

M/s Associated Constructions Vs. The Executive Engineer

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Court : Karnataka

Decided On : May-23-2023

Judge : H.P.SANDESH

Appeal No. : CRP 29/2022

Appellant : M/s Associated Constructions

Respondent : The Executive Engineer

Judgement :

- 1 - CRP No.29 of 2022 C/W CRP No.33 of 2022 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE 23D DAY OF MAY, 2023 BEFORE THE HON'BLE MR JUSTICE H.P.SANDESH CIVIL REVISION PETITION NO.29 OF 2022(IO) C/W. CIVIL REVISION PETITION NO.33 OF 2022(IO) IN CIVIL REVISION PETITION NO.29 OF 2022 BETWEEN: M/S. ASSOCIATED CONSTRUCTIONS, CIVIL ENGINEERS AND CONTRACTORS, NO.144, 11TH B CROSS, NIPUNA HERITAGE ROAD, KODIGEHALLI, VIRUPAKSHIPURA, VIDYARANYAPURA POST, BANGALORE - 560 097. REPRESENTED BY ITS MANAGING PARTNER SRI K. MUNIKRISHNA. PETITIONER (BY SRI VIKRAM HUILGOL, SENIOR COUNSEL FOR SRI MOHAN C., ADVOCATE) AND:

1. THE EXECUTIVE ENGINEER, KARNATAKA HOUSING BOARD, DISTRICT CO-ORDINATION OFFICE, BELLARY - 583 101.

2. SRI M.V.S. RAO, SOLE ARBITRATOR, NO.282, ARAKERE GATE, LAKSHMI LAYOUT, 7TH CROSS, 2ND MAIN ROAD, BANNERGHATTA ROAD, BANGALORE - 560 076. RESPONDENTS - 2 - CRP No.29 of 2022 C/W CRP No.33 of 2022 (BY SRI BASAVARAJ SABARAD, SENIOR COUNSEL ALONG WITH SRI H.L. PRADEEP KUMAR, ADVOCATE FOR R-1, SRI NAGENDRA A, ADVOCATE FOR R-2) THIS CRP IS FILED UNDER SECTION 115 OF CPC, AGAINST THE

ORDER

DATED 18.06.2020 PASSED IN A.S.No.12/2017 ON THE FILE OF THE LXIX ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, (CCH.NO.23) BENGALURU, DISMISSING THE APPLICATION FILED UNDER

ORDER

7 RULE 11 OF CPC, FOR REJECTION OF PLAINT. IN CIVIL REVISION PETITION No.33/2022: BETWEEN: M/S. ASSOCIATED CONSTRUCTIONS, CIVIL ENGINEERS AND CONTRACTORS, NO.144, 11TH B CROSS, NIPUNA HERITAGE ROAD, KODIGEHALLI, VIRUPAKSHIPURA, VIDYARANYAPURA POST, BANGALORE-560097. REPRESENTED BY ITS MANAGING PARTNER SRI K. MUNIKRISHNA. ...PETITIONER (BY SRI VIKRAM HUILGOL, SENIOR COUNSEL FOR SRI MOHAN C., ADVOCATE) AND:

1. THE EXECUTIVE ENGINEER, KARNATAKA HOUSING BOARD, DISTRICT CO-ORDINATION OFFICE, GULBARGA- 585101.

2. SRI M.V.S. RAO, SOLE ARBITRATOR, NO.282, ARAKERE GATE, LAKSHMI LAYOUT, 7TH CROSS, 2ND MAIN

ROAD, BANNERGHATTA ROAD, BANGALORE-560076. RESPONDENTS - 3 - CRP No.29 of 2022 C/W CRP No.33 of 2022 (BY SRI BASAVARAJ SABARAD, SENIOR COUNSEL ALONG WITH SRI H.L. PRADEEP KUMAR, ADVOCATE FOR R-1, SRI NAGENDRA A, ADVOCATE FOR R-2) THIS CRP IS FILED UNDER SECTION 115 OF CPC, AGAINST THE

ORDER

DATED 18.06.2020 PASSED IN AS.NO.13/2017 ON THE FILE OF THE LXIX ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, (CCH.NO.70), BENGALURU, DISMISSING THE APPLICATION FILED UNDER

