
(2006) 11 MP CK 0074
In the Madhya Pradesh High Court

Bhilai Castings and Forgings (P) Ltd.

APPELLANT

Vs

M.P. Electricity Board

RESPONDENT

Date of Decision : 02-11-2006

Acts Referred:

Evidence Act, 1872 — Section 106

Citation : (2006) 11 MP CK 0074

Hon'ble Judges : R.S. Jha, J;Dipak Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dipak Misra, J.—Invoking the revisional jurisdiction of this Court u/s 19 of the Madhyastham Adhikaran Adhiniyam, 1983 (for brevit "the Act") the contractor petitioner has called in question the legal propriety of the award dated 24-10-1997 passed in Reference Case No. 105/1993 by the M.P. Arbitration Tribunal, Bhopal (in short "Tribunal").

2. The facts which are necessitous to be stated are that the petitioner was awarded a contract by the respondent for manufacture and supply of 200 MT of 40 mm diameter EN-44 Forged Steel Grinding Media Balls for drum type Russian Coal Mills at Korba (East), Distt. Bilaspur. As some dispute arose between the parties with regard to an amount of Rs. 2,70,000/- which had been withheld by the respondents, the petitioner after following due procedure knocked at the doors of the Tribunal for payment of the amount in question with interest.

2. The respondents entered contest and raised an objection that the arbitrator does not have the jurisdiction to decide the lis inasmuch as the contract in question does not relate to a works-contract as defined u/s 2(1)(i) of the Act. It is worth mentioning here that a stance was taken that the M.P. Electricity Board is not a public undertaking and on that ground also the arbitrator did not possess the jurisdiction. The Tribunal adverted to the jurisdictional issue and came to hold that the M.P. Electricity Board is a public undertaking; that the contract in

question is not a works contract as per the definition clause; and that though contractor was entitled to an amount of Rs. 2,70,000/- with ante lite interest amounting to Rs. 37,800/- and future interest at the rate of 12% per annum but the same was not payable as the contract was not a works contract and thereby the Tribunal is bereft of jurisdiction to grant the said relief.

3. We have heard Mr. Ankit Pandey, earned Counsel for the petitioner and Mr. R.S. Jaiswal, learned Senior Counsel along with Mr. Manoj Kushwaha for the respondents.

4. Mr. Ankit Pandey, earned Counsel for the petitioner appearing for the petitioner raised the following contentions:

(a) The Tribunal has misconstrued the definition of works contract occurring in the dictionary clause and the interpretation placed by it being fundamentally erroneous, the conclusion in that regard is vulnerable in law.

(b) The Tribunal has fallen into grave error by scrutinizing the agreement in question in an isolated manner without taking note of the affidavits filed by the authorities concerned, who have categorically and unequivocally stated that items purchased were utilized for operation and maintenance of power house and power station of M.P. State Electricity Board.

(c) An agreement in certain cases may be treated as singular governing factor but in the case at hand the said pedestal should not be conferred on the agreement when the authorities were very well conscious from commencement of the transaction that the supplied items have a different utility and have to be specifically utilized for maintenance.

(d) The Tribunal would have been well advised to fix the burden of proof, as engrafted u/s 106 of the Evidence Act on the owner that they had not utilized the supplied items in a specified manner to escape from the sweep of the definition of works contract and that having not been done, the case of the petitioner should have been allowed especially in view of the affidavits filed by the authorities Board and evidence produced by the claimant-revisionist.

5. Mr. R.S. Jaiswal, learned Senior Counsel appearing for the respondents in oppugnation raised the following proponentes:

(i) The finding recorded by the Tribunal as regards the issue that the agreement is not a works contract is supported with cogent and germane reasons and there being no jurisdictional error this Court should not interfere in revision.

(ii) When an agreement is in writing the language employed therein should be given due weightage and any kind of extraneous things have no allowance to change or transform the nature of the instrument unless there is any allegation of fraud or misrepresentation.

(iii) The contention that the burden of proof lies on the Board is absolutely a misconceived one because the concept of burden of proof as envisaged u/s 106

of the Evidence Act is no way attracted.

(iv) The tender documents which precede the agreement would go a long way to show that it is not a works contract and, therefore, the conclusion arrived at by the Tribunal is absolutely presentable.

6. To appreciate the rival submissions raised at the Bar it is appropriate to refer to Section 2(1)(i) of the Act. It reads as under:

2. (1)(i) "works contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works.

7. The said provision came to be interpreted by this Court in the case of Smt. Kamala Bai and Ors. v. State of M.P. (C.R. No. 920/1996, decided on 18-7-06), wherein it has been held as under:

6. The seminal question is that if the contract relates to transportation for carrying cement from storage to Government Stores, would in tantamount to a works contract. We are obliged to state that Mr. Rao has made enormous effort to show that the words "agreement for supply of goods or material and all other matters relating to the execution of any of the said works" would cover the transport or supply contract because by virtue of the contract the cement was brought to the storage. The words that have been used in the statute spell out that relating to any of the said works. The key words, as we understand, are the execution of the works that feature in the main part of the provision. True it is, it is an inclusive definition but by no stretch of imagination it can cover transport or supply contract unless it has nexus with the execution of any specific work. In our considered opinion, if the definition clause is understood in proper perspective in appropriate context, with clarity of perception, it would not be in propriety of things to hold that the supply to a storage wherever it is situated, whatever nomenclature is given, would come within the concept of execution of the said work and thereby come within the ambit of works contract.

