

State of M.P. and Others Vs. Som Datt Builders Pvt. Ltd.

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Court : Madhya Pradesh

Decided On : Mar-27-2014

Judge : Sujoy Paul

Appeal No. : W.P. No. 1705 of 2014

Appellant : State of M.P. and Others

Respondent : Som Datt Builders Pvt. Ltd.

Advocate for Def. : Shri. M.L. Swarnakar

Judgement :

Sujoy Paul, J:

1. By invoking jurisdiction of this Court under Article 227 of the Constitution, the petitioners have challenged the legality, validity and propriety of the order dated 11-2-2014, whereby petitioner's application dated 24-6-2013 preferred under Rule 9 of M. P. Arbitration Rules, 1997 (for brevity, the 'Rules') read with Order 14 and Order 18 of Code of Civil Procedure, is rejected by the Court below.

2. The relevant facts are that on 8-3-2008 an agreement for execution of work of rehabilitation of Chambal Right Main Canal was executed between the petitioners and respondent. It is contended that the work order was issued on 8-3-2008 by directing the contractor to complete the work within 36 months. The petitioners submitted that the progress of the work of the respondent was not satisfactory

and, therefore, it led to a dispute between the parties. Ultimately, the petitioners cancelled the contract by letter dated 26-4-2011 and invoked the bank guarantee. The respondent initially challenged the invocation of bank guarantee by filing a writ petition. The writ petition was disposed of by this Court commanding the respondent to raise the claim before the arbitrator. In turn, the dispute was referred before the arbitrator. The arbitrator, in turn, passed the award on 21-2-2012. The petitioners challenged the same by preferring an application under section 34 of the Arbitration and Conciliation Act, 1996 (for brevity the 'Act') before the Second Additional District Judge, Sheopur. This case is registered as Arbitration Case No. 24/2012. The Court below issued notice to the respondent on 18-6-2012 and, in turn, the respondent appeared before the Court on 23-7-2012. The respondent filed its reply before the Court below.

3. The grievance of the petitioners is that after filing of the reply by the respondent, the Court below has straightaway fixed the matter for final hearing. It even did not wait for the record to come from the arbitrator. The petitioners then filed the application (Annexure P/3) by praying that the issues be framed and parties be given an opportunity to lead evidence. This application dated 24-6-2013 is rejected by the Court below by impugned order dated 11-2-2014.

4. Shri Shekhar Bhargava, learned senior counsel assailed this order on the ground that as per the settled legal position, in cases where issue is required to be made, as a thumb-rule, it cannot be said that issues need not be framed at all. Criticising the impugned order, learned senior counsel submits that in the application (Annexure P-3), the petitioners have prayed for two reliefs. Firstly, it is prayed that issues be framed and secondly, the parties be permitted to lead evidence. By taking this Court to the impugned order, it is contended that the first prayer regarding framing of issues is considered by the Court below and second prayer for permitting the parties to lead evidence is not at all considered. He submits that this non-consideration amounts to serious procedural flaw which runs contrary to principle of natural justice. Learned senior counsel relied on the judgment of Supreme Court in the case reported in, (2009) 17 SCC 796, Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and another.

5. Per Contra, Shri M.L. Swarnakar, learned counsel for the respondent submits that the present petitioners filed another petition against another contractor, i.e., W.P. No. 7490/2013, State of M.P. and another v. M/s Udai Pratap Sharma and others. The said matter was dismissed on 12-12-2013. It is contended that as per Rule 30(d) of Chapter 10 of High Court of M. P. Rules, 2008 (for brevity '2008 Rules'), the petitioners should have disclosed this fact. In absence of such disclosure, this petition is not entertain-able. Interestingly, Shri Swarnakar also relied on the judgment of Fiza Developers (supra). By taking this Court to certain paragraphs of this judgment, it is contended that the proceedings under the Act are summary in nature and Court need not frame issues. He further submits that no evidence needs to be led before the Court below. In addition, he relied on the judgment of Punjab and Haryana High Court in the case reported in, (2005) 139 PLR 269, Krishan Lal Kacker v. Ram Chander decided on 19-8-2004. The judgment of Jammu and Kashmir High Court, reported in, 2005(2) JKJ 368, Kh. Saif-Ud-Din v. State of J. and K. and another is also relied upon. Lastly, he relied on the judgment of Supreme Court in the case of M.P. Housing Board v. Progressive Writers and Publishers, reported in, (2009) 5 SCC 678. By placing reliance on para 18 of this judgment it is contended that the appellate Court cannot re-appreciate the evidence.

