Jain Refractory Erectors Vs Cement Corporation of India Ltd. and Another

Court: Delhi High Court

Date of Decision: March 12, 2003

Citation: (2003) 5 AD 417 : (2003) 3 ARBLR 256 : (2003) 104 DLT 469 : (2003) 2 RAJ 456

Hon'ble Judges: Usha Mehra, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: A.P.S. Gambhir, for the Appellant; S.K. Taneja Kawal Nain and Puneet Taneja, for the Respondent

Judgement

Pradeep Nandrajog, J.
An agreement was executed between the appellant and the respondent No. 1 for the works listed there. Appellant

was awarded the work of ""erection of refractory materials at Akaltara Cement Project"" at Bilaspur (M.P.).

2. On 15.12.1980, the work under the contract was executed and completed. The final bill was raised by the appellant. The bill contained

payments for certain extra works, alleged to have been executed by the appellant.

3. The contract between the parties contained and arbitration clause being Clause No. 24. The same reads as under:

Clause 24:

In case of any dispute or difference arising between the parties of matters touching or the construction, meaning, operation or effect thereof the

terms of the contract or with regard to working of the contract or breach thereof, the accredited representative from both sides shall consult each

other and endeavor to settle the same. In case such settlement cannot be reached, the same shall be settled by a three member arbitration

committee to be constituted as under:

.....

4. The respondent did not agree to accept the final bill and release payment there under as claimed by the appellant. Differences arose between the

parties pertaining to the final bill.

5. Since the arbitration clause provided that prior to the reference of dispute to arbitration, the parties would endeavor to settle the same, the

appellant and the respondent in faithful compliance with the said contractual terms undertook the exercise of ""endeavoring to settle the dispute"".

6. The endeavor between the parties towards settlement was successful. On 11.4.1980 the parties reduced in writing the settlement arrived at. The

settlement was recorded and signed by the parties. The same is relevant and is being reproduced as under:

In terms of negotiation between CCI, Akaltara Management and Shri S.K. Jain, proprietor of M/s. Jain Refractories, New Delhi. The following

settlement have been arrived at against the extra claim submitted by Shri S.K. Jain.

(1) Dressing of Molar Bricks--30,000 molar bricks for which cutting was necessary has been allowed for payment at the rate of Rs. 0.65 per

brick.

(2) For corrugated mesh welding each point will be considered as two points as both sides of the corrugated mesh have been welded.

With the agreement of the above items all the claims of M/s. Jain Refractories are fully and finally settled and nothing is pending with Cement

Corporation of India Ltd., Akaltara against Contract No. Nil dated 26.9.1979.

Sd/- Sd/- Sd/-

(S.M. Bharkatia) (V.K- Rao) 11.4 Refs. Engg.

Head Burner Deputy Manager (MECH.)

Sd/-

(S.K.Jain)

M/s. Jain Refractory Erectors

Sd/- Sd/-

(D.S. Parthar) (K.P.Ghosh)

Manager (M and S) Deputy Manager (Finance)

7. In pursuance of the aforesaid settlement, on 12.4.1980, the appellant issued a no claim certificate and thereafter in terms of the settlement

recorded on 11.4.1980 received the final payment from the respondent in full and final settlement of the dues pertaining to the work done by the

appellant. Having done so, the appellant wrote letters to the respondent on various dates claiming that all the dues payable to the appellant had not

been paid. These letters were written on 2.7.1980, 6.2.1981, 19.7.1982, 4.3.1983, (sic.)4.1983, 27.4.1983 and 6.5.1983 thereafter on

9.5.1983, the appellant served a notice upon the respondent invoking the arbitration clause. Shri Ashok Kumar Sharma, Advocate, was

nominated by the appellant as its Arbitrator and the respondent was requested to nominate their co-Arbitrator within 15 days. It was stated in the

notice that if the respondent failed to nominate their co-Arbitrator, Shri Ashok Kumar Sharma, Arbitrator nominated by the appellant would

function as the sole Arbitrator. Since the appellant had, on 6.5.1983 written a letter to the respondent to the effect that its dues were still pending,

on 13.5.1983 the respondent wrote back, that in view of the settlement arrived at between the parties on 11.4.1980, the matter stood closed and

the appellant was not entitled to any amount.

8. The respondent did not nominate their co-Arbitrator on the ground that no dispute subsisted between the parties, which requires to be

adjudicated upon the matter on merit. Shri Ashok Kumar Sharma thereupon proceeded to act as sole Arbitrator. He published his award on

2.2.1984 in favor of the appellant and the same was sought to be made a Rule of the Court in proceedings initiated under Sections 14, 17 and 29

of the Arbitration Act, 1940, which proceedings were initiated by the appellant and were registered as Suit No. 232A/84.

9. The respondent filed objections to the award inter alias on the ground that there was no subsisting dispute between the parties and Therefore the

Arbitrator had no jurisdiction to make the award. In the objections it was pleaded that the perusal of the arbitration clause shows that at the first

instance parties would endeavor to settle their disputes and differences and only in the eventuality of no settlement being arrived at could the

question of appointment of Arbitrator arise.

