SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Union of India and anr. Vs. Dalmia Dadri Cement Co. Ltd.

Union of India and anr. Vs. Dalmia Dadri Cement Co. Ltd.

SooperKanoon Citation : sooperkanoon.com/680200

Court : Delhi

Decided On : May-23-1979

Reported in : AIR1979Delhi223

Judge : D.K. Kapur, J.

Acts : Interest Act, 1839 - Sections 1; ;Cement Control Order, 1967

Appeal No. : Suit No. 645 of 1975

Appellant : Union of India and anr.

Respondent : Dalmia Dadri Cement Co. Ltd.

Advocate for Def. : R.S. Sharma, Adv.

Advocate for Pet/Ap. : Charanjit Talwar,; Avinish Ahlwat and; S.K. Misra, Advs

Judgement :
ORDER

1. The suit under consideration has been instituted for the recovery of Rs.2,70,82,043.36. The basis of the suit is the Cement Control Order, 1967, referred to hereinafter as the 'Order' which was issued under the provisions of the Industries (Development and Regulation) Act, 1951. Under this 'Order' the price of cement has been fixed on a uniform pattern throughout India. Under Clause 9 of the 'Order' every producer has to pay a certain amount to the Controller when the

price realised by the producer exceeds the aggregate of the ex-factory price calculated under the Order, together with the selling agency commission, the excise duty and packing charges. The excess amount is to be kept by the Cement Controller in a Cement Regulation Account and spent for equalizing the expenditure of various producers and other parties as fully specified in the said 'Order'.

2. The case of the plaintiffs is that the defendant used to send monthly statements showing the quantity of cements sold and the price realised. As a result of the statements which were submitted and certified by the. auditors of the defendant company, huge amounts became payable for the period 1st Jan., 1968 to 5th May, 1974. According to the plaint, the amount due is Rupees 1,84,11,602.85. It is then said that the accounts were checked by officials in the office of the Cement Controller, who found that there were some additional amounts due on account of miscalculations. After allowing for all the errors, the total amount due is stated in paragraph No. 19 of the plaint to be Rupees '1,87,26,538.30, which can be referred to as the principal claim. The plaintiffs claim interest on this amount which has been calculated at Rs.82,98,105.67, and some additional interest on the arrears and miscalculations which have been discovered later. The total claim for interest is Rs. 83,55,505.06. The suit before the Court seeks the recovery of the principal claim plus interest which has been calculated up to 31st Aug., 1975. Interest pendente lite and future interest is also claimed. I may also say that the interest has been calculated at the rate of interest applicable to advances made by the State Bank of India to individual borrowers.

3. The suit was resisted by the defendant and on the pleadings the following issues were drawn on 13th Dec. 1977:-

(i) Whether the gum of Rupees 1,87,26,538.30p. (Rupees one crore eighty seven lacs, twenty - six thousand five hundred thirty eight and thirty paise only) is not due to the plaintiff as claimed in the suit? OPD.

(ii) Are the plaintiff entitled to any interest on the above amount, if so at what rate? OPP.

(iii) Whether the suit is within limitation? DPP/OPP.

(iv) Whether the plaintiffs are competent to file the present suit? OPP.

(v) Relief.'

Some evidence was recorded, but eventually the dispute between the parties was narrowed down as per statements of counsel recorded on 22nd Aug. 1978, to the question of interest only. There is now no dispute about principal sum stated above and the only question is whether interest as claimed is due.

4. I have heard arguments addressed by learned counsel and find that the question of interest is by no means a simple one in this case.

5. Before dealing with the contentions actually raised, I may set out the position of the plaintiffs on the question of interest as stated in the plaint. It is stated in para. No. 21 of the plaint that the amounts to be paid under Clause 9 of the 'Order' had to be aid at a time fixed by the Cement control order, 1967, and as the amounts were not paid, interest is payable under S. 1 of the Interest Act, 1839, from the date on which the amount became payable. The case of the plaintiffs then is that under the 'Order' there was a time or date by which the amounts became payable and the amounts and the date on which they became payable are set out in Annex. 6 attached to the plaint. Similarly, for the miscalculated amount, the plaintiffs have calculated the date from which interest became payable.

6. The claim for interest is resisted by the defendant on the ground that interest is not payable under the Interest Act.

7. I would now set out S. 1 of the Interest Act under which the claim falls:

'1. Power of Court to allow interest It is, thereforee, hereby enacted, that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then

from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law.'

