly remaining to settle under the same contract on the plea that while certifying the final settlement he was either misled in giving the certificate or that he gave such certificate under duress or under some compulsion. Where such plea is raised the first question which would arise will be whether the certificate of final settlement of the claims arising from the contract was given voluntarily or under coercion. This question in my opinion cannot be settled by the arbitrator. Such a plea can however be raised only in a suit if filed for cancellation of the documents the question which according to the claimant had been obtained from him under duress or coercion. So long the document endorsing final settlement remains it is not open for him to put up other claims under the contract. In the above background I would now revert to the law laid down on the subject by the Supreme Court. First I will deal with decision in P. K. Ramaiya which is sheet anchor of the appellants argument. The brief facts which were involved in that case were as follows :--

The appellant had entered in a contract with the respondent on February 7, 1979 to complete the site levelling and grading for Ramagundam Super Thermal Power Project Ramagundam, Karimnagar District, A.P. for a sum of Rs. 1,74,33,334/- and the work had to be completed within 15 months. According to the appellant he completed the work. On December, 30, 1980 his claim for further amounts was rejected. On August 12, 1984 he sent letter requesting the respondent to settle his claim within a period of one month from the date of its receipt. Though the respondent promised in their letter dated November, 10 1984 and March 7, 1987 to refer the dispute for arbitration, no action in that behalf was taken under Clause 57 of the contract. On his application under Sections 8, 11 and 12 of the Arbitration Act. 1940, 5th Additional Judge, City Civil Court, Hyderabad, after hearing the parties, appointed Shri P. Chennakesava Reddy, retired Chief Justice, Gauhati High Court as an Arbitrator. On appeal the Court in C.R.P. Nos. 838 and

839 of 1990 by judgment dated October 31, 1991 held that the appellant had acknowledged the final measurement and accepted the payment in full and final settlement of the contract on May 19, 1981, therefore, there was no subsisting contract for reference. The learned Judge also found that after 3 years from the date of rejecting the claim, the claim was barred by the limitation set aside the order of the Civil Court. The matter was then taken in the Supreme Court.

9. After extracting Clause 57 of the contract Supreme Court observed in para 6 as follows :--

Thus it is clear that if there is an arbitrable dispute, it shall be referred to the named arbitrator. But there must be exist a subsisting dispute. Admittedly the appellant acknowledged in writing accepting the correctness of the measurements as well as the final settlement and received the amount. Thereafter no arbitrable dispute arises for reference".

10. Again in Para 8 of the report after noticing some Judicial precedent, Supreme Court observed as follows :--

"Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an after-thought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given".

11. Finally the Supreme Court observed as follows :

"Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration".

12. Shri Bhattacharyya tried to call out a fine distinction between the case decided by the Supreme Court and in the present case. According to him where as in Rammaiah objection regarding maintainability of the claims, on the ground of existence of final settlement of the claims was taken at a subsequent stage but in the present case the objection has been taken at the very outset. According to Sri Bhattacharyya until the arbitrator tests the worth of the certificate of full and final settlement it is not Just and proper to nip in the bud and deny a rightful claim. Shri Bhattacharyya however failed to point out how it makes any difference on the fate of a claim in case objection regarding its non-maintainability is made at the first or at a subsequent stage. Since objection to the maintainability of the claim goes to the root of the matter it is better raised at the earliest opportunity. As will be found in the Supreme Court's observation cited above the contract does not survive after final settlement of the dues. The point of distinction on this score which was attempted to be found by Shri Bhattacharyya does not exist. No doubt the Supreme Court has not specifically overruled its decision in Ahuja but its observations as cited above run contrary to

those made by it in Ahuja. It is noteworthy that both in Ahuja as also in Ramaiah the point of bar of limitation too was pleaded but the decision on that point has no impact on the main question about the substance of the contract after the issuance of the certificate of the final accord. This apart Ramaiah being a subsequent decision of the Supreme Court having been given the after noticing Ahuja's shall have precedence over Ahuja. This Court being bound by the decision/judgment of the Supreme Court u/s 141 of the Constitution cannot cut out a non-existent ground of distinction to ignore the law as propounded in Ramaiah. For the above reasons I do not find force in the contention of Mr. Bhattacharyya.

13. In Ahuja the Supreme Court has no doubt observed that though new claims, which are made after reaching of final accord, no doubt become weak but the claimant has a right to demand its reference to the arbitrator. The dictum no doubt supports Sri Bhattacharyya contention and the impugned order but in view of the law in Ramaiah the case cannot be decided on that basis. In my opinion decision in Ramaiah has application in the present case with all force which is binding on this Court. Accordingly, I hold that having given the certificate of final settlement in favour of the appellant the plaintiff is estopped from raising any further claims under the contract and to demand its reference to the arbitrator under the contract. The trial Court was not justified in directing the appellant to refer such new claims raised by the plaintiff-respondent for settlement by the arbitrator. The judgment and order passed by the trial Court being vitiated is accordingly set aside. In the result the appeal succeeds which is allowed with costs.