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Court : Jammu and Kashmir

Decided On : Mar-23-1998

Reported in : AIR1999J& K58

Judge : R.C. Gandhi and; G.D. Sharma, JJ.

Acts : Jammu and Kashmir Code of Civil Procedure (CPC) , 1977 Smvt. - Order 47, Rule 1

Appeal No. : Civil Review Petn. No. 1 of 1989

Appellant : Pt. Dev Dutt

Respondent : State of J. and K. and anr.

Advocate for Def. : D.K. Khajuria, Adv.

Advocate for Pet/Ap. : D.S. Thakur, Adv.

Disposition : Petition dismissed

Judgement :

R.C. Gandhi, J.

1. Petitioner is seeking review of the judgment dated 6-2-1989 delivered by the Division Bench in LPA (C) No. 13/86 whereby the judgment dated 10-5-1986 of the learned single Judge passed in Arbitration Application No. 72/80, has been

modified by disallowing items 13 and 14 of the claims awarded by the arbitrator, and made rule of the Court by the learned single Judge. He also seeks to grant interest at the rate of 18 percent against 6 percent per annum allowed by the learned single Judge, by allowing the cross-objections filed by him before the learned single Judge.

2. Shorn of details the brief fact necessary for disposal of this review petition are : that a contract for the construction of part of Ravi Tawi Irrigation Complex including the earthwork and construction of concrete structures, was allotted to the petitioner which he could not complete within the stipulated period. A dispute having arisen, petitioner filed petition under Section 20 of the Arbitration Act (No. 72/80) in the Court for issuing directions to the respondents to file arbitration agreement in the Court and refer the disputes arisen between the parties to an independent arbitrator. Along with it, he also moved an application (CMP No. 136/80) in which the learned single Judge appointed a Commissioner on 13-6-1980 to visit the site and record measurements of the work done by the petitioner. This order came to be modified by changing the Commissioner vide order dated 28-8-1980 passed in CMP No. 176/80. The Commissioner accordingly submitted his report on 9-12-1980 after recording the measurements of the work done by the petitioner on spot. For adjudication of the disputes and the claim raised by the parties, the learned single Judge on 9-4-1982 appointed Shri N. N. Dogra, retired Chief Engineer, as an agreed arbitrator to enter upon the reference and make award which he filed on 9-2-1983. The learned single Judge, after observing the provisions of the Arbitration Act and due process of law, made the award of the arbitrator a rule of the Court with modification of slashing down the interest from 10% to 6% per annum and also deleted the clause imposing penal interest at the rate of 18% per. annum being harsh, from the award.

3. Respondents, aggrieved of the judgment and decree of the learned single Judge, preferred, LPA(C) No. 13/86. The Division Bench modified the judgment by rejecting claim's 13 and 14 on the ground that the arbitrator had exceeded his jurisdiction as the same were neither contained in the application under Section 20 nor referred by the Court for adjudication by the arbitrator. The petitioner has sought review of the judgment of the Division Bench on the ground that the

judgment under review suffers from errors apparent on the face of record within the meaning of Order XLVII, C.P.C. and can be corrected by way of a review.

4. At the threshold Mr. Khajuria, learned Counsel representing the respondents, has taken a preliminary objection with regard to the maintainability of the review petition as the petitioner had already challenged the judgment before the Supreme Court and his contention is that while the petitioner has filed an appeal, he could not seek redress in view of the mandate of Rule 1 of Order XLVII, C.P.C. which envisages that any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, may seek review of a judgment. Since, the petitioner has preferred the appeal, therefore, he eannot seek review. To meet this objection of Mr, Khajuria, learned Counsel for the petitioner, Mr. Thakur, submitted that the petitioner has filed review petition prior to the filing of appeal and the appeal being still pending adjudication, review cannot be held to be not maintainable. He has sought support in this behalf from a judgment of the Supreme Court reported in AIR 1964 SC 1372, wherein it has been held :

'The crucial date for determining whether or not the terms of Order XLVII, Rule 1 (1) Civil P.C. are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application On the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.' (Para 8)

In view of this law laid down by the Apex Court, the objection raised by Mr. Khajuria is held to be not sustainable.

5. Now we proceed to deal with the review petition on its merits.

6. Mr. Thakur has submitted that the Division Bench has committed an error apparent on the face of the record by holding that the arbitrator had exceeded the jurisdiction by allowing claims 13 and 14 while the petitioner was entitled to raise the claims in view of the term of the order of reference made by the learned suide

Judge, which reads as under:

'The disputes mentioned in the application Under Section 20 of the Arbitration Act as well as the objections filed thereto by the other side are therefore, referred to the aforesaid arbitrator with a direction that he shall enter upon the reference and make his award within four months thereafter in accordance with law. The parties shall beat liberty to raise any further disputes before him provided it is not against the terms of the agreement. The parties, whoever shall be in possession of the original agreement, shall produce the same before the arbitrator. Copy of the application, the objections filed thereto and a copy of this order shall he provided to the arbitrator.'

