State of Bihar

Vs

Hanuman Mal Jain

(S.B. Majmudar, M. Jagannadha Rao JJ)

17.07.1997

JUDGMENT

S.B. Majumdar, J.

1. Leave granted in both these Special Leave Petitions.

2. By consent of learned advocates of parties the appeals were heard finally and are being disposed of by this common judgment. The appellants in both these appeals are State of Bihar and its officers in Rural Engineering Organisation. Respondent in both these appeals is also one and the same contractor. The grievance raised by the appellants centers round the orders passed by learned Subordinate Judge, Chaibasa, making award rules of the Court in two Title Suits filed by the respondent against the appellants. These orders of the learned Subordinate Judge in turn were confirmed by the High Court of Patna in appeal moved by the Appellants and that is how the appellants are before us in these proceedings. We shall refer to the respondent as plaintiff and the appellants as defendants in later part of this judgment.

3. The plaintiff filed two Title Suits for recovering money dues from the defendants, in the Court of the Subordinate Judge, Chaibasa. His contention was that while carrying out contract work entrusted to him by the defendants he had incurred expenditure over various extra items which were not paid for by the authorities concerned. He also raised certain ancillary claims against the defendants seeking money decrees against the defendants in both these suits.

4. The defendants resisted the suits on diverse grounds. After hearing the parties the Trial Court appointed the, superintending Engineer, Rural Engineering Organisation, Works Circle, Ranchi as the sole arbitrator to adjudicate upon the disputes raised in the suits. It was subsequently found that before the arbitrator could finish the arbitration proceedings his office fell vacant due to retirement. Consequently the plaintiff moved another application under the Arbitration Act, 1940 (hereinafter referred to as 'the Act') for, appointment of a fresh arbitrator. The appellant-defendants agreed to the name of one Shri T. Ghosh, retired Chief Engineer to act as sole arbitrator and that is how the disputes between the parties in both these suits were referred to the said arbitrator who after hearing the parties gave his award on 6th July, 1992 for a sum of Rs. 3,99,400/- in favour of the plaintiff in Title Suit No.7 of 1988 with 18% interest. He passed another award dated 7th July, 1992 for a sum of Rs.2,38,200/- along with interest and cost in favour of the respondent-plaintiff in Title Suit No. 8 of 1988. The plaintiff moved applications under Section 20 of the Act in both the suits for making the awards rules of the Court. The defendants filed objections to these awards under Section 30 of the Act. The Learned Subordinate Judge, Chaibasa, after hearing the parties overruled the objections of the defendants and decreed both the suits in terms of the arbitration awards. As noted earlier the

appellant-defendants being aggrieved by both these award decrees approached the High Court of Patna at Ranchi in appeal. The High Court dismissed the appeal and confirmed the arbitration awards.

5. Learned senior counsel Shri Sanyal in support of these appeals placed before us two contentions for our consideration :

> 1. The awards which were made rules of the Court suffered from patent error of law on the ground that Clause 11 of the Agreement between the parties was not complied with by the plaintiff and hence both the awards were barred by limitation as per the second proviso to the said Clause and both the Subordinate Court as well as the High Court had patently erred in relying upon Clause 11 dehors the second proviso while confirming the awards.
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> 2. The award of interest by the arbitrator was patently erroneous and without jurisdiction as it was contrary to the tender notice Clause 2.32 which prohibited grant of such interest on the disputed amounts. Initially when these Special Leave Petitions reached admission hearing before a Bench of this Court consisting of Hon'ble B.P. Jeevan Reddy and K.S. Paripoornan, JJ., an order was passed by the said Bench on 9th September 1996 adjourning for three weeks the said Special Leave Petitions to enable Shri Sanyal, learned senior counsel for the petitioners to produce the copy of the grounds of appeal before the High Court to establish the following facts :
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> (i) that the State did point out that the District Judge has quoted a wrong proviso to clause 11 of the contract and that the correct proviso to clause 11 reads altogether in a different manner.
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> (ii) that a submission was raised in the grounds of appeal that by virtue of clause 2.32 of the tendered document no interest shall be payable to the contractor. Pursuant to the said order the appellants through their counsel have produced the grounds of appeal before the High Court by way of compilation in Paper Book No.I. On a perusal of these grounds it is found that the twin contentions canvassed before us by Shri Sanyal in support of the appeals have in terms been raised before the High Court in the Memo of Appeal being Ground No.VII. We have, therefore, examined these contentions on merits after hearing learned counsel for both the sides. Contention No.1

