HIGH COURT OF GUJARAT

MUNICIPAL CORPORATION OF AHMEDABAD CITY
Versus
SHAH CONSTRUCTION CO LTD

Date of Decision: 04 July 2011

Citation: 2011 LawSuit(Guj) 916

Hon'ble Judges: K S Jhaveri

Case Type: First Appeal

Case No: 1839 of 1985

Subject: Civil

Final Decision: Appeal dismissed

Advocates: Keyur Chandhi, Nanavati Associates, Satyam Y Chhaya

Cases Referred in (+): 2

K. S. Jhaveri, J.

[1] By way of present appeal, the Appellant has challenged the legality and validity of the impugned judgment and decree dated 29th November 1984 passed by the Additional Principal Judge, Court No. 2, City Civil Court, Ahmedabad, in Civil Suit No. 3040 of 1978, whereby the trial Court has dismissed the suit filed by the Appellant-original Plaintiff holding that since Clause 24 of the agreement dated 21st March 1972 arrived at between the parties has a precondition that a certificate from the City Engineer in respect of loss and damage is to be obtained to claim money in present suit, which has not been followed, the suit is dismissed.

[2] The facts of the case in brief are that on 06th December 1963 an agreement to construct Subhash Bridge at a cost of Rs. 51,30,000/- was arrived at between the parties and the said work of construction was to be completed within three years from the date of agreement, which was subsequently extended to 22nd May 1967. Thereafter, on 31st January 1969, Tolani Brothers applied for advance on tools and machineries to be utilized for construction which were of their ownership and an agreement was entered with the Appellant-Ahmedabad Municipal Corporation to that effect, against which the Corporation agreed to pay Rs. 5 lacs subject to settlement

towards damages caused in case of any breach of the terms and conditions of the said agreement.

2.1 Subsequently, a supplementary agreement dated 07th February 1969 was executed between the parties to complete the said bridge by 31st December 1971. Thereafter, M/s. Tolani could not complete the work in time and thereby committed the breach of terms and conditions of the agreement and an amount of Rs. 1,37,000/- was settled against the advanced furthered and even a civil suit was filed, whereby injunction was prayed for and obtained to the effect that the said M/s. Tolani Brothers shall not obstruct the completion of bridge and let their tools and machineries be used for the purpose of completion. The Appellant agreed to pay an amount of Rs. 3 lacs towards utilization of the tools for 18 months ending on 25th February 1972. Thereafter, another agreement was entered into for completion of the remaining work for a lump sum of Rs. 36 lacs and in September, 1973 the work was completed.

2.2 Thereafter, on 05th January 1974 when the final bill was raised, the Respondent herein executed an indemnity bond, whereby it indemnified the Appellant for payment of any loss, shortage raised by M/s. Tolani Brothers towards equipment and machineries. M/s. Tolani Brothers raised a claim of Rs. 8 lacs and the Appellant raised a counter claim of Rs. 3,62,193/- along with interest shifting charges.

2.3 On 01st October 1975 an arbitration agreement for redressal of claims and counter claims raised, was entered into between M/s. Tolani Brothers and Appellant-Corporation being MCA/89/77, which came to be filed to that effect, whereby the Appellant-Corporation was allowed Rs. 3,62,13/- together with 50% interest shifting charges amounting to a total of Rs. 3,74,693.85 ps., whereas M/s. Tolani Brothers were allowed damages to the tune of Rs. 3,74,693/- and after settlement the Appellant was entitled to recover Rs. 35,000/-. Thereafter, on 02nd March 1977 the Appellant-Corporation issued a demand notice to the Respondent-Shah Construction for an amount of Rs. 3,39,693/- pursuant to the indemnity bond signed by it at the time of raising the final bill, which ultimately resulted into aforesaid suit. The trial Court after appreciating the documentary evidence on record and taking into consideration the relevant aspects of the matter rejected the suit filed by the Appellant. Hence, present appeal.

