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Court : Kolkata

Decided On : May-12-1978

Reported in : AIR1978Cal449

Judge : Monjula Bose, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 11; ;[Contract Act, 1872](#) - Section 73

Appeal No. : Suit No. 496 of 1958

Appellant : Talchar Coalfields Ltd.

Respondent : Central Coalfields Ltd.

Advocate for Def. : Ajit Panja, Adv.

Advocate for Pet/Ap. : Tapash Banerje ;Sivaji Sen and ;Somnath Biswas, Advs.

Disposition : Suit dismissed

Judgement :

Monjula Bose, J.

1. The plaintiff's case in the plaint is shortly as follows:--

By an agreement dated Oct. 29, 1930, by and between the plaintiff and the Madras and South Mahratta Railway Company Ltd., the latter undertook to supply electric energy to the plaintiff from its power house at Talchar, Orissa on terms and conditions set out in the said agreement. Sometime after 1935, the said Railway Company was acquired by the Government of India and all its assets and liabilities including its rights and obligations under the aforesaid agreement vested in the Government. In Oct. 1965, the National Coal Development Corporation Pvt. Ltd. (hereinafter referred to as the said Corporation) was incorporated, and it inter alia having taken over the said powerhouse at Talchar, rights and obligations of the Government under the said agreement, stood vested in the said Corporation. On October 23, 1975, the name of the said Corporation was changed to Central Coalfields Ltd.

2. Longstanding disputes between the plaintiff and the predecessors in interest of the defendant in respect of dues of the defendant on account of electricity supplied from the said power house and enhancement of rates and faulty meters installed, resulted in an agreement being entered upon by and between the parties, recorded in a letter of January 17, 1957. The said agreement provided inter alia as follows:-- (a) the plaintiff would by adjustment of its monthly bills for supply of coal to the Southern Railway pay to the said corporation a sum of Rs. 40,000/- every month commencing from February 1957 till its dues were fully liquidated (b) all coal-sale bills of the plaintiff to the Southern Railway would be submitted through the Railways Chief Accounts Officer and the Railways would deduct Rs. 40,000/- per month from such bills and remit the same directly to the said Officer at Calcutta for payment to the defendant, (c) The arrangement for deduction from the plaintiff's bills as aforesaid would continue until the Southern Railway would be advised by the said Corporation to stop such remittances and not otherwise, (d) The said arrangement would be without prejudice to the plaintiff's claim against the said Corporation and its predecessor for excess amounts charged and faulty meters installed.

3. The plaintiff alleges that on June 22, 1957, it demanded of the said corporation immediate termination of the aforesaid arrangement starting from bills for the second half of May 1957 and that thereafter in terms of the said agreement the

plaintiff had demanded that the Southern Railway be directed to pay all further bills to the plaintiff directly inasmuch as the plaintiff's dues had been fully realised by the said Corporation, The plaintiff alleges further that the said Corporation wrongfully continued to realise according to the said arrangement further sums of Rs. 80,000/- and Rs. 90,000/- aggregating to Rs. 1,70,000/- from the plaintiff's bills, though nothing remained due to the defendant in May 1957. The plaintiff alleges that on the contrary it had a claim of Rs. 1,99,377.13 against the defendant. In consequence of the failure and neglect of the said Corporation which was bound to terminate the arrangement and to instruct the Railways to pay the bills directly to the plaintiff on and from May 1957, the plaintiff alleges it was unable to pay its own workmen at its collieries, greatly injuring its credit, reputation, and good will for which it has suffered damages to the extent of Rs. 5,00,000/- and special damages of Rs. 3,16,800/- by reason of non-payment of the workers dues, and by reason of consequent fall in the production of coal in its colliery by 1800 tons monthly on an average since May 1957 to December '57, The plaintiff also claims the sum of Rs. 1,70,000/- as having been wrongfully retained by the defendant.

