

S. Muthuswamy Vs. Chief Engineer, Construction Works Branch, Southern Railway and anr.

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Court : Chennai

Decided On : Oct-04-1991

Reported in : (1992)1MLJ121

Appellant : S. Muthuswamy

Respondent : Chief Engineer, Construction Works Branch, Southern Railway and anr.

Advocate for Def. : Mr. V.T. Gopalan

Judgement :

Lakshmanan, J.

1. The plaintiff above named filed C.S. No. 339 of 1989 with the following prayers:

(a) direct the arbitration agreement bearing No. 81/CN/84, dated 6.11.1984, Agreement No. 16/CN/84, dated 15.2.1984 and No. 82/CN/ 84, dated 6.11.1984 filed into this Hon'ble Court;

(b) direct the first defendant to refer the dispute to arbitration in terms of the agreement;

(c) costs of this application be provided;

(d) such further or other reliefs as this Hon'ble Court may deem fit.

His case in short:

Plaintiff entered into three agreements with the defendants Railway Administration for carrying out certain work as detailed in paragraph 3 of his plaint and in pursuance of these agreements, the plaintiff was executing the works and was submitting periodically the Bills. The work was completed and final bills were also submitted. The plaintiff firm did not receive the full amount claimed. Later it was found that in respect of agreement No. 16/CN/84, dated 15.2.1984, a sum of Rs. 3,29,812 was recovered. Similarly in respect of agreement No. 81/CE/CN/84, dated 6.11.1984, a sum of Rs. 63,772 was recovered and in respect of agreement No. 82/CN/84, dated 6.11.1984, a sum of Rs. 30,379, was recovered, thus making a total sum of Rs. 4,23,963.

3. According to the plaintiff, he was not advised about these recoveries and no notice was given before recovering these amounts and no details were given as to why this sum of Rs. 4,23,963 had been recovered from the Bills. Asum of more than Rs. 2 lakhs has been recovered towards security deposit. The plaintiff by his letter, dated 9.3.1987 wrote to the first defendant that these recoveries have been made without giving notice and had also requested for refund of the security deposit in respect of all the three agreements enclosing a conditional no claim certificate reserving their right to claim the amounts due. The plaintiff received a reply, dated 11.3.1987 from the Executive Engineer, Madras stating that Rs. 4,23,963 has been recovered from the Bill under the three agreements towards accident compensation. The plaintiff wrote a letter that he is not liable to meet the accident compensation and that the recovery is illegal and that appropriating it against the compensation alleged to be payable by the Railways under Section 82-A of the Railways Act is absolutely unwarranted. The Railways sent a reply, dated 11.7.1987 relying on Clauses 11 and 12 of special conditions of contract and contended that the contractor should bear all the loss and expenditure as he will be held responsible for any injuries, loss or damage caused during the course of work to the labourers or public or private persons or to the Railway public or private property. Therefore the plaintiff issued a legal notice dated 28.12.1987

setting out the facts and pointed out that neither under the general conditions of contract nor under the special conditions of contract the contractor could be made liable for any loss or damage arising out of any accident, not due to the negligence of the contractor, but brought about by other agencies. The plaintiff therefore demanded refund of the amount. The first defendant refused to comply with the demand made by the plaintiff. Thereafter, the plaintiff demanded for arbitration inasmuch as the agreement between the plaintiff and the first defendant is governed by Arbitration clause.

4. As there is dispute and difference between the plaintiff and first defendant by reason of the refusal of the claim made by the plaintiff, the said dispute according to the plaintiff has to be referred to arbitration in terms of Clause 63 of the general conditions of contract.

5. The following are the disputes that have to be resolved by Arbitration:

(i) Whether the recovery of a sum of Rs. 4,24,963 from the bills in respect of the agreements referred to above on the allegation that the plaintiff is liable to pay compensation to the victims on account of accident in terms of Clauses 11 and 12 under Special Conditions of contract and Clause 24 of General Conditions of contract is valid?

(ii) such other and further questions that may be referred to for decision by Court and/or by the parties for decision by the Arbitrator.

6. This suit is resisted by the Railways. They filed a counter affidavit dated 6.10.1989 and an additional counter affidavit, dated 27.8.1991 now, after the rem and order by the Division Bench, dated 5.8.1991.

