

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 181 OF 2017

in

ARBITRATION PETITION NO.939 OF 2016

The Bombay Dyeing and Manufacturing Co.Ltd.)
A company incorporated under the provisions of)
the Indian Companies Act,1866).. Appellant

versus

M/s.I.R.Enterprises)
A partnership firm registered under the)
Partnership Act.).. Respondent

Ms.Tanmayi Rajadhyaksha, Ms.Rujuta Patil, Ms.Niyathi Kalra i/b.
Negandhi Shah & Himayatullah, for the Appellant.

Mr.Dinesh Kumar Jain i/b. Pravesh Anand Gupta, for the Respondent.

**CORAM: NARESH H.PATIL AND
G.S.KULKARNI, JJ**

JUDGMENT RESERVED ON: 4th June, 2018

JUDGMENT PRONOUNCED ON: 8th June, 2018

JUDGMENT (Per G.S.Kulkarni, J.)

1. This appeal under Section 37 of the Arbitration and Conciliation Act,1996 (for short 'the Act') arises from the judgment and

order dated 18 November 2016 passed by the learned Single Judge whereby the appellant's petition under Section 34 of the Act challenging the award of the sole arbitrator stands rejected.

2. The dispute between the parties arose under a contract entered between the parties in regard to the work of “mass excavation” for a textile mill building. On 7 January 2008 the respondent had submitted its offer to the appellant, which was accepted by the appellant and a work order dated 18 January 2008 (for short '**the contract**') was issued by the appellant in favour of the respondent.

3. The respondent having performed the contractual work submitted to the appellant, four running bills (R.A.bills) dated 19 February 2008, 5 March 2008, 15 April 2008 and 24 April 2008 for varied amounts. The appellant also made payments under the said R.A.bills on different dates, the last of such payment being made on 8 May 2008. However, in making payments under the said R.A.Bills, the appellant withheld total amount of Rs.39,73,294/- being 5% of the amount stated to be the retention money as per clause 1.10 of the contract and further an amount of Rs.14,00,823/- was retained towards other deductions.

4. The dispute between the parties was in regard to above amounts as retained by the respondent under clause 1.10 of the contract. It would be appropriate to extract the said clause being the focus of the disputes between the parties, which reads thus:-

“Clause 1.10:- 5% of the then value of work done towards Retention will be deducted from each R.A.Bills & the same shall be released after the Virtual Completion as certified by the Project Manager.”

5. As the said amounts were not released by the appellant, the respondent approached the appellant and made a demand for the said amounts by its letters dated 23 April 2009, 3 August 2009, 5 April 2010, 24 June 2010. The respondent ultimately by its Advocate's letter dated 29 March 2011 invoked the arbitration clause and sought a reference of the disputes to be adjudicated by the arbitral tribunal. In April, 2011 the respondent also filed winding up petition against the appellant for non payment of unpaid dues. The respondent thereafter filed an application under Section 11 of the Act seeking appointment of an arbitrator. By an order dated 25 November 2011 passed by this Court, the dispute was referred to be adjudicated by a sole arbitrator.

6. Before the sole arbitrator, the respondent in its statement of claim prayed for an award of Rs.53,74,119/- against the appellant, and further for an amount of Rs.46,21,742/- towards interest at the rate of 24% per annum from the period 1 June 2008 to 1 January 2012. The claim was resisted by the appellant by filing the statement of defence. The respondent also filed a counterclaim. The parties led their respective evidence. The learned Arbitrator considering the documentary and the oral evidence on record, passed an award dated 22 June 2015 allowing the respondent's claim holding that the appellant is liable to pay to the respondent an amount of Rs.53,74,118/- with interest at the rate of 12% from 1 June 2008 till payment and/or realization, with a further direction to pay to the respondent an amount of Rs.3,00,000/- towards the costs of the arbitration.