The petitioner in his application under Section 20 of the Arbitration Act, had raised as many as 13 claims in the summary of claims for an amount of Rs. 39.47.000/-. Under the cover of the order of reference which contained the words 'parties shall be at liberty to raise any further dispute before him (arbitrator) provided it is not against the terms of the agreement', submitted revised 28 claims for Rs. 63.00 lacs.

7. It appears from the judgment that the appellate Bench in order to specifically consider the contention of the petitioner with regard to the disputes raised and the jurisdiction of the arbitrator, framed four additional issues out of which two were :

'B) Whether the arbitrator was empowered to enlarge the scope of the reference by entertaining the disputes not raised before the Court and do not form part of the reference?

C) Whether the arbitrator exceeded his jurisdiction by admitting certain claims and giving award on the items against the terms of the agreement?'

The Division Bench has dealt with these points in paras 13 to 15 of the judgment, as under:

'13. ..... When serious allegations of misconduct are made against the arbitrator as to his impartiality and of extraneous considerations and the Award travels beyond the scope of reference not covered by the terms of agreement. Courts are

empowered to examine the material available on record and determine the separable claims out of the Award. Support can be found on this proposition 'B' above from the authority of their Lordships of the Supreme Court in AIR 1977 SC 2014 (Orissa Mining Corporation Ltd. v. M/s. Premnath Vishwanath Rawalley), whereby it has been held :

'When an agreement is filed in Court and order of reference is made then the claim as a result of the order of reference is limited lo a particular relief and the arbitrator cannot enlarge Ihe scope of the reference and entertain fresh claims without a further order of reference from the Court.'

From the perusal of the order of reference made on April 9, 1982 it is manifestly made clear that though liberty was given to the parties to raise any further disputes before the arbitrator but they were qualified with the words :

'Provided it is not against the terms of the agreement.'

Thus, if il is found that some of the claims awarded by the arbitrator travel beyond the terms of agreement, they can certainly be assailed in proposition 'B' that the arbitrator cannot enlarge the scope of the reference by entertaining the disputes not raised before the Court and do not form part of the reference, the Court will be justified in selling aside lhat part of the Award falling within the ambit of mistake apparent on the face of the Award, specially when the same is separable.

14. Learned Counsel for the appellant on the above proposition made specific reference to the Award of claim No. 13 in the Award amounting to Rs. 7.12.850.00 (Rupees seven lacs twelve thousand eight hundred and fifty only) which falls outside the terms of agreement and thus beyond the scope of reference. Admittedly on the date of application under Section 20 there was nothing on record about the claim before the Court based on the measurement done by the Commissioner or any claim up to the date of reference. The report of the Commissioner was produced before the Court on December 1,1980. The Court vide order dated December 9, 1980, recorded about filing the report of the Commissioner, declared CMP No. 176/1980 and CMP No. 136/1980 as infructuous and disposed of both the petitions. In the order of reference there is no

mention of this report nor by that time it was made a part of the claim by the respondent/ contractor. It is thus apparent that the report of the Commissioner and the calculations made thereon were neither the part of the reference nor that claim preferred to at item No. 13 of the Award based on para 20 of the statement of facts and claim form part of the agreement. This statement does not find place in the claim filed in the Court along with the arbitration petition either. It finds place only in the statement of facts and claims filed before [he arbitrator on August 14. 1982. It is pertinent to note that the total sum shown in the summary of claims filed before the Court initially amounted to Rs. 39,47,000/- (Rupees thirty-nine lacs forty-seven thousand only). Whereas in the statement of facts and claim filed before the arbitrator on August 14, 1982, goes to the extent of the amount of about Rupees 63,00,000/- (Sixtythree lacs). Such a claim, in our opinion, cannot be said to he a part of reference and is not shown to have been based on any term of the agreement. The rates sanctioned and the work agreed upon by the parties according to the agreement on spreading over of the work done was calculated to the total sum of Rs. 12,235 lacs (Twelve lacs twenty three thousand five hundred). As against this the respondent along with his claim before the arbitrator on August 14, 1982, filed Annexure A, the 'Final Bill' amounting to Rs. 14,32,436.62 out of which an amount of Rs. 5,71,915.60 paise is shown to have been paid to the contractor/respondent on his running bill, leaving the balance of Rs. 8,60,521.02 paise (Eight lacs sixty thousand five hundred twentyone and paise two only) to be paid to the respondent/contractor. It is thus clear that any sum claimed going beyond the agreed amount and over and above the 'Final Bill' prepared on the basis of measurement of work done, does not form part of the agreement and incomparable with the terms of the agreement. Such a type of dispute which is against the terms of the agreement undoubtedly travels beyond the scope of reference and in violation of the clear and emphatic directions 'provided it is not against the terms of the agreement', while making the reference by the Court on April 9. 1982.

