K. V. George

Vs

Secretary to Government, Water and Power Department, Trivandrum and Another

Civil Appeal Nos. 4209-10 of 1989

(Sabyasachi Mukharji, B. C. Ray JJ)

05.10.1989

JUDGMENT

RAY, J. –

1. Special leave granted.

2. These appeals on special leave have been filed by the contractor, K. V. George against the judgment and order passed on April 10, 1987 by the Kerala High Court in M.F.A. Nos. 291 and 304 of 1982 whereby the High Court set aside the judgment of the Sub-Court, Trivandrum in O.P. (Arb.) No. 296 of 1981 as also the award of the arbitrator in A.C. No. 276 of 1980 and directed that the arbitrator will dispose of the Arbitration Case No. 132 of 1980 in the light of the judgment of the Sub-Court in O.P. No. (Arb.) No. 81 of 1981 in accordance with law considering the claim of the contractor-appellant and the counter-claim of the respondents.

3. The appellant who is a contractor entered into a contract with the respondents on April 22, 1978 in connection with the construction of a embankment across Musaliyar Padom between Chaniage 2573.5 M to 2827 M of E.B. Main Canal of Kallada Irrigation Project. The work was required to be completed by March 30, 1980 i.e. two years from the date of selection notice which was dated March 30, 1978. As the appellant failed to complete the work as per the terms of the contract, the respondents sent a notice dated April 26, 1980 to the appellant cancelling the contract at his risk and cost. On July 2, 1980 the appellant filed a claim being Arbitration Case No. 132 of 1980 before the named arbitrator i.e. the Chief Engineer (Arbitration), Vellayambalam, Trivandrum claiming enhancement of rates in respect of the earth work involved in the contract, interest on delayed payments and costs. The second respondents, the Superintending Engineer, K.I.P. Circle, Karnataka filed a defence statement stating inter alai in para 2(1) that the time of completion of the work was fixed as 24 months from the date of handing over site to the contractor and he could have anticipated all such variations before quoting rates. As per agreement the rates once agreed will not be enhanced. The department is not bound to pay the claimant a revision of schedule. In para 2(m) it has also been pleaded that as per agreement the contractor is bound to carry out additional and extra items of works that arise during execution. The additional and extra items of works done by the contractor are quite meager when compared to the total volume of the work. The extra and excess items were covered by supplemental agreement. The contractor was not able to complete even 35 per cent. of the total work within the time for completion of the work and as such the claimant is not entitled to attributed delay on this account. A counter-claim was filed by the Superintendent Engineer, K.I.P. Circle, Kottarakkara, respondent 2 wherein a claim of a sum of Rs. 28,84,000 was made.

4. The arbitrator by his order dated January 22, 1981 made the award in regard to claim No. 1 directing the respondents to pay 35 per cent. increase in the agreed rate for the item of earth work excavating and filling for forming the compacted embankment with earth from barrow area. Claim No. 1 was thus allowed. Claim Nos. 2 and 3 regarding interest were disallowed. As regards counter-claim Nos. 1 and 2, it was ordered that those issues will be considered separately and so not award was made.

5. The appellant thereafter filed O.P. (Arb.) No. 81 of 1981 in the Court of Sub-Judge, Trivandrum under Section 14 of the Arbitration Act for making the award a rule of the court. On objections being raised by the respondents, the Court of the Sub-Judge after hearing the parties by order dated August, 18, 1981 remitted the reference to the arbitrator for fresh consideration on the ground that the arbitrator did not consider the counter-claims made by the respondents. The appellant thereafter filed I. A. No. 3780 of 1981 in the Court of Sub-Judge praying that the order dated August 18, 1981 may be reviewed. In the meantime, the appellant filed another Arbitration Case No. 276 of 1980 before the same arbitrator in respect of the wrongful termination of the contract and also raised 13 items of claims therein. The arbitrator after going through the objections of the respondent made an award on October 29, 1981 whereby her ordered that the rearrangement of the work should not be at the risk and cost of the appellant. As regards claim No. 2, he ordered 30 per cent. increase in rates (as per original and supplemental agreement) for all items of work carried out by the appellant except on items covered by Award No. 132 of 1980 dated January 22, 1981. Claim Nos. 3 and 5 were rejected. As regard claims No. 4 and increase of 20 per cent. in the agreed rates for these items was allowed. Claim No. 11 regarding interest was disallowed. It was also stated in the award inter alia that the claimant shall be entitled to the refund of the security amount as well as refund of the retention amounts, the claimant shall be entitled to his final bill in terms of the award, the counter-claim for recovery of costs on rearran__gement of work and also the counter-claims filed by the respondent dated April 8, 1981 were declined. The appellant filed O.P. (Arb.) No. 296 of 1981 for making the second awa a rule of the court. A statement of defence was filed by the respondents wherein it has been stated inter alia in para 6 that :

