

Bombay High Court

M/S. Gem Synth Resins Pvt. Ltd vs M/S. Mahendra Rosin And ... on 11 June, 2014

Bench: R.S. Dalvi

(1)

(905) ARBP 10

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

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ARBITRATION PETITION NO. 168 OF 2012

M/s. Gem Synth Resins Pvt. Ltd. .. Petitioner  
Vs.  
M/s. Mahendra Rosin and Turpentine Pvt. Ltd. .. Respondent

Mr. S. K. Shinde a/w. Mr. S. Ganoo a/w. Mr. Rajesh Ravindran for  
Petitioner.  
Mr. S. C. Naidu a/w. Mr. Yogesh B. Dandekar for the Respondent.

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DATE

: MRS. ROSHAN DALVI, J.

: 11 th JUNE, 2014.

ORAL ORDER

1. The petitioner has challenged the arbitration award dated 29 th December, 2010 only on the ground that the claim of the respondent before the learned Arbitrator was barred by limitation but has been considered and that could not have been so considered. The petitioner would contend that since limitation is held to be on the plea of the public policy, a stale could not be considered in arbitration. [See. Municipal Corporation of Greater Mumbai Vs. Prestress Products (India) 2003(3) Bom. C. R.

117.]

2. The claim has been considered as a promise to pay an amount in writing under Section 25(3) of the Indian Contract Act, 1972 (ICA).

3. The parties had business relationship. Supplies were made by the respondent to the petitioner herein from time to time. Part payments were made. The last of such payments has been made on 29.06.2005. The claim has been referred well after 3 years. The learned Arbitrator has (2) (905) ARBP 168/12 considered a promise made in writing and signed by the petitioner to pay that debt under Section 25(3) of the ICA which could be enforced by a separate suit which runs thus:

25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law. -.....

(1) .....

(2) .....

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

4. The promise to pay in writing is made by the petitioner under its letter dated 1st September, 2007, the relevant part of which runs thus:

Your outstanding figure we dispute and deny since we have mutually never so far verified and clarified how your outstanding figure arrives. This is possible by mutual verification of the account and finalizing the figures mutually.

We have never denied the legal due payment. Delay in payment was due to helplessness but not intentionally. This is our business ethics maintained as an entrepreneur since 1972. This, please verify and clarify the legal dues mutually for which we will always cooperate.

5. The learned Arbitrator has sought to consider what to make of the aforesaid statement. The Learned Arbitrator was called upon to consider whether the statement was a promise to pay under Section 25(3) of the ICA. This Court would also, therefore, have to see only that aspect.

6. Whatever was the outstanding figure shown by the respondent was disputed and denied. That was because it was not mutually verified and clarified. Hence the petitioner did not know how it was arrived. But the petitioner accepted that it would be possible to arrive at figure which (3) (905) ARBP 168/12 would be payable by the petitioner upon mutual verification and finalization. The

petitioner clarified that it never denied its legal due payment. Consequently it admitted the legal due payment. It accepted that there was delay. That was because of helplessness (due to a certain fire) but not intentional (to avoid or evade payment or to defeat the plaintiff's right). This is a matter of business policy of moral ethics of the petitioner. Hence the petitioner called upon the respondent to verify and clarify the legal dues mutually and the petitioner offered to cooperate.

7. The respondent sent a further reply dated 1 st June, 2008 annexed to which was the entire statement of account of the balance amount payable and the interest claimed thereof together with the total amount payable. This the petitioner denied on the ground that in an earlier notice the respondent claimed the principal amount and in the notice dated 1st June, 2008 the respondent claimed the principal as also the interest and hence proper accounts were not furnished and true and correct information and the description of the business transaction was not given. This was despite the promise to pay what was the legal due payment upon verification and clarification, albeit mutually, and with the petitioner's cooperation. If the petitioner would not cooperate, the verification and clarification made by the respondent would have to be seen to ascertain the legal due payment which the petitioner expressly stated it has never denied.

8. The learned Arbitrator has considered this aspect as an admission on the part of the petitioner herein. The admission would be the promise to pay. The promise to pay in writing would be an express promise to pay. The express promise to pay in this case is what is legally due. The respondent has shown the precise amount which is legally due.

(4) (905) ARBP 168/12 Unless the petitioner shows how it is an illegal demand, the express promise to pay would have to be performed by payment. This is what the Arbitrator has considered. The mere stating that it is an admission, instead of a promise to pay would not make the award liable for being set aside as that would not be an error of jurisdiction but an error in exercise of jurisdiction, if at all [See. Municipal Corporation of Greater Mumbai Vs. Prestress Products (India) 2003(3) Bom. C. R. 117 Para 14.]

9. It has been argued that an implied promise to pay is not contemplated under Section 25(3) of the ICA, 1972 as it would be upon a written acknowledgment of liability under Section 18 of the Limitation Act, 1963. That does not matter because the acknowledgment of liability has not been made within the period of limitation and consequently does not apply in this case and has not been considered by the learned Arbitrator also. All that has to be seen is whether there was an express promise to pay in writing under the petitioner's letter dated 01.09.2007, the relevant part of which has been extracted above.

10. The promise to pay must be express. [See. Reunion Engineering Co. P. Ltd. Vs. Mrs. Uma Kumar, Proprietor, Kandhan Electricals and Engineers in Appeal (L) No. 319 of 2006 in Company Petition No. 570 of 2005 of this Court dated 21.06.2010 as held by the Division Bench of this Court and the case of Balkrishna Mansukhram Vs. Jayshankar Narayan in Letters Patent Appeal No. 16 of 1937 of this Court decided on 23.06.1938] in which the distinction was made between Section 18 of the Limitation Act, 1963 (earlier Section 19 of the Indian Limitation Act) and Section 25(3) of the ICA. In that case it was specifically held that an implied promise to pay inferred from an

acknowledgment could not be made the basis of the suit to recover a debt (5) (905) ARBP 168/12 barred at the time of the acknowledgment and since Section 25(3) related to the promise to pay a debt which was already barred. It was held that under Section 25(3) of the ICA there must be an express promise as opposed to an unconditional acknowledgment involving an implied promise to pay.

11. What is seen is that the petitioner has expressly admitted to pay whatever is legally due though the petitioner disputed the outstanding figure then shown by the respondent herein which was shown to be Rs.13,80,859/- (without interest later claimed).

12. The petitioner having not shown the learned Arbitrator or even this Court how that is not a legal demand cannot challenge the impugned award. Consequently the petition is dismissed.

(ROSHAN DALVI J.)