
(2011) 08 MP CK 0010
In the Madhya Pradesh High Court
Case No : First Appeal No. 228 of 2010

Harsh Wood Products (M/s.) Pvt. Ltd., Gwalior	APPELLANT
Vs	
State of M.P. and Others	RESPONDENT

Date of Decision : 23-08-2011

Acts Referred:

Arbitration Act, 1940 — Section 34
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11, 96

Citation : (2011) 08 MP CK 0010

Hon'ble Judges : S.K. Gangele, J;Brij Kishore Dube, J

Bench : Division Bench

Advocate : S.K. Shrivastava, for the Appellant; Sangeeta Pachauri, Deputy Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dube, J.—Feeling aggrieved by the judgment and decree dated 8.7.2010 passed by IX Additional District Judge (FTC), Gwalior in Civil Suit No. 23-A/2010 (M/s. Harsh Wood Products (Pvt.) Limited v. State of M.P. and others), by which the suit has been dismissed as barred by principles of res judicata, the appellant-plaintiff has filed this appeal u/s 96 of the Code of Civil Procedure, 1908. Facts, in brief, relevant for the purpose of disposal of this appeal are that the appellant-plaintiff instituted a suit for damages against the respondents-defendants alleging that the plaintiff-company was carrying the business of manufacturing of Kattha for which the basic raw material is Khair tree. The supply of Khair tree is sole right of the State, and, therefore, an agreement was entered between the plaintiff and the State, on 19th December, 1981 wherein the State agreed to supply Khair trees to the plaintiff-appellant on the terms and conditions mentioned in the agreement. The State failed to supply the requisite number of Khair trees to the plaintiff-appellant, therefore, the plaintiff-appellant filed two suits; one in the Court of Additional District Judge, Gwalior and the other in the Court of District Judge, Morena for declaration and injunction inter alia praying that the defendants be directed to ensure supply of Khair trees as per the

agreement entered into between the parties. Later on, the suit filed in the Court of District Judge, Morena was transferred to the Court of Additional District Judge, Gwalior. After consolidation of these two suits, a writ petition and the first appeals were preferred by the parties before this Court. A Division Bench of this Court heard the matter and vide its common order dated 13.11.1992 referred the dispute to the Arbitrator and Hon"ble Justice Shri G.L. Oza, Retired Judge of the Supreme Court was appointed as an Arbitrator. After the award has been passed by the Arbitrator on 30.5.1997, the same has been made rule of Court vide judgment and decree dated 8.5.1998 passed by the learned trial Court. Two appeals; one by the plaintiff and the other by defendants were preferred against the judgment and decree of the trial Court making the award as rule of Court before this Court. Both the appeals were dismissed by a Division Bench of this Court vide judgment and decree dated 23.1.2004 by which the award passed by the Arbitrator has been upheld. The Civil Appeals No. 6711-6712 of 2004 filed by the State before the apex Court were also dismissed on 2.5.2007. Thereafter, the review petition filed by the State was also dismissed by the Supreme Court on 8.10.2007, therefore, the award passed by the Arbitrator was confirmed up to the apex Court.

2. However, during pendency of the aforesaid appeals, the plaintiff-appellant filed execution proceedings before the Executing Court. In the execution proceedings an interim order was passed, against which both the parties have preferred civil revisions before this Court. Both the civil revisions were decided by this Court by a common order dated 3.3.2003, wherein it has been observed that the plaintiff was not entitled to raise an objection as to short supply due to non-issuance of transit passes in respect of certain number of Khair trees and consequent loss in the execution proceedings, but the plaintiff was granted liberty to seek its remedy in proper forum. In the light of the aforesaid observation of this Court, the plaintiff filed a suit claiming damages for non-supply of Khair trees and breach of contract against the defendants.

