M/s. Jethanand and Sons

Vs

The State of Uttar Pradesh

Civil Appeals Nos. 421 to 423 of 1957

(J. L. Kapur, J. C. Shah JJ)

06.02.1961

JUDGMENT

SHAH, J. –

These three appeals were filed by the appellants M/s. Jethanand & Sons with certificate of fitness granted under Art. 133(1)(c) of the Constitution by the High Court of Judicature at Allahabad.

The appellants entered into three separate contracts with the Government of the United Provinces (now called the State of Uttar Pradesh) on March 20, 1947, May 27, 1947, and June 28, 1947, for the supply of stone ballast at Shankar Garh, District Allahabad. The contracts which were in identical terms contained the following arbitration clause :

> "All disputes between the parties hereto arising out of this contract whether during its continuance or after its rescission or in respect of the construction or meaning of any clause thereof or of the tender, specifications and conditions or any of them or any part thereof respectively or anything arising out of or incident thereto for the decision of which no express provision has hereinbefore been made, shall be referred to the Superintending Engineer of the Circle concerned and his decision shall in all cases and at all times be final, binding and conclusive between the parties."

Pursuant to the contracts, the appellants supplied stone ballast. Thereafter, purporting to act under cl. (16) of the agreements, the Executive Engineer, Provincial Division, referred certain disputes between the appellants and the State of Uttar Pradesh, alleged to arise out of the performance of the contracts, to arbitration of the Superintending Engineer of the Circle concerned. The Superintending Engineer required the appellants to appear before him at the time fixed in the notices. The appellants by their letter dated May 31, 1951, declined to submit to the jurisdiction of the Superintending Engineer, and informed him that if he hears and determines the cases ex parte, the "decisions will not be binding" on them. On February 7, 1953, the Superintending Engineer made and published three awards in respect of the disputes arising under the three contracts and filed the same in the court of the Civil Judge, Lucknow. The appellants applied for setting aside the awards alleging that the contracts were fully performed and that the dispute alleged by the State of Uttar Pradesh to have arisen out of the contracts could not arise after the contracts were fully performed and that the State could not refer those alleged disputes to arbitration. They also contended that the awards were not valid in law because on the arbitration agreements action was not taken under s. 20 of the Arbitration Act. The Civil Judge, Lucknow, held that the disputes between the parties were properly referred to the Superintending Engineer by the State of Uttar Pradesh and that the awards were validly made. Against the orders passed by the Civil Judge, Lucknow, three appeals were preferred

by the appellants to the High Court of Judicature at Allahabad.

The High Court set aside the orders passed by the Civil Judge and remanded the cases to the Trial Judge with a direction that he do allow the appellants and if need be, the respondent to amend their pleadings, and frame all issues that arise out of the pleadings and allow the parties an opportunity to place such evidence as they desire and decide the case on such evidence. In the view of the High Court no proper notice of the filing of the awards was served upon the appellants and that they were "seriously handicapped in their reply by the course which had been adopted both by the court and the arbitrator in the conduct of the proceedings in court." On the applications filed by the appellants, the High Court granted leave to appeal to this court under Art. 133(1)(c) of the Constitution, certifying that the cases were fit for appeal to this court.

Counsel for the respondent has urged that the High Court was incompetent to grant certificate under Art. 133(1)(c) of the Constitution.

The order passed by the High Court was manifestly passed in exercise of the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Under Art. 133 of the Constitution, an appeal lies to this court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies that :

> #(a).....(b)..... or##
>
> (c) "the case is a fit one for appeal to the Supreme Court."

In our view, the order remanding the cases under s. 151 of the Civil Procedure Code is not a judgment, decree or final order within the meaning of Art. 133 of the Constitution. By its order, the High Court did not decide any question relating to the rights of the parties to the dispute. The High Court merely remanded the cases for retrial holding that there was no proper trial of the petitions filed by the appellants for setting aside the awards. Such an order remanding the cases for retrial is not a final order within the meaning of Art. 133(1)(c). An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order, the civil proceeding still remains to be tried and the rights in dispute between the parties have to be determined, the order is not a final order within the meaning of Art. 133. The High Court assumed that a certificate of fitness to appeal to this court may be issued under s. 109(1)(c) of the Code of Civil Procedure, even if the order is not final, and in support of that view, they relied upon the judgment of the Judicial Committee of the Privy Council in V. M. Abdul Rahman v. D. K. Cassim & Sons [(1933) L.R. 60 I.A. 76]. But s. 109 of the Code is now made expressly subject to Ch. IV, Part V of the Constitution and Art. 133(1)(c) which occurs in that chapter authorises the grant of a certificate by the High Court only if the order is a final order. The inconsistency between s. 109 Civil Procedure Code and Art. 133 of the Constitution has now been removed by the Code of Civil Procedure (Amendment) Act 66 of 1955. But even before the amending Act, the power under s. 109(1)(c) being expressly made subject to the Constitution, an appeal lay to this Court only against judgments, decrees and final orders.

Again, the orders passed by the High Court did not raise any question of great public or private importance. In the view of the High Court, the applications for setting aside the awards filed by the appellants were not properly tried and therefore the cases deserved to be remanded to the court of first instance for trial de novo. The High Court granted leave to the parties to amend their pleadings; they also directed the Civil Judge to frame "all the issues that arise and allow the parties an

opportunity of adducing such evidence as they desired." It was an order for trial de novo on fresh pleadings and on all issues that may arise on the pleadings. Evidently, any decision given by the High Court in the course of the order would not in that trial de novo be binding and the cases will have to be tried afresh by the Civil Judge. The High Court was of the view that the interpretation of para. 3 of the first schedule of the Indian Arbitration Act raised a substantial question of law. But by the direction of the High Court, this question was also left open to be tried before the Civil Judge. We fail to appreciate how an observation on a question which is directed to be retried can still be regarded as raising a question of law of great public or private importance justifying grant of a certificate under Art. 133(1)(c) of the Constitution.

We accordingly vacate the certificate granted by the High Court and dismiss these appeals with costs. One hearing fee.

Appeals dismissed.

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