7. The appellant being aggrieved by the Award had approached learned Single Judge by filing a petition under Section 34 of the Act. The appellant's challenge to the award was principally on two counts, firstly that the learned Arbitrator has made the award contrary to the terms of the contract and more particularly clause 1.10 which permits, retention of

5% of the payment until a virtual completion certificate was issued by the project manager. According to the appellant, such a certificate was never issued and therefore, the respondent was not entitled to make the claim in the absence of a such certificate. Secondly it was contended that the claim for retention money under R.A.Bill No.1 was time barred. The learned Single Judge did not find favour in the contentions as urged on behalf of the appellant and dismissed the appellant's petition under Section 34 by the impugned order.

8. The learned Counsel for the appellant at the outset would state that the issue of limitation is not being pursued in this appeal. In assailing the impugned order the learned Counsel for the appellant submits that the award is contrary to Clause 1.10 of the contract as entered between the parties, inasmuch as the respondent was making a claim for payment of the retention money, in the absence of a virtual completion certificate which was required to be issued as per clause 1.10 of the contract. It is submitted that clause 1.10 which requires obtaining a virtual completion certificate from the project manager is an independent clause, and unless such a certificate was obtained any claim, even if made before the learned Arbitrator, was untenable. The second contention is

that the award is rendered illegal as the learned Arbitrator himself has undertaken to determine what was required to be inter se done between the parties as per clause 1.10, namely certification of virtual completion. It is submitted that the learned Arbitrator could not have substituted the working of the contract between the parties. The approach of the learned Arbitrator has rendered nugatory clause 1.10 and hence, the award was liable to be set aside.

9. On the other hand, the learned Counsel for the respondent has reiterated the respondent's submission as made before the learned Single Judge. He submits that it is not in dispute that several demands were raised by the respondent for release of the retention money, the demands having not been honoured, the arbitration clause was required to be invoked by the respondent. It is submitted that the learned Arbitrator has complete jurisdiction to decide all issues of disputes which had arisen between the parties, under the contract. It is submitted that the requirement of obtaining virtual completion to be certified by the Project Manger, as contained in clause 1.10 is being wrongly interpreted by the respondent. According to the learned Counsel, the appellant never felt the requirement of the virtual completion to be certified, as the appellant

never disputed completion of the contractual work. It is next submitted that there was no mechanism provided under the contract which would require the respondent to obtain a virtual completion certificate. It is untenable for the appellant to urge that till its officer (project manager) grants virtual completion certificate, the appellant would be entitled to withhold the payment. It is submitted that this would make a completely unreasonable and arbitrary reading of the said contractual clause namely that on one hand the virtual completion would not be certified by the project manager and on the other hand the respondent would be kept waiting for payment of the legitimate dues. In his submission, this is unreasonable and this can never be the intention, which can be gathered from the said clause of the contract. It is further submitted that the learned Arbitrator has adopted a correct approach on the basis of evidence as also has correctly interpreted in clause 1.10 of the contract, in holding that the retention money cannot be withheld by the appellant alleging non-compliance of clause 1.10 of the contract. It is submitted that the impugned order has correctly upheld the impugned award in dismissing the appellant's petition.

10. We have heard the learned Counsel for the parties. We have

also perused the record. The award of the contract and the completion of the work under the contract on 30 May 2008 appears to be not in dispute as also observed by the learned Single Judge. The only area of dispute is the insistence of the appellant that as per clause 1.10 of the contract (supra), the respondent was required to obtain a virtual completion certificate from the Project Manager, and having not obtained such a certificate, the respondent would not be entitled to claim the retention amount of 5% in four R.A.bills in question.

11. The parties in clause 1.10 of the contract agreed that 5% of the value of the work done towards retention would be deducted in each of the R.A.bills and the same shall be released after virtual completion as certified by the Project Manager. A reading of clause thus clearly indicates that it is the the appellant, who would deduct the said amount as also the project manager would be the appellant's agency, who would if at all certify the virtual completion if felt necessary by the appellant. The appellant has pointed out and conceded that the work was completed on 30 May 2008. Also prior to this date under different R.A.Bills, the payments were released deducting 5% retention amount, however, at no point of time the appellant appears to have had any issue as regards the

completion or the virtual completion. The appellant therefore never felt the need to have the requirement of a virtual completion to be verified and accordingly had not taken any steps to undertake and/or to examine the virtual completion, however at the same time retained the retention money payable to the respondent under different R.A.bills. The respondent in its several letters addressed to the appellant had made demand for the said amounts. There was no reply to these letters much less any assertion on the part of the appellant that the amount was retained only on the ground that the virtual certificate was not issued by the Project Manager as per clause 1.10 or that the respondent would be required to obtain such certificate. Thus, in our opinion, there was no justification on the part of the appellant to withhold the said amounts.

