Mars Constructions Vs. Karnataka Bank Ltd.

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Court : Karnataka

Decided On : Jul-07-1995

Reported in : ILR1995KAR2884; 1995(6)KarLJ22

Judge : M.F. Saldanha, J.

Acts : Arbitration Act, 1940 - Sections 32

Appeal No. : R.F.A. No. 282 of 1995

Appellant : Mars Constructions

Respondent : Karnataka Bank Ltd.

Advocate for Def. : Y.V. Parthasarathy, Adv. for R-1

Advocate for Pet/Ap. : L. Govindaraju, Adv.

Disposition : Appeal dismissed

Judgement :

Saldanha, J

1. The appellants' learned Advocate points out that appellants 2 and 4 are the L.Rs. of deceased appellant No. 3 and that they are already on record. It is, therefore, unnecessary to take any further steps. I.A.II to stand disposed of.

2. The point involved in this Appeal is one of some consequence. The brief facts which are undisputed indicate that the appellants had availed of certain overdraft facilities from the respondent- Bank for a substantial sum of money aggregating to about Rs. 15 lakhs. Neither the loan amount nor the interest was paid whereupon, the Bank decided to refer the matter to Arbitration. Obviously, in order to provide for an expeditious Forum for the recovery of such outstandings, the Bank had entered into an Agreement with the appellants in October 1991 whereunder it was provided for that in the event of a dispute/difference, that the matter may be referred to Arbitration. On the Bank following this course of action, the respondents to the Arbitration Proceedings filed a suit before the trial Court contending that the Proceedings were without jurisdiction, the main ground being that there is no dispute in existence. They contend that the Bank and themselves are not at loggerheads in respect of anything and that it was because of financial stringency and a number of factors that had contributed to their inability to repay the loan that they were in default. The contention was that only in the event of a dispute arising, that the matter was to be referred to an Arbitrator for resolution of that and in the absence thereof, that the entire Arbitration Proceedings were uncalled for and were without jurisdiction.

3. The Bank seriously contested the suit and took out I All before the trial court for dismissal of the suit on the ground that under Section 32 of the Arbitration Act, that the suit was not maintainable in so far as the parties have by an Agreement in writing, agreed to refer the dispute to Arbitration. The learned trial Judge upheld this contention and dismissed the suit and it is against that order that the present Appeal is directed.

4. The main argument advanced by the appellant's learned Advocate is that the facts of this case will indicate that there is no dispute between the parties. She has submitted that even in response to the notice of demand received from the Bank, that her clients have only demonstrated their inability to pay, they have not disputed the fact that the amount was advanced to them, their liability to repay them etc. and that therefore, there is nothing that falls for adjudication before the learned Arbitrator. According to the learned Advocate, it is necessary to construe Clause 1 to the Arbitration Agreement which reads as follows:

'1. Any dispute/difference between the parties and the Bank touching rights and liabilities, pertaining to or connected with or incidental to the transactions between the parties and the Bank shall be referred to the sole Arbitrator to be appointed by the Chairman of the Bank for the time being from the panel of Arbitrators to be maintained by the Chairman from time to time. It shall be open to the Bank or the parties to move the Chairman of the Bank to make a reference to arbitration, whenever the occasion arises. The reference so made by the Chairman to any one in the panel shall be binding on the Bank and the parties and shall not be liable to be questioned.

Without prejudice to the generality of the clause above, it is hereby clarified that any dispute/difference pertaining to construction or interpretation of loan documents, rate of interest costs, charges, expenses etc. or anything connected with or incidental to the execution of documents or ancillary, thereto shall be deemed to be dispute covered by this Arbitration Agreement.'