6. So far as the applicability of second proviso to Clause 11 of the Agreement is concerned Shri Sanyal was right when he contended that Clause 11 as extracted by the learned Subordinate Judge in both of his judgments in Title Suit Nos.7 and 8 of 1988 has been reproduced without the second proviso which is a part thereof. The second proviso to Clause 11 which is found in the Agreement leads as under :

> "Provided always that the contractor shall not be entitled to any payment for any additional work done unless he has received an order in writing from the Engineer Incharge of the additional work that the contractor shall be bound to submit his claim for any additional work done during any month on or before 15th day of the following month accompanied by a copy of the order, in writing of the Engineer Incharge for the additional work and that the contractor shall not be entitled to any

payment in respect of such additional work if he fails to submit his claim within the aforesaid period." It, therefore, becomes clear that while making awards rules of the Court and also while confirming the awards both the courts below have assumed that Clause 11 dehors the second proviso was considered by the arbitrator and, therefore, it prima facie appeared as if the Trial Court while making the awards rules of the Court and the High Court while confirming that decision had not addressed themselves to the question whether the aspect of limitation of the plaintiff's claim was at all considered by the arbitrator and whether that introduced a vital defect which would have required remission of the awards to the arbitrator for re-consideration. However on a closer scrutiny of the awards as well as the written objections filed by the defendants themselves before the arbitrator and even the objections under Section 30 of the Act filed by the defendants to the said awards before the Trial Court it is revealed that not only the arbitrator was alive to the question of applicability of entire Clause 11 of the Agreement including the second proviso but the defendants wanted to object to the awards or, the ground that the decision of the arbitrator on the question of limitation was erroneous. We will presently show how this is clearly revealed from the record of the case.

7. When the plaintiff put forward his money claims before the arbitrator for adjudication the defendants themselves joined issue on the applicability of Clause 11 of the Agreement. In their written objections filed before the arbitrator in both these cases, at paragraph 9 the following pertinent averments were made :

"9. That the statements made in para 6 of the statement of claims are not correct. It is submitted that clause 11 of the agreement executed between the parties relate to additional or extra items of work and it lays down that certificate of Engineer in Charge of the work shall be conclusive and further says that in the event of a dispute the decision of the Superintending Engineer of Circle will be final. In the instant suit the Superintending Engineer R.E.O. Works Circles, Ranchi did not agree with the recommendations of the Executive Engineer, Shri B.N. Puran in view of the fact that the extra items of work were not executed during his incumbency and wanted the orders and acceptance of Shri P.C. Das in whose incumbency the work was executed and only on his recommendations any claim can be considered. Under the facts and circumstances of the case the claimant is not entitled to any of the claims or reliefs prayed by him." A mere look at the aforesaid written objections of the defendants before the arbitrator on the applicability of Clause 11 shows that their only grievance before the arbitrator was that the procedure of Clause 11 was not followed and there was not a whisper about the claim becoming barred by limitation in the light of second proviso to Clause 11. Even that apart when we turn to the awards which are non-speaking awards we find the following pertinent recital: "Now, therefore, I said Taradas Ghosh (T. Ghosh) after going through all the statements, evidences, arguments etc. and having duly considered all the matters submitted to me by both the parties do hereby make my award as follows :

1. That the Executive Engineer Rural Engineering Organisation Works Division Chaibasa should pay Sri Hanuman Mal Jain Contractor Chakradharpur a sum of Rs.3,99,400/- (Rupees three lakhs ninety nine thousand four hundred only) after going through all the documents and arguments by both the parties.