ORDER

RULE 11 OF CPC. THESE PETITIONS COMING ON FOR FINAL HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

These two civil revision petitions are filed before this Court under Section 115 of CPC challenging the order passed by the LXIX Additional City Civil and Sessions Judge (Commercial Court, CCH-89), Bangalore in A.S.Nos.12/2017 and 13/2017, dismissing the applications filed by the revision petitioner before the Court invoking the provisions under Section Order 7 Rule 11 of CPC, wherein prayed the Court to reject the arbitration suit filed under Section 34 of the Arbitration and Conciliation Act, 1996 (the said Act for short). In support of the application, one of the partner of the defendant in the said suit filed an affidavit stating that an agreement was entered into between the KHB through - 4 - CRP No.29 of 2022 C/W CRP No.33 of 2022 the plaintiff and the defendant herein on 23.03.1992 for the construction of the houses and when the dispute was arisen between the parties, the matter was referred to the arbitrator. The arbitrator having considered the material available on record, passed the award directing the defendants to pay the arbitral award amount. Being aggrieved by the said arbitral award, a suit is filed by respondent No.1 herein before the Court questioning the very award passed by the arbitrator. The defendant before the arbitration suit filed an application contending that the very suit is filed beyond the limitation period and the period allowed under Section 34(3) of the Act is only for a period of three months and on satisfaction, further one month period can be condoned. But in the case on hand, it is contended that the arbitration award was passed on 01.01.2014 and the same was communicated and in pursuance of the communication, a letter was also written to the State Government for satisfaction of the arbitration award. Even an execution petition was filed and in the execution petition also appeared and filed the - 5 - CRP No.29 of 2022 C/W CRP No.33 of 2022 statement of objections and even if taken the date of appearance before the executing Court and also filing of the objection statement, the suit is hopelessly barred by limitation.

2. The learned counsel for the petitioner would vehemently contend that the very contention of the respondent before the suit filed in A.S.No.12/2017 and 13/2017 is that the arbitration award is served on 03.10.2016 and the suit is within time cannot be accepted. The Trial Court while considering the application filed under Order 7 Rule 11 of CPC ignored the same and comes to the conclusion that service is on 03.10.2016 considering the averments made in the plaint and hence the very approach of the Trial Court is erroneous and hence it requires interference of this Court.

3. Per contra, the learned counsel for respondent No.1 would contend that under Section 31(5) of the Act, it is very clear that arbitration award shall be made in - 6 - CRP No.29 of 2022 C/W CRP No.33 of 2022 writing and shall be signed by the members of the Arbitration Tribunal and sub-Section (5) is clear that after the arbitral award is made, a signed copy shall be delivered to each party. The learned counsel submits that the party before the arbitrator is the Executing Engineer, who entrusted the work to the petitioner herein and no copy is delivered to the Executing Engineer and merely copy is sent to the Chief Engineer cannot be a proper service. The learned counsel submits that while entertaining the application under Order 7 Rule 11 of CPC, the Court has to consider the averments of the plaint and not the defence of the petitioner herein and only considering the averments made in the plaint, the Court can invoke Order 7 Rule 11 of CPC.

4. The learned counsel in support of his argument relied upon the judgment of the Apex Court in the case of C. NATRAJAN v. ASHIM BAI AND ANOTHER reported in (2007) 14 SCC183 and brought to the notice of this Court paragraph No.8 of the judgment, wherein it is observed that an application for - 7 - CRP No.29 of 2022 C/W CRP No.33 of 2022 rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the Court would not be entitled to consider the case of the defence.

5. The learned counsel also relied upon the judgment of the Apex Court in the case of SRI BISWANATH BANIK AND ANOTHER v. SMT. SULANGA BOSE AND OTHERS reported in 2022 Live Law (SC) 280 and brought to the notice of this Court paragraph No.7 of the judgment, wherein discussed with regard to provision under Order 7 Rule 11 of CPC on the ground of limitation. It is observed that at this stage what is required to be considered is the averments in the plaint. For the aforesaid purpose, the Court has to consider and read the averments in the plaint as a whole.-. 8 - CRP No.29 of 2022 C/W CRP No.33 of 2022 The learned counsel brought to the notice of this Court paragraph No.7.4 of the judgment, wherein it is observed with regard to the consideration of the averments made in the plaint with regard to barred by limitation. It is observed that it is the settled proposition of law that the plaint cannot be rejected partially. Even otherwise, the reliefs sought are interconnected. Whether the plaintiffs shall be entitled to any relief under Section 53A of the Transfer of Property Act or not has to be considered at the time of trial, but at this stage it cannot be said that the suit for the relief sought under Section 53A would not be maintainable at all and therefore the plaint is liable to be rejected in exercise of powers under Order 7 Rule 11 of CPC. It is also observed that the High Court has committed a grave error in allowing the application under Order 7 Rule 11 of CPC in rejecting the plaint.

