

State of Bihar and ors. Vs. Shiv Shankar Construction Co. (P) Ltd.

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Court : Patna

Decided On : Jun-24-2008

Judge : R.M. Lodha, C.J. and Kishore K. Mandal, J.

Appellant : State of Bihar and ors.

Respondent : Shiv Shankar Construction Co. (P) Ltd.

Disposition : Appeal dismissed

Prior history : 1. That the relevant clause of contract, which according to the appellants is an arbitration agreement, is Clause 23 of General Rule and Directions for the guidance of the contract is not in dispute. 2. Clause 23 reads thus: In case any dispute or difference shall arise between the parties or either of thereupon any question relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned or as to the quality of workmanship or materials used on the work,

Judgement :

1. That the relevant clause of contract, which according to the appellants is an arbitration agreement, is Clause 23 of General Rule and Directions for the guidance of the contract is not in dispute.

2. Clause 23 reads thus:

In case any dispute or difference shall arise between the parties or either of thereupon any question relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned or as to the quality of workmanship or materials used on the work, or as the construction of any of the conditions or any clause or thing therein contained, or as to any question, claim, rights or liabilities of the parties, or any clause or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawing, specifications, estimates, instructions, order, or these conditions, or otherwise concerning the work, or the execution, or failure to execute the same whether arising during the progress of the work, or alter the completion or abandonment thereof, or as to the breach of this contract, then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be referred to the Superintending Engineer of the circle and his decision thereon shall be final conclusive and binding on all the parties.

3. Shorn of unnecessary details, the brief facts that has given rise to the present controversy, are thus : the present respondent initially entered into an agreement for two-third of work for removal of over burden in Durgawati Spillway somewhere in the year 1987. Then by a further agreement, remaining one-third of work was also given on contract to the present respondent. Two-third of the work was to be completed by December, 1987 and the remaining one-third was to be completed by October, 1988. The last payment for the work was made to the respondent by the appellants somewhere in the month of December, 1989. After a lapse of about 10 years, the respondent was called upon by the present appellants to pay back an amount of about Rs. 10,00,000/- which according to them was paid in excess. The present respondent explained to the appellants that no excess payment was made and the allegation was unfounded and misconceived. Despite response of the present respondent, the proceedings for recovery of an excess amount of about Rs. 10,00,000/- was started against the present respondent under the Bihar and Orissa Public Demands Recovery Act, 1914, (for short, 'Recovery Act'). That necessitated the present respondent in filing the writ petition being C.W.J.C. No. 3100 of 2003 challenging the action of the present appellants under Recovery Act for recovery of an amount of about Rs. 10,00,000/-. The writ petition was opposed by the State Government and its functionaries (present appellants). The single

Judge after hearing the parties vide his order dated 7th of September, 2003, allowed the writ petition and quashed the proceedings for recovery of demand under the Recovery Act. An appeal was preferred from that order which also came to be dismissed at the threshold on 11th of March, 2004 without notice to the present respondent. It appears that thereafter, acting under afore noticed Clause 23 of the agreement, the present appellants appointed the Superintending Engineering as an Arbitrator and communications were sent to the present respondent in this regard vide letters dated 19th May, 2004 and 20th May, 2004. The respondent approached this Court and challenged the said letters and a couple of other letters. In sum, the present respondent challenged the appointment of the Arbitrator.

4. The present appellants contested the writ petition and raised the plea that all aspects concerning the jurisdiction of arbitral Tribunal must be raised before the arbitrator who under Section 16 of the Arbitration and Conciliation Act, 1996, is empowered to decide about his jurisdiction.

5. The single Judge allowed the writ petition, set aside the appointment of the Arbitrator and the impugned letters by his order dated 24th of April, 2007. It is from this order that the present appeal has been filed.

6. We deem it proper to reproduce paragraph 12 of the impugned order as it is that reads thus:

In the present case, after completion of the contractual work long time back and all payments having been made to the contractor on completion of the work finding it to be satisfactory, after ten years of without any enquiry, no question could have been raised by the respondents. The question of excess payment raised by the respondents has also finally been settled in C.W.J.C.No. 3100 of 2003. Now there is nothing to be resolved by the Arbitrator, as such, initiation of arbitration proceeding is illegal and not maintainable.

7. As a matter of fact, the counsel for the State could not Justifiably assail the aforesaid finding recorded by the single Judge. We also find ourselves in agreement with the aforesaid view of the single Judge.