2. That the aforesaid amount carries simple interest @ 18% (eighteen) per annum which I consider reasonable with effect from 1.1.86 till the date of award and also from the date of award till the date of payment or the date of decree whichever is earlier." It becomes, therefore, clear that the arbitrator while passing non-speaking awards in both these cases had considered all statements, evidences and arguments offered by the contesting parties before him and then he had passed the awards. It is also pertinent to note that amongst the documents considered by the arbitrator the Agreement between the parties including Clause 11 with both its provisos duly signed by the parties was obviously on the record and whatever contentions were canvassed by the defendants regarding the applicability of Clause 11 were stated to have been considered by the arbitrator and then the non-speaking awards were passed. Consequently it is impossible to appreciate the contention that there was any patent error on the part of the arbitrator in not considering the question of limitation as mentioned in the second proviso to Clause 11. It is also necessary to note that the said second proviso does not totally prohibit granting of a claim for the work an extra items carried out by the contractor but it only lays down the procedure how the claim could be lodged. Consequently the second proviso cannot be said to have ousted jurisdiction of the arbitrator in deciding the dispute on merits as well as on the question of limitation. Implicit the observations in the award is the finding of the arbitrator that the claims were not contrary to Clause 11 but were in compliance thereof. Not only that, in the objections under Section 30 of the Act filed by the defendants in both these cases before the Trial Court the following contentions were raised by the defendants in Objection No. (x) :

"(x) For that the learned Arbitrator ought to have disallowed the claim as time barred and not maintainable in terms of Clause 11 of the Agreement." This objection on the face of it shows that according to the defendants the arbitrator had wrongly allowed the claims which were time barred as per Clause 11. Thus the objection was not on the ground of absence of jurisdiction of the arbitrator but on merits meaning thereby that the arbitrator wrongly held the claimto be within time. This obviously was in the domain of the jurisdiction of arbitrator and even if he had decided wrongly the question of limitation it could not be made a subject-matter of objection under Section 30 of the Act against a non-speaking award. Nor would it show any misconduct on his part. The Court obviously could not sit as a Court of Appeal against the decision rendered by the arbitrator on this ground. Much more so when the awards were non-speaking awards. In this connection we may refer to a decision of this court in the case of Dandasi Sahu Vs. State of Orissa (1990) 1 SCC 214 to which our attention was invited by Shri Sanyal, learned senior counsel for the appellants. He submitted that even in case of a non-speaking award the arbitrator is bound to refer to all the documents and his awards nowhere showed that he had considered all the documents in this connection while passing the awards. The observations found in paragraph 3 at page 2l8 of the Report on which reliance was placed by Shri Sanyal read as under :

"...Though the arbitrator is not bound to disclose as to what interpretation he has made and what inference he has derived from the documentary evidence, he is bound to refer in the award that he had considered all the documents placed before him no matter whether he relies on them or discards them from consideration. The arbitrator in his award ex facie does not mention that he has referred to or considered the

