

D.D.a Vs. Pandit Construction Co.

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Court : Delhi

Decided On : Apr-19-2012

Judge : Pradeep Nandrajog & Siddharth Mridul

Appeal No. : FAO (OS) 382 OF 2007

Appellant : D.D.a

Respondent : Pandit Construction Co.

Judgement :

PRADEEP NANDRAJOG, J.

1. Two issues are required to be reflected upon by us in the instant appeal. The first issue relates to the applicability of Section 28 of the Indian Contract Act 1872, post amendment vide Act No.1 of 1997 with effect from January 08, 1997 and the second issue relates to the plea raised by the appellant before the learned Arbitrator, which plea was accepted by the learned Arbitrator, but reversed by the learned Single Judge, on waiver of the respondent to press for the claim by accepting payment under the final bill towards full and final settlement of its claim.

2. The facts in brief are that appellant invited offers by issuing a Notice Inviting Tenders for constructing a local shopping centre at New Rajendra Nagar. Respondent's offer was accepted and this resulted in the party binding themselves to a contract as per agreement dated November 30, 1990. The stipulated date of completion was March 09, 1992 and admittedly the work lingered on till April 28,

1998. The final bill was prepared by the appellant on July 05, 1999, but best known to the appellant was cleared/passed by its Competent Authority on March 20, 2001. Respondent received payment as per the final bill cleared on April 12, 2001 and on July 09, 2001 raised claims against the appellant, which were referred to arbitration in view of there being an arbitration clause in the agreement between the parties, and while making the reference it was made clear that the issue pertaining to the claim being barred by limitation and additionally being waived would be adjudicated by the learned Arbitrator.

3. The learned Arbitrator pronounced the award holding in favour of DDA on the two technical pleas. But, the claims were adjudicated on merits as well by the learned Arbitrator, who clarified while so doing, that he did so to prevent a reference back to him if his award, if rendered only on the two technical pleas was set aside by the Court.

4. Indeed, the prophecy of the learned Arbitrator proved correct inasmuch as the award has been reversed on the two technical findings rendered by the learned Arbitrator.

5. Clause-25 of the General Conditions of Contract, which provides of reference of disputes to arbitration, inter alia, reads as under:-

“It is also a term of the contract that if the contractor(s) does/do not make any demand for arbitration in respect of any claim(s) in writing within 90 days or receiving the intimation from the Engineer-in-Charge that the Bill is ready for payment, the claim(s) of the contractor(s) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of all liabilities under the contract in respect of those claims.”

6. The clause in question, bars the remedy of preferring a claim pertaining to the bill which is certified as being ready for payment by the engineer-in-charge if the contractor does not dispute the same and raises a demand for the dispute to be referred to arbitration within 90 days of receipt of information of the bill being ready for payment.

7. With effect from January 08, 1997, as amended by Act No.1 of 1997, Section 28 of The Indian Contract Act, 1872 reads as under:-

“28. Agreements in restraint of legal proceedings, void - Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”

8. Hitherto fore i.e. prior to January 08, 1997, Section 28 of the Indian Contract Act, as interpreted by the Supreme Court in the decision reported as AIR 1997 SC 2049 National Insurance Co. Ltd. vs. Sujir Ganesh Nayak and Co. Ltd. declared void only such agreements which curtailed the period of limitation within which claims could be preferred and not such agreements which had the effect of forfeiture of the right to initiate action. It may be highlighted that though the decision was pronounced on March 21, 1997, probably for the reason nobody brought to the notice of the Supreme Court the amendment made to Section 28 of the Contract Act vide Act No.1 of 1997, the Supreme Court gave its opinion with reference to the un-amended section.

9. A perusal of the amended Section 28 of the Contract would reveal that both kinds of agreements i.e. which restrict the right, by providing a period within which claims could be preferred, as also agreement which extinguish the right of a party to prefer a claim or discharges any party from any liability under a contract on the expiry of a specified period are void.

10. Thus, the position post January 08, 1997 would be that Clause 25 of the General Conditions of Contract would be void.

11. Now, in the instant case, the agreement between the parties is dated November 30, 1990 i.e. a date prior to Section 28 of the Contract Act being

amended. But, the work lingered on till April 28, 1998. The final bill was prepared on July 05, 1999 and intimation of it be finalized sent to the respondent on March 20, 2001. The dispute was raised on July 09, 2001.

