

Prasad Construction and anr. Vs. the State of Bihar and ors.

Prasad Construction and anr. Vs. the State of Bihar and ors.

SooperKanoon Citation : sooperkanoon.com/132978

Court : Patna

Decided On : Jul-21-2004

Judge : S.N. Hussain, J.

Acts : [Arbitration Act, 1940](#) - Sections 8 and 20; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47

Appeal No. : Civil Revision No. 1540 of 2002

Appellant : Prasad Construction and anr.

Respondent : The State of Bihar and ors.

Advocate for Def. : Nand Bansh Nr. Singh, Adv.

Advocate for Pet/Ap. : A.B. Jittu, SC-II

Disposition : Revision allowed

Judgement :

S.N. Hussain, J.

1. The petitioners were the plaintiff-Decree-holders in the Court below and are aggrieved by order dated 31.8.2002 by which the learned Subordinate Judge-III, Patna, dismissed Execution Case No. 8/99 assuming that the decree award had been fully satisfied by the payments made by the judgment-debtors.

2. The short facts of this case is that the petitioners had filed Title Suit No. 262/1990 (19 of 1990) under the provisions of Sections 8 and 20 of the [Arbitration Act, 1940](#) (hereinafter referred to as 'the Act') for payment of the dues of bills with interest for the complete construction works of 5th to 7th storeys of Technical Secretariat of Patna.

3. On 24.8.1991 the defendants-Opposite parties filed their show-cause praying that the matter may be referred to Arbitration under the provisions of Clause 23 of agreement whereupon the matter was referred to arbitration by the learned trial.Court on 5.3.1992. But, subsequently due to the death of that Arbitrator Anr. Arbitrator was appointed on 30.6.1992. The said Arbitrator prepared an award on 27.9.1992 holding that plaintiff to be entitled to payments of the bills due with interest at the rate of 12% per annum.

4. The defendants-Opposite parties filed their objection to the said award on 17.12.1992 in the Court below whereafter the plaintiffs-petitioners also filed their rejoinder on 21.1.1993 and after hearing the parties and considering the materials on record, the learned trial Court affirmed the award and made it rule of the Court on 16.6.1994 and accordingly the decree was prepared and signed on 2.7.1994 whereafter the defendants- Opposite parties challenged the same before this Court in Misc. Appeal No. 483/1994 under the provision of Section 39 of the Act which dismissed in-limine on 15.12.1997.

5. Thereafter, the plaintiffs-petitioners got Execution Case No. 8/1999 initiated for execution of the said decree and in the said Execution case the defendants-Opposite parties (judgment-debtors) filed a petition on 22.9,2000 for dropping the said Execution case and also for directing the plaintiffs-petitioners (decree-holders) to pay Rs. 1,90,961/- with 15% interest from 26.10.1992 which, according to the defendants-Opposite parties, was the date of filing the bill. To this petition the plaintiffs-petitioners filed a rejoinder dated 22.11.2000 denying the claim of the defendants-Opposite parties regarding payment and also stating that the Executing Court can not go behind the decree specifically when the High Court had also affirmed the decree. However, by the impugned order dated 31.8.2002 the Executing Court, namely, Sub-ordinate Judge-II, Patna, dismissed the

Execution Case No. 8/99 holding that the decree had been fully satisfied after arriving at the findings that the plaintiffs had completed the assigned work, according to the specification, within the extended time granted by the Department. So the plaintiffs are entitled for legal dues for which the award was given. The Court below further held that final bill was submitted by the defendants-judgment-debtors on 10.8.2000 which showed that the defendants-judgment-debtors were entitled to recover Rs. 1,90,961/- and that Annexure- 2 to the aforesaid objection of the defendants show that the defendants-judgment-debtors have already paid the sum to which, according to the Court below, no objection was raised by the plaintiffs-Decree-holders.

6. Preliminary objection has been raised by the learned counsel for the Opposite parties regarding maintainability of this Civil revision on the ground that appeal under the provision of Section 39(1)(vi) of the Act could have been filed against the impugned order as the impugned order amounted to setting aside of the award. In support of his contention the learned counsel for the Opposite parties has cited a Full Bench decision of this Court reported in AIR 1967 Pat 407, Maakeshwar Mishra v. Laliteshwar Prasad Singh and Ors. In my view, the preliminary objection raised by the defendant-Opposite parties is not sustainable in law as the impugned order cannot in any way assumed to set aside the award, rather the impugned order only decides the question as to whether the said award has been satisfied by the subsequent act of the parties.