8. More importantly, we find merit in the submission of the counsel for the respondent that Clause 23 of the agreement does not amount to an arbitration agreement. The submission gets support from the decision of the Supreme Court in the case of *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd.*, Kanpur : [1999]1SCR181 . In the case of *Bharat Bhushan Bansal* the Supreme Court was concerned with Clauses 23 and 24 of the agreement which reads thus:

23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

24. Except as provided in Clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein.

9. Although the language of Clauses 23 and 24 under consideration by the Supreme Court in the case of *Bharat Bhushan Bansal* and Clause 23 of the present agreement are not couched in exactly same words, but the purport of both clauses is not at all different. Neither in Clauses 23 and 24 with which the Supreme Court was concerned had a mention that the dispute be referred to Arbitration to the authority provided therein, nor Clause 23 of the agreement between the parties with which we are concerned mentions that the dispute would be referred to arbitration of the Superintending Engineer. The expression occurring in Clause 23 before us '...such dispute or difference shall be referred to the

Superintending Engineer of the circle and his decision thereon shall be final, conclusive and binding on all the parties' does not mean that the parties agreed that such dispute of reference shall be referred to the Superintending Engineer of the Circle for arbitration. Thus, materially, there is no distinction between Clauses 23 and 24 under consideration by the Supreme Court in the case of Bharat Bhushan Bansal and Clause 23 before us.

10. In the case of Bharat Bhushan Bansal, the Supreme Court considered the decision in the case of the State of U.P. v. Tipper Chand : AIR 1980 SC1522 upon which the strong reliance has been placed by the State Counsel before us. In paragraph 7 of the report in the case of Bharat Bhushan Bansal, the Supreme Court considered the case of Tipper Chand thus:

7. The wording of the clause in the present case is very similar to the wording which was interpreted as not an arbitration clause in the above case. Both the above judgments of this Court have relied upon an earlier decision of this Court in the case of State of U.P. v. Tipper Chand. The clause which was interpreted in the above case was also materially similar to the clause before us. Clause 22 of the contract in that case provided (SCC p. 34, para 2):

Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of specification, design, drawing and instructions hereinbefore mentioned. The decision of such engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter, or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications,...or otherwise concerning the works, or the execution or failure to execute the same, ...shall also be final, conclusive and binding on the contractor.

This Court held that the clause did not contain any arbitration agreement either expressly or by implication. The intention was to vest the Superintending Engineer with supervision and administrative control over the work.

11. For the self-same reasons, Tipper Chand cannot be applied to the present Clause 23.

12. Yet another decision in the case of K.K. Modi v. K.N. Modi : [1998]1SCR601 was considered by the Supreme Court in paragraph 4 of the report in the case of Bharat Bhushan Bansal which reads thus:

In the case of K.K. Modi v. K.N. Modi a Bench of this Court (of which one of us was a Member) had the occasion to consider the essential ingredients of an arbitration clause. Among the ingredients which are described in the said judgment, two important ingredients are that the agreement between the parties must contemplate that substantive rights of parties will be determined by the agreed Tribunal and that the Tribunal will determine the rights of the parties in an impartial and judicial manner with the Tribunal owing an equal obligation of fairness towards both sides and also that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law. There is a difference between an expert determination and arbitration. S.K. Chawla in Law of Arbitration and Conciliation at p. 164 states as follows:

4. Arbitration agreement to be distinguished from agreement for decision by an engineer or expert.- Contracts may contain a clause that on certain questions the decision of an engineer, architect or another expert shall be final. The decision given in such cases by the Engineer etc. is not an award. As pointed out by Bernstein, such a person is under no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own expertise and investigations. The procedure involved is not arbitration, and the Arbitration Act does not apply to it. The primary material on which such person acts is his own knowledge and experience, supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conform to rules of 'evidence') put up before him by either party. An arbitrator on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a less thorough investigation. Only one mind will be brought to bear on the problem. There will be no discovery of documents, there will not normally be any oral

'evidence' or oral submissions.

13. In K.K. Modi, the Supreme Court has succinctly drawn a distinction between the arbitration agreement and a decision by an engineer or expert for decision on certain questions. The said observations aptly apply to the present case.

14. Thus, we have no hesitation in holding that Clause 23 of the agreement between the parties is not an arbitration agreement.

Seen thus, the consideration of the matter by the single Judge cannot be faulted. Lepers Patent Appeal has no merit and it is dismissed in limine.

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