8. Plainly, interest is payable in quite a number of variable circumstances under this Section. The Section also shows that when a debt or sum certain is payable at a specific time or even otherwise, the Court may in certain circumstances allow interest in addition to the principal sum. The interest is to be calculated from the date when the sum or debt in question became payable, The circumstances in which the section operates are clear from the following words:-

'if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writ-ing 11

In the latter case, it is provided that interest will only run if interest had been claimed in the letter of demand. It is nobody's case that a demand for interest was raised, so, we are left with the question whether the debt was payable by virtue of some written 'instrument' at a certain time. Alternatively, it has been urged before me that the case is covered by the last words of the section, which is that interest is payable because the money was held in trust by the defendant.

9. As the amount involved in the present case is a very substantial one, it has become imperative to find out whether in a case like the present interest can be allowed by the court. The obligation to pay the amount has been created by the Cement Control Order, 1967. The 'Order' states in Clause 9 as follows:-

'Payments to Cement Regulation Account Every producer shall, in respect of each transaction by way of sale of cement effected by him, pay within one month of the close of the month in which sales took place, to the Controller, an equivalent to the amount, if any, by which free on rail destination price of such cement realised by him exceeds the aggregate of the following amounts, etc .....

Thus, in practice this Clause means that if some cement is sold, say, in the month of Nov., 1964, then the excess amount, if any, payable under the Clause has to be paid by the end of December of that year. As the defendant has been selling cement over a long period of time as would be obvious from the facts stated above, this amount was payable by certain specific dates under the 'Order' and when it was not paid, a liability under the Clause arose for paying the said amount. As the payments have admittedly been very much delayed, the question for consideration is whether this payment was under a 'written instrument'. This leads to the obvious query whether the 'Order' can be described as a written instrument. According to the contentions of the learned counsel for the plaintiffs the 'Order, is a written instrument and, thereforee, the conditions of S. 1 of the Interest Act are satisfied. A number of cases have been referred to at the Bar on this question on the other hand, the contention of the counsel for the defendant is that the Cement Control Order is a law which cannot be described as an instrument within the meaning of the Interest Act. The alternative contention of the plaintiffs is that the money remained in the hands of the defendant as an express or implied trustee and, hence, interest was payable even if the document in question was not an instrument.

10. To support his contention that the Cement Control Order is an 'instrument', learned counsel has cited Mohan Chowdhury v. Chief Commr., Union Territory of Tripura, : 1964 CriLJ132 , wherein a Presidential order issued under Art. 359(1) of the Constitution was held to be an 'instrument' within the meaning of S. 8 of the General Clauses Act, 1897. The relevant part of S. 8 of the General Clauses Act states that if a Central Act or Regulation, repeals and re-enacts, with or without modification, any provision, of a former enactment, then references in any other enactment or in any other instrument to the repealed provision shall be construed as references to the re-enacted provision. In effect, what the section means is that if there is a reference in any Act to (any) the Limitation Act or the Specific Relief Act or the Cri. P. C., which are all Acts which have been re-enacted, then the reference will be construed as being to the new re-enacted Act. The provision in the General Clauses Act is obviously intended to avoid the necessity for wholesale alterations of references to Acts which are repealed and then re-enacted. In the case before the Supreme Court, a detention order had been passed under R. 30

of the defense of India Rules, 1962. This was after the President had declared an emergency on 3rd Nov. 1962 and suspended the right to move the Court for enforcement of rights conferred by Arts 21 and 22 of the Constitution. The actual order passed by the President suspending the right to move the Court contained at the end the following words:-

'if such person has been deprived of any such rights under the defense of India Ordinance, 1962 (4 of 1962) or any rule or order made there under.'

The effect of these limiting words was that the right to move the Court was suspended only if the detention in question was under the defense of India Ordinance or rules made there under and not in other cases. As it happened, the Ordinance came to an end because it could only operate for six weeks after the re-assembly of Parliament, and then the defense of India Act, 1962 was passed repealing and re-enacting the Ordinance. One of the questions urged before the Supreme Court was that the limitation to move the Supreme Court for enforcement of the fundamental rights under Arts. 21 and 22 of the Constitution could not apply as the Ordinance had been repealed and the Presidential Order was limited only to detentions under the Ordinance. This contention was rejected on the ground that the Presidential order was an 'instrument, and references in the 'instrument' to an Act or Regulation such as the Ordinance which had been repealed and re-enacted in the form of the defense of India Act had to be read as references to the re-enacted provision. In other words, the effect of the suspension of the fundamental rights continued also in respect of detentions continued under the defense of India Act, 1962.

