Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 23 OF 2017
WITH
CIVIL APPLICATION NO. 25 OF 2017

M/s. Gammon India Ltd.] Appellant

Vs.

M/s. VVR Crushers and Constructions,] Respondent

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Mr. Rashmin Khandekar i/b G.H. Shukla a/w K.R. Singh, for appellant.
Mr. Rahul Karnik, for respondent.

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CORAM : R.G. KETKAR, J.

DATE : 14th JULY, 2017.

P.C.

Heard Mr. Khandekar, learned Counsel for the appellant and Mr. Karnik, learned Counsel for the respondent at length.

2. By this appeal u/s 37 of the Arbitration and Conciliation Act, 1996 [for short 'Act'], the appellant hereinafter referred to as 'defendant' has challenged the judgment and order dated 13th February, 2017 passed by the learned Judge presiding over Court Room No. 27 of the Bombay City Civil Court at Mumbai in Notice of Motion No. 4477 of 2014 taken out by the defendant in Summary Suit No. 639 of 2014 instituted by the respondent

hereinafter referred to as 'plaintiff'. Defendant took out that Notice of Motion for dismissal of the suit on the ground that suit is not maintainable and City Civil Court has no jurisdiction to try and entertain the suit in view of Section 8 of the Act. In the alternative, defendant prayed for framing issue u/s 9-A of the Code of Civil Procedure, 1908 [for short 'C.P.C'] for framing preliminary issue as to the maintainability of the suit and jurisdiction of the City Civil Court in view of arbitration clause.

3. In support of this Petition, Mr. Khandekar submitted that the learned trial Judge committed serious error in holding that the defendant has admitted its liability. He submitted that said finding is clearly perverse. He submitted that sub contract No. 8441 dated 5th January, 2010 and 9th January, 2010 was issued by the defendant in favour of the plaintiff. Clause 12 provides referring disputes arising out of sub contract between the parties to Chief Engineer of the Company (other than engineer concerned with this contract) nominated by the Company. Award of the arbitrator so nominated shall be conclusive and binding on the parties to the contract. He submitted that once there is arbitration clause, parties are mandatorily required to be referred to the arbitration. He also relied upon amended Section 8 (1) of the Act. It lays down that a judicial authority, before an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then,

notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. In the present case, valid arbitration agreement exists between the parties. Defendant has also not submitted his first statement of defence on the substance of the disputes. As defendant has complied with all the requisitions of Section 8 of the Act, the trial Court had no option but to refer the parties to arbitration.

4. Mr. Khandekar further submitted that the plaintiff has relied upon so-called Total Liability Statement dated 24th February, 2011. Representative of the defendant merely acknowledged receipt of the said statement. He did not admit contents of the said statement. Present suit is instituted on 25th March, 2014 which is also time barred. In support of this submission, he relied on Article 137 of the Limitation Act, 1963.

5. In support of his submissions, Mr. Khandekar relied upon decision of the Apex Court in the case of **Sant Lal Mahton Vs. Kamla Prasad and others, A.I.R1951 Supreme Court 477**. Mr. Khandekar also invited my attention to Section 19 of the Limitation Act to contend that there has to be acknowledgment of the payment in the handwriting or in a writing signed by the person making the payment. In the present case, there is no acknowledgment in the handwriting of the defendant or in a writing signed by the defendant or its representative. As the requirement of proviso to Section 19 is not fulfilled in the present

case, the plaintiff cannot claim fresh period of limitation from 28th March, 2011 when the alleged payment of Rs. 19,80,000/- was made by the defendant. In support of this submission, he relied upon decision of Apex Court in the case of **Sant Lal** [supra] and in particular paragraphs 9 and 10 thereof. He also relied upon following decisions:

[2] **Ion Exchange (India) Ltd Vs. MSK Projects (India) Ltd, 2005 (4) ALLMR 645** and in particular paragraphs 8 to 10 thereof to contend that Section 8 of the Act is applicable even to suits instituted under Order- XXXVII of the C.P.C. He submitted that in the present case, the defendant has complied requirements of Section 8 of the Act. The defendant has not filed first statement on the substance of the dispute. Section 8 of the Act is applicable even in a suit instituted under Order- XXXVII.

[3] **Mr. Milind s/o Dattatraya Mahajan & Ors. Vs. Mr. Pramod s/o Deshraj Budhraja, Arbitration Appeal No. 18 of 2015** decided by this Court [Coram: R.K. Deshpande, J.] on 29th February, 2016 to contend that in the absence of an application for leave to defend as contemplated by sub Rule-(5) of Rule-3 of Order-XXXVII, application u/s 8 of the Act is maintainable.

