

Union of India and Another. Vs. M/S Sri Ramakrishna Constructions and anr.

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Court : Orissa

Decided On : Jun-23-2010

Judge : B.K. Patel, J.

Acts : Arbitration Act - Section 20, 8; Limitation Act - Section 137 Article 137 clause 6.

Appeal No. : M.A. NO. 971 OF 1999; CIVIL REVISION NO.401 OF 1999.

Appellant : Union of India and Another.

Respondent : M/S Sri Ramakrishna Constructions and anr.

Advocate for Def. : M/s B.H. Rao; A.Kanungo; M.K.Biswal; R.Mohapatra; S.R.Mishra; S.K.Mishra, Adv.

Advocate for Pet/Ap. : M/s B.Pal; S.K.Ojha; A.K.Mishra; P.Das; A.Pal, Adv.

Judgement :

1. Date of hearing-8.4.2010 :: Date of judgment 23.06.2010 B.K.PATEL, J. Both Misc. Appeal No.971 of 1999 and Civil Revision No.401 of 1999 are directed against the judgment dated 29.7.1999 and decree dated 13.8.1999 passed by the learned Civil Judge (Senior Division), 1 st Court,Cuttack in Title Suit No.25 of 1996, a proceeding under section 20 of the Arbitration Act,1940 (for short, 'the Act') filed by the respondent/ opposite party no.1-plaintiff against the appellants/petitioners- defendants. Misc.Appeal No.971 of 1999 filed under section 39(1)(iv) of the Act is directed against that part of the impugned judgment by which

defendants were directed to file the original agreement entered into between the parties and Civil Revision No.401 of 1999 is directed against that part of the impugned judgment by which Arbitrator for adjudication of the dispute between the parties was appointed. Respondent no.2 was impleaded in the appeal and the revision at the instance of appellants/petitioners on the ground that during pendency of the appeal and revision, assets and liabilities of the plaintiff's partnership firm have been vested with it.

2. Plaintiff is a contractor. Defendants accepted plaintiff's tender for execution of earth work and issued work order dated 15/21.10.1992. As per the work order the work was to be completed by 20.4.1994. Accordingly, the parties entered into an agreement dated 17.3.1999. In the first variation statement agreement value was enhanced to enable the plaintiff to execute extra work and accordingly a supplementary agreement dated 14.2.1994 was executed.

3. General Terms and Conditions of the Contract and Standard Specifications, 1994(Volume-2) (for short, the 'GCC')of the Engineering Department of South Eastern Railway include Arbitration Clause. Clauses 63 and 64 of the GCC read as follows:

"63. MATTERS FINALLY DETERMINED BY THE RAILWAY :

all disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its 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 receipt of the contractor's presentation shall make and notify decisions on all matters referred to by the contractor in writing, provided that matters for which provision has been made in Clauses

18,22(5),39,45(a), 55,55-A(5), 61(2) and 62(1)(xiii), (B) (e)(b) of the General conditions of contract or in any Clause of the special conditions of the contract shall be deemed as "excepted matters", and decisions thereon shall be final and binding on the contractor, provided further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and shall not be

referred to arbitration. 64.(1)(i) DEMAND FOR ARBITRATION : In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 63 of these conditions, the contractor, after 90 days or within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

(ii) The demand for arbitration shall specify the matters which are in question, dispute or difference. Only such dispute(s) or difference(s) in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.

(iii) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Government that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims."

4. Plaintiff's case is that immediately on receipt of the work order plaintiff deployed men, materials and machineries but due to hindrances and impediments arising out of inaction on the part of the defendants, the work could not be started till 24.12.1992. However, plaintiff substantially completed work by the stipulated date of completion. By letter dated 15.4.1994(Ext.1) the plaintiff requested the defendants for extension of time for completion of small quantity of incomplete work. However, defendants did not respond as a result of which, machineries and equipments such as, dozers, excavators, tippers, rollers, etc. deployed by the plaintiff remained idle on the spot causing heavy loss on account of hire charges. In such circumstances, plaintiff had to demobilize with effect from 15.6.1994 as the monsoon set in keeping the defendants informed regarding the developments. In all, the plaintiff avers to have sustained loss to the tune of Rs.55.00 lakhs on this

account. It is also averred that the plaintiff has not been paid for the work done as per the specification. It is averred by the plaintiff that he is entitled to claims as per the schedule to the plaint as such claims are not "excepted matters" in terms of Clause 63 of the GCC. In the 14th Bill the defendants were satisfied regarding value of the work executed by the plaintiff to be Rs.204 lakhs as against contractual amount of Rs.190 lakhs after excluding the miscellaneous items which were not operated by the Railway. The Defendants were also satisfied with the extra work executed by the plaintiff according to the estimate. In the 15 th R.A. Bill endorsement was made on behalf of the defendants that payments due to the plaintiff have not been made. As all the claims made by the plaintiff cannot be said to be "excepted matters", and the defendants having illegally terminated the contract without intimation to the plaintiff, plaintiff avers to have sent letters dated 6.3.1995(Ext.9), 21.4.1995(Ext.10) and 31.10.1995(Ext.11) putting forth his claims. Defendants did not respond to plaintiff's demand and tried to encash plaintiff's bank guarantee of Rs.5,93,503/-. Finally, as the defendants failed to refer the dispute raised by the plaintiff to appoint Arbitrator as requested under Ext.11, plaintiff filed the application under section 20 of the Act.

