

Carbon and Grabhite Pro. and Anr Vs. Bihar State Min.Dev.Corpnltd.

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Court : Jharkhand

Decided On : Sep-14-2017

Appellant : Carbon and Grabhite Pro. and Anr

Respondent : Bihar State Min.Dev.Corpnltd.

Judgement :

First Appeal No. 182 of 1996 (R) --- 1. Carbon and Graphite Products, Ranchi 2. Suresh Kumar Bajaj --- --- Defendants/Appellants Versus Bihar State Mineral Development Corporation Ltd., Ranchi. ---- --- Plaintiff/Respondent --- PRESENT THE HONBLE MR. JUSTICE APARESH KUMAR SINGH ----- For the Appellants : Mr. Pandey Neeraj Rai, Advocate For the Respondent : Mr. Anoop Kr. Mehta, Advocate ----- By Court: Heard counsel for the parties.

2. The defendant in Money Suit No.14 of 1983 is the appellant aggrieved by the judgment and decree dated 3 rd October 1989/10th November 1989 passed by learned Sub-Judge-V, Ranchi whereby and whereunder the suit has been decreed ex-parte against him holding him to be liable to pay a sum of Rs. 8,33,691.39 paise being the principal amount of Rs.7,37,895.96 paise and interest @ 12% to the tune of Rs.1,01,795.43 paise. The defendant has been liable to pay interest at the said rate till the decretal amount is realised.

3. The case of the plaintiff as set-up in the plaint inter-alia asserts as under. The defendant had entered into an agreement with the plaintiff on 5.5.1977 for purchase of graphite ore from the plaintiff. Agreement is exhibited as Exbt.1.

According to the terms and conditions of the agreement, plaintiff had agreed to sell and supply to the defendant no.1 graphite ores extracted from various areas under the plaintiff-corporation and defendant no.1 agreed to purchase it subject to minimum quantity of 1500 tonnes per month. Defendant no.1 agreed to pay the price of the graphite ores supplied by the plaintiff on the basis of fixed carbon content of the mineral which was to be determined in the manner mentioned in the agreement. It was also agreed that the defendant will pay the price of the graphite ore supplied to it at the end of each month on the receipt of the bills. Bills were prepared and sent to the defendant no.1 for supply made and he used to make the payment of the same. Between 3rd April 1980 to 22nd March 1982 the plaintiff supplied graphite ores to the defendant valued at Rs.12,76,408.39 paise. Out of the aforesaid amount the defendant paid Rs.5,44,512.43 paise and the balance of -2- Rs.7,31,895.96 paise remains. Statements of accounts were also exhibited. The original bills for supply of minerals were sent to the defendant no.1. The duplicate copy of the bills were exhibited as 2/A to 2/J series. The payments made by the defendant no.1 have been adjusted towards the bills submitted by the plaintiff in accordance with their priorities. Therefore, a sum of Rs.7,31,895.96 paise as principal and Rs.1,01,795.43 paise as interest, total Rs.8,33,691.39 paise became due. Defendants failed to pay despite repeated demands and service of notice demanding payment of dues on 15 th April 1982. The defendants claim interest @ 12% per annum. The cause of action, according to the plaintiff, arose within the jurisdiction of learned court on 3 rd April 1980 when supply of graphite ores for Rs.6187.80 paise were made to the defendant no.1 for bill no.2 of 1980-81 and thereafter as and when supplies were made and bills were sent to defendant no.1 and on 15.4.1982 when notice was sent. The plaintiff, accordingly, prayed for a decree of Rs.8,33,691.39 paise and a decree for the costs of the suit along with the interest pendente lite and future at the rate of 12% per annum.

4. The defendants appeared on notice and filed an application under Section 34 of the Arbitration Act, 1940 on 9 th August 1983 seeking stay of the legal proceedings in view of the arbitration clause contained in the agreement. Defendants admittedly did not file a written statement and also did not pursue the application under Section 34 of the 1940 Act for more than 6 years. It was finally rejected on 15 th September 1989 by the learned court as it was not being moved

for several dates. The plaintiff examined six witnesses- P.W.1 to P.W.6. P.W.1 exhibited the agreement. The bills were exhibited by P.W.2. The other plaintiff witnesses supported the case of the plaintiff through their oral testimonies. The defendants did not cross-examine any of the plaintiff witnesses and thereby failed to contest the suit on merit which was decreed ex-parte against them.