5. The submission proceeds on the footing that the cause of action, if any, to refer the matter to the Arbitration could only arise if there has been a 'dispute/difference' between the parties. She submits that this requirement is condition precedent, because in that event, the Arbitrator will have to resolve the conflict that has arisen. The argument is reinforced by alluding to the second paragraph of Clause 1 wherein different heads have been set out such as interpretation of loan documents, rate of interest, costs, charges, expenses etc and the learned Advocate submits that in the event of the parties not being in agreement in relation to any of these factors alone, that the matter could be referred to Arbitration. It is her submission that if it is a question of mere enforcement of a liabiliy, that the only remedy lies in taking out appropriate legal proceedings before a Court and that an Arbitrator is not the designated authority for this purpose. As regards the reliance placed by the learned trial Judge on the Decision reported in AIR 1992 Delhi 55 Jhabbu Mal Jung Bahadur v. Nanak Chand Aggarwal and Anr, the learned Advocate submits, that the facts before the Court in the Delhi case were different in so far as the opposite party had remained silent when the notice of demand was made and in these circumstances, the Delhi High Court took the view that it constituted a dispute within the meaning of Section 2(a). It is her submission that

on facts, there is a total absence of a dispute in this case and that therefore, the invocation of the Arbitration Clause is unsustainable.

6. The learned Advocate who represents the respondent-Bank has supported the decision of the trial Court and he submits that the aforesaid Case applies squarely to the facts of the present case. He amplifies his submission by pointing out that in the aforesaid Decision, the Delhi High Court had occasion to consider the Case Law in detail over the years including the liability as enunciated by the Supreme Court as also some of the older Decisions going back to the year 1990, The Decisions in question are set out below:

1) : AIR1980 Delhi238

2) : AIR1979 Delhi58

3) : AIR1979 Delhi64

4) AIR 1972 J &K; 44 : 1971 J & K LR 503

5) AIR 1968 J & K 86 : 1968 Kash LJ 134

6) : [1964]2SCR599

7) : [1967]3SCR147

8) : AIR1954 Cal245

9) AIR 1920 Cal 143 : 23 Cal WN 704 : ILR 46 Cal 534

10) (1919) 23 Cal WN 707 (FNHL)

7. As regards this aspect of the matter, I do not need to enter into a detailed examination of the definitions of the term 'dispute' nor is it necessary to have to go to words and phrases Judicially defined etc. The Arbitration Clause which I have reproduced earlier, takes cognizance of two situations namely, disputes and differences. One does not have to do any legal hair-splitting or go into the genesis of the two terms, but what a Court is required to do is to glean from Clause 1 on a consideration of the facts of the present case as to whether the reference to

Arbitration was competent. To my mind, it was unnecessary for the appellants to have in so many words, raised a controversy with regard to any of the terms and conditions of the transaction or for that matter, to have raised a dispute in the conventional sense of the term before the Bank got the authority to refer the matter to Arbitration. In terms of the contract or the Agreement between the parties, an obligation was cast on the appellants to perform certain functions namely, to repay the amount in the manner as agreed to. Undoubtedly, they have stated that it was due to certain difficulties and inabilities that they had defaulted. The ground on which the default has taken place whether deliberate, voluntary or otherwise is to my mind, a secondary question because, the facts of the matter indicate that inspite of demands from the Bank, the money was just not forthcoming. The Bank was, therefore placed in a position whereby it had no option left except to approach a competent Forum to place the facts of the case before it and to obtain an order for payment of the amount. The Bank was certainly an aggrieved party to this extent and in these circumstances, it would be impossible to hold that a dispute or difference had not arisen. The only interpretation possible on a clear construction of Clause 1 is that it is an omnibus provision which would confer on the Bank the right to refer the matter to an adjudicating authority for purposes of resolution in a case where non-payment has taken place. It would be inconceivable to hold that such a situation is outside Clause 1 or that it is excluded. To my mind, Clause 1 is all inclusive or all pervasive and the Bank was more than fully justified in having referred the matter to Arbitration.

8. Once it is held that the parties have agreed to refer their disputes or differences to Arbitration, the bar under Section 32 of the Arbitration Act is automatic and the learned trial Judge was, therefore, perfectly justified in having dismissed the suit. It cannot be said that merely because some contentions were raised before the trial Court questioning the jurisdiction of the Arbitrator, that the Court should have mechanically continued with the hearing of that suit for the next two decades, if prima facie, and in law, the Civil Court had no jurisdiction to entertain a proceeding of that type. The learned Judge has not only acted correctly, but to my mind, this is a statutory practice and it is only hoped, that the trial Courts will hereinafter be more vigilant in sifting out, from out of the proceedings instituted before them

those which deserve to be heard on merits and those which require to be called at the initial stage itself.