6. I have heard learned counsel for the parties and perused the record.

7. The first contention of learned counsel for the respondent is based on Rule 30(d) of 2008 Rules. It is contended that since the petitioner has not disclosed the factum of filing of W.P. No. 7490/2013, as per the said rule, the petition is not entertain-able. A perusal of the names of the parties in W.P. No. 7490/2013 makes it clear that the said writ petition was not between the same parties. The respondent/contractor in the said case was different. The facts in the earlier case were different which were based on the said case wherein the petitioner was litigating against the different respondent. The relief was also different the language of Rule 30(d) of 2008 Rules talks about "same facts and/or same relief. It does not talk about "similar facts or similar relief. Thus, nondisclosure of filing of earlier petition is not fatal to the petitioner. Thus, it cannot be said that the petitioner has not disclosed the material information or this petition suffers from

any deficiency which attracts Rule 30(d) aforesaid. Thus, this contention is rejected.

8. So far the contention of the petitioners regarding framing of issue is concerned, in the opinion of this Court, this point is no more *res Integra*. The curtains are finally drawn on this issue by the Supreme Court in the case of *Fiza Developers* (*supra*). Para 31 of the said judgment reads as under:-

"31. Applications under section 34 of the Act are summary proceedings with provision for objections by the respondent-defendant, followed by an opportunity to the applicant to "prove" the existence of any around under section 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the respondent-defendant to place his evidence by affidavit. Where the case so warrants, the Court permits cross-examine of the person swearing to the affidavit. Thereafter, the Court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The Court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings under section 34 of the Act."

(Emphasis Supplied)

9. In the light of said finding, it is crystal clear that in the summary proceedings under Arbitration Act, the issues are not required to be framed, In Writ Petition No. 7490/2013, the Court below rejected the prayer of the petitioner for framing issues. This Court by order dated 12-12-2013 affirmed the said order by relying on the judgment of *Fiza Developers* (*supra*). I am bound by this judgment. Considering the aforesaid, I have no hesitation to hold that the Court below has not committed any error in rejecting the prayer of the petitioners for framing issues. To this extent the impugned order is upheld.

10. Dealing with the other submission of Shri Bhargava regarding non-considering the prayer of the petitioners for leading evidence, in the opinion of this Court, this aspect needs to be considered and dealt with. Although Shri Swarnakar relied on

the judgment of this Court in M/s Udai Pratap Sharma (supra) on this aspect also, a careful perusal of the judgment shows that the point regarding non-consideration of the prayer of the petitioners to lead evidence was not pressed before this Court. In other words, the petitioners in M/s Udai Pratap Sharma (supra) did not advance the argument assailing the order of Court below to the extent the question of permission to lead evidence was not dealt with. Since this point is neither pressed nor decided, the judgment in M/s Udai Pratap Sharma (supra) cannot be treated to be a precedent on this point. This is settled in law that a decision is an authority for which it is decided and not what can logically be deduced therefrom. A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. See, (2003) 2 SCC 111, Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and others (Para 59) and 2012(1) MPLJ (Cri.) (S.C.) 30 : (2011) 5 SCC 708, Sushil Suri v. Central Bureau of Investigation and another (Para 32).

11. Learned counsel for the respondent although relied on the judgments of Punjab and Jammu High Courts in this regard, however, these matters were decided much prior to the judgment of Supreme Court in the case of Fiza Developers (supra). Since the Supreme Court has already dealt with this aspect in extenso in Fiza Developers (supra), the judgments of High Courts are of no assistance to the respondent. The judgment of M.P. Housing Board (supra) is also of no help to the respondent. Para 18 of the said judgment deals with the question of re-appreciation of evidence by the appellate authority. This is not the point here.