[3] Mr. Satyam Chhaya, learned advocate for the Appellant-Corporation, has submitted that the trial Court has erred in deciding Issue No. 6 as a preliminary issue against the Appellant; that the trial Court erred in interpreting various clauses of the agreement between the parties; that the trial Court has erred in holding that Clause 24 of the

agreement was not an arbitration clause but a certification clause; that the trial Court ought to have made conjoint reading of Clauses 21, 22, 23 and 24 of the agreement and that the trial Court has erred in not appreciating the fact that the Respondent has committed breach of the indemnity bond executed by it at the time of raising the final bill. In view of aforesaid submissions, it is prayed that present appeal may be allowed.

[4] Mr. Keyur Gandhi, learned advocate for the Respondent, has submitted that the trial Court has after appreciating the evidence on record and taking into consideration the pros and cons of the matter rightly decided the issue No. 6 as preliminary issue and came to the impugned conclusion, which is just and proper. Hence, present appeal may be dismissed.

[5] Having considered the rival contentions raised by the learned advocates for the respective parties, averments made in the appeal memo and the documentary evidence produced on record, including the impugned judgment and decree passed by the trial Court, it transpires that the trial Court has after going through the pros and cons of the matter decided the matter and came to the impugned conclusion, which is just and proper. It is pertinent to note that the various issues were framed by the trial Court at Exhibit 40. However, it is observed in paragraph 3 of the impugned judgment that by consent of the parties the Issue No. 6 is heard as a preliminary issue because it goes to the very root of the matter. It would be beneficial to reproduce the said Issue No. 6 as enumerated in the impugned judgment as under:

> Issue No. 6: Whether Clause 24 (or any other clause) in the agreement dated 21st March 1972 between the parties makes obtaining of a certificate from City Engineer with regard to the extent or assessment of losses and damages, a precondition to claim there of by suit; and that till such certificate might be obtained, the Plaintiff did not have right to file the present suit and that thus, the suit is not maintainable for want of cause of action.
>
> 5.1 Here it is pertinent to note that the trial Court has after assigning detailed reasons to the effect that Clause 24 is not an arbitration clause but it is a certification clause and thus, unless the City Engineer decides the extent of loss or damage, as agreed between the parties, the Appellant-original Plaintiff cannot maintain the suit claiming a specific amount. The trial Court has rightly relied upon the decisions of the Apex Court in the case of State of U.P. v. Tipper Chand, 1980 AIR(SC) 1522 as well as in the case of Rukmanibai Gupta v. Collector, Jabalpur and others, 1981 AIR(SC) 479, which aptly apply to the facts of the present case, and thereby, decided the aforesaid issue. It is required to be noted that in view of the ratio laid down in the aforesaid decisions, it can be said that the question about loss or damage shall be decided by the City Engineer and his decision on that

score, shall be final and binding to the contractor and such a clause cannot be said to be an arbitration clause. The trial Court has rightly decided the said Issue No. 6, which is just and proper.

5.3 So far as the contention of the learned advocate for the Appellant in respect of indemnity bond is concerned, it is pertinent to note that the said indemnity bond has been executed by the Respondent only on account of the fact that the Appellant-Corporation was not paying the final bill of the Respondent. It is required to be noted that it is no where stated by the Appellant that on execution of the indemnity bond the original contract between the parties stands discharged. In view of aforesaid, it is rightly held by the trial Court that it cannot be held that Clauses 21 to 24 or any of them stand discharged because of the indemnity bond. Thus, the trial Court has rightly held that before instituting the suit, the Appellant-original Plaintiff ought to have obtained a decision of the City Engineer on the question of loss or damage to the equipment and machineries caused by the Respondent and till that is done, the Appellant-original Plaintiff would not have any cause of action for claiming the amount by way of a suit.

[6] In view of aforesaid, I am of the opinion that the trial Court has assigned cogent and convincing reasons for arriving at the impugned conclusion. Over and above the aforesaid reasons, I adopt the reasons assigned by the trial Court and do not find any illegality much less any perversity in the findings recorded. I am in complete agreement with the findings recorded by the trial Court. No case is made out to interfere with the findings recorded by the trial Court. Hence, present appeal deserves to be dismissed.

[7] For the foregoing reasons, present appeal fails and is, accordingly, dismissed. No order as to costs.