> "The claims made in this petition under paras 6(ii), (iii), (iv), (v), (vi), (vii) and (viii) are barred by res judicata and constructive res judicata. No work was done by the claimant after termination of the contract on June 24, 1980. The claim petition in Arbitration Case No. 132 of 1980 was filed by the claimant before the hon'ble arbitration on July 2, 1980. It was open to him to raise these claims in that arbitration petition. Having not done this raising of these claims now which are all bogus and imaginary is barred by constructive res judicata. He had not raised these claims before Chief Engineer (next superior authority) and also before the hon'ble arbitrator in his petition dated October 27, 1980. Hence it is prayed that the above claims may not be taken up for arbitration and they may be rejected."

It has also been in sub-para (iv) of para 6 that :

> "(iv) As above, Also there had been no error in the rates. The claimant was paid at his agreed rates, and he had received it and also no dispute lies on it. Claim may be rejected. Work done was recorded as per Item No. 7 of application of agreement and was paid as per agreement."

6. The Sub-Judge by order dated March 18, 1982 made the award a rule of the court dismissing the plea of res judicata raised by the respondents in O.P. (Arb.) No. 296 of 1981. The respondents filed

two appeals being F.M.S. Nos. 291 and 304 of 1982 before the High Court of Kerala at Ernakulam which held that the arbitrator could not review its order on the facts of the present case and so allowed F.M.A. No. 291 of 1982. The High Court also allowed F.M.A. No. 304 of 1982 holding that principles of constructive res judicata would apply to the arbitration case. Feeling aggrieved by the aforesaid judgment and order passed in F.M.A. Nos. 291 and 304 of 1982, the appellant-contractor has preferred the instant appeals on special leave.

7. Mr. Bhatt, learned counsel appearing on behalf of the appellant has submitted in the first place that the High Court was wrong in reversing the judgment and order of the trial Court without considering the provisions of Section 114 as well as Order XLVII, Rule 1 of the Code of Civil Procedure inasmuch as Order XLVII, Rule 1 clearly provides that review of an order may be made either on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. In the instant case, the first award was set aside by the trial court on the ground that the counter-claim filed on behalf of the respondents was not considered by the arbitrator and so it remitted the same for consideration afresh. It has been held by the High Court that liable refusal to consider the counter-claims had rendered the prior award liable to be set side for misconduct of the arbitrator and the proceedings. It has been urged by the learned counsel that the counter-claim has been fully considered in the second award made by the arbitrator and as such the first award cannot be set aside on the ground of non-consideration of a counter-claim and it cannot be treated as misconduct of arbitrator and the proceedings for non-consideration of the counter-claim in the first award. It has been further contended in this connection that the finding of the High Court to the effect that the subsequent award passed by the arbitrator dealing with counter-claims did not have the effect of mitigating the misconduct of the arbitrator or of condoning the error on the face of the award, is also not sustainable inasmuch as the counter-claim filed by the respondents was duly considered by the arbitrator in the second award made by him.

8. It has also been submitted by the learned counsel for the appellant that the principles of res judicata and constructive res judicata are not applicable to the award made in Arbitration Case No. 291 of 1981 inasmuch as the disputes that were raised were not ripe for being referred to arbitration in view of the terms of the contract that the contractor had to raise the dispute before the Superintending Engineer and thereafter before the Chief Engineer and had to wait till the end of the stipulated period. It has been further submitted that since the period was not over, the claims that have been raised subsequently in the second claim petition before the arbitrator could not be raised in the first claim petition before the arbitrator and as such the second award made by the arbitrator cannot be said to have been barred by res judicata as provided in Section 11 of the Code of Civil Procedure or by the rules of constructive res judicata. The judgment and order of the High Court in allowing F.M. A. No. 304 of 1982 setting aside aside the award made in Arbitration Case No. 296 of 1981 is unwarranted and as such it is not sustainable. It has also been contended that the claim made in the second claim petition before the arbitrator is not barred by Order II, Rule 2 of the Code of Civil Procedure inasmuch as the disputes raised in the second claim petition before the arbitrator were not ripe for reference as the appellant had to wait till the end of the stipulated period in accordance with the terms of the contract. The judgment and order of the High Court in allowing the F.M.A. No. 304 of 1982 is not legal and valid and is liable to be set aside.