12. Now, retroactive is defined as acting backward and affecting what is past. In its strict application, a retroactive law takes away or impairs vested rights acquired under existing law and creates a new obligation and imposes a new duty or attaches a new disability in respect to past transactions. Alternatively it can be said that a law is retroactive if it affects transactions that have occurred or rights that have accrued before the law becomes operative and ascribes to them affects not inherent in their nature in view of the law in force at the time they occurred. However, in the instant case, we need not bother ourselves whether Section 28 of the Contract Act when amended by Act No.1 of 1997, in relation to the amendment incorporated is retroactive or not, for the reason as held by a Division Bench of the Court in the decision dated May 26, 2009 in Arb.P.No.246 of 2005 Ms. Chander Kant and Co. vs. The Vice Chairman DDA and Ors. Has held that law as in force has to be considered when a dispute arises and not when a contract was entered into. In the instant case, the dispute arose only when intimation of the bill being finalized was sent to the respondent on March 20, 2001. The decision reported as AIR 2003 Delhi 32 M/s Continental Construction Ltd. vs. Food Corporation of India and Ors. Is distinguishable on account of the fact that in said case the dispute arose under the contract prior to January 08, 1997 and thus the Court considered the applicable clause in the contract with reference to Section 28 of the Contract Act as per its pre existence.

13. Thus, the view taken by the learned Single Judge in the instant case is correct.

14. On the issue of waiver and abandonment, with respect to various decisions of the Supreme Court, a Division Bench of this Court had an occasion to pen its opinion in the decision reported as (104) 2003 DLT 469 Jain Refractory Erectors vs. Cement Corporation of India. The relevant paragraphs of the opinion read as under:-

“Is there an accord and satisfaction between the parties on 11.4.1980? Did the Arbitrator have jurisdiction to adjudicate upon the claim? Was there any subsisting

dispute or difference between the parties, which could be referred to the Arbitrator?

16. The aforesaid questions have received the attention of the Apex Court and are a subject matter of adjudication in the five cases noted above. Appellant relies upon two of them. The respondent relies upon three judgments of the Apex Court.

17. The judgment in *U.O.I. v. L.K. Ahuja* (supra), being the first on point of time may be noted. It is a judgment by a two-Judge Bench of the Apex Court. The issue arose in the context of limitation for invoking the arbitration clause and the invoking of the arbitration clause if the final payment was received by a party coupled with issuance of a no claim declaration. In the context of the twin issues raised it was held as under:

"In view of the well-settled principles we are of the view that it will be entirely wrong to mix-up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act, and, secondly, whether the claim to be adjudicated by the Arbitrator, was barred by lapse of time. The second is a matter which the Arbitrator would decide unless, however, if no admitted facts a claim is found at the time of making an order under Section 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case, the claim for reference was made within three years commencing from April 16, 1976."

18. The aforesaid observations were considered in the second judgment in a *P.K. Raimaia's* case (supra). The said judgment is again by two Judges. It was noted in the said judgment that there was a dispute between the parties pertaining to measurement and payment under the final bill. Parties had deliberated upon the said difference and on May 19, 1981, the contractor had made, in his own hand the endorsement that: "final measurement and payment accepted in full and final settlement of the contract." Later on the contractor sought to wriggle out of the

same by pleading coercion. Matter was sought to be referred to arbitration. It was declined and the matter came up before the Supreme Court. The contractor relied upon the judgment in L.K. Ahuja's case. Dealing with the issue, it was held as under:

".....In L.K. Ahuja and Company case this Court while laying the general law held that if the bill was prepared by the department, the claim gets weakened. That was not a case of accord and satisfaction but one of pleading power of limitation without prior rejection of the claim. Therefore, the ratio therein is of little assistance."

19. It was held that admittedly the full and final satisfaction was acknowledged in writing and the amount was received unconditionally. Thus, there was accord and satisfaction by final settlement of the claims. It was held that the subsequent allegation of coercion is an after-thought and a device to get over the settlement of the dispute. The Apex Court held that there was no existing arbitrable dispute capable of reference to the arbitration. The decision of not referring the dispute to arbitration was upheld, the appeal was dismissed.

20. In the third case, Nathani Steels Ltd. (supra), we may note that the judgment is by a Three-Judge Bench. The facts were similar. Contractor's claim under the final bill was disputed. Parties sat across the table and negotiated. Settlement was arrived at. Payment was received and thereafter the contractor sought reference of the dispute to arbitration. It was held as under:

"It appears that the dispute which arose on account of the non-completion of the contract came to be settled by and between the parties and the settlement was reduced to writing as found in document dated 28.12.199 (Exh. 'F' at p. 236). By this document the disputes and differences were amicably settled by and between the parties in the presence of the Architect on the terms and conditions set out in Clauses 1 to 8 thereof. There is no dispute that the parties had, under the arrangement, arrived at a settlement in respect of disputes and differences arising under the contract then existing between the parties. This document bears the signatures of the respective parties. There is also a reference in regard to discussion that had ensued prior in point of time before the parties came to a final

amicable settlement of the disputes and differences."

"In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the arbitration clause. We are, Therefore, of the opinion that the High Court was wrong in the view that it took."

