
(2010) 08 CHH CK 0002
In the Chhattisgarh High Court
Case No : Writ Appeal No. 208 of 2008

Bajwa and Company

APPELLANT

Vs

State of Chhattisgarh and Others

RESPONDENT

Date of Decision : 27-08-2010

Acts Referred:

Arbitration Act, 1940 — Section 20, 7
Arbitration and Conciliation Act, 1996 — Section 2(4), 40(1), 41, 43
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11

Citation : AIR 2011 Chh 8 : (2011) 1 ARBLR 217 : (2011) 4 MPHT 10

Hon'ble Judges : Prashant Kumar Mishra, J; I.M. Quddusi, J

Bench : Full Bench

Final Decision : Allowed

Judgement

I.M. Quddusi, J.—Heard.

2. This writ appeal has been filed against the impugned order dated 05.08.2008 passed by the learned Single Judge in WP (C) No. 3700/2008 dismissing the writ petition challenging the validity of the order of the learned District Judge, Sarguja (Ambikapur) dated 05.05.2007 passed in Execution Proceedings No. 1/2007 whereby the application of the writ Appellant for execution of the award dated 22.08.2006 was rejected with a finding that the executing court has no jurisdiction to execute the arbitration award.

3. Brief facts of the case are that the writ Appellant was given a contract regarding the work of construction of Masonry Dam Overflow Block Nos. 7, 8 and 9 and Non-Overflow Block Nos. 10 and 11 with right key wall including R.C.C. piers, gallery, bucket and bridges, etc. of the project, namely, Shyam (Ghunghutta) Project, Ambikapur under an Agreement No. 24/DL/82-83 entered between the parties. The period fixed for completion of the contract was 18 months excluding rainy season, however, the writ Appellant could not complete the contract work within the extended period also and, therefore, the Executive Engineer vide memo dated 15.12.1992 terminated the contract awarded to the

writ Appellant against which the writ Appellant had preferred an appeal before the Superintending Engineer under Clause 51 of the agreement and the Superintending Engineer after hearing the parties disallowed the termination order vide order dated 28.10.1993.

4. After disallowance of the termination order, the writ Appellant vide letter dated 26.04.1994 submitted a claim before the Respondent for several extra works done during the contract period and when no decision was given by the Superintending Engineer for quite sufficient long time, the writ Appellant filed a writ petition before the then High Court of M.P. and the same was disposed of vide order dated 30.04.1998 giving liberty to the writ Appellant to file a detailed representation before the Respondent authorities for redressal of his grievances.

5. In compliance of the court's order the writ Appellant submitted his representation, which was rejected on 05.08.1998. Thereafter, the writ Appellant again made representation on 10.08.2000 for settlement of disputes as per Clause 51 of the contract deed, however, when nothing had been communicated to the writ Appellant, he again wrote a letter to the Chief Engineer on 03.10.2003 (Annexure P-3 to the writ petition) mentioning that the Superintending Engineer has failed to give decision till date and as per Tender Clause 52 the writ Appellant requested for appointment of the sole arbitrator for settlement of dispute. The request was reiterated subsequently on 20.11.2003. Vide letter dated 24.11.2003 (Annexure P-6 to the writ petition) the writ Appellant was apprised by the Chief Engineer that the claim of the writ Appellant for payment towards extra item is pending and, therefore, the request cannot be acceded to. The Chief Engineer further informed the writ Appellant that it was decided in the meeting held on 27.09.2003 that the decision taken on 29.05.1995 should remain unchanged. However, with regard to the proposal of appointment of the sole arbitrator, it is informed that the same is pending consideration at the level of government and as such further action was not possible at the level of the Chief Engineer.

6. The writ Appellant vide his letter dated 17.03.2005 again requested for settlement under Clause 51 of the agreement and on this representation of the Petitioner the Superintending Engineer gave his decision on 28.11.2005 and rejected the claim of writ Appellant. The writ Appellant thereafter vide his application dated 07.01.2006 applied for appointment of the sole arbitrator as per Clause 52 of the agreement and the Chief Engineer vide order dated 22.02.2006 appointed Shri V.K. Chelani, Retired Chief Engineer as sole arbitrator. However, Shri Chelani was subsequently replaced by Shri CM. Malhotra, Retired Superintending Engineer as the sole arbitrator who after concluding the proceedings passed the arbitration award on 22.08.2006 (Annexure P-8 to the writ petition) in favour of the writ Appellant and awarded a sum of Rs. 2,19,64,449.