11. The contention of learned counsel for the plaintiff, though plausible, cannot in my view apply to the case before me. For one thing, the word 'instrument' used in S. 8 of the General Clauses Act is used in quite a different context from the word, 'instrument' occurring in S. 1 of the Interest Act. The word as used in the Interest Act must relate to some document which creates a relationship of debtor and creditor because interest is only payable in the case of loans or debts and not in other cases. The word 'instrument, as used in the General Clauses Act is of much more general application. Then a Presidential Order under Art. 359 of the

Constitution is very different from the Cement Control order now under consideration because, this order is issued under the provisions of the Industries (Development and Regulation) Act, 1951 and has the force of law. It is a statutory order which has under the general rules of interpretation the same effect as the original Act. The principles of delegated Legislature are now so well-settled that it cannot be doubted that the Cement Control Order, 1967 has to be treated as if it is part and parcel of the Industries (Development and Regulation) Act, 1951. In applying S. 8 of the General Clauses Act, it may be that this order can be treated as an 'instrument', but the word 'instrument, as occurring in the Interest Act appears in my view to mean an instrument executed between the parties such as a mortgage, sale-deed, loan agreement, contract, lease and so on. In such instrument, provision is often made for paying amounts by specific dates. The meaning of the section appears to be that if the date is specified but no rate of interest is mentioned, then interest can be allowed. If an instrument such as the Cement Control Order is involved, it is not an 'instrument' executed inter parts, but a law declared by a competent authority. So, I am not able to hold that the Cement Control Order, 1967 is an 'instrument' within the meaning of that Order as it occurs in S. 1 of the Interest Act. To my mind, the word 'instrument' can have several meanings which may be wide or narrow according to the context. When a question arises as to what is the meaning to 'e given then the answer has to depend on the context in which the word occurs.

12. There is another judgment of the Supreme Court which has also been cited before me which gives a more appropriate answer in the context in which I am examining the question. This judgment is reported as Purshottam. H. Judye v. V. B. Potdar, : (1966)ILLJ412SC . An award had been given under the Payment of Wages Act, 1936 (Maharashtra Amendment) and the Court had to consider whether it was an 'instrument' within the meaning of the definition of 'Wages'. In the relevant Section, wages included amounts payable under any law, 'contract or instrument.' So the question before the Court was whether an award directing payment of gratuity was an 'instrument'. A complete analysis of this question occurs in paras Nos. 11 and 12 of the judgment where both the narrower and wider interpretations of the word 'instrument' are dealt with. The two paragraphs read as under.

'11. That takes us to the question as to whether an award can be appropriate described as an instrument which provided for the payment of gratuity. It is true that an instrument normally indicates a document executed between the parties to it. But if the intention of the Legislature was to confine the word 'instrument' to such documents alone, it would have said 'under any law, contract or other instrument.' The use of the word 'other' would have justified the contention that the instrument should be of the same category as a contract, and cannot take in a document which evidences adjudication by an Industrial Court. The scope of the denotation of the word 'instrument' has to be judged in the light of the general object which the amended definition of 'wages' is intended to achieve. As we have already indicated, when the Legislature amended the definition of 'wages' in 1957, it obviously intended to widen the scope of that expression. Remunerations payable under the awards have been included within the definition, bonus payable under the awards also falls within subclause (d). That is the obvious implication of sub-clause (6). Having regard to the object which the legislature had in mind in widening the scope of the definition, we think it would not be unreasonable to hold that the word 'instrument' has a wider denotation in the context and cannot be confined only to documents executed as between the parties. The scheme of the definition and the context of sub-clause (d) read with subclause (6) seem to suggest that the word 'instrument' would include awards made by Industrial Courts of competent jurisdiction on principle, it is difficult to imagine that whereas a bonus claimable under an award can be recovered by employees by moving the authority , S. 15, a gratuity claimable under an award cannot be so recovered.'

'12. In construing the word 'instrument' in narrower sense, the High Court has referred to the decision in Jordell v. Jordell (1869) 7 Eq 461. In that case, Lord Romilly, M. R. has observed that an order of Court is not an instrument within the meaning of the Apportionment Act, 4 and 5 Will 4, C. 22. This decision undoubtedly shows that the word 'instrument' can have a narrow meaning if the context of the statutory provision in which it occurs indicates that way. On the other hand, under the Convincing Act, 1881 44 Vict. C. 41 S. 2 (xiii) 'instrument' includes deed, will, in closure, award and Act of Parliament, (vide Stroud's Judicial Dictionary, p. 1473). It is thus clear that in construing the word 'instrument' we must have regard to the context in which the word occurs. No one can suggest

that the word 'instrument' can always and in every case include an award or an order of adjudication. On the contrary, as we had ready indicated 'instrument' would refer to documents executed by the parties. But if the context clearly indicates that the word 'instrument' is used in a much larger sense, that context must be taken into account and a comprehensive interpretation must be placed upon that word. We are, thereforee, satisfied that the High Court was in error in coming to the conclusion that the word 'instrument' did not include an award and that made the applications made by the appellants before respondent No. 1 incompetent.'

