

Devender Singh Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : Apr-13-1987

Reported in : AIR1987All306

Judge : K.C. Agrawal and ;R.K. Gulati, JJ.

Acts : [Contract Act, 1872](#) - Sections 73

Appeal No. : First Appeal No. 122 of 1980

Appellant : Devender Singh

Respondent : State of U.P. and anr.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : V.K. Gupta, Adv.

Disposition : Appeal partly allowed

Judgement :

K.C. Agrawal, J.

1. The plaintiff filed the suit giving rise to the present appeal for recovery of Rs. 63,830/- for the work done for the defendant with pendente lite and future interest and for recovery of Rs. 30,480/- for damages on account of breach of contract. The details of the amounts claimed are mentioned in Annex. A to the plaint.

2. For deciding the claim since the details are not required to be given excepting that of damages, we refrain from mentioning the same. The sum of Rs. 30,480/- claimed as damages can be divided into two heads. One of them covers Rs. 20,480/-, the details of this amount are given in Annex. A to the plaint The balance amount of Rs. 10,000/- was claimed for the delay in the disposal of the application made by the plaintiff for extension of time. The plaintiff claimed that the application for extension was made on 4-9-1967, but was finally rejected on 14-2-1968. Because of the delay or belated disposal, five months and 11 days were spent. He claimed that had the department given this refusal with regard in extension of time just at the expiry of the stipulated period, the plaintiff would have been able to get some work elsewhere and would have executed work worth Rs. 1,00,000/- and would have easily earned Rs. 10,000/- as profit. This loss of Rs. 10,000/- to the plaintiff during the period of 5 1/2 months, which was wasted due to noncommunication of decision with regard to the extension on the part of the department is also due from the department, for which the plaintiff is also entitled.

3. The suit was contested by the defendants denying the liability. The defendants claimed that neither was the plaintiff entitled for the work done as claimed by him nor towards damages.

4. The plaintiff had claimed Rs. 27,136/- deposited by him as security money for the due performance of contract along with 10% interest. This claim was founded on the allegation that the amount had been wrongly forfeited by the State.

5. On the pleadings of the parties, a number of issues were framed. Amongst these, the material ones for deciding the appeal are 4 to 7, which are quoted below : --

4. Whether the plaintiff committed any breach of terms of contract?

5. Whether there was any negligence on the part of employees of the defendant?

6. Whether the plaintiff is entitled to claim any amount and damages?

7. To what relief, if any, is the plaintiff entitled?

6. Issues 1 to 3 were decided in favour of the plaintiff.

7. During the trial, the claim of the plaintiff for refund of security of Rs. 27,136/- was conceded to on behalf of the defendants. The suit was thus decreed for this sum along with interest at the rate of Rs. 6/- per cent per annum. As against this decree, no appeal has been preferred by the defendants. Consequently, this has become final.

8. Before us, the main controversy is about issues 4, 5, 6 and 7, as we have already pointed out. The defendants relied on Clause 23 of the agreement for resisting the claim of the plaintiff which runs as under :

'Clause 23 -- 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 the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, 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, conclusive and binding on the contractor.'

9. He argued that the decision of the Superintending Engineer with regard to the claims was since final, the suit of the plaintiff was liable to be dismissed on that ground. ; The trial Court did not examine the merits of the claim of various items set forth in Annex. A to the plaint and by holding that the decision of the Superintending Engineer with regard to admissibility of the amount could not be questioned, dismissed the suit.

10. We are unable to uphold the view of the Court below inasmuch as on interpretation of Clause 23, referred to above, we are unable to agree.

11. At this place, we may refer to a letter dated 6-6-1969 (Ex. 44) written by the Superintending Engineer in reply to the application made by the plaintiff dated 8th May, 1969. It appears that through this application, the plaintiff sought arbitration of the Superintending Engineer with regard to the various claims which are the subject-matter of the present suit. The Superintending Engineer refused to go into the disputed items by saying that Clause 23 was since not an arbitration clause, he could not do so.