4. The defendant in its written statement has inter alia, alleged that on March 21, 1958 the parties had agreed to and had referred their disputes to the sole arbitration of Mr. S. C. Chatterjee, a retired Judge of the Patna High Court. It was recorded in the letter of reference inter alia, that disputes had arisen between the parties relating to the quantum of energy supplied and also relating to prices or rates thereof and that each party claimed to be entitled to recover from the other large amounts which would be found due on accounts being taken of the transactions. In the arbitration, the plaintiff claimed a refund of Rs. 4,54,344-20 on account of faulty meters and enhanced rates and the defendant also claimed an equally large amount as being due on account of supply of electricity. One of the issues raised before the arbitrator was 'what amount, if any, either party is entitled to recover from the other'? It is alleged that an Award dated Sept. 29, 1958, was passed in favour of the plaintiff, for Rs. 1,35,428-10-6 and Rs. 1247/- on account of costs confirmed by a judgment and decree dated April 25, 1963 respectively, which decree stands fully satisfied by payment. It is contended that the plaintiff's claims in the suit being the subject matter of the said arbitration and the Award therein were not maintainable.

5. It is contended further that as disputes including the plaintiff's claim for recovery of Rs. 1,70,000/- were pending adjudication in arbitration proceedings there was no question of the plaintiff suffering any damages general or special. Alternatively, it is alleged that the claim for damages is too remote and not recoverable in law.

6. No oral evidence was adduced at the trial by either party. The parties by consent tendered the Judges Brief of documents Part I as Ex. 'A', Part II as Ex. 'B', the further brief of documents disclosed by the defendant by its letter dated Dec. 12, 1977 Part III. as Ex. 'C', the further brief of documents disclosed by the defendants by its letter dated Dec. 29, 1977, part IV as Ex. 'D' and the further brief of documents disclosed by the plaintiff by its letter dated Jan. 13, 1978 as Ext. 'E'.

7. The following issues were raised and settled for determination;--

1. (a) Was there any agreement between the plaintiff and the defendant on the 5th Jan, 1957 as alleged in paras 10 and 11 of the plaint?

(b) Did the defendant wrongfully fail and neglect to take steps to terminate the arrangement for deduction of Rs. 40,000/- per month from the plaintiff's bills on the Southern Railway as alleged in para 16 of the plaint?

(c) Did the defendant in breach of the agreement cause the Southern Railway to suspend payment to the plaintiff altogether of the bills and did it wrongfully retain sums of Rs. 80,000/- and Rs. 90,000/- as alleged in Paras 16 and 17 of the plaint

2. (a) Is the plaintiff entitled to recover a sum of Rs. 1,70,000/- or any portion thereof as claimed in Para. 21 of the plaint

(b) Is the plaintiff's claim of Rs. 1,70,000/- covered by the award of the Arbitrator, Mr. S. C. Chatterjee, as pleaded in Para. 12 of the Written Statement

3 (a) Did the defendant commit any breach of the agreement on Jan. 1957 as alleged in Para. 19 of the plaint

(b) If so, did the plaintiff suffer general damages to the extent of Rs. 5,00,000/- or any other sum as alleged in Para. 19 of the plaint

4 (a) Was there any wrongful conduct or breach of agreement on the part of the defendant as alleged in Para. 20 of the plaint

(b) Did the plaintiff suffer special damages to the extent of Rs. 3,16,800/- or any other sum as alleged in Paragraph 20 of the plaint

5. Are the damages as claimed by the plaintiff in Paras. 19 and 20 of the plaint too remote and not recoverable in law

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

8. It was conceded by Mr. Ajit Panja the learned counsel for the plaintiff that issues 2 (a) and 2 (b) stood covered by the Award. By consent the Court was invited to decide Issue No. 5 as a preliminary issue.

9. Dr. Tapash Banerjee, learned counsel for the defendant contended that the plaintiffs claims for wrongful withholding of Rs. 90,000/- and Rs. 80,000/- aggregating Rs. 1,70,000/- having been claimed before the Arbitrator, the instant suit was hit by the principles of res judicata and/or principles analogous thereto and the same was not recoverable in law. Dr. Banerjee contended further that a bona fide dispute between the parties including the defendant's large claim against the plaintiff was duly referred to arbitration. Until finally determined no certain sum was presently due or payable to the plaintiff. Nor could it be contended that any money was being wrongfully withheld by the defendant. Therefore a claim for damages did not lie. He contends further that the suit was filed on April 1, 1958 and on the self same day there was the reference to arbitration (Ex. B, p. 36). The claim for damages on April 1, 1958 was thus patently premature, and in any event not maintainable in law.