3. The defendants submitted a joint written statement, thereby refuted the claim of the plaintiff-appellant. They have stated that the dispute between both the parties became final after settling amount of Rs. 63,37,205/ by an order dated 21.4.2003, but inspite of that for one reason or the other plaintiff is continuing the litigation. After a lapse of period of 12 years from the date of passing of award, i.e., 30.5.1997, by the Arbitrator, the plaintiff has now filed suit claiming damages on the ground that in the decree dated 8.5.1998, no claim on account of damages was allowed. They have further pleaded that the suit is insufficiently stamped and improperly valued and the court-fees is not paid properly. The defendants prayed for dismissal of the suit of the plaintiff with costs.

4. On the basis of the pleadings of the parties, the learned trial Court framed as many as six issues which are as under:

5. The learned trial Court has taken issue No. 3 as a preliminary issue and decided by the impugned order dated 8.7.2010 that the suit is not maintainable

under the provisions of Order II rule 2 and section 11 of CPC and, eventually dismissed the same.

6. Shri S.K. Shrivastava, learned counsel appearing for the appellant has vehemently argued that the previous suits were only for declaration and permanent injunction. In the previous suits, the dispute was relating to the fixation of price for Khair trees whereas in the present suit, the relief is for payment of compensation for breach of agreement and non-supply of Khair trees, therefore, the subject-matter and relief of the present suits are not one and the same as that of the previous suit. Further, the previous suits were filed in the year 1985 and 1988, while the present suit has been filed in the year 2009 claiming damages against the defendants. The quantum of damages could not have been assessed by the plaintiff till the year 1985 and 1988 because the agreement in question was valid up to 18.12.1993, therefore, the said relief could not have been prayed by the plaintiff in the earlier suits. Further, it has been argued by him that the defendants have not taken the plea of res judicata and the provisions of Order II rule 2 of CPC, therefore, in the absence of the same, it is not within the jurisdiction of the trial Court to dismiss the suit on the grounds which were not pleaded in the written statement by the defendants. Learned counsel has further submitted that in the award dated 30.5.1997 passed by the Arbitrator while deciding the issue No. 12, it has been observed that the quantum of damages was not the subject-matter of the suits, and therefore, no finding was given regarding quantum of damages. The award was confirmed up to the apex Court, hence, it is clear that the quantum of damages was not assessed and was not the subject-matter of the previous suits. Learned counsel has further submitted that this Court in its order dated 3.3.2003 passed in civil revisions had observed in para 16 that quantum of damages was not the subject-matter in the previous suits and liberty was granted to the plaintiff to agitate the issue before the appropriate forum and, therefore, he prayed to allow this appeal and to set aside the impugned judgment and decree.

7. Learned counsel for the appellant in support of his contentions has placed reliance on the following decisions :

- (i) AIR 1936 259 (Privy Council)
- (ii) Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar,
- (iii) Gurbux Singh Vs. Bhooralal,
- (iv) State of M.P. v. Prem Kumar [1995(1) MPWN 37 (DB)];
- (v) P.C. Rajput v. State of M.P. [1997(1) MPLJ 102 (DB)];
- (vi) Pawan Kumar Gupta Vs. Rochiram Nagdeo,
- (vii) Rikabdas A. Oswal Vs. Deepak Jewellers and Others,
- (viii) Alka Gupta Vs. Narender Kumar Gupta,

8. In response, Smt. Sangeeta Pachauri, learned Deputy Government Advocate appearing for the respondents-defendants has argued in support of the impugned judgment and decree and contended that after going through the record, the learned trial Court has considered the case with regard to its maintainability and found that the dispute between both the parties with regard to the agreement dated 19.12.1981 had been decided finally, and therefore, in the present suit provisions of section 11 read with Order II rule 2 of CPC will attract on the matter. She prayed for dismissal of the appeal.

9. We have heard learned counsel for the parties and carefully perused the record.

10. It is apparent from the record that both the parties entered into an agreement on 19.12.1981, wherein the State agreed to supply Khair trees to the plaintiff in the terms and conditions mentioned in the agreement.