12. We are not impressed with the contention as raised on behalf of the appellant that the learned arbitrator had no jurisdiction to award the claim as made by the respondent, as awarding the claim was against clause 1.10 of the contract. This for the reason that once the parties had agreed to refer the disputes that had arisen under the contract to arbitration in pursuance of a clear arbitration clause which recites that “*all questions, differences and disputes arising between the parties hereto relating*

to any matter under or touching this Agreement, its performance breach of termination including interpretation of any clause therein shall be settled by Arbitration shall shall be conducted by an Arbitral Tribunal” then surely jurisdiction in regard to adjudication of all the issues of dispute under the contract, is deemed to be conferred on the learned arbitrator. The law in this regard is well settled. Once this is the agreement, we see no impediment for the learned Arbitrator to interpret the terms of the contract, examine the effect of the said clause and test how the parties acted under the same, so as to determine the entitlement of the claim as made by the respondent in the arbitration proceedings.

13. In our opinion, the learned arbitrator in paragraph 5.30 of the award has appropriately recorded a finding based on evidence qua the entitlement of the respondent to the claim amount. It is appropriately held that reading of clause 1.10 of the contract in the manner the appellant urged, would result in unjust enrichment of the appellant, whereby the appellant without jurisdiction withheld the amounts payable to the respondent, without the appellant having proved that the work was not done satisfactorily and also without having proved any loss or damage to the appellant. The learned arbitrator in the circumstances was right in

holding that the stand of the appellant was very unfair to withhold the claim amounts.

14. The award also records that the appellant's witness had stated in the evidence that he was not aware as to who was the Project Manager and also he was not conversant with the requirement to apply and obtain a virtual completion certificate. Further there was no procedure contemplated for an application to be made to the Project Manager under the contract, and even for the interim payment although certification was contemplated under clause 1.9 of the contract, however no such certification was made and nonetheless payments were released.

15. In our opinion, the learned Arbitrator was correct in recording finding that once the disputes have arisen and the disputes are a matter of consideration before an adjudicatory authority, namely as to whether the work was done in accordance with the terms of the contract, it was incumbent upon the respondent to establish and prove that the work was not done in accordance with terms of the the contract, so that a recourse to clause 1.10 of the contract can be said to be justified. The appellant having failed to prove that the work under the contract was not done as per the contract, there was no justification for the appellant to

withhold the retention money, on a mere and empty assertion that there is no virtual completion certification granted by the project manager.

16. The learned Single Judge in our opinion, has correctly observed that the appellant having not disputed that the work was completed by the respondent, the appellant could not have raised the issue of non-production of virtual completion certificate and on that ground withhold the retention money. As there was no dispute as raised by the appellant that the work was not completed, there was no situation brought about for a virtual completion certificate to be sought for. Also such a stand was never raised in the correspondence as held between the parties, prior to the institution of the claim by the respondent, before the learned arbitrator. It thus clear that though such a defence was raised by the appellant before the learned Arbitrator, it was unsupported by any material/any evidence in that regard. The interpretation of the terms of the contract as made by the learned Arbitrator is a plausible interpretation. As correctly observed by the learned Single Judge, there was no perversity in the impugned award which would require interference under the parameters falling under Section 34 of the Act.

17. We accordingly see no reason to interfere in the well reasoned order passed by the learned Single Judge. The appeal is devoid of merit. It is accordingly dismissed. No costs.

(G.S.KULKARNI, J.)

(NARESH H. PATIL, J.)