10. Dr. Banerjee also contended that even assuming any money was withheld by the defendant, it did not follow that the defendant would be liable for any damages for mere non-payment of money due. He drew the attention of the Court to Section 73 of the Indian Contract Act which reads as follows :

'73. Compensation for loss or damage caused by breach of contract -- When a contract has been broken, the party who suffers by such breach is entitled to

receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract -- When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation -- In estimating the loss or damage arising from a breach of contract, the means which existed or remedying the inconvenience caused by the non-performance of the contract must be taken into account.

11. Drawing the Courts attention to Ex. B at pages 14 to 16 Dr. Banerjee next contended that there was no breach of the agreement, and the plaintiff had all along proceeded on the basis that the arrangement under the agreement entered upon on Jan. 5, 1957 would continue and had requested the defendant not to discontinue supply of electricity to the plaintiff pending decision in the Arbitration. Accordingly, on its own initiative and accord until March 19, 1958 the plaintiff continued to process its bills on Southern Railways through the defendant vide Exhibit 'D' page 3 and also Annexure 'F' at page 64 of Ext. 'B'. The arbitrator had also found the agreement to be subsisting.

12. Dr. Banerjee contended further that assuming the defendant had committed a breach, the damages claimed by the plaintiff could not be said to have arisen naturally therefrom. Where the contractual obligation was to pay an amount on a particular day, breach thereof did not entitle the payee to recover anything more than the principal sum and interest. He cited illustration (n) to Section 73 of the Indian Contract Act, which reads:--

(n) A contracts to pay a sum of money to B on a day specified A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay together with interest up to the day of payment.

13. He contended that normally the creditor was not entitled to recover even any interest unless interest was payable either by the agreement or under any statutory provision. In support he cited *Jamal v. Molla Dawood Sons & Co.*, reported in (1916) 43 Ind App 6 : (AIR 1915 PC 48); *Bengal-Nagpur Railway v. Ruttanji Ramji* reported in AIR 1938 PC 67 at p. 70; *Union of India v. Ladulal Jain* reported in : [1964]3SCR624 and *Union of India v. Watkins Mayor & Co.* reported in : AIR 1966 SC275 . He also cited *Graham v. Campbell* reported in (1877-78) 7 Ch D 490 at p. 494 for the proposition that no collateral or consequential damages arose from mere delay in receipt of money. Lastly he contended, that it was incumbent on the plaintiff to take all steps to mitigate its loss but the plaintiff having continued to process its bills through the defendant without any attempt to minimise the alleged over payment, the defendant was absolved of any liability for the alleged loss if any.

14. Mr. Ajit Fanja, Learned Counsel for the plaintiff has contended that the claim in this suit for damages arising from wrongful withholding of money was not a matter referred to Arbitration and was not covered by the Award made. Accordingly, he submits the suit is maintainable.

15. On Sept. 11, 1972, the defendant made an application in this suit inter alia praying that.--

(a) The suit having already been adjudicated by Arbitration and therefore having been settled and/or adjudicated in terms of the Award given by the Arbitrator, he dismissed or struck out or be recorded that the suit has been settled and/or adjudicated between the parties;

(b) Alternatively, time to file written statement be extended;

16. This application it appears was disposed of on May 25, 1973 by S. K. Roy Chowdhury, ' J. and no order was made in terms of prayer (a) but time to file written statement was extended. Mr. Panja submits that the matter thereby has become res judicata, and the Award does not disentitle the plaintiff from claiming damages for wrongful detention of the said two several sums. He cites the Privy Council decision Ram Kripal Shukul v. Rup Kuari reported in (1883) 11 Ind App 37 (PC), which decision was followed in Arjun Singh v. Mohindra Kumar reported in : [1964]5SCR946 as to interlocutory orders which are final in nature. He further contends that the Award (Ex. B at p. 126) established without doubt that money was wrongfully retained and/or withheld by the defendant and that disputes raised by the defendant were sham and frivolous. Placing reliance on Mayne on Damages (12th Edition) p. 535, and the decision Trans Trust S. P. R. L. v. Danubian Trading Co. Ltd. reported in (1952) 2 QB 297 in support of the proposition that damages may be awarded in cases where it naturally flows from a breach of contract to pay money, and it was in the contemplation of the parties that damages would be caused by nonpayment, he submits the defendant in the instant case cannot avoid its liability for damages arising from non-payment of the plaintiff's legitimate dues, as found by the Arbitrator.