11. The first suit which was filed by the plaintiff-appellant before the Additional District Judge, Gwalior was Civil Suit No. 60-A/1985. This suit was filed for declaration and permanent injunction. In this suit, reliefs sought were :

(i) It be declared that the demand made by the defendant of price of the Khair tree as Rs. 29/-, Rs. 34/- and Rs. 37/- per tree was fully wrong and illegal.

(ii) It be declared that the defendant got deposited from the plaintiff a price of Khair tree @ Rs. 29/- per tree is also bad, illegal. Defendant is not entitled to recover the price of Khair trees more than Rs. 21/-per Khair tree. Thus, it be declared that the extra amount deposited by the plaintiff be adjusted against the price of Khair trees supplied in future.

(iii) It be declared that demand of the defendant of a Letter of Credit for Rs. 3,36,600/- is illegal.

(iv) It be declared that the demand of the defendant of interest on the price of Khair trees and the Sales-tax from the plaintiff is illegal.

(v) Permanent injunction be issued against the defendant, that till the decision of the petition numbering 39/85 and an order passed on 1.3.1985 till the disposal of that petition, the defendant shall not ask the plaintiff to pay Sales-tax.

(vi) The mandatory injunction be issued against the defendant that they shall supply to the plaintiff upto 18000 Khair trees useful for the purpose of production till 30th June, 1985.

(vii) The injunction be issued against the defendant that Khair trees which are not fit for the production of Kattha in the plaintiffs factory be not supplied to the plaintiff.

(viii) It be declared that Khair trees being a fuel wood Sales-tax on the price is only chargeable on 75% of the price @ 3% and on remaining 25% of the price @ 10% only.

(ix) A mandatory injunction be issued against the defendant that they may continue to supply to the plaintiff Khair trees @ Rs. 21/- per tree.

12. The second Civil Suit No. 35-A/1988 was filed by the plaintiff-appellant in the Court of District Judge, Morena, the title of the suit was for declaration and permanent injunction. Reliefs sought, in this suit reads as under:

(i) It be declared that the plaintiff is entitle to transit passes immediately in respect of Khair trees allotted.

(ii) It be declared that the agreement dated 19.12.1981, item 27 is unreasonable, unfair and unforceable and contrary to law and, therefore, not binding on the plaintiff.

(iii) A permanent injunction be issued against defendant (State) that they may not compel the plaintiff to get transit pass for manufactured products Kattha and Cutch and also shall not be compelled the plaintiff to submit statement about the capital investment, the profit earned and other details about the working of the Industry.

(iv) It be declared that the plaintiff is entitled to get Rs. 1,23,223.76 paise adjusted against the Sales-tax payable.

(v) A mandatory injunction be issued against the defendant, that defendant shall supply to the plaintiff for the year commencing from 1.11.1988 last year's i.e. 1987-88 balance of Forty-five thousand Khair trees and for 1988-89 Ninety thousand Khair trees be supplied immediately and in future also the supply of Khair trees be continued.

(vi) The defendant be directed that because of the delay on the part of the defendant in granting transit passes, the trees allotted to plaintiff could not be lifted because of the rainy season and for this delay the defendant should not ask for ground rent.

13. The defendants raised a preliminary objection by moving an application u/s 34 of the Arbitration Act. The said application was dismissed by the Court below. Against the dismissal of the said application, appeal was preferred by the defendants before this Court. A writ petition was also filed before this Court. In the writ petition, it was prayed that the plaintiff had filed two suits; one at Gwalior and the other at Morena in regard to the same matter and prayed that both the suits be consolidated. A Division Bench of this Court vide order dated 13.11.1992 considered the prayer and taking into consideration of the dispute between the parties directed for appointment of an Arbitrator to determine the dispute raised in the two suits between the parties and thereafter this Court appointed Hon"ble Justice Shri G.L. Oza, Retired Judge of the Supreme Court, as an Arbitrator with an observation that the Arbitrator shall not travel beyond the scope of two suits and his determination and conclusion shall be limited to the subject-matter of the two suits.