6. The learned counsel also relied upon the judgment of the Apex Court in the case of STATE OF MAHARASHTRA AND OTHERS v. ARK BUILDERS PRIVATE LIMITED reported in (2011) 4 SCC616 and - 9 - CRP No.29 of 2022 C/W CRP No.33 of 2022 brought to the notice of this Court paragraph Nos.13, 14 and 15, wherein it is discussed with regard to Section 34 of the Act. In paragraph No.13, an observation is made that the expression party making that application had received the arbitral award cannot be read in isolation and it must be understood in light of what is said earlier in Section 31(5) that requires a signed copy of the award to be delivered to each party. Reading the two provisions together it is quite clear that the limitation prescribed under Section 34(3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting it aside. The learned counsel brought to the notice of this Court paragraph No.14 wherein extracted paragraph No.8 of the judgment of the Apex Court in the case of Union of India v. Tecco Trichy Engineers and Contractors, wherein it is observed with regard to the compliance of Section 33(1) of the Act and also considering the limitation under Section 34(3). As this delivery of the copy of the award has the effect of conferring certain - 10 - CRP No.29 of 2022 C/W CRP No.33 of 2022 rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of the award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.

7. The learned counsel also brought to the notice of this Court paragraph No.15 of the judgment, wherein the Apex Court discussed the legal position on the issue may be stated thus. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law.-. 11 - CRP No.29 of 2022 C/W CRP No.33 of 2022 8. The learned counsel referring these judgments would vehemently contend that the arbitrator has not served the copy of the arbitral award to the party, who is a party in the arbitral award and hence there cannot be a proper service of award. The learned counsel submits that if the copy was served on 03.10.2016 and suit is filed within the period of limitation i.e., within three

months i.e., in the month of January 2017 and hence the Court has to take note of the averments made in the suit itself. The learned counsel brought to the notice of this Court paragraph No.3.1 of the memorandum of arbitration suit, wherein it is very clear that a signed copy of the award was served on the plaintiff by defendant No.2 sole arbitrator vide letter dated 26.09.2016 and received on 05.10.2016 by the plaintiff. The learned counsel submits that the suit is filed within the time prescribed under Section 34(3) of the Act and the same has to be looked into and not the defence of the revision petitioners.-. 12 - CRP No.29 of 2022 C/W CRP No.33 of 2022 9. In reply to the arguments of the learned counsel for respondent No.1, the learned counsel for the petitioner submits that the documents which have been produced along with the memo of documents is very clear that there was a correspondence between the State Government and KHB for having had the knowledge of the arbitral award dated 01.01.2014 and consequent upon, the same was received by the KHB on 04.01.2014 and the letter was sent to the Principal Secretary of the State Government on 07.01.2014 and reference is also made in the said letter and hence they are having the knowledge about the award and the same has to be calculated from that date and the very contention of the learned counsel for respondent No.1 cannot be accepted. The learned counsel brought to the notice of this Court document No.8, wherein sought for information from the KHB and the Chief Engineer has given the information with regard to addressing the letter on 22.02.2014 and also on 08.01.2014 for release of award amount and the same has to be considered.-. 13 - CRP No.29 of 2022 C/W CRP No.33 of 2022 10. Having heard the respective learned counsel and also on perusal of the material available on record, there is no dispute with regard to the fact that the work was entrusted to the petitioner herein for construction of the houses under the Ashraya Scheme. The dispute between the parties is with regard to the work done by the petitioner herein and the matter was entrusted to the arbitration and arbitrator has passed the arbitral award on 01.01.2014. Admittedly, the arbitration suit is filed in the month of January 2017 and in the averments it is made clear in the arbitration suit that the copy was served on 05.10.2016 in terms of the letter dated 26.09.2016 and limitation has to be calculated based on the averments made in the Arbitration Suit No.12/2017. The Apex Court in its judgment in the case of C. Natrajan (supra) made it clear that the Court has to look into the averments made in the plaint and only the averments made in the plaint are relevant. Further, it is observed that at this stage the Court would not be entitled to consider the case of the defence. The - 14 - CRP No.29 of 2022 C/W CRP No.33 of 2022 petitioner is relying upon the document for having made the correspondence between the State Government and KHB that they are having the knowledge and those documents are nothing but the defence and also it is settled law that while considering an application under Order 7 Rule 11 of CPC, the Court has to consider the averments of the plaint while rejecting the plaint. The judgment referred by the learned counsel for respondent No.1 in the case of C. Natrajan (supra) is aptly applicable to the case on hand and the Court has to look into the averments made in the plaint which has been referred in paragraph No.3.1 of the arbitration suit.