6. On the other hand, Mr. Karnik supported the impugned order. He invited my attention to Total Liability Statement which was signed by the representative of the defendant on 24th February, 2011. He submitted that the defendant had paid Rs. 19,80,000/-

after deducting TDS on 28th March, 2011. He further invited my attention to a letter dated 7th February, 2014 addressed by the plaintiff to the defendant referring to e-mail dated 26th March, 2013, wherein the plaintiff had requested the defendant to pay balance amount of Rs. 43,50,491/-. He invited my attention to paragraphs 10 and 11 of the plaint as also affidavit filed by Mr. J.L. Ashar, Vice President of the defendant company. Mr. Karnik submitted that at no point of time, the defendant has disputed correctness or otherwise of Total Liability Statement dated 24th February, 2011. That apart, in pursuance thereof, in fact on 28th March, 2011, defendant had paid Rs. 19,80,000/-. Though e-mail dated 26th March, 2013 as also letter dated 7th February, 2014 was received by the defendant, defendant never disputed its liability of payment of Rs. 43,50,491/.

7. In support of his submission, Mr. Karnik relied on following decisions:

[1] **Maruti Udyog Limited Vs. Mahalaxmi Motors Limited, ARBLR 2002 1, 271** decided on 5th December, 2001, to contend that where there is admitted liability, arbitration clause cannot be invoked.

[2] **Captin Amar Bhatia Vs. The Kingfisher Airlines Limited, CS (OS) No. 1151 of 2013** decided on 3rd April, 2014 by Delhi High Court [Coram: Rajiv Sahai, Endlaw, J..] to contend that there is really no denial or dispute raised by the defendant to the claim of the plaintiff for recovery of Rs. 43,50,491/-.

[3] **M/s. Fenner (India) Ltd. V/s M/s. Brahmapurta Valley Fertilizer Corporation Ltd. CS (O.S.) No. 1281 of 2014** decided on 8th January, 2016 by Delhi High Court [Coram: Jayant Nath, J.] to contend that application u/s 8 cannot be allowed as arbitration clause is not invokable in respect of admitted liability.

8. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused material on record. As noted earlier, the plaintiff has instituted suit under Order-XXXVII of C.P.C In paragraphs 10 and 11, the plaintiff has asserted thus:

> "The Plaintiff submits that despite protest by the plaintiff for the proposed unauthorized deductions from the bills submitted by the plaintiff, the defendants have issued Total liability statement signed and sealed by the Defendant through their DGM Mr. Alok Kumar on 24th February, 2011, acknowledging and admitting their legal liability in respect of all the aforestated work orders and LOIs to extent of Rs. 63,50,491.00 only, and promised and assured to pay the amount of Rs. 63,50,491.00only and promised and assured to pay the amount of Rs. 63,50,491/- forthwith. Though the sum agreed to be paid, is contrary to the terms of contract and unreasonable, the Plaintiff left with no other alternative but was compelled to accept the same in view of assurance of immediate payment. The Plaintiff through their Project Manager has accepted the said Total Liability Statement issued by the Defendant by putting their signature on the same. The Defendant under the said Total Liability Statement signed and executed on 24th February, 2011 have accepted their liability towards the Plaintiff to the sum of Rs. 63,50,491/- (Rupees Sixty

> Three Lakhs Fifty Thousand Four Hundred Ninety One only). Hereto annexed and marked as EXHIBIT-E is the copy of Total Liability Statement issued by the Defendant on 24th February, 2011.
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> 11.The Plaintiff submits that despite the Defendants agreeing and admitting to pay an amount of Rs. 63,50,491/-(Rupees Sixty Three Lakhs Fifty Thousand and Four Hundred Ninety One Only) at the earliest, the defendants wilfully failed and neglected to so it was only after rigrous follow ups the Defendant made part amount of Rs. 19,80,000/- (Rupees Nineteen Lakhs Eighty Thousand only) vide Cheque No. 226122, which was issued after deductions of TDS as such the Defendants are still liable to pay balance amount of Rs. 43,50,491/- (Rupees Forty Three Lakhs Fifty Thousand Four Hundred Ninety One Only). The Plaintiff submits that the part payment of Rs. 19,80,000/- was credited to the plaintiffs account vide Cheque No. 226122 on 28-03-2011 after deducting TDS of Rs. 20000/- (Twenty thousand) from the gross amount of Rs. 20,00,000/- released by the defendant. The Plaintiff craves leave of this Hon'ble Court to refer and rely upon the bank statement as and when produced.

9. The plaintiff has relied upon the Total Liability Statement which is admittedly signed by the representative of the defendant on 24th February, 2011. It is the case of the defendant that representative of the defendant has acknowledged receipt of that statement and has not admitted contents of the said statement. Mr. Khandekar submitted that the said statement is not issued by the defendant. Amount is also not receivable by the defendant and that statement is issued by the plaintiff. *Prima facie*, it is not possible to accept this submission. In pursuance of this statement,

in fact on 28th March, 2011, defendant had made part payment of Rs. 19,80,000/- after deducting TDS. Not only that, the plaintiff had sent e-mail on 26th March, 2013 and letter dated 7th February, 2014 calling upon the defendant to pay balance final amount of Rs. 43,50,491/-. The defendant did not respond to this letter raising objections towards payment of Rs. 43,50,491/-. A perusal of affidavit in support of notice of motion filed on behalf of the defendant also does not remotely indicate that the defendant has disputed Total Liability Statement, more so, in the light of paragraphs 10 and 11 of the plaint extracted hereinabove.