7. On the other hand, the learned counsel for the plaintiffs-petitioners submits that the impugned order is completely without jurisdiction as the learned Court below which was the Executing Court had no jurisdiction to go behind the decree, specifically when the High Court had also affirmed the decree and that there was no provision in the Act under which such an objection can be raised by the Opposite parties- defendants-judgment debtors in an Executing Court. The only provision under which the Executing Court can pass any such order is Section 47 of the Code of Civil Procedure against which no appeal lies and only a revision can lie. In support or the said contention the learned counsel for the plaintiffs-petitioners cited a Full Bench decision of this Court reported in AIR 1987 Pat 33, Masomat Narmada Devi and Anr. v. Ram Nandan Singh and Ors.. Hence,

according to him, this civil revision is maintainable. The learned counsel for the plaintiffs-petitioners further contended that in their objection in the Court below the defendants-Opposite parties had annexed some bills but they were for the period prior to the award given which cannot be counted after the award and the decree has been prepared by the Court below. He further submitted that bills prior to the award cannot be counted and only payments made after the award and the decree can be legally subtracted from the decretal amount. But there was no whisper about any such payment until the said award was confirmed and decree was prepared by the trial Court on 16.6.1994 and 2.7.1994. Hence; according to him, the learned Court below had no jurisdiction to enter into the aforesaid controversy. He further contended that the defendants-Opposite parties did not ever raise any question of set or counter-claim in the suit which remained pending for about two years after the preparation of the award. Hence, according to him, such objections cannot be legally raised in the Executing Court. The learned counsel for the plaintiffs-petitioners also raised the plea of res-judicata, waiver, estoppel etc. stating that the defendants-Opposite parties had already waived their rights by not raising their claims before the decree was prepared. He has placed reliance upon a Full Bench decision of this Court reported in AIR 1968 Pat 150, Bokaro and Ramgur Ltd. v. Dr. Prasun Kumar Banerjee. He further contended that the defendants-Opposite parties were claiming adjustments of the award which cannot be allowed in the instant case as the period of limitation provided under Section 125 of the Limitation Act was only thirty days but even as per the claim of the defendants- Opposite parties regarding final bills dated 26.10.1992, no such objection was ever raised either before the trial Court or before any competent Court for several years. In support of his contention he. has placed reliance on the case of Shyamlal Jagnani and Ors. v. Sunder Singh and Ors., reported in AIR 1974 Pat 138. In view of the aforesaid facts and circumstances as well as the position in law the learned counsel for the plaintiffs-petitioners submits that the impugned order is not sustainable in law and hence the same be set aside as the decree has to be executed in accordance with law.

8. The learned counsel for the defendants-Opposite, parties vehemently opposed the contention of the learned counsel for the petitioners stating that it was specifically stated in the award dated 27.9.1992 that the Contractors (plaintiffs-

petitioners) were entitled to any other legal dues as per the terms of contract and as such the award was given for payment of legal dues after final bill was prepared and checked by the Department as per codal department. Hence, according to his contention, the final bill was prepared on 27.9.1992 and payments were made thereafter and a catalogue to that effect was also prepared on 10.8.2000 and, hence, according to him, there were no dues left to be paid to the plaintiffs-petitioners and as such the impugned order was fully justified legal and proper.

9. After considering the contentions raised by the learned counsel for the parties as well as the materials on record including the award, judgment, objection, rejoinder and the impugned order, I find that the main issue to be decided by the learned Court below was with respect to the period when the payments were made. If the payments were made before the award, and the decree of the trial Court, they cannot be legally taken into consideration by an Executing Court which had jurisdiction to go behind the decree specially when the High Court had also affirmed the decree. But if the payments had been made after the award and decree prepared by the Court, certainly the amounts to paid have to be subtracted from the decretal amount on the awarded amount as the case may be. I also find that the learned Court below has passed the impugned order on the assumption that the plaintiffs-petitioners had not raised any objection to the statements of the defendants-Opposite parties in their petition dated 22.9.2000 with respect to the payments made to them, but it is apparent from the rejoinder filed by the plaintiffs-petitioners dated 22.11.2000 that they had denied to have received any amount after the award. But this aspect of the matter has been completely overlooked by the learned court below.

10. In the aforesaid facts and circumstances, I find that the impugned order is clearly illegal, without jurisdiction and against specific proposition of law. Accordingly, this civil revision is allowed, the impugned order of the learned Court below is set aside and the matter is remanded to the learned Court below to decide the entire matter afresh in accordance with law and in the light of the observations made above and also after considering the objections raised by the defendants-Opposite parties and the rejoinder/claim of the plaintiffs-petitioners.