11. The Apex Court in the judgment in the case of Sri Biswanath Banik (supra), discussed with regard to consideration of averments in the plaint as a whole in paragraph Nos.7 and 7.4. The Apex Court in the judgment in the case of ARK Builders Private Limited (supra) in paragraph Nos.13, 14 and 15 considering the proviso of Section 34 of the Arbitration Act in detail discussed the scope of Sections 31, 33(4), 33(1) and - 15 - CRP No.29 of 2022 C/W CRP No.33 of 2022 34(3) of the Act, wherein it is categorically held that it is not mere formality serving of copy and the same is mandatory. The legal position on the issue may be stated thus. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date of which the order/award was received by the party concerned in the manner prescribed by the law.

12. The provision under Section 31(5) of the Act is clear that after arbitral award is made, a signed copy shall be delivered to each party. In the case on hand, for having delivered the copy of the award to the party i.e., the Executive Engineer, no material is placed before the Court. The learned counsel for the petitioner would contend that the very arbitrator has appeared and filed an affidavit before the Court that it is personally - 16 -

CRP No.29 of 2022 C/W CRP No.33 of 2022 delivered and apart from that, the same is sent through post. For having served the copy personally, no document is placed before the Court and no doubt, the postal receipt for having sent the same is also produced before the Court and acknowledgement for having delivered the arbitration award is not produced before the Court. Section 31(5) of the Act is clear that a signed copy shall be delivered to each party and no doubt the correspondence is made by the Chief Secretary of the KHB with regard to award is concerned and in compliance of Section 31(5) of Act, no material is placed before the Court. When such being the case, the very contention of the learned counsel for the petitioner cannot be accepted.

13. It is important to note that when the arbitration suit was filed before the Court, the office objection was raised with regard to limitation is concerned. The Court considered the office objection and passed the order dated 08.02.2017, wherein comes to the definite conclusion having considered the averments - 17 - CRP No.29 of 2022 C/W CRP No.33 of 2022 made in the plaint that it is specifically stated that it was received by the plaintiff on 03.10.2016 and the same is within limitation period. It is important to note that this order has not been challenged by the revision petitioner and the same has attained its finality. No doubt, this order was passed when the office objection is raised with regard to the limitation is concerned prior to the appearance of the revision petitioner. Even on appearance also, when the Court has given the definite finding that the suit is not barred by limitation and the same is filed within the period of three months from the date of receipt of arbitral award, the same ought to have been challenged and instead of challenging the said order, an application is filed under Order 7 Rule 11 of CPC and while dismissing the application, the Trial Court comes to the conclusion that the Court cannot sit and again consider the same issue by entertaining the application under Order 7 Rule 11 of CPC and the said observation is made in paragraph No.10 of the order. The Trial Court has not committed any error in dismissing - 18 - CRP No.29 of 2022 C/W CRP No.33 of 2022 the application and the Trial Court has taken note of the averments made in the plaint, particularly in paragraph No.31.1 and while exercising the power under Order 7 Rule 11 of CPC, the Court has to look into the averments of the plaint and not committed any error. Hence, I do not find any error committed by the Trial Court in rejecting the application filed under Order 7 Rule 11 of CPC.

14. In view of the discussions made above, I pass the following:

ORDER

Both the petitions are dismissed. Sd/- JUDGE MD List No.:

1. SI No.:

6.

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