9. Mr. Abdul Khadir, learned counsel appearing on behalf of the respondents on the other hand urged before this Court that the Sub-Judge acted legally in directing the arbitrator to dispose of the Arbitration Case No. 132 of 1980 in the light of the judgment of the Sub-Court in O.P. (Arb.) No. 81 of 1981 and in setting aside the order of review because no case for review nor any sufficient cause has been made out for exercising the power of review under Section 114 read with Order

XLVII, Rule 1 of the Code of Civil Procedure. The High Court, it has been submitted, was right in holding that the order of review was unwarranted and in setting aside the same and directing the arbitrator to dispose of the reference in accordance with law considering the claim of the contractor-appellant and the counter-claim of the respondents. It has been further submitted by Mr. Abdul Khadir that in view of the provisions of Section 41 of the Arbitration Act which specifically provides that the provisions of the Code of Civil Procedure shall apply to arbitration proceedings, the principles of res judicata or of constructive res judicata will apply to arbitration proceeding. The appellant-contractor having not raised all his claims in his first claim petition made to the arbitrator for decision and award having been made thereon, the second claim petition before the arbitrator making certain other claims in Arbitration Case No. 276 of 1980 is barred by the principles of constructive res judicata inasmuch as on the termination of the contract by order dated April 26, 1980 the contractor could have raised all his disputes arising out of the contract at that time, but the appellant chose to take only some of the issues arising from the said breach of contract before the arbitrator. The second claim petition raising some issues before the arbitrator is therefore, hit by the principles of constructive res judicata and the High Court rightly allowed the appeal setting side the award made in Arbitration Case No. 276 of 1980. It has also been submitted that the provisions of Order II, Rule 2 of the Code of Civil Procedure apply to the arbitration case and the appellant having not sought reference of all the issues, he should be deemed to have surrendered those issues and he is debarred from raising those issues in a subsequent claim petition made before the arbitrator. In this connection, he has cited the ruling in Muhammad Hafiz v. Mirza Muhammad Zakariya (AIR 1922 PC 23 : 49 IA 9 : CWN 153). The learned counsel drew our attention to para 2(i) of the objections filed by the respondents in Arbitration Case No. 132 of 1980 wherein it has been stated that :

"... As per agreement the rates once agreed will not be enhanced. The department is not bound to pay the claimant a revision of schedule."

10. It has been further submitted by the learned counsel on behalf of the respondents that the appellants was not entitled to an increase in the rates as he claimed increase with the agreement and the claim that has been made is untenable.

11. It has been lastly submitted on behalf of the respondents that the arbitrator has misconducted himself and the proceedings by not deciding the counter-claim filed by the government while considering the claim filed by the appellant and making an award. The High Court has rightly held that the arbitrator misconducted himself and the proceedings and allowed the appeal, setting aside the second award made by the arbitrator in Arbitration Case No. 276 of 1980.

12. The first question that falls for consideration in this case is whether the finding of the High Court setting aside the order of review made in I.A. No. 3780 of 1981 and setting aside the order made in O.P. (Arb.) No. 81 of 1981 dated August 18, 1981 whereby the case was remanded to the arbitrator is sustainable or not. Admittedly, the appellant file a claim petition being Arbitration Case No. 132 of 1980 making certain claims before the arbitrator. The respondents filed the counter-claims. The arbitrator without considering the counter-claims kept the counter-claims for subsequent consideration and made an award. The trial court set aside the award and remitted the same to the arbitrator for making a fresh award considering the claims and counter-claims filed by the parties. On an application for review, the trial court set aside the order and passed a decree in terms of the award. It is not disputed that the arbitrator did not at all consider the counter-claims and kept the same for consideration subsequently while making award in respect of the claims filed by the appellant. Undoubtedly, this award made by the arbitrator is not sustainable in law and the arbitrator