7. After passing of the award dated 22.08.2006, the writ Appellant made several requests for execution of the award but no steps have been taken by the

Respondents and, therefore, the writ Appellant filed the execution application under Order 21 Rule 11 of the Code of Civil Procedure, 1908 before the District Judge, Ambikapur (Sarguja), as per provisions of the Arbitration and Conciliation Act, 1996 (for short "the Act, 1996"), however, on the objection of the Respondent-State, the learned District Judge has rejected the said application holding that he has no jurisdiction to execute the arbitration award because the award is a nullity in view of the existence of Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983 (for short "the Adhiniyam, 1983") as the arbitration tribunal was made functional in the State of Chhattisgarh w.e.f. 03.09.2005 and the award was made on 22.08.2006.

8. Before proceeding further it is necessary to peruse the Clauses 51 and 52 of the contract deed and Sections 7 and 20 of the Adhiniyam, 1983, which are reproduced herein below:

51. Settlement of disputes--If the contractor considers any work demanded of him to be outside the requirement of contract, or considers any drawings, record or rolling of the E.E. Shyam Project D.N. Ambikapur, on any matter in connection with or arising out of contract of the carrying out of work to be acceptable, he shall promptly ask to E.E. Shyam Project D.N. Ambikapur in writing, for written instructions or decision. Thereupon the E.E. Shyam Project D.N. Ambikapur shall give his written instructions or decision within a period of thirty days of such request.

Upon receipt of the written instructions or decision the contractor shall promptly proceed without delay to comply with such instructions or decision.

If the E.E. Shyam Project D.N. Ambikapur fails to give his instructions or decision in writing within a period of thirty days after being requested, or if the contractor is dissatisfied with the instructions or decision of the E.E. Shyam Project D.N. Ambikapur, the contractor may within thirty days after receiving the instructions or decision appeal to the Superintending Engineer who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. The officer shall give a decision within a period of sixty days after the contractor has given the said evidence in support of his appeal.

If the contractor is dissatisfied with this decision, the contractor within a period of thirty days from receipt of the decision shall indicate his intention to refer the dispute to arbitration failing which the said decision shall be final and conclusive.

52. Arbitration--All the disputes or differences in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows:

Within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration the Chief Engineer, Ganga Basin Rewa shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The

contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of the one officer from the list who shall then be appointed as the sole arbitrator. If contractor fails to communicate his selection of name within the stipulated period the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within thirty days as stipulated, the contractor shall send a similar list to the Chief Engineer within fifteen days. The Chief Engineer shall then select officer from the list and appoint him as the sole arbitrator within fifteen days. If the Chief Engineer fails to do so the contractor shall communicate to the Chief Engineer the name of one officer from the list, who shall then be the sole arbitrator.

7. Reference to tribunal--

(1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the tribunal.

(2) Such reference shall be drawn up in such form as may be prescribed and shall be supported by an affidavit verifying the averments.

(3) The reference shall be accompanied by such fee as may be prescribed.

(4) Every reference shall be accompanied by such documents or other evidence and by such other fees for service or execution of processes as may be prescribed.

(5) On receipt of the reference under Sub-section (1), if the tribunal is satisfied that the reference is a fit case for adjudication, it may admit the reference but where the tribunal is not so satisfied it may summarily reject the reference after recording reasons therefore.

20. Bar of jurisdiction of civil court--

(1) As from the date of the constitution of the tribunal and notwithstanding anything contained in Arbitration Act, 1940 (10 of 1940) or any other law, for the time being in force, or in any agreement or usage to the contrary, no civil court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the tribunal under this Act.

(1-A) Notwithstanding anything contained in Sub-section (1), a civil court may entertain and decide any dispute of the nature specified in the said Sub-section referred to it by a person in the capacity of indigent person.

Explanation--For the purpose of this Sub-section "indigent person" shall have the meaning assigned in the Code of Civil Procedure, 1908 (5 of 1908).

(2) Nothing in Sub-section (1) shall apply to any arbitration proceeding either pending before any arbitrator or umpire or before any court or authority under the provisions of Arbitration Act, or any other law relating to arbitration, and

such proceedings may be continued, heard and decided in accordance with agreement or usage or provisions of Arbitration Act or any other law relating to arbitration in all their stages, as if this Act had not come into force.

9. Further, it is also to be noticed that the Act, 1996 came into force w.e.f. 22.08.1996 and enforced all over the India including the State of M.P. (after reorganization of the State of M.P. in the State of Chhattisgarh also). The applicability of the Act, 1996 has been provided in Sub-section (4) of Section 2, which reads as under:

(4) This Part except Sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except insofar as the provisions of this Part are inconsistent with that other enactment or with any rules made hereunder.