documents placed before him in respect of the original claim." These observations made in connection with a non-speaking award instead of helping the learned senior counsel for the appellants on the facts of the present case as against the appellants. The reason is obvious. In the awards in question, as seen earlier, the arbitrator has clearly mentioned that he had considered all matters submitted to him by both the parties and he had gone through all the statements, evidences, arguments etc. It is true that the word 'evidences' is mentioned and not 'documents' in that paragraph. However it could not be urged with any emphasis that evidence would include only oral evidence and not documentary evidence. But even that apart the subsequent identical paragraph found in the awards which is already extracted by us earlier leaves no room for doubt that the claims have been adjudicated after going through all the documents and arguments by both the parties. Consequently it must be held that even though the learned Trial Judge as well as the High Court had not noticed the second proviso to Clause 11 of the Agreement both the parties had joined issue on the point before the arbitrator and the arbitrator having considered all the relevant contentions of the parties on this aspect had passed the impugned awards which even according to the defendants were passed on consideration of Clause 11 as a whole but only fault sought to be found by the defendants against the awards was that the arbitrator had wrongly treated the claims not to be time barred. That question would squarely get connected with the second proviso to Clause 11 to which we have made a reference earlier and not dehors it. The first contention, therefore, is found to be devoid of any substance. That takes us to the second submission raised by Shri Sanyal, learned senior counsel for the appellants. Contention No.2

8. Shri Sanyal submitted that Clause 2.32 of the Tender Terms which was binding on the plaintiff prohibited the arbitrator from awarding any interest on the disputed amounts. The said clause in the Tender Notice reads as under :

"2.32 - CLAIMS FOR INTEREST :-

No claim for interest or damage shall be made against the department with respect to any money or balance which may be lying with the department owing to any dispute, unsettled claim, difference of understanding between the Engineer-in-charge on the one hand and the Contractor on the other hand with respect to any unavoidable delay on the part of the Executive Engineer in making final payment in any respect whatsoever." This contention was raised by the defendants for consideration before the High Court in the Memo of Appeal. Not only that but this contention was also canvassed for consideration of the learned Trial Judge. It is also true that the Trial Court while dealing with these objections has made identical observations in both the proceedings in identical paragraph 14 of its judgments. That identical paragraph reads as under :

"14. The learned G.P. however argues that clause 2.32 of Bihar Public Works Department F-2 specifically debars interest and hence on the basis of ruling relied upon by the Plaintiff reported in AIR 1992 SC 732 the arbitrator should not allow interest. I have carefully gone through clause 2.32 of Form F-2 and it is debatable on the point whether arbitrator should allow interest or not? Hence it is the duty of the arbitrator to decide whether clause 2.32 fetters his hand in allowing interest or not." It is true that the learned Trial Court thought that it was a debatable question and that

> it was the duty of the arbitrator to decide such questions. The learned Trial Judge had not addressed himself to the question whether the arbitrator had considered the said clause or not. When we turn to the High Court's judgment in appeal we find the situation no better. In the impugned judgment at paragraph No.6 the High Court has noted the contention that award of interest @ 18% p.a. in absence of any agreement to this effect was unwarrented. But when we turn to the discussion in the said judgment the only discussion found is in paragraph 10 of the judgment dealing with the main argument regarding Clause 11. This would have required us to either remand the proceedings to the High Court for consideration of this second contention or decide the same ourselves. As these are old claims arising out of suits of 1988, in our view, interest of justice requires that we may ourselves decide this question on its own merits. We have, therefore, heard the learned advocates on this question.

9. When we turn to the said clause 2.32 we find that it may prima facie be found to be applicable to the claims for interest or damage in connection with any money or balance which may be lying with the department and which the plaintiff may rightfully claim to be refundable to him. The phrase 'money or balance which may be lying with the department' may cover not only any amount of money but even any balance of money meaning thereby the claim may refer to the whole amount which the plaintiff claims to be refundable to him or any balance of it after having been refunded a part of it and thus the claim is confined to only the balance being left with the department. In either case it would be a claim for refund of an amount of money already lying with the department. However learned senior counsel Shri Sanyal submitted that the term 'any money' is independent of the balance which may be lying with the department and, therefore, any money claimed by the plaintiff against the defendants would be covered by the said Clause and it is not necessary that the money must be lying with the department and only claim of refund would be contemplated by the said clause. However even assuming that such a construction of the clause is possible, the real hurdle in the way of the defendants lies in the penultimate part of the said clause. It clearly shows that the claim for money or damage should have been made against the department and the dispute regarding the same should have remained unsettled between the Engineer-in-Charge on the one hand and the Contractor on the other and in connection with such a dispute it should be demonstrated that there was any unavoidable delay on the part of the Executive Engineer in making the final payment. It is, therefore, obvious that if the delay was avoidable on the part of the Executive Engineer in making the final payment then the claim of interest in connection with the said amount of money would not get barred under the said clause. So far as this aspect is concerned it is interesting to note that nowhere in the objections filed before the arbitrator or even before the Court under Section 30 of the Act such a contention was canvassed for consideration by the appellants. In the third volume of additional documents filed by the appellants themselves is found a copy of the Minutes maintained by the arbitrator in connection with the proceedings before him in the present two cases. At paragraph 6 of the said Minutes in connection with the plaintiff's claims the contention of his counsel is noted. The summary of the submissions as noted in the said paragraph reads as under:

> "6. Sri Kar Roy, Counsel for the Claimant, while summing up submitted that the claims were submitted to the Department before completion of the work on 01.04.85. Reminder notices were submitted by the Claimant on 08.04.85 and 12.04.85. The E.E. might have thought it fit to obtain recommendations of the S.D.O. who in turn thought it fit to obtain recommendations of the J.E. The A.E. gave his recommendations on 11.09.85 after obtaining recommendations of J.E. Thereafter unreasonable delay occurred on the part of E.E. to take next logical step and ultimately recommended and/or dealt with the claim on 21.08.87. The concerned

officers of the Respondent generally accepted the claims, but did not give any reason for rejection of any item, which was absolutely arbitrary." [Emphasis supplied] The aforesaid contentions before the arbitrator leave no room for doubt that it was the case of the plaintiff before the arbitrator that his claims were unreasonably delayed by the Executive Engineer before considering the same. It is this contention which is accepted by the arbitrator by passing the impugned awards though in a non-speaking manner. Therefore, it is not possible to agree with the contention of learned senior counsel for the appellants that the claim for interest was barred by clause 2.32 of the Tender Terms. If the contention of the plaintiff before the arbitrator was that his claims were unduly delayed they would obviously rule out the applicability of the said clause as that would not amount to unavoidable delay on the part of Executive Engineer in making the final payment. On the contrary it would be avoidable delay which would take out the claims from the fetters of Clause 2.32, even assuming that Shri Sanyal, learned senior counsel for the appellants is right in his submission that the said clause would cover all money claims pertaining to the amounts which may not be lying with the department and still would be within the sweep of the first part of the said clause. In this connection it is also profitable to refer to paragraph 13 of the written objections filed an behalf on the defendants before the arbitrator :

"13. That,there is specific provision in the agreement between the parties that claim for damage or interest department is not maintainable. Moreover the facts and circumstances of the case as well as under the provisions of law the claimant is not entitled for any damage or interest as claimed by him"

This statement of objections clearly shows that the defendants joined issue on the question whether any interest could have been awarded against the defendants by the arbitrator. Implicit in this contention would be the moot question whether there was any unavoidable delay on the part of the Executive Engineer in making the final payment which according to the plaintiff fell short of his claim and it is this contention which, as noted by the arbitrator in the Minutes was pressed for consideration of the arbitrator. He ultimately came to his own conclusion regarding the same by rejecting this contention on merits by non-speaking awards. It is, therefore, not possible to agree with the learned senior counsel for the appellants that applicability of Clause 2.32 of the terms of tender was not kept in view by the arbitrator and consequently his awards suffered from any patent error of law. We have to undertake this exercise on the facts of the present cases as neither the learned Trial Judge nor the High Court had come to the grip of this issue and in order to avoid unnecessary protraction of litigation we thought it fit, as noted earlier, after hearing the parties to decide this controversy. We accordingly find that on merits there is no substance even in this second contention. In the result, both these appeals fail and are dismissed. However in the facts and circumstances of the cases there shall be no order as to costs in each of them.