7. The following are the principal contentions raised:

I further submit that the sum of Rs. 4,23,963 (actually it should be Rs. 4,24,962.75) recovered from the plaintiff/contractor's bill was towards the accident caused to the Railway Passengers/Railway property on 15.4.1985 on account of his negligence in executing the work. The aforesaid amount of Rs. 4,24,963 was recovered under the powers conferred under the General Conditions of Contract according to which

the contractor shall indemnify the Railway Administration on account of any such accidents. The plaintiffs allegation that no notice was given to him before the recoveries made is denied by me. The first notice to the plaintiff/contractor was given by the Executive Engineer, Southern Railway as early as on 6.5.1985. It was stated therein that pending assessment of the damages, a sum of Rs. 1 lakh would be recovered from the plaintiff/contractor's bill. The recoveries were made from his 'on account' bills at the rate of 5% from each of the 'on account' bills so as to avoid immediate hardship to the plaintiff as he has to get on with other works also simultaneously..In fact the plaintiff/contractor never raised any objections to these recoveries at least for a period of two years. For the first time he raised the objections only on 9.3.1987 by which time he had already given unconditional no claim certificate in respect of all the agreements on 22.12.1986, 27.1.1987 and 17.9.1986 at the stage of the final bills. The conditional no claim certificate, referred to in his letter dated 9.3.1987 was not at all submitted by him nor would it have been entertained on 9.3.1987 when he had already submitted unconditional no claim certificate much earlier..It is true a demand was made for arbitration vide his letter dated 5.12.1988 but the same was denied by the Railway Administration vide letter dated 9.3.1989 since the dispute in question cannot be referred to the arbitration in view of the fact that the plaintiff/contractor had already furnished unconditional no claim certificate for each of the contracts separately on 27.1.1987, 22.12.1986 and 19.9.1986 and hence he is estopped from raising any claims in the context of Clause 43(2) of the General conditions of the contract, which governs all the three agreements referred to by him..It is submitted that this Hon'ble Court may kindly consider the case only as to whether the matter is to be referred to the arbitration or not and there is no necessity to go into the correctness or otherwise of the compensations directed to be paid by the Claims Commissioner (Sessions Judge, Chengalput) once over..Secondly, the plaintiff/contractor is estopped from raising any disputes as per Clause 43(2) of the General Conditions of the contract, he having already given unconditional no-claim certificates for the contracts at the stage of final bills. So far as the Railway Administration is concerned, there is no dispute at all that should be referred to an arbitration as the amount was recovered from the plaintiff/contractor in terms of Clause 10 to 12 of the Special Conditions of the contract as also under the context

of Clause 24 of General conditions of contract. The recoveries were rightly made and at any rate, they cannot be gone into in an arbitration proceedings.

8. On 22.3.1991, after hearing both counsels, I passed the following Judgment:

The suit is to direct the first respondent Chief Engineer/Construction Works Branch, Southern Railway, Madras-8 to file the Arbitration Agreements, bearing No. 81/CN/84, dated 6.11.1984, No. 16/CN/84, dated 15.2.1984 and No. 82/CN/84, dated 6.11.1984 into this Court and to refer the dispute to arbitration in terms of agreements. The suit is filed by the contractor for the above relief.

2. I have heard Mr. B.T. Seshadri on behalf of the contractor and Mr. V.T. Gopalan on behalf of the Railways. I have also perused the affidavit filed in support of the suit and the counter statement filed on behalf of the Railways.

3. The General Manager, Southern Railway will follow the procedure in accordance with Clause 63(3)(ii) and Clauses 63(3)(b) of the General Conditions of Contract and appoint two Arbitrators to decide the dispute and differences that have arisen between the contractor and the Southern Railway. All the disputes that have been already raised by both parties in the affidavit filed in support of the suit and also in the counter affidavit will be decided by the two arbitrators. The arbitrators so appointed shall dispose of the matter and pass the Award within four months from the date of entering upon the reference.