12. Before further dealing with this aspect, I deem it proper to quote Rule 9 of Arbitration Rules, 1997, which reads as under:--

"9.(1) Save as otherwise expressly provided in the Act or these Rules the following provisions of the Code of Civil Procedure, 1908 (V of 1908) shall apply to the proceedings before a Court insofar as they may be applicable thereto; namely:-

(i) Sections 28, 31, 35, 35A, 35B, 107, 133, 135, 148A, 149, 151 and 152, and,

(ii) Order III, V, VI, IX, XIII, XIV, XVI to XIX, XXIV and XLI.

(2)(a) For the purpose of facilitating the application of the provisions referred to under sub-section (1) the Court may construe them with such alterations, not affecting the substance, as may be necessary or proper to adopt to the matters before it; and

(b)The Court may, for sufficient reasons, proceed otherwise than in accordance with the said provisions if it is satisfied that the interests of the parties shall not thereby be prejudiced."

(Emphasis Supplied)

13. Reverting back to para 31 of the judgment of Fiza Developers (supra), it is apt to mention that the Supreme Court, in no uncertain terms, opined that section 34 of the Act are summary proceedings. The parties may get opportunity to "prove" the existence of any ground under section 34(2). For this purpose, they may file affidavits of the witnesses and in a given case the other side may be permitted to cross-examine the parties on the basis of affidavits. The application (Annexure P/3) is preferred under Order 14 and Order 18 of Civil Procedure Code. In addition to prayer of framing issue, it was prayed that the parties be permitted to lead evidence. Rule 9(2)(b) of the Rules makes it clear that the Court is not mechanically bound by the borrowed provisions of the Civil Procedure Code. For sufficient reason, it may decide otherwise. However, for deciding this course, the Court is required to be "satisfied" that in the interest of the parties, the Court needs to adopt a particular procedure. Putting it differently, for sufficient reasons and on 'satisfaction' the Court may proceed otherwise than the provisions of the Civil Procedure Code. The word "satisfied" has great significance. For the purpose of recording satisfaction, one has to apply mind. Without application of mind, no satisfaction can be arrived at. This Court, after considering the judgment of Supreme Court, reported in, (1994) 3 SCC 1, S.R. Bommai and others v. Union of India and others opined in, 2014(1) J.L.J. 109, South Eastern Coal Field Ltd. v. Union of India that "Appropriate Government can be satisfied only when it applies its mind on the basis of relevant consideration in the context of relevant Statute." Thus, the "satisfaction" can be reached only on application of mind.

14. A bare perusal of the impugned order shows that the Court below has not applied its mind nor considered the prayer of the petitioner seeking permission to lead evidence. At this stage, I am not obliged to act as a Court of first instance and to decide whether the permission to lead evidence was required to be given to the parties? I am only concerned with the decision making process adopted by the Court below. In the opinion of this Court, the decision making process is not in accordance with law. Non-consideration of the prayer to lead evidence amounts to procedural impropriety. This also runs contrary to the principle of natural justice and requirement of the Rules of 1997. The Apex Court in *Shalini Shyam Shetty and another v. Rajendra Shankar Patil*, reported in, 2010(4) MPLJ (S.C.) 590 : (2010) 8 SCC 329, opined that the power under Article 227 of the Constitution can be exercised in order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them. Apart from this, it was held that the High Court can interfere in exercise of its power of superintendence where there has been a patent perversity in the orders of the tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted. In the present case, the Court below has failed to exercise its jurisdiction and did not examine the partial relief prayed for with regard to permission of leading evidence.

15. Thus, the impugned order is liable to be set aside to the extent petitioners' prayer to lead evidence is not dealt with. The impugned order to this extent is set aside. The finding in the impugned order regarding framing of issues is upheld. The matter is remitted back to the Court below to decide the application dated 24-6-2013 to the extent petitioners had prayed for permission to lead evidence.

16. Petition is partly allowed. No costs.

Petition partly allowed.

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