5. Defendants filed written statement resisting plaintiff's application. It is pleaded that by letter under Ext.1 the plaintiff informed that he had completed 85% of the agreed work and requested for grant of extension of time till 31.12.1994. Accordingly, by letter dated 9.7.1994(Ext.2) time was extended till 30.11.1994. It is also alleged that though plaintiff was requested by letter dated 9.6.1994 to attend the office of the defendants for negotiation in the rate of earth work he did not attend. As the plaintiff did not take any action to extend validity of bank guarantee after its expiry on 8.7.1994, letter was issued to the bank for encashment of the bank guarantee. In spite of instructions issued to the plaintiff by letters dated 18.11.1994 and 21.11.1994 he did not resume the work though plaintiff requested to withdraw the letter sent to the bank for encashment of bank guarantee stating that he would complete the work by 31.12.1994. Instead of completing the work the plaintiff sent a telegram on 15.11.1994 for release of payments stated to have been withheld though full payment had been made to the plaintiff for the work executed before monsoon and no work had been executed thereafter. As the plaintiff failed to execute the work in spite of repeated reminders and as the

plaintiff expressed his inability to execute any work under his letter dated 12.12.1994, agreement was terminated by letter dated 4.1.1995 issued to the plaintiff as per the GCC. Plaintiff was asked to witness final measurement by letter dated 17.2.1995 but he did not attend measurement work. On such measurement it was observed that the plaintiff had taken excess payment which was directed to be deposited. It is averred that letter of the plaintiff under Ext.9 cannot be said to be a letter for demand of arbitration. As per the GCC if the contractor does not prefer his specific final claim in writing within a period of 90 days on receipt of intimation from the Government about final bill and its payment, it will be deemed that the contractor has withheld his claim. Moreover, the plaintiff did not claim for arbitration within the period stipulated under Clause 64. It is further pleaded that the plaintiff having not challenged termination of agreement, termination of agreement has become final and he has no right to ask for reference of his claim for arbitration. Further pleading of the defendants is that all the claims lodged by the plaintiff being "excepted matters" the same are excluded from the purview of arbitration clause. Rights and liabilities of the parties to the contract having been terminated earlier, plaintiff's claim subsequently made in letter under Ext.9 cannot be construed to be a dispute which is to be referred for arbitration.

6. Upon reference to rival pleadings, the following issues were framed for adjudication.

(1) Is the suit maintainable?

(2) Has the plaintiff any cause of action to file the suit (3) Is it a fit case for directing the defendants to file agreement and for reference of disputes and differences, if any, between the parties to an arbitrator? And

(4) To what other relief, the plaintiff is entitled?

7. In order to substantiate his claim plaintiff examined P.W.1. No oral evidence was adduced from the side of the defendants. Documents marked Exts. 1 to 11 and Exts. A to K were marked on admission on behalf of the plaintiff and defendants respectively. On perusal of the materials on record and upon reference to the rival contentions, in answering issue no.(1) it was held by the learned trial

court that proceeding under section 20 of the Act is barred neither under Clause 64 of the GCC nor under Article 137 of the Limitation Act, 1963. It was further held that the plaintiff having all along challenged termination of the contract as illegal and unauthorized, on the ground that there cannot be repudiation of the contract unilaterally, such termination cannot operate as a bar for the plaintiff to take recourse to provision under section 20 of the Act. In answering issue no.(3) it was held by the learned trial court that claims made by the plaintiff under Ext.9 cannot be said to be not a dispute within the ambit of the contract. Issue No.(2) appears to have not been pressed for adjudication. In view of the findings recorded in answering the issues Nos. (1) and (3) and as the Chief General Manager of the Railways had failed to appoint Arbitrator in terms of the contract it was held by the learned trial court that the plaintiff is entitled to the reliefs of appointment of Arbitrator for adjudication of dispute. Accordingly, the impugned judgment was passed and the suit was decreed.

8. In assailing the impugned judgment it was contended by the learned counsel for the appellants that bare analysis of the arbitration clause in the agreement reveals that the contractor is required to demand arbitration after 90 days but within 180 days of presenting final claim on disputed matters. In the present case, plaintiff made final claim in his letter under Ext.8 on 9.1.1995. However, no demand in writing was made by the plaintiff to refer the dispute or difference for arbitration. In such circumstances, learned trial court should have held that the plaintiff had abandoned his final claim and did not want adjudication by way of arbitration under clause 64 of the agreement. As the plaintiff had not made any demand for arbitration in his letter under Ext.8, the defendants were not legally responsible for appointment of Arbitrator. Alternatively, it was argued, even if letter under Ext.9 dated 6.3.1995 is construed to be a demand for arbitration, the claim made there under did not arise out of any contract which subsisted between the parties. It was not disputed by the learned counsel for the appellants that the period of limitation of three years as provided under section 137 of the Limitation Act is applicable to the arbitration proceeding. It was conceded that this limitation applies to filing of applications under section 20 or section 8 of the Act. However, it was contended that it does not relate to invocation of arbitration clause in which there is stipulation regarding time for demanding arbitration. As the plaintiff did not make demand for

arbitration within the period as stipulated in clause 64 of the GCC, learned trial court should not have taken into account plaintiff's claim for arbitration. It was further argued that as the agreement between the parties provided for appointment of Gazetted Railway Officer as Arbitrator, learned court below committed illegality in appointing a retired Judge of the High Court as sole Arbitrator.