4. The procedure with regard to the appointment of two arbitrators shall be completed within six weeks from this date.

9. Aggrieved against my Judgment, dated 22.3.1991, the Railway Administration filed O.S.A. No. 135 of 1991. They raised a number of points in the Grounds of Appeal and also have stated in the affidavit filed in support of the stay petition that the points raised by the Railways in the counter statement were unfortunately not considered by me and hence the appeal. Believing the representation and the points raised in the grounds of Appeal and the arguments advanced at the time of hearing, the Division Bench allowed the Appeal and remitted back the whole matter for a re-hearing and disposal in accordance with law. 10. The Division

Bench consisting of Hon'ble Mishra, J. and Hon'ble Janarthanam, J. in their Judgment while remanding the suit have observed as under:

It is not known why the learned single Judge found that the General Manager, Southern Railway, was required to follow the procedure in accordance with Clause 63(3)(ii) and Clauses 63(3)(b) of the General conditions of Contract and appoint two arbitrators to decide the dispute and differences that have arisen between the contractor and the Southern Railway. When it had been contested before him on behalf of the appellants/Railways that no such arbitration was possible with respect to the dispute and that the dispute falls beyond the agreement. No judicial order can be justified unless it is a speaking order. It is not stated anywhere in the impugned order what was the dispute for, why the plaintiff wanted the appointment of arbitrator and reference of the dispute to the arbitrator and why the appellants/Railways objected to the appointment of the arbitrator or reference of the dispute to the arbitrator. It appears that correct position of law in this regard was not brought to the notice of the learned single Judge. It is well settled that a judicial order must advert to the facts and issues and give a specific finding before the operative order is passed. For the said reason alone, the impugned order has to be set aside and remitted to the trial Court.

3. Accordingly, we allow the appeal, set aside the impugned order and remit the whole matter to the trial Court for a rehearing and disposal in accordance with law. There will be no order as to costs.

11. Unfortunately for the Railways, the matter against came up before me for a re-hearing.

12. What actually transpired in Court in 22.3.1991 has been dealt with by me in the later part of this judgment. However, I may at this stage say that entirely a different picture has been placed before the Bench.

13. Pursuant to the Division Bench judgment, the matter was heard by me. Both the learned Counsels have reiterated the points raised in the affidavit and the counter statements.

14. Mr. B.T. Seshadri contended that the recoveries had been made by the Railways without any justification and as there is dispute and difference between the plaintiff and the first defendant and by reason of refusal of the claim made by the plaintiff the said dispute has to be referred to Arbitration in terms of Clause 63 of the General Conditions of Contract. He said that the plaintiff is not liable to pay compensation to the victims on account of accident in terms of Clauses 11 and 12 under Special Conditions of Contract and Clause 24 of General Conditions of Contract and hence he said the recovery is illegal. It is further urged by Mr. B.T. Seshadri that the plaintiff by his letter dated 9.3.1987 wrote to the defendant requesting them to refund the security deposit enclosing a conditional 'no claim certificate' reserving his right to claim the amount due.

15. Mr. V.T. Gopalan, learned Counsel for the defendant contended that the contractor shall indemnify the Railways under the powers conferred on them under the General Conditions of Contract. According to the learned Counsel the recoveries were made from the contractor on account bills at the rate and that the plaintiff never raised any objections to these recoveries, and that he raised the objections for the first time only on 9.3.1987 by which time he had already given unconditional no claim certificate in respect of all the three agreements at the stage of final bills. The conditional no claim certificate referred to in the letter dated 9.3.1987 was not at all submitted by the plaintiff nor would it have been entertained on 9.3.1987 when the plaintiff had already submitted unconditional no claim certificate. Hence, it is contended that the plaintiff is estopped from raising any claim in the context of Clause 43(2) of the General Conditions of the Contract which governs the agreements in question. Thus according to the Railways the dispute is not referable to arbitration.

16. In order to attract the provisions of Section 20 of the Arbitration Act, the following conditions must be fulfilled:

(a) The parties must have a valid and subsisting arbitration agreement between them;

(b) The agreement was executed before the Institution of a suit relating to the subject matter of the agreement;

(c) Existence of a difference to which the agreement applies.

(d) The application is made to a court having jurisdiction in the matter to which the agreement relates.

Under Section 20, the Court has to ensure about the existence of an arbitration agreement between parties and the covering of the dispute by that agreement. The existence of a dispute is absolutely essential for a reference under Section 20.

17. In the present case the nature of dispute is clearly set forth in the affidavit. In my opinion sufficient cause is shown to this Court to make an order of reference under the relevant provisions of the Act. The agreement between parties provides for referring the matter in dispute to arbitration. The agreement is binding upon the parties and hence in my view it should be made as a rule of the court.