It may be noticed that the present case seems to be covered by the narrower meaning. I completely agree that in the context of the present case, the word 'instrument, has to be given the narrower meaning, i.e., it must be treated as a document executed by the parties. If the context had directed otherwise or it was the inevitable result of what is stated in the Interest Act, I would have to take the wider view to hold that instrument made by some third party could be treated as creating an obligation to pay interest.

13. Strictly speaking, the word 'interest' properly applies to cases where a relationship of debtor and creditor exists. A lender of money who allows the borrower to use certain funds deprives him self of the use of those funds. And he does so because he charges interest which may be described as a kind of trent for the use of funds. The familiar case of a Bank or a lender lending out money on payment of interest gives the idea behind the Section, The Section covers cases when no interest is payable under the arrangement between the lender and the borrower. The Court has the discretion to allow interest if it thinks fit at the current market rate of interest if the debts are payable at a certain time under a written instrument. I can not properly say that the funds involved, in this case are payable under a written instrument. No doubt, the Cement Control order is a document in writing and as it directs payment at a given time, it can be urged and it has been urged that it is a written instrument directing payment by a particular date and, thereforee, directing interest. But then, any enactment made by the Legislature such as the Sales Tax Act or the Income-tax Act, and so on, are documents which direct payment of certain amount and it would be surprising if interest could be

payable under them without a specific provision in those Acts regarding the payment of interest. Normally, there are provisions in say, the Income-tax Act and other Acts directing that if taxes are not paid on a given date then some penalty is imposable. If there was no such provision, it would be surprising to my mind to apply the Interest Act to such cases. It would appear that if a statute or a statutory order creates a liability, then the same statute or statutory order must specify the penalty that will follow for non-compliance. The Interest Act is not intended to cover cases of this type. To my mind, the Interest Act only applies when the debtor and creditor relationship is created by a voluntary act and not when the relation is created by the exercise of a Legislative power. If the State wants to impose interest for noncompliance with a statutory liability, then the source of that penalty must also be in that statute or some allied statute which clearly deals with such a question. The theory of interest to my mind is based only on a contractual relation and the Interest Act cannot be extended to cover a case like the present one. As the amount of interest involved is quite enormous, the question had turned out to be of more than ordinary significance because the amount is somewhat larger than is normal in cases involving interest. Still, I would come to the conclusion that interest is not payable under the Interest Act within the context of S. 1 of the Interest Act, the Cement Control Order, 1967, cannot be described as a written instrument though it might be treated as an instrument for the purpose of S. 8 of the General Clauses Act.

14. 1 now take up the alternative case pressed by counsel for the plaintiff. Reliance is placed on the proviso to Section 1 of the Interest Act which states that interest shall be payable in all cases in which it is now payable by law. The contention now is that the provisions of the Cement Control Order, 1967 create a scheme for rationalizing the cost of production of cement throughout the country the purpose of the enactment is to equalize prices and secure supply of cement at various places in the country. I am quite satisfied that this contention is correct. If the price realized by the producer is more than the ex-factory price plus the selling agency commission plus the excise duty for packing, then the excess has to be paid to the Central Account. The Controller is to credit the amount of excess received by him in a Cement Regulation Account, which is mentioned in Para. No. 11 of the Order. This equalization account is to be used for paying those

producers who realise less than they should have realised on account of the factory price plus selling agency commission plus excise duty plus, packing charges. The case of the State is that the whole amount involved in the suit should have gone to the Cement Regulation Account for being paid to, other producers. It is contended that the defendant had no right to retain, this amount and having retained it, al kind of trustee relationship has been created. In other words, the contention is that the amount has been held by the defendant in trust and in the case of amounts held in trust, interest would be payable. A number of cases have been cited before me to show that interest is payable in equity. If a trustee or a person who is in the position of a trustee utilizes or retains the funds to his own benefit, then he is bound to recompense by paying interest on the trust funds. This is both an equitable proposition and a proposition, which has been accepted, in several reported cases. The following passage from Bengal Nagpur Railway v. Ruttanji Ramji, , illustrates the point now under consideration. The question before the Court was that interest was payable on damages on account of wrongful detention of money. It was held.