10. The said objection of the respondent was accepted and it was held that the award was without jurisdiction. The same was accordingly set

aside.

11. Contention of Mr. A.P.S. Gambhir, learned Counsel for the appellant, is that the impugned judgment and order dated 23.7.1985 is liable to be

setaside. It was argued that the issue of accord and satisfaction is itself a dispute and, Therefore, the Arbitrator would have complete jurisdiction to

decide the same. Reliance was placed on two judgments of the Apex Court being: Union of India (UOI) and Another Vs. L.K. Ahuja and Co.,

and Jayesh Engineering Works v. New India Assurance Co. Ltd., The argument in response by Shri S.K. Taneja, Senior Advocate on behalf of

the respondent was that the arbitration clause between the parties itself required, at the first instance an endeavor to be made by the parties to

settle the disputes or differences and it was only in the eventuality of no settlement being arrived at, could the matter be referred to arbitration. He

argued that if there was a settlement arrived at between the parties, there subsisted no dispute or difference and the subsistence of a dispute or

difference was a condition precedent for the Arbitrator to be clothed with jurisdiction. Mr. S.K. Taneja, learned Senior Counsel for the respondent

relied upon three judgments of the Apex Court being: 1994 Suppl 3 SCC 126, B.K. Ramaiah and Company v. Chairman and Managing Director,

NTPC; 1995 Suppl 3 SCC 324 , Nathani Steels Ltd. v. Associated Constructions and Union of India Vs. M/s. Popular Builders, Calcutta, .

12. Before reverting to the judgments cited at the Bar, certain important facets of the case need to be noted. At the first instance it is relevant to

note that the settlement arrived at on 11.4.1980 was pursuant to the final bill raised by the appellant. The appellant and the respondent had a

disagreement on the amount payable to the appellant. Parties had endeavored to arrive at a settlement. Negotiations were held. A settlement was

arrived at. The terms of the settlement were reduced in writing on 11.4.1980, which has been extracted by us above, indicates the consensus ad-

idem arrived at between the appellant and the respondent. Certain claims under the final bill were agreed to be paid by the respondent to the

appellant and after recording what items were to be paid for, the parties clearly recorded that with the agreement of the above items all the claims

of M/s. Jain Refractories are fully and finally settled and nothing is pending with Cement Corporation of India Ltd.

13. It is important to note that in the settlement the representatives of the respondent from the Mechanical, Engineering, and Finance Department

were present and the appellant was represented by its sole Proprietor Shri S.K. Jain. The language of the settlement clearly brings out that there

was a complete accord and satisfaction of the claim by the appellant. This settlement was followed by a ''no claim certificate'' issued by the

appellant on the next day i.e. 12.4.1980. In the said certificate, the appellant certified as under:

We have no other claim against M/s. Cement Corporation of India Unit, Akaltara against contract dated 26.9.1979 for erection of refractory

material at Akaltara project.

14. The second important point to be noted is that pursuant to the settlement, on 21.4.1980 the appellant was released the payment in terms of the

settlement arrived at. At no stage till this date, did the appellant intimate that it had arrived at the settlement under some bona-fide mistake or that

the settlement arrived at was a result of coercion or undue pressure. Thereafter on various dates noted by us above commencing from 2.7.1980 to

6.5.1983 the appellant wrote letters that it had further claims for the alleged extra works done. It is relevant to note that in none of these letters he

had stated that the settlement arrived at was a result of coercion, pressure or undue influence. Even in the notice dated 9.5.1983 invoking the

arbitration clause there is no mention of any coercion, pressure or undue influence being exercised upon the appellant.

15. 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 u/s 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 u/s 20 of

the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference u/s 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 ture 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 u/s 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 hill 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 u/s 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.

24. In our aforesaid understanding of the law we proceed to apply facts of the present case. Admittedly, the work was completed on 15.2.1980.

A final bill was raised thereafter. There were claims for extra works in the final bill. Respondent was not agreeing to the final bill as raised. The

arbitration clause between the parties enjoined upon them to first sit across the table and endeavor to settle the disputes. Parties negotiated. A

settlement was arrived at. The settlement was reduced in writing and it was specifically recorded that with the agreement arrived at all claims of the

appellant are fully and finally settled and nothing is pending against the contract in question. The settlement was arrived at 11.4.1980. It was

followed by a "no claim certificate" issued on 12.4.1980. Payments were released pursuant to the settlement on 21.4.1980 and even at the time of

receiving payment, the appellant did not allege any coercion. There was thus, a complete accord and satisfaction of the disputes pertaining to the

contract in question. Even in the subsequent letters written from July, 1980 to May, 1983 there was not even a whisper that the settlement arrived

at was a result of coercion. The conclusion is inescapable. As a result of complete accord and satisfaction between the parties, the disputes tinder

the contract got resolved. The appellant acknowledged the settlement and received the full and final amount under the settlement. The accord and

satisfaction got executed by the said acts. There was thus no existing arbitrable dispute, which could be referred to arbitration and the Arbitrator

Therefore had no jurisdiction to entertain the claim of the appellant.

25. We find no merit in the appeal. The same is accordingly dismissed. There shall, however, be no order as to costs.