9. In reply, learned counsel for the respondents/opposite parties supported and defended the impugned judgment. It was strenuously argued that the learned court below has assigned cogent reasons in rejecting the contentions raised on behalf of the defendants to hold that the dispute raised by the plaintiff is required to be resolved by an Arbitrator appointed by the court in terms of section 20 of the Act.

10. The contentions relating to bar to the proceeding under section 20 of the Act have been dealt with by the learned trial court while adjudicating issue no.(1). According to learned counsel for the appellants/petitioners the plaintiff raised claims in connection with the contract for the first time in Ext.8 letter dated 9.1.1995 and reiterated the same in Ext.9 letter dated 6.3.1995. However, demand for arbitration was made in Ext.10 letter dated 21.4.1995 i.e. before 90 days of presenting the claims and again in Ext.11 letter dated 31.10.1995 i.e. after 180 days of presenting the final claim. Therefore, the plaintiff lost the right to claim for adjudication of dispute by arbitration in view of clause 64(1)(i) of the GCC. Learned court below has assigned cogent reasons to observe that stipulation regarding time for demanding that the dispute be referred to arbitration as contained in clause 64 of the GCC cannot be considered to be mandatory so as to nullify jurisdiction of the Court to entertain proceeding under section 20 of the Act. So far as the proceeding under section 20 of the Act is concerned, it is governed under the Article 137 of the Limitation Act,1963. It has also been held that termination, if any, of contract by one of the parties to it does not operate as a bar for the aggrieved party to initiate a proceeding under section 20 of the Act. Clause 63 of the GCC itself provides that all disputes and differences arising out of or in connection with the contract, whether during progress of the work or after its completion or before or after termination of contract, are to be decided by the Railway. Learned court below also relied upon decisions of the Hon'ble Supreme

Court in Wazir Chand Mahajan and another v- The Union of India: AIR 1967 SC 990; Damodar Valley Corporation v- K.K.Kar: AIR 1974 SC 158 and The Vulcan Insurance Co. Ltd. v- Maharaj Singh and another: AIR 1976 SC 287. In Wazir Chand Mahajan and another v- The Union of India (supra) it has been held that a court is not concerned in dealing with the question whether the claim of a party to the arbitration agreement is barred by the law of limitation; that question falls within the province of the arbitrator to whom the dispute is referred. While reiterating the said principle it was held by the Hon'ble Court in The Vulcan Insurance Co. Ltd. v- Maharaj Singh and another (supra) that if the difference which had arisen between the parties was the one to which the arbitration clause applied then the application under section 20 of the Act could not be dismissed on the ground that the claim would not ultimately succeed either on facts or in law. The matter has to be left for the decision of the arbitrator. In Damodar Valley Corporation v- K.K.Kar(supra) it has been held that the question whether the termination was valid or not does not affect the arbitration clause, or the right of the aggrieved party to invoke it for appointment of an arbitrator. It is not disputed that the proceeding under section 20 of the Act was filed within the period of limitation prescribed under Article 137 of the Limitation Act, 1963. There appears no infirmity in the findings of the learned court below to the effect that the proceeding before it was barred neither under clause 64 of the GCC nor under section 137 of the Limitation Act, 1963.

11. A feeble attempt was made on behalf of the appellants/petitioners to assail appointment of a retired Judge of the High Court as the Arbitrator. However, in view of the observations made by the Hon'ble Supreme Court in Union of India v- Singh Builders Syndicate: (2009) 4 SCC 523, relied upon by the learned counsel for the respondents/opposite parties, such appointment was not seriously challenged on principle. Nonetheless, it was suggested on behalf of the parties that as the impugned judgment was passed as early as in the year 1999 and more than a decade has elapsed in the meanwhile, in view of availability of other retired Judges also at present, another retired Judge of the High Court may be appointed as Arbitrator for adjudication of the dispute. Upon soliciting the views of the learned counsel appearing for the parties, there appeared consensus regarding appointment of Sri P.K.Mishra, retired Chief Justice of Patna High Court as the

Arbitrator.

12. In view of the above discussion, subject to modification to the extent of appointment of Sri P.K.Mishra, retired Chief Justice of Patna High Court as the Arbitrator for adjudication of the dispute between the parties, the impugned judgment and decree passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in Title Suit No.25 of 1996 are confirmed.

Accordingly, Misc. Appeal No.971 of 1999 is dismissed and Civil Revision No.401 of 1999 is disposed of.

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