10. Mr. Khandekar submitted that defendant has not applied for leave to defend and, therefore, did not deal with contentions raised in paragraphs 10 and 11 of the plaint. Defendant also did not deal with Total Liability Statement. He submitted that if defendants were to deal with these contentions, as also Total Liability Statement, it would have been treated as its first statement on the substance of the dispute.

11. Having regard to the correspondence between the parties as also conduct of the defendant, I do not find any merit in the submission of Mr. Khandekar that the defendant has disputed the Total Liability Statement which was received by the representative of the defendant on 24th February, 2011.

12. Mr. Khandekar relied upon Section 19 and in particular proviso thereto as also Article 137 of the Limitation Act. Article

137 of the Limitation Act prescribes limitation of three years when right to apply accrues. In the present case, the defendant has not denied its liability to pay amount to the plaintiff. In other words, right to apply has not accrued to the plaintiff so as to institute the suit within three years from that date of denial of the defendant.

13. Mr. Khandekar relied upon a decision of **Sant Lal** [supra]. In that case, respondents/plaintiffs instituted a suit against the appellant for enforcement of a simple mortgage bond by sale of mortgage property. Mortgage bond was dated 8th April, 1927. Executants had put their signatures to the document on 12th April, 1927 and it was registered on a later date. Due date as given in the Mortgage was 6th March, 1928. Suit was instituted on 14th March, 1940. In the plaint, the plaintiff asserted that defendants made 8 payments in all, aggregating a sum of Rs. 780-9-0 in part satisfaction of the debt since execution of mortgage bond. First payment of Rs.300/- was made on 21st January, 1928 and the last payment was made on 15th May, 1936. In the plaint which was originally instituted, prayer was only for mortgage decree in the usual form. After hearing was closed, the plaintiffs were apprehensive that the Court might not hold the bond to be properly attested.

14. In these circumstances, they prayed for an amendment of the plaint which was allowed by the Court. By the amended plaint the cause of action was stated to arise from the different payments made on different dates as were stated in para 7 of the

plaint. The Apex Court observed that there was neither any averment nor any proof that any of these payments was acknowledged in writing prior to the institution of the suit. The Apex Court also noted that none of the payments specified was endorsed on the bond itself and there was no acknowledgment either in the handwriting of or signed by the debtors prior to institution of the suit. Trial Court relied on paragraph 15 of the written statement filed on behalf of defendants No.1 to 3 wherein they admitted not only that payments specified in the plaint were actually made on respective dates but asserted that there were other payments besides it which reduced the debt still further as the plaintiffs did not give any credit to the defendants.

15. Apex Court considered Section 20 of the Limitation Act, 1908 which is pari materia with Section 19 of the Limitation Act, 1963. In paragraph 9, Apex Court held that to attract an operation of Section 20, two conditions are essential: first the payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. In paragraph 10, Apex Court held that while it is not necessary that the written acknowledgment should be made prior to the expiry of the period of limitation, it is essential that such acknowledgment whether made before or after the period of limitation must be in existence prior to the institution of the suit. To claim exemption u/s 20, the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the

principal, but that such payment had been acknowledged in writing in the manner contemplated by that section. The ground of exemption is not complete without the second element and unless both these elements are proved to exist on the date of filing of the suit. In that case, due date as given in the mortgage was 6th March, 1928 and suit was instituted on 14th March, 1940. In the present case, there is no denial of liability and in fact, defendant made part payment. The decision in **Sant Lal's** case [supra] is not applicable to the present case.

16. Mr. Khandekar relied upon decision in the case of **Milind /so Dattatraya Mahajan, Arbitration Appeal No. 18 of 2015 (supra)**. In that case, the learned Single Judge referred to the decision of **Ion Exchange (India) Ltd v. MSK Projects (India) Ltd., 2005 (4) Mh. L. J. 921** [supra] which deals with Section 8 of the Act vis-a-vis Order-XXXVIII of the C.P.C. In that case, the learned Single Judge held that even in the absence of application for leave to defend as contemplated in Order-XXXVII, application us/ 8 of the Act can be entertained and decided by the Court. There is no dispute with the proposition laid down either in the case of **Ion Exchange (India) Ltd or Milind s/o Dattatraya Mahajan in Arbitration Appeal No. 18 of 2015.**

17. While dismissing Motion, learned trial Judge has referred to clause 12-arbitration clause as also Total Liability Statement at Exhibit E. Learned trial Judge also referred to the decision of **Maruti Udyog Limited Vs. Mahalaxmi Motors**

Limited, AD(DEL) 2002, 2, 765. In paragraph 12, the learned trial Judge observed that liability of payment by the defendant to the plaintiff is not in dispute. In view thereof, as there is no dispute about liability to pay amount by the defendant, clause-12 is not applicable. After considering the material on record, I do not find that the trial Judge has committed any error in passing the impugned order. Hence, Appeal fails and the same is dismissed.

18. In view of dismissal of appeal, Civil Application No. 25 of 2017 for stay does not survive and the same is disposed of.

[R.G. KETKAR, J.]