18. Clause 63 of the Arbitration Agreement is reproduced hereunder:

63. All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions, directions, classification, measurements, drawings and certificates with respect to any matters the decisions of which is specially provided for by these or other special condition given and made by the Railway, or by the Engineer on behalf of the Railway, are matters which are referred to hereinafter as 'excepted matters' and shall be final and binding upon the Contractor and shall not be set aside on account of any informality, omission, delay or error in proceedings, in or about the same or on any other ground or for any other reason and shall be without appeal.

19. Clause 63 in my view is couched in very wide terms and it covers all the disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract. The

dispute shall be referred by the contractor to the Railways and the Railways Shall within a reasonable time make and notify decisions thereon in writing. Clause 63(3)(ii) and Clause 63(iii)(b) provides for procedure for appointment of two arbitrators for all claims of Rupees three lakhs and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of complicated nature.

20. It is seen from the affidavit that the contractor has questioned the authority of the Railways in recovering the amounts from his bills. According to the Railways, they are entitled to do so under the General Conditions of Contract according to which the contractor shall indemnify the Railways. It is further contended by the Railways that the Contractor is estopped from raising any claims in the context of Clause 43(2) of the General Conditions. Thus, in my opinion, a dispute exists between parties and hence, it should be referred to arbitration. The arbitrators have to see whether recovery of the sum of Rs. 4 lakhs and odd and appropriating it against the compensation alleged to be payable by the Railways under Section 82-A of the Railways Act is absolutely warranted and as pointed out by the Contractor whether the contractor could be made liable for any loss or damage arising out of any accident not due to negligence of the contractor but brought about by other agencies under the General Conditions of Contract or under the Special Conditions of Contract. The Arbitrators have also to find out whether the contractor is estopped from raising the plea now or whether he is a consenting party for the recoveries and deductions made.

21. As stated above this Court is called upon to decide whether the parties have a valid agreement, whether there is a dispute and whether agreement was executed before the institution of the suit relating to the subject matter of the agreement. Once it is found out that all the above conditions are satisfied, the Court has a duty to refer both parties to the agreement to arbitration as contemplated under the agreement. In my opinion difference and dispute exist between parties, they have to be referred to arbitration. The Court is not expected to deal with the matter on merits and decide whether the claim made by the parties are true or not, which will amount to encroaching upon the jurisdiction of the arbitrators. Hence, I refrain from doing so and only refer the entire dispute between parties to arbitration as

provided under the Agreement. Thus, I reject the condition of the Railways and hold that arbitration is the only remedy to resolve the dispute between parties. It squarely comes within the agreement as contended by the counsel for the contractor.

22. Thus the Railway Administration is directed to follow the procedure in accordance with the relevant provision of general conditions of the contract and appoint two arbitrators to decide all the disputes and differences that had arisen between the parties and as referred to in the affidavit, counter and additional counter statement filed in this proceedings. The arbitrators so appointed shall decide the dispute and dispose of the matter strictly in accordance with the procedure and law and with a clear and unbiased mind and without being prejudiced by the findings and observations made in this Judgment within four months from the date of entering upon the reference. The procedure with regard to the appointment of the arbitrators as mentioned above shall be completed within six weeks from to-day.

23. It is contended by Mr. V.T. Gopalan learned Counsel for the respondents that since the contractor never raised any objections to the recoveries and had already given unconditional no claim certificate in respect of the agreements which amount to accord and satisfaction and hence the claim cannot be the subject matter of arbitration. Even on this point there are two versions. The contract or says that he had given only a conditional no claim certificate. The Railways say that the contractor had given an unconditional no claim certificate. Hence, again there is dispute and difference of opinion which can be settled only by arbitrators. I am unable to countenance the said contention in view of the decision of the decision of the Apex Court reported in *Damodar Valley v. K.K. Kar* : 1974 CriLJ303 , and followed by me in *Tamil Nadu Electricity Board v. Hindustan Construction Company Ltd.*(1991) 1 L.W. 53 which is as follows:

In the said case the tenderer entered into a contract with the Corporation to supply coal but as he failed to do so in accordance with the terms of the contract, the Corporation unilaterally repudiated the contract and ultimately paid the respondent for the supply of coal. But it was the case of the Corporation that these

payments, including the return of the deposit amount, finally settled the claims of the tenderer. After receiving those payments the tenderer claimed from the Corporation damages for repudiation of the contract. When the Corporation did not agree the respondent served a notice of his intention to refer the matter to the arbitration under the arbitration clause contained in the contract. The arbitration clause provided for reference to the adjudication of the arbitrators after notice, any question, dispute or difference arising between the parties upon or in relation to or in connection with the contract. The question arose whether the Court on an application under Sections 9(d) and 33 of the Act was entitled to enquire into the truth and validity of the averment as to whether there was or was not a final settlement on the ground that if that was proved, it would bar a reference to the arbitration inasmuch as the arbitration clause itself would perish. The Supreme Court on a consideration of the entire matter held that the question whether there had been a full and final settlement of a claim under the contract was itself a dispute arising upon or 'in relation' Or 'in connection with' the contract. A claim for damages was a dispute or difference which arose between the respondent and the appellant and was 'upon' or 'in relation' or 'in connection with' the contract, and the reference to the arbitrator by the respondent was not barred.

The Supreme Court Judgment referred to above is the direct answer on the question of estoppel raised by the learned Counsel for the Railways. In my opinion, still it is open to the contractor to raise a dispute arising out of the contract. Mere signing of the Bills receiving payment does not amount to consent.

24. Before parting with this case, it is my duty to place on record the unfortunate developments in the case. When the matter came up before me on the earlier occasion, viz., on 22.3.1991, the learned Counsel for the Railway Administration conceded before me that the matter could be referred for arbitration. In fact, Clause 63(3)(2) and 63(b) of the General Conditions of the Contract was specifically brought to my notice by the counsel appearing for the Railways. In those circumstances, an order which is extracted above was passed by me. Having regard to the stand taken by the Railways which conceded for referring the disputes to the Arbitration, the above order came to be passed. Taking advantage of the fact that this Court did not record the concession made by the Railways, in

my earlier order, O.S.A. No. 135 of 1991 was filed. It is very unfortunate that before the Division Bench a picture has been presented as if number of points were raised by the Railways and this Court did not consider those points. In fact, the Railways did not raise and argue any point on 22.3.1991 when the matter came up before me for hearing. It is rather painful that a public sector undertaking like the Railway Administration should take such an unhealthy stand. I only wish and hope that public sector Corporations and Government organizations and departments would not take such pleas in future like private litigants. It is also common knowledge that the Court takes into confidence the counsel who are also officers of Court. It is the duty of the counsel to instruct his client not to adopt such an unreasonable and unhealthy stand.

25. Before the Division Bench the Railway Administration has stated that they had argued before me that no appointment of Arbitrator was possible with respect to the dispute and that the dispute falls beyond the agreement. No such argument was urged before me on the earlier occasion. It is only in those circumstances I passed the order with a view to save judicial time. Further, there was no need for me to pass a lengthy speaking order, having regard to the stand taken by the Railways before me at that time. If really the Railway Administration had felt that I had not considered all the aspects of the matter they could have very well approached me with necessary application and I would have passed suitable and appropriate orders.

26. Utmost importance has been attached to the statement of facts as to what transpired at the hearing recorded in the Judgment of the Court, as could be seen in *State of Maharashtra v. Ramdas Shrinivas* : 1982 CriLJ1581 .

27. The Supreme Court had deprecated the practice of the parties contradicting the statements recorded in the Judgments by affidavit or other evidence. The Supreme Court has observed as follows:

Statements of fact as to what transpired at the hearing, recorded in the Judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party,

while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course, a party may resile and an appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but he may not call in question the very fact of making the concession as recorded in the Judgment.

29. In *Perumal Gounder v. Easwara Kandar* 89 L.W.198, is also on the same point. Ismail, J. (as he then was) has observed as follows:

A statement in a judgment or order as to what had taken place in court is conclusive and cannot be allowed to be controverted by an affidavit or otherwise, and a party, who is aggrieved by what he considers a wrong statement in the Judgment should apply to the very same Judge by way of review.

30. Another recent Judgment of our High Court can also be referred to in this connection. In *A.M. Shamsudeen and Ors. v. The District Judge, WestThanjavur* : (1990)2MLJ461 , K.S. Bakthavatsalam, J., has observed as under:

It is well settled that what happened in the court is a matter to be found out only from the judgment and that Judgment alone is final.

31. In the result, the suit is decreed on the above terms. Though the conduct of the Railway is condemnable, taking a lenient view, I say no costs.

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