'The Interest Act however contains a proviso that 'interest shall be payable in all cases in which it is now payable by law.' This proviso applies to cases in which the Court of equity exercises jurisdiction to allow interest. As observed by Lord Tomlin in Maine and New Brunswick Electrical Power Co. Ltd. v. Hart, 1929 Ac 631:

'In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the nonperformance of a contract of which equity can give specific performance.'

The present case does not however attract the equitable jurisdiction of the Court and cannot come within the purview of the proviso.'

Later on in the same judgment, the following passage occurs:-

'As observed in Jamal v. Moola Dawood, Sons& Co. (1914) 43 I A 6 , S. 73 is merely declaratory of the common law as to damages and it has been held by the House of Lords in London, Chatham & Dover Railway Co. v. South Eastern

Railwav Co. 1893 Ac 429 that interest cannot be allowed at common law by way of damages for wrongful detention of debt. The judgment of the Privy Council in Maine and New Brunswick Electrical Power Co. Ltd. v. Hart, (1929) Ac 631 dealt with a statute of New Brunswick, the relevant section of which was identical in terms with the Interest Act of India, and it was held in that case that the plaintiff was not entitled to interest at law, and, as the case did not attract the equitable jurisdiction of the Court, no rule of equity in regard to interest could have any application. The law has however been amended in England by S. 3, Law Reform (Miscellaneous Provisions) Act, 1934, empowering a Court of Record to award interest on the whole or any part of any debt or damages, at such rate as it thinks fit, for the whole or any part of the period between the date when the cause of action arises and the date of the judgment. But there has been no such amendment of the law in India.'

15. These two passages would indicate that the Privy Council had held that there is no equitable principle in India which allows interest to be charged on a wrongful retention of a debt. The fact of the case are also material to the present case. The plaintiffs had filed a suit for recovering certain amounts alleged to be due to them from the Bengal Nagpur Railwav Co. Ltd., for work done for that railway. The trial Court as well as the High Court held in favor of the contractor and also allowed interest at the rate of six per cent from 26th July, 1925 when it was due and uptil 29th Nov. 1927, when the suit was filed, and also future interest. The Privy Council held that future interest could be allowed and there was no objection to this because of S. 34 of the Civil P. C. but they held that previous interest could not be allowed. The conclusion was based on the fact that no interest was payable under the contract and under the equitable jurisdiction there was no law allowing interest on the withheld amount.

16. I see quite a parallel between the case before the Privy Council and the present case. There was a contract between the parties under which price was payable for goods or works to be done. That amount was not paid and then the suit was filed. The Court held that no interest was payable on the price which had been withheld. If the present contention is correct, then the contract between the parties should have been treated as a written instrument and the Court should

have directed or allowed interest, but the Court held that interest was not payable under the contract nor under any other provision of law. In the same way, the money has been withheld in the present case. There is no direction in the Cement Control Order that interest is payable, so there is no contraction to pay interest. I cannot read the Interest Act to mean that any interest is payable because I am of the view that the Cement Control Order is not an 'instrument' under the previous discussion and I must also come to the conclusion that interest is not payable in equity.

17. The contention of learned counsel that the money was held in trust by the defendant or in quasi trust is not acceptable to me. In order to create a trust, there must be a fiduciary relationship as stated in equity, there must be a confidence reposed in the trustee, or quasi trustee. I do not see any such confidence reposed by the provisions of the Cement Control Order, 1967. The order is quite a straightforward one. It provides that if the producer of cement gets a price above a certain amount on account of the sale of cement, he is required to deposit the excess with the Controller and if he gets less amount then he is to get that extra amount from the Controller. The scheme of the Order is to regulate the supply of cement and the profits of the producers. The producers themselves are only part of the mechanism to put the Order into effect. They are not the trustees or beneficiaries. I cannot see how it can be held that the defendant is the trustee and the Cement Controller is the beneficiary. I am of the view that interest is not payable in equity in the circumstances of the case.

18. In the circumstances, I would decree the suit for only the principal sum involved in this suit. I would pass a decree for Rs.1,87,26,538.30 and also order interest at the rate of six per cent per annum thereon from the date of the institution of the suit 2nd Sept. 1975 till the date of realisation. I would disallow interest prior to the date of the institution of the suit. The plaintiff will get proportionate costs against the defendant.

19. Order accordingly.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com