7. In this context, we may refer with profit to the decision rendered in the case of Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, . In the aforesaid case, the Apex Court was interpreting an arbitration clause with regard to the contract and in that context came to hold that the same was of the widest amplitude. We have referred to the said decision to show that even after applying the concept of widest amplitude we do not perceive it is so in the case at hand, because the statute governs the field and the works contract has been defined

under the provisions of the Act. An affidavit filed by the officer, in our considered opinion, is absolutely inconsequential. After the goods are stored, how they are being used is totally insignificant because that is not a part of the contract with the contractor. It does not require Solomon's wisdom to say that cement is stored in a storage and definitely it has to be used for some purpose or the other. Had the same been incorporated in the agreement the matter would have been different. Had there been an agreement that it would come within the purview of works contract, possibly the same could have been entertained. In the total absence of the same and with the clarity of language in which the agreement has been couched, we have no scintilla of doubt that it is a transport contract having no iota or trace of works contract. At this juncture, we may profitably note that the Tribunal while ascribing reasons also dealt with the facet that it was also not asserted that the works were at the stage of execution when the present agreement of transportation was entered into so that it may be said that transportation was for execution of a particular work. The Tribunal has also noted the fact that there is no evidence that the transport of cement under the present case was meant for any of the aforesaid work. Thus, by scanning the features of the agreement as also the facts that have been pleaded before the Tribunal, we are of the considered opinion, that the agreement/contract that has been entered into by the petitioner does not tantamount to a works contract and, therefore, the same would not come within the jurisdiction of the Tribunal for adjudication. As the Tribunal has so held, we do not find any vulnerability in the order passed by it and accordingly, we give the stamp of approval to the same. We may clarify that we have not adverted to the merits of the case, it is unnecessary to emphasize that if the petitioner has any other remedy in law, he may always pursue the same.

8. Earned Counsel for the respondent Board has also invited our attention to the decision rendered in the case of Kushal Kumar Talukdar Vs. Chandra Prasad Goenka, (MP), wherein this Court has expressed the view as under:

Thus, Works Contract as per the said definition means a contract for a work relating to construction, repair, maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, powerhouse, transformers etc. and includes an agreement for supply of goods or material relating to execution of the said work. This means that there must be an agreement relating to construction of building etc. and the goods have been supplied in relation to execution of the said construction of work.

8. In the present case plaintiff has approached the Court merely by saying that he has supplied the goods to the Municipal Council. He has nowhere averred that these goods were supplied in connection to a work order issued in respect of any construction work. Defendant in his written statement has also nowhere alleged that the goods were supplied in connection with any construction work and in such circumstances the mere supply of goods unconnected with any particular building or construction work will not be covered under the definition of the word

work contract as defined by Section 2(i). Hence the present dispute is not a dispute which is within the jurisdiction of the Tribunal constituted under the said Adhiniyam.

9. Keeping in view the aforesaid enunciation of law we are required to scrutinize the agreement. The same was exhibited before the Tribunal as Exh. P-3. The relevant portion reads as under:

We are pleased to accept your offer for supply of 200 MT (Two Hundred MT) of 40 mm dia EN-44 forged steel grinding media balls for drum type Russian Coal Mills at PH-II, Korba (East) in material composition as indicated in the Schedule. The purchase shall be governed by all the references mentioned above in addition to the following terms and conditions.

10. After the aforesaid paragraph the other things that finds mention relate to transit insurance, freight charges, security deposit, delivery period, penalty clause, test certificate, inspection, consignee and such other things and the clause relating to dispute. In the "disputes" clause it is mentioned as "In case of any dispute, legal jurisdiction shall be Jabalpur only". On a perusal of the document in entirety it is quite vivid that it pertains to executability of supply of certain items to the Board. Submission of Mr. Pandey is that there are affidavits of the Assistant Engineer of the board who has stated that the petitioner use to send the material in various trucks to Korba and the same was supplied to the Board Station. Earned Counsel for the petitioner also placed reliance oh Paragraph 2 of the affidavit of M.P. Mittal, Executive Director of MPSEB. Mr. Jaiswal would like us to peruse Paragraphs 3 and 4; As has been held in the case of R.K. Sehgal (supra), when the document is clear, the affidavit cannot further the case to metamorphose it from a simple contract of supply to that of works contract.

11. The next facet of submission of Mr. Pandey is that burden is on the owner to prove what was the utilization of the supplied items. As has been indicated, he has placed heavy reliance on Section 106 of the Evidence Act. Said provision provides when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. We fail to fathom how the said provision would be attracted to a case of this nature. It is obligatory on our part to scrutinize the terms and conditions of the contract. We have already scanned the terms of the contract. In our considered opinion, when a document is absolutely clear and unambiguous, the question of any additional proof with regard to utilization does not arise. The submission of Mr. Pandey has to be repelled being spacious and, if we allow ourselves to say so, quite ambitious.

12. In the result, the civil revision, being devoid of merit, stands dismissed without any order as to costs.