21. In the 4th judgment, Union of India v. Popular Builders, which again is a judgment by a Three-Judge Bench, it was noted that the agreement between the parties contained an arbitration clause and that after completion of the work a final bill was raised. There was dispute pertaining to the claim under the final bill. A settlement was arrived at. The contractor agreed to accept the final bill without demur and indeed received payment for the same. Contractor claimed that dispute subsisted. Matter was referred to arbitration. Arbitrator made an award in favor of the contractor. Award was challenged as being without jurisdiction on the ground that there was no subsisting dispute, which could be referred to arbitration and hence the Arbitrator had no jurisdiction. Following the ratio of law in Nathani Steels Ltd. and P.K. Raimaia's case it was held that the existence of a dispute being the condition precedent for appointment of an Arbitrator, the matter being settled and the contractor receiving the payment pursuant to the settlement, there was no subsisting dispute, which could be made a subject matter of reference of an arbitrable dispute.

22. In the 5th judgment Jayesh Engineering Works (supra), which is a judgment by a two-Judge Bench, the Apex Court relying upon L.K. Ahuja's case came to the conclusion that notwithstanding the receipt of payment in full and final settlement of the works the appellant was entitled to have the matter referred to arbitration. The issue was decided by the Apex Court as under:

"(1) The appellant offered Tenders I and II to the respondents, pursuant to which certain civil works were carried out and in respect of which they made a claim for payment of money. Although several claims had been made by the appellant, ultimately on 6.2.1989, the respondents intimated the appellant to receive a cheque for a sum of Rs. 2,79,600/- in full and final settlement of the works relating

to Tenders I and II. The appellant acknowledged the same by endorsing on the said letter stating that he had received the said amount as full and final settlement and he had no further claim in that regard. Thereafter, he wrote a letter dated 24.2.1989 stating that his statement that payment had been accepted by him on 6.2.1989 in full and final settlement is not correct and still there are outstanding dues which need to be paid otherwise the matter will have to be referred to arbitration in terms of Clause 37 of the agreement. Pursuant to the said notice each of the parties nominated their respective Arbitrators. At that stage, an application was filed under Section 33 of the Arbitration Act seeking a declaration that the agreement dated 7.4.1981 between the parties no longer subsists as the work has already been completed and the payment was received by respondent in full and final settlement. It was also contended that the clause providing for reference of disputes to arbitration is not attracted in such a situation. In an identical situation, this Court in *Union of India v. L.K. Ahuja and Co.*, held that on completion of work, the right to get further payment gets weakened but whether the claim subsists or not, is a matter which is arbitrable. When this direction was cited before the High Court, the same was distinguished by stating that it was a decision on its own facts and has no application to the case. We find that this view does not appear to be correct. Whether any amount is due to be paid and how far the claim made by the appellant is tenable are matters to be considered by the Arbitrator. In fact, whether the contract has been fully worked out and whether the payments have been made in full and final settlement are questions to be considered by the Arbitrator when there is a dispute regarding the same. We, Therefore, set aside the order made by the High Court and dismiss the application filed under Section 33 of the Arbitration Act. Now proceedings before the Arbitrator/s will have to be continued in accordance with law.

(2) The appeal is allowed. No costs."

23. What would be the legal position pertaining to the issue of accord and satisfaction culled out from the aforesaid five judgments of the Apex Court? The observations made in *L.K. Ahuja's* case have been explained in *P.K. Raimaia's* case, followed in *Nathani Steel's* case and reiterated in *Jayesh Engineering Works*. If there is a considered endeavor made by the parties to settle the dispute

and the dispute is settled between the parties resulting in an accord and satisfaction of the dispute, no dispute would subsist thereafter and as a result there would be no existing arbitrable dispute capable of being referred to arbitration.”

(Emphasis Supplied)

15. Applying the law afore-noted, to the facts of the instant case evidence evidences that the final bill was cleared for payment on July 05, 1999, but for reasons best known to the appellant intimation thereof was sent to the respondent on March 20, 2001. The appellant received payment as certified under the final bill on April 12, 2001 and within three months thereof, on July 09, 2001 raised the dispute. The acceptance of payment under the final bill, as cleared for payment by the appellant, was not preceded by any dialogue between the parties, no considered endeavour was made by the parties to settle the dispute and thus it cannot be said that it is a case of receipt of payment under an accord which resulted in a satisfaction when the payment was received.

16. This Court takes cognizance of the fact that Government Departments insist as a matter of rule that while receiving payments, receipts should be executed as per proforma prepared by the Government Departments, which proforma as a matter of routine records that full and final payment is being received under the bill. Such compulsive execution of the receipts would not amount to an act of waiver or abandonment for the reason both waiver and abandonment are conscious intentional acts.

17. The view taken by the learned Single Judge on the second point is also correct.

18. Neither before the learned Single Judge, nor before us arguments were advanced with respect to such claims which were allowed by the learned Arbitrator and thus we need not reflect upon the legality of the adjudication by the learned Single Judge with respect to the third limb of the award.

19. The appeal is accordingly dismissed, but we refrain from imposing any costs.

20. Under interim orders passed in appeal, the decretal amount has been deposited by the appellant of which 50% has been released to the respondent upon furnishing security and thus we discharge the security. Remaining 50% has been deposited in a fixed deposit and thus we direct that the said deposit, together with interest accrued thereon be released in favour of the respondent.

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