5. It would also not be out of place to mention here that after the decree of suit ex-parte, the defendant preferred a Misc. Petition No.2/1990 under Order-IX, Rule-13 read with Section-151 of the Code of Civil Procedure before the learned Sub-Judge-V, Ranchi seeking setting aside of the ex-parte decree. By order dated 11th July 1991 the Misc. petition was dismissed by a reasoned order. The defendant/appellant herein thereafter -3- challenged it in Misc. Appeal No.197/1993 (R) which was also dismissed by learned Single Judge of Patna High Court (Ranchi Bench) by judgment dated 6th November, 1995. The aggrieved applicant/appellant herein preferred LPA No.1A/1996(R) before the Patna High Court (Ranchi Bench) which was also dismissed by judgment dated 30th April, 1996 as not maintainable. The matter was taken up to the Apex Court by the aggrieved defendants/appellants herein where they also lost. The present appeal was preferred in the year 1996 with considerable delay which, however, was condoned by this Court earlier.

6. Learned counsel for the appellant has, in support of the challenge to the impugned judgment, inter-alia made the following submissions :- (i) The learned trial court fell in error in not deciding the application under Section 34 of the Act of 1940 and proceeded without jurisdiction, to decree the suit in an ex-parte manner. The ingredients of Section 34 require the learned court to express its opinion in view of the readiness and willingness of the defendants to participate in a reference of the matter to arbitration in view of the arbitration clause-17 contained in the agreement between the parties. Learned counsel for the appellant has relied upon a judgment rendered by the Calcutta High Court in the case of Subal Chandra Bhur Vs. Md. Ibrahim & Anr. reported in AIR (30) 1943 Calcutta 484 in support of the submission that the learned trial court should have decided the issue of readiness and willingness of the defendants in the application made under Section 34 of the Act of 1940. The application was rejected without any application

of mind. (ii) Learned counsel has further assailed the impugned judgment on the ground that in terms of Clauses-4 and 7 of the agreement dated 5th May 1977, payments were to be made at the rate agreed upon only if the graphite content of the supplies made were not less than 7%. He has referred to various bills adduced by the plaintiff as Annexure-2 series being bills dated 8 th August 1981, 18th November 1981, 10th December 1981, 24th April 1982 and 31st March 1982 in order to submit that these bills did not -4- contain any reference of the graphite content of the supplies made in the respective column distinct from the other Bills and were therefore also provisional in nature. They were distinct from the other bills which were final in nature and also contained the graphite content of the supplies made. The amount raised under these bills total Rs.1,81,563.08 paise which is approximately 24% of the principal amount claimed, which in any case could not have been decreed by the learned trial court. Learned trial court was required to apply itself to the terms and conditions of the agreement and the claims raised through the bills in question to come to a finding that which of these bills did conform to the requirement of the agreement between the parties.

7. The learned trial court therefore fell in error on an important issue of fact which has vitiated the judgment.

8. Learned counsel has further submitted that the contract between the parties did not contain any stipulation of interest. The rate of interest @ 12% is a figment of imagination of the plaintiff. Learned trial court has not exercised its discretion under Section 34 of the CPC in awarding interest for the period prior to the institution of suit, pendente lite and future interest. A blanket rate of interest @ 12% has been awarded in a mechanical manner over the principal amount. The impugned judgment therefore suffers on various counts. Learned counsel for the appellant has lastly submitted that for appreciation of the questions of facts, the matter deserves to be remanded to the trial court for fresh consideration.

9. Learned counsel for the plaintiff-respondents herein Mr. Anoop Kr. Mehta submits that the case of the plaintiff is plain and simple based upon a written agreement between the parties. Supplies have been made pursuant to the agreement to the defendant and part payments have also been made against the

same. The plaintiffs have raised a claim after the defendant failed to pay the remaining dues despite the acceptance of the supplies and failing to reply to the legal notice as well. The agreement and the bills were adduced by the plaintiff witnesses in support of his case to which the defendants never ventured to contest. The defendants having failed to contest the claim of the -5- plaintiff at any stage on merits, the learned trial court was absolutely justified in decreeing the suit in the form prayed for. The proceedings of the learned trial court would show that after appearance of the defendants on summons they failed to file a written statement throughout the pendency of the suit. They also failed to prosecute the application made on 9 th August 1983 under Section 34 of the Act of 1940 despite their appearance on a number of dates thereafter for a period of six years. The learned trial court was left with no option but to reject the application by the order dated 15th September, 1989. The order of rejection of the application under Section 34 remained unchallenged in any forum. The proceeding of the case itself is evidence of the lack of interest and diligence on the part of the defendants/appellants in contesting it. It is further submitted that the award of interest is fully supported by the provisions of the Interest Act, 1978 Section-3 thereof. The impugned judgment and decree therefore deserves no interference.

10. Learned counsel for the appellant in reply submits that the order dated 15th September 1989 being an interim order has merged in a final judgment and therefore appellant is entitled to raise a ground in relation thereto in the present appeal.

11. I have considered the submissions of the parties, gone through the impugned judgment and the relevant material exhibits placed by the learned counsel for the parties during the hearing of the case.