10. It is not in dispute that the writ Appellant applied for settlement of dispute vide letter dated 26.04.1994 (Annexure P-1 to the writ petition) under Clause 51 of the contract deed and when no decision was given by the Superintending Engineer, the writ Appellant filed a writ petition before the High Court, which was disposed of with liberty to the Petitioner/Appellant to file detailed representation. The representation submitted by the writ Appellant pursuant to the court's order dated 30.04.1998 was rejected on 05.08.1998. Thereafter, on 10.08.2000, the writ Appellant again submitted a reference before the Superintending Engineer for settlement of dispute, which remained pending for sufficient long time, and, therefore, the writ Appellant wrote a letter to the Chief Engineer on 03.10.2003 (Annexure P-3 to the writ petition) mentioning that the Superintending Engineer has failed to give decision till date and as per Tender Clause 52 it was requested to appoint the sole arbitrator.

Again, on 20.11.2003, the writ Appellant wrote letter to send the names of three officers of the rank of Superintending Engineer or higher for appointment of sole arbitrator under Clause 52 of the contract deed. The Chief Engineer vide letter dated 24.11.2003 (Annexure P-6 to the writ petition) informed the writ Appellant that it was decided in the meeting held on 27.09.2003 that the decision taken on 29.05.1995 should remain unchanged. However, with regard to the proposal of appointment of the sole arbitrator, it is informed that the same is pending consideration at the level of government and as such further action was not possible at the level of the Chief Engineer.

Thereafter, the writ Appellant vide his letter dated 17.03.2005 reiterated his request and on this representation of the Petitioner the Superintending Engineer gave his decision on 28.11.2005 and rejected the claim of writ Appellant.

The writ Appellant thereafter vide his application dated 07.01.2006 applied for appointment of the sole arbitrator as per Clause 52 of the agreement and the Chief Engineer vide order dated 22.02.2006 appointed Shri V.K. Chelani, Retired

Chief Engineer as sole arbitrator. However, Shri Chelani was subsequently replaced by Shri CM. Malhotra, Retired Superintending Engineer as the sole arbitrator who after concluding the proceedings passed the arbitration award on 22.08.2006 (Annexure P-8 to the writ petition) in favour of the writ Appellant and awarded a sum of Rs. 2,19,64,449.

11. Learned Counsel for the writ Appellant has submitted that no arbitration tribunal under the Adhiniyam, 1983 was in existence till 02.09.2005 and, therefore, the request to appoint the sole arbitrator under the Act, 1996 was valid and binding in view of Clause 52 of the contract deed.

12. Learned Counsel for the Respondents has submitted that in view of the existence of the Adhiniyam, 1983 and also the fact that from 02.09.2005 the arbitration tribunal started functioning and after the constitution of the arbitration tribunal, the tribunal was only competent to decide the dispute, the appointment of sole arbitrator was illegal.

13. Section 20 of the Adhiniyam, 1983 bars the jurisdiction of the civil court only. Therefore, whenever there is arbitration clause in the agreement, the applicability of the Act, 1996 cannot be ruled out.

14. In the above regard, the Hon''ble Apex Court vide order dated 14.01.2010 passed in VA Tech Escher Wyass Flovel Ltd. v. M.P.S.E. Board Civil Appeal No. 3747/2005 has held that the Adhiniyam, 1983 and the Act, 1996 can be harmonized by holding that the Adhiniyam, 1983 only applies where there is no arbitration clause but it stands impliedly repealed by the 1996 Act where there is an arbitration clause. The relevant part of the order dated 14.01.2010 is quoted herein below:

In our opinion, the 1983 Act and the 1996 Act can be harmonized by holding that 1983 Act only applies where there is no arbitration clause but it stands impliedly repealed by the 1996 Act where there is an arbitration clause. We hold accordingly.

15. Further, the Single Bench of this Court in batch of writ petitions, leading case of which was Integral Construction Co. v. State of Chhattisgarh MCC No. 69/2003 has held that constitution and functioning of the arbitration tribunal under the Adhiniyam, 1983 w.e.f. 02.09.2005 would not be a bar for the Chief Justice to pass an order appointing an arbitrator in these proceedings. The SLP was also filed before the Hon''ble Apex Court against the said order which was registered as SLP No. 3942/2006 and the same was dismissed by the Hon''ble Apex Court vide order dated 22.01.2008.

16. On the basis of the facts and circumstances discussed above, it is held that since there was an arbitration clause, i.e. Clause 52 as quoted above, in the agreement, provisions of the Act, 1996 would be applicable and the Adhiniyam, 1983 in that case stands impliedly repealed by the Act, 1996 as held by the Hon''ble Apex Court in Civil Appeal No. 3747/2005 (supra) and the award passed

by the arbitrator cannot be said to be a nullity.

17. In the result, the writ appeal succeeds and is allowed. The impugned order dated 05.08.2008 passed by the learned Single Judge in WP (C) No. 3700/ 2008 and order dated 05.05.2007 passed by the learned District Judge, Sarguja (Ambikapur) in Execution Proceedings No. 1/2007 are hereby set aside. The District Judge shall decide the application of the writ Appellant filed for execution of the award dated 22.08.2006 in accordance with law.

18. No order as to costs.