12. The controversy relating to the interpretation of Clause 23 came up for decision before a Division Bench of this Court in *State of U.P. v. Padam Singh Rana*, AIR 1971 All 270. The clause in that case was exactly the same as it is in the present appeal. In that case, to the award given by the arbitrator, objection was filed by the contractor on the ground that in the agreement between the parties, there was no provision for referring the matter to an arbitrator for decision. The High Court affirmed the decision of the trial Court by holding that the essential characteristic of 'arbitration is the binding character of the decision of the arbitrator on the parties before him. When a decision of a person is binding on one of the parties and not all the parties to the dispute, it could not be said that the function, which a person giving the award exercised, was arbitral in character.

13. We have already quoted Clause 23 above. What is material in Clause 23 is that it does not lay down that the award will be binding on all the parties. It prescribes that any decision of the Superintending Engineer would be binding on the contractor. It is not provided in it that it will be binding on the State Government as well. An award given in an arbitration has to be binding on all the parties which are involved in a dispute, and not only on one of them. This is a basic and essential character of an award. Apart from the interpretation of Clause 23, we have noticed above that the Superintending Engineer had refused to examine the merits of the various items of the claim of the plaintiff by saying that he was not an arbitrator, and in our opinion, that was rightly done. Since it was so, the Court below could not rightfully treat it as an award. Admittedly, neither was evidence taken by the Superintending Engineer nor those claims were adjudicated upon in the manner that an arbitrator does.

14. In State of U. P. v. Tiper Chand, AIR 1980 SC 1522, the Supreme Court came to consider Clause 22 of the agreement which was on the same lines as Clause 23 of our case. The Supreme Court held that Clause 22 did not amount to an arbitration agreement, dismissed the appeal.

15. In this connection the Supreme Court observed :

'Admittedly, the clause does not contain any express arbitration agreement. Nor can such an agreement be spelt out from its term by implications, there can be no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of clause clearly appears to be to vest the Superintending Engineer with the supervision of execution of work and administrative control over it from time to time'.

16. That is the position in our case as well.

17. For what we have said above, since the Court below did not examine the claim of the plaintiff on merits and dismissed the same solely on the basis of Clause 23, it is liable to be set aside.

18. We have noticed above that the claim of the plaintiff for damages is for Rs. 10,000/- for the delay in the disposal of the application for extension of time. The plaintiff had alleged that had the application been disposed of earlier, he would have been able to get some work elsewhere and would have executed the work worth Rs. 1,00,000/- and earned Rs. 10,000/-. This type of damages, one is not entitled to get.

19. The plaintiff, Devender Singh, in his statement deposed that had the department refused his application for extension of time earlier, he could get another contract and earned money. His statement is unsupported by any evidence. Nothing has been brought on record to demonstrate that future contract was even available. For the quantum of damages claimed, there is no material on record. The claim, moreover, appears to us to be remote. For deciding whether damages claimed are too remote, the test is whether the damage was such as must have been for contemplation of the parties as being 'a possible result or the

breach'. That is not so in the instant case. There is no guarantee in the contract that in case an application for extension for completing the contract was given, the same was bound to be allowed. The measure of damages in contract is compensation for the consequence which flows as a natural and capable consequence of the breach or, in other words, which could be foreseen (Cook v. Swinfen, 1967 (1) All ER 299).

20. We having not found any substance in the claim of Rs. 10,000/- for the belated rejection of the application for extension of time, in agreement with the Court below, find that the plaintiff-appellant is not entitled to any decree in respect of it.

21. In view of the fact that the claims on merits have not been examined by the Civil Judge it is necessary to remand the suit to the Court below for a fresh decision about the claim of Rs. 10,000/- for damages covered by issue No. 6.

22. In the result, the appeal succeeds and is allowed partly and the suit is remanded to the Court below for a fresh trial in the light of the observations made above. The parties shall pay and receive the costs in accordance with the failure and success of this appeal.

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