has misconducted himself and in the proceedings by making such an award. It is the duty of the arbitrator while considering the claims of the appellant to consider also the counter-claims made on behalf of the respondents and to make the award after considering both the claims and counter-claims. This has not been done and the arbitrator did not at all consider the counter-claims of the respondents in making the award. As such the first award dated January 22, 1981 made by the arbitrator in Arbitration Case No. 132 of 1980 is wholly illegal and unwarranted and the High Court was right in holding that the arbitrator misconducted himself and the proceedings in making such an award and in setting aside the same and directing the arbitrator to dispose of the reference in accordance with law considering the claim of the contractor and the counter-claim of the respondents. The order allowing the application for review by the trial court is also bad inasmuch as there was no mistake or error apparent on the face of the order dated August 18, 1981 made in O.P. (Arb.) No. 81 of 1981 nor any sufficient reason has been made out for review of the said order. The order dated August 18, 1981 is legal and valid order and the order dated March 18, 1982 allowing the application for review being I.A. No. 3780 of 1981 and setting aside the order in O.P. (Arb.) 81 of 1981 dated August 18, 1981 is, therefore, bad and unsustainable.

13. With regard to the submission that the issues that have been raised in the second claim petition before the arbitrator is barred under the provisions of Order II, Rule 2 of the Code of Civil Procedure, it is convenient to refer to a passage in Mulla's Code of Civil Procedure (Volume II 14th edn.) at page 894 :

> "..... This rule does not require that when several causes of action arise from one transaction, the plaintiff should sue for all the them in one suit. What the rule lays down is that where there is one entire cause of action, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect suits in respect of those parts."

14. It is pertinent to refer in this connection to the decision in Muhammad Hafiz v. Mirza Muhammad Zakariya (AIR 1922 PC 23 : 49 IA 9 : 26 CWN 153) wherein a mortgage deed provided that if the interest was not paid for six months the creditor should be competent to realise either the unpaid amount of the interest due to him or the amount of principal and interest, by bringing a suit in court without waiting for the expiration of the time fixed, and the plaintiff, more than 3 years after (i.e. time fixed), brought a suit for interest alone and got a decree. It was held that the second suit for principal and arrears of interest was not maintainable as under Order II, Rule, CPC he must be deemed to have relinquish his claim for further relief, he having exercised the option of suing for interest alone. It was further held that the cause of action referred to in the rule is the cause of action which gives occasion to, and forms the foundation of, the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by recover the balance by independent proceedings.

15. In the instant case, the contract was terminated by the respondents on April 26, 1980 and as such all the issues arose out of the termination of the contract and they could have been raised in the first claim petition filed before the arbitrator by the appellant. This having not been done the second claim petition before the arbitrator raising the remaining disputes is clearly barred.

16. With regard to the submission as to the applicability of the principles of res judicata as provided in Section 11 of the Code of Civil Procedure to arbitration case, it is to be noted that Section 41 of the Arbitration Act provides that the provisions of the Code of Civil Procedure will apply to the arbitration proceedings. The provisions of res judicata are based on the principles that there shall be

no multiplicity of proceedings and there shall be finality of proceedings. This is applicable to the arbitration proceedings as well. It is convenient to refer to the decision in Daryao v. State of U. P. ((1962) 1 SCR 574, 582-83 : AIR 1961 SC 1457) wherein it has been held that the principles of res judicata will apply even to proceedings under Articles 32 and 226 of the Constitution of India. It has been observed that :

> "Now, the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32."

17. In Satish Kumar v. Surinder Kumar (AIR 1970 SC 833 : (1969) 2 SCR 244 quoting from an unreported judgment in Uttam Sing Dugal & Co. v. Union of India, Civil Appeal No. 162 of 1962, dated October 11, 1962 (SC)) it has been observed that :

> "The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject matter of the reference.... This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed."

18. Considering the above observations of this Court in the aforesaid cases we hold that the principle of res judicata or for that the principles of constructive res judicata apply to arbitration proceeding and as such the award made in the second arbitration proceeding being Arbitration Case No. 276 of 1980 cannot be sustained and is therefore, set aside. The High Court has rightly allowed the F.M.A. No. 304 of 1982 holding that the appellant-contractor was precluded from seeking the second reference. No other points have been raised before us by the appellant.

19. In the premises aforesaid, we dismiss these appeals with costs quantified at Rs. 5000 and affirm the judgment and order dated April 10, 1987 made by the High Court.

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