15. ..... In view ol the discussion made in the preceding paragraph we need not to dwell upon the scope of interference in a non-speaking A ward or the theory of 'fundamental breach' and have upheld the validity of a non-speaking Award. |n the facts and circumstances of the case in hand we find that the Award covered by

item No. 13 based on para 20 of the statement of facts and claim, is beyond the scope of reference being against the terms of the agreement is without jurisdiction and as a necessary implication of the same Award of claim based on the said para covered by item No. 14 amounting to Rs. 95,400.00 (Ninetyfive thousand four hundred only) must also fall along with the same.....'

8. Looking to this backdrop of the case, the contention of Mr. Thakur that the Division Bench has committed an error apparent on the face of the record in disallowing items 14 and 14 (sic) appears to have no substance. The Division Bench has categorically and specifically dealt with the contentions of facts and law in the judgment under review which have been raised in review. The learned Counsel has not been able to make out a ease seeking review upon discovery of an important and new matter of evidence which, after exercise of due diligence, was not within the knowledge or could not be produced by him. There is remarkable and distinguishable distinction between the words 'erroneous decision' and 'error apparent on the face of the record'. While the former can be corrected by higher forum, the latter can be corrected by exercise of review jurisdiction.

9. The High Court cannot usage the power of appeal for exercising the power of review which is limited and cannot be exercised on the ground that the decision was erroneous. Neither the power of review can be exercised to correct an erroneous order on merits nor can an erroneous decision be termed as 'mistake or error apparent on the face of the record'. There are definite limits to the exercise of the power of Review which can be exercised on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or power of the person seeking rer view or could not be produced by him at the time when the order was made. The power of review may be exercised where some mistake or error apparent on the face of the record is found or on any analogous ground. The power of review is not to be confused with the appellate power which may enable the higher forum to correct all errors committed by the subordinate Court. An error apparent on the face of the record, must be such an error which strikes one on a mere looking on the record and would not require any long-drawn process of reasoning on points, and should not admit or conceive of two opinions. The Supreme Court in case Satyanarayan

Hegde v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137, made the following observation with regard to the expression 'an error apparent on the face of the record' (Para 17):

'An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ.'

The Supreme Court in AIR 1995 SC 455, further held (Para 12):

'..... In substance, the review Bench has reappreciated the entire evidence sat almost as Court of appeal and has reversed the findings reached by the earlier Division Bench. Even if the earlier Division Bench findings regarding C.S. Plot No. 74 were found to be erroneous, it would be no ground for reviewing the same, as that would be the function of an appellate Court. Learned Counsel for the respondent was not in a position to point out how the reasoning adopted and conclusion reached by the Review Bench can be supported within the narrow and limited scope of Order 47, Rule 1, C.P.C. Right or wrong, the earlier Division Bench judgment had become final so far as the High Court was concerned. It could not have been reviewed by reconsidering the entire evidence with a view to finding out the alleged apparent error for justifying the invocation of review papers.....'

The exercise of review jurisdiction under Order XLVII, Rule 1, C.P.C,, is not permissible for an 'erroneous decision' to be reheard and cor-reeled and also cannot be used and allowed to be an appeal in disguise.

10. In Ghulam Hussain v.Ghulam Qadir, 1978 J&K; LR 158 : (AIR 1978 J & K 88), a Full Bench of this Court, speaking through Justice Dr. A. S. Anand (as His Lordships then was), has held as under (Para 9):

'The power of review granted to the Court under Order 47, Rule 1, C.P.C. has limited purpose and the Court would be transgressing its power if it proceeds to enlarge the scope of review by interfering with an allegedly earlier erroneous order. A review petition in that case would be equated with an appeal which is not permitted by law and offends against the accepted judicial principles of attaching finality to the judgment.'

11. Looking to the whole controversy and the legal position, as discussed above, it is apparent that the Division Bench has dealt with the pleas and rejected the claim of Items 13 and 14, allowed by the arbitrator, by discussing the facts and law and returning the findings by making observations. The scope of the Review being limited and definitive, the judgment under review cannot be said to be suffering from an error apparent on the face of the record.

12. The net result is that the review petition, fails which is accordingly dismissed.

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