17. Mr. Panja finally submits that the cause of action for wrongful detention of the plaintiff's money existed since May 1957 and the Award was merely a piece of evidence which supported the plaintiff's case of wrongful withholding.

18. On careful consideration of respective submissions of the parties, it appears to me that the highest that Mr. Panja may be said to have established, is that the plaintiff's claim for damages is outside the scope of arbitration proceedings. Mr. Panja has not been able to convince me by citing any authority or on basic legal principles as to how the plaintiff's claim for damages is otherwise sustainable. It appears to me that, the parties went to arbitration for resolving all their disputes pending at the time, including the dispute as to how much was due from one to the other. The plaintiff's demand for termination of the arrangement for deduction of Rs. 40,000/- per month from its bills on the Southern Railway with effect from the second half of May 1957 was very much a part of the disputes referred to the Arbitrator (Ex. B, page 50). To my mind when parties submitted such disputes to

the Arbitrator there existed real differences between the parties which cannot be termed as either sham or frivolous and the parties joined issue on the point as to whether the defendant entitled to deduct and whether any money payable to either party.

19. It is well settled that as a general rule all claims which are the subject-matter of the reference to Arbitration merges in the Award, and after pronouncement of an award, the respective rights and liabilities of the parties in respect of any claim can only be determined in the light of and on the basis of the award. It is also well settled that prior to an award being pronounced or even thereafter, no second action can be commenced on the original claim which was the subject-matter of the reference. Nor can it be disputed that if an award which has been pronounced between the parties has in fact or can in law be deemed to have dealt with the present dispute, any second adjudication would be incompetent. The claim in my view as to whether the plaintiff is entitled to a sum of Rs. 1,70,000/- and whether damages are payable for withholding of money are not new disputes. A claim for damages, admittedly was made by the plaintiff as far back as Nov. 25, 1957 (Ex. B, pages 30-31) prior to the matter being referred to Arbitration. In my view principles of res, judicata or principles of general law are applicable to Arbitration proceedings as well as Awards. It is also well settled that questions of law can be submitted to Arbitration. In the instant case admittedly no claim for damages was made before the Arbitrator. In that view, the plaintiff ought to have raised and agitated its claim for damages in the arbitration proceedings concerned and not having done so, is hit by the principles of constructive res judicata and cannot be allowed to agitate the same claim again in this suit.

20. Mr. Panja learned counsel for the plaintiff was also unable to satisfy this Court that the plaintiff's claim for damages is otherwise maintainable, and that there was a breach of the agreement pleaded. The only obligation thereunder was for immediate restoration of supply and for the defendant to continue supply of electricity to the plaintiff's power House pending the decision of the Arbitrator, which it did. Furthermore, it is expressly provided in the agreement that payments made by the plaintiff would be without prejudice to its claims for excess charges and faulty meters installed (Ex. B, page 14).

21. The third obstacle in Mr. Pania's way entitling him to a decree for damages is that the usual claim where money is wrongfully withheld is for a decree for the sum withheld and nothing more. No authority has been cited to show that a claim as in the instant case is maintainable in law, and the English decision cited and the principles of law relied upon are not relevant and do not advance the plaintiff's case to any appreciable extent and in any event is hit by illustration (n) of Section 73 of the Indian Contract Act. For the reasons as stated above, the preliminary issue is answered in the affirmative and in favour of the defendant. The plaintiff having conceded that its claim for Rs. 1,70,000/-withheld is covered by the Award, there is no other issue on which this suit can propped. Accordingly the suit is dismissed with costs.

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