9. Before parting with this case, I need to observe that, legal thinking in different parts of the World particularly in Europe and North America have now recognised the Alternate Disputes Resolution procedure commonly known as A.D.R. as a Forum to supplement the load on the Courts. It is well known that the Courts in this Country are heavily overburdened as the situation now exists and therefore, the Bank was well-advised in having provided for an alternate Forum by way of an arbitration. To my mind, the present appellants will not be prejudiced in the least in so far as it would be open to them to canvass all pleas before the learned Arbitrator and that to my mind, is an additional ground on which the order of the learned trial Judge requires to be upheld.

10. Having regard to the aforesaid position, the Appeal fails and stands disposed of. The interim orders, if any to stand vacated.

FOR BEING SPOKEN TO Dated 14th July 1995

1. After the Judgment had been dictated, appellants' learned Advocate brought it to the notice of the Court that there is a recent Decision of this Court reported in : AIR1995 Kant126 Karnataka Housing Board v. Vaijanath Tubewells Ltd, wherein an identical issue had arisen for determination before the Court in relation to an Arbitration Agreement. The learned Advocate submitted that unfortunately, that Decision was not brought to the notice of the Court and that if the ratio of that case were to be applied, that the Decision in this Appeal could possibly have been exactly the opposite. The matter was therefore, re-listed and I have heard the learned Advocates with regard to this aspect of the matter. The appellants' learned Advocate draws the attention of the Court to the various references in the Judgment in support of her argument that mere non-payment or inaction on the part of the appellants cannot be construed as involvement in a dispute nor can it justify the reference to arbitration in this instance. In particular, a parallel is sought to be drawn between the facts of the Decision referred to above and the present case and the argument proceeds on the footing that a learned Single Judge of this Court had earlier taken the view that a dispute had not arisen in that instance. The

learned Single Judge has observed that it is necessary for a Court making a reference to first establish the existence of an agreement for arbitration and secondly, examine as to whether a dispute has arisen which requires resolution through the arbitration process. On this basis, it is submitted, that since there is no dispute as far as the present proceedings are concerned, the appellants having in fact admitted their liability, that no reference could have been validly made to arbitration.

2. The respondents' learned Advocate has submitted that once the Agreement is admitted, the Bank is faced with a legal bar in the matter of filing proceedings before a Civil Court and that it was obliged to refer the matter to arbitration. He maintains that the mere act of non-payment of the Bank's dues over a period of time clearly constitutes a dispute and that consequently, even if this Court took another view on the facts of the earlier case, that the reference in the present instance is more than fully competent.

3. Quite apart from the fact that the present case is completely distinguishable on facts, the second aspect which requires to be taken cognizance of is that the agreement is admitted in the present proceeding. The non-payment is also admitted. The non-action on the part of the appellants or rather, non-observance of the legal obligations cast on them by virtue of the arrangement of contract between them and the Bank is no different in my mind, from a positive situation whereunder the party has refused to pay. It is a hair-splitting difference. What the Court is concerned with is the effect of the action. A party positively refusing to pay, adopting an aggressive posture or starting a dispute in conventional terms with the Bank would have precisely the same effect as that of a party Who either keeps silent or pleads helplessness. The institution finds itself in a position whereby the loanee has breached the obligations and the institution cannot recover its dues except by resort to an outside Forum. It is for that Forum to examine the justification of the Bank's claim and to pass appropriate orders and in these circumstances, the conduct of the defaulting party in so far as it amounts to a situation whereby the party for whatever reason is refusing to perform its obligations would clearly come within the ambit of a dispute. I have already dealt with the relevant Clause in the Arbitration Agreement which goes much further

than narrowing down the circumstances under which an arbitration reference can be made in so far as it is a composite arrangement which takes care of any situation which requires outside adjudication, directions or orders.

4. In these circumstances, the Decision relied on by the appellants' learned Advocate will not avail the appellants at all. It may be that on the facts of that case, the Court was inclined to hold that certain rights had not been transgressed, whereas on the facts of the present case, the situation is exactly the opposite.

5. Having regard to the above, I see no reason to vary the earlier Judgment of this Court. I.A.II fails and stands dismissed.

6. Appellant's learned Advocate is permitted to carry out necessary amendments in the cause-title.