14. After hearing both the parties and examining the material on record, an award has been delivered on 30.5.1997 which has been made rule of Court vide judgment and decree dated 8.5.1998 passed by IX Additional District Judge, Gwalior, which runs as under :

In this view of the matter, the claim is decided in their favour with the declaration of initial price at Rs. 27/- per Khair tree and subsequent prices by enhancing it by 10% after every two years and also that the claimant shall be entitled to interest on the amount lying in deposit with the respondent. The claimant also shall be entitled to costs and expenses of these proceedings as may have accrued to the claimant before the competent Court.

15. Undisputedly, the award given by the Arbitrator on 30.5.1997, became rule of Court on 8.5.1998 after settling the objections of the parties and the same attained finality as it was confirmed up to the apex Court.

16. It is apposite to mention here that the learned Arbitrator after hearing both the parties and considering the pleadings framed as many as 14 issues in the matter. Issue No. 12 was as to whether first party (plaintiff) has suffered loss on account of non-supply of Khair trees. This issue has been decided by the learned Arbitrator in the affirmative and held as under:

As discussed earlier, that by short supply and not issuing transit passes the first party has to suffer loss as the necessary raw material for the working of the industry was not made available to them as per contract the supply was not made regular, transit passes were not issued, which ultimately resulted in loss to the claimant. The claimant, therefore, is entitled to recover these losses, but as the quantum of losses and damages is not the subject-matter of the two suits and this arbitration proceeding under limited jurisdiction cannot go into that question, therefore, we are not going in that question except that the claimant is entitled to damages.

19. It is apparent from the record that considering the dispute between both the parties in Civil Revisions No. 706/2000, 997/2000 and 1048/2000, this Court in para 16 of its common order dated 3.3.2003 has observed as under:

16. The arbitrator while deciding issues No. 11 and 12 had admitted that State of M.P. had withheld certain transit passes and thus caused damage of HWP who is entitled to recover such loss to HWP. Further he had observed :

The claimant therefore is entitled to recover these losses but as the quantum of loss and damages is not a subject-matter of two suits and this arbitration proceeding under limited jurisdiction cannot go into that question. Therefore, we are not going in that question except that claimant is entitled to damages

In view of above observation HWP is not entitled to raise the objection as to short supply due to non-issuance of transit passes in respect of certain number of Khair trees and consequent loss in the execution proceedings. HWP is free to seek its remedy in proper forum.

18. The present suit was filed by the plaintiff for declaration and claiming relief of damages against the defendants for non-supply of Khair trees till the year 1993 and for breach of contract against the defendants.

19. In the case of Pawan Kumar Gupta (supra), it has been held by the apex Court that the rule of res judicata incorporated in section 11 of the CPC prohibits the Court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties", and has been heard and finally decided by that Court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata.

20. In the case of L.K. Trust Vs. EDC Ltd. and Others,], it has been explained by the Hon"ble apex Court that where issue in both the proceedings were not same, the principle of res judicata would not be applicable.

21. From the above discussion, it is clear that the matter that was directly and substantially in issue in the subsequent suit is completely different from the matter that was directly and substantially in issue in the earlier suit. The reliefs claimed also different, therefore, the present suit is not barred by the principles of res judicata. { Haryana State Electricity Board Vs. Hanuman Rice Mills and Others,

22. In the result, this appeal succeeds and is hereby allowed. The judgment and decree passed by the learned trial Court is set aside and the case is sent back to the learned trial Court to decide the case on merits in accordance with law. Parties are directed to appear on 5.9.2011 before the learned trial Court. It is made clear that no notice shall be issued by the learned trial Court to any of the parties in that regard. Registry is hereby directed to send back the original record to the learned trial Court forthwith. Looking to the peculiar facts and circumstances, parties are directed to bear their own costs.