12. From the face of the proceeding before the learned trial court it clearly shows that the defendant had miserably failed to contest the suit after its appearance. After filing the application under Section 34 of the Act of 1940 on 9th August 1983 itself, the application remained pending for more than six years without being pressed on its part. The learned trial court had in such circumstances ample reason to reject it on 15 th September 1989. During the proceeding of the trial

though as many as 6 plaintiff witnesses were adduced, but the defendants not only failed to file its written statement, but did not also cross-examine any of the plaintiff witnesses. The defendant also has not disputed the supplies made against the bills in question exhibited as Exhibit-2 series. The defendant did not even make any denial to the claim raised through the legal notice served upon it prior to the institution of the suit. The learned trial court in the aforesaid state of facts and circumstances and the -6- material evidences on record, did not have any reason to doubt that the defendants after having accepted supplies against the bills raised through Exhbt.-2 series over a period of almost two years from 3 rd April 1980 to 22nd March 1982 had failed to make payment of the outstanding dues. It also took into account that the defendants had made part payments towards supplies made by the plaintiff during the same period. In the wake of such uncontested facts, the plaintiff had been able to establish that the principal dues had remained unpaid despite the supplies made over a period of time on the part of the defendants. The findings of the learned court on this score, therefore, cannot be said to suffer from any error in appreciation of evidence or perversity. Learned trial court while dealing with the issue relating to an application under Section 34 of the 1940 Act relied upon the decision by the Allahabad High Court in the case of L. Raghunath Prasad & Ors. Vs. L. Gurdyal Prasad & Ors. reported in AIR1956 Allahabad, page-194, para-17. Para-17 of the said report reads as under :-

17. In the circumstances, we have come to the conclusion, that, as the law now stands, if a person, who has been a party to an arbitration agreement, brings a suit ignoring that agreement, the defendant's remedy, if he wants to rely on that agreement, is to proceed under S.34, Arbitration Act, and to ask for stay of the suit. If he does not avail of that remedy, the court has jurisdiction to hear the suit and to give a decision on merits. The contention that the suit should fail cannot be upheld in the present state of law.

13. The ratio of the learned court, as quoted above, leaves no room of doubt that mere filing an application under Section 34 of the Act of 1940 and not pressing it does not amount to ousting the jurisdiction of the trial court in deciding the suit on merits. The conduct of the defendant throughout the proceedings of the case itself manifests lack of diligence in contesting the claim. He has also lost in the

challenge to the ex-parte decree in a proceeding arising out of the Misc. case filed under Order-IX, Rule-13 of the Code of Civil Procedure till the Apex Court as noted above. Therefore, the grounds of challenge urged by the appellant on these counts do not merit acceptance.

14. The judgment rendered by the Calcutta High Court in the case of Subal Chandra Bhur (Supra) in the aforesaid facts and circumstances also does not come to an aid of the appellant as there was complete lack of readiness and willingness on its part to participate in any such reference -7- prayed for in an arbitration proceeding in terms of Clause-17 of the agreement except filing of such an application on 9 th August 1983 just after his appearance in the suit.

15. The next question which arises for consideration is on the issue of grant of interest by the learned trial court. It is true that the agreement between the parties did not contain any component of interest to be awarded in case of default in supplies or payments by either of the parties. The plaintiff has also not adduced any evidence in support of the prevalent rates at which money was lent or advanced by the nationalised bank in relation to commercial transaction. The parties were indeed in commercial transaction in view of their relationship arising out of the agreement. Section 34 of the Code of Civil Procedure entitles the Court in a decree for payment of money, to order interest at such rate as the Court deems reasonable to be paid on the principal from the date of suit to the date of decree, in addition to any interest on such principal sum for any period prior to the institution of the suit with future interest at such rates not exceeding 6% per annum from the date of decree to the date of payment or to such earlier date as the Court deems fit.

16. As per the proviso to Section 34 when the liability in relation to the sum so attached arises out of commercial transaction, the rate of such interest may exceed 6% per annum but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which money is lent or advanced by nationalised bank in relation to commercial transaction. In the absence of any contractual rate of interest in the agreement in question or absence of evidence of prevalent rate at which moneys were lent or advanced by nationalised bank in

relation to commercial transaction, the award of interest at the average rate of 12% per annum does not seem to be proper in the eye of law.

17. In such circumstance, however, interest of justice would be met if the impugned judgment and decree is modified to the extent of the interest awarded in the following manner :- 18. Defendants would be liable to pay interest @ 8% on the principal amount up to the institution of the suit and thereafter pendente lite and future interest @ 10% on the principal amount till the decretal amount is realised. The impugned judgment and decree, therefore, stands -8- modified to the extent indicated herein above. Appeal is partly allowed. Decree accordingly.

19. The lower court records may be returned to the court concerned forthwith. (Aparesh Kumar Singh, J.) High Court of Jharkhand at Ranchi Dated :

14. h September, 2017 Shamim/

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