
(2008) 08 DEL CK 0065

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 50 of 2007

Northern Coalfields Ltd.

APPELLANT

Vs

Heavy Engineering Corporation Ltd. and Another

RESPONDENT

Date of Decision : 07-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 7 Rule 7
Constitution of India, 1950 — Article 131

Citation : (2008) 105 DRJ 710 : (2009) 1 ILR Delhi 633

Hon'ble Judges : Sudershan Kumar Misra, J; Manmohan Sarin, J

Bench : Division Bench

Advocate : Anip Sachthey and Mohit Paul, for the Appellant; Maneesha Dhir and Sumit Attri, for the Respondent

Final Decision : Dismissed

Judgement

Sudershan Kumar Misra, J.—This appeal has been filed by M/s. Northern Coalfields Ltd. against the decision of a Single Judge of this Court dated 10.07.2007, whereby the two applications filed by respondent No. 1 and 2 under Order 7, Rule 11 (d) of the CPC were allowed and the plaint filed by the appellant was rejected. The facts leading to the present appeal are as follows:

2. In May 1984, the appellant issued a tender for construction of a Coal Handling Plant at Bina (hereinafter "the Bina Project"). This construction work was to be carried out under two contracts. They were (a) a Contract for Works and Services; and, (b) a Contract for Equipment and Spares. Both the contracts were awarded to M/s Heavy Engineering Corporation Ltd. (respondent No. 1) on 21.09.1988. Clause 3 of the terms of the said Contracts prohibited the contractor, i.e., respondent No. 1 herein, from sub-letting; a. the whole contract; or, b. any part thereof without the prior written consent of the appellant. It is alleged that within 45 days of the said contracts, i.e. on 4.11.1988, respondent No. 1, i.e., Heavy Engineering Corporation Ltd., sub-contracted the entire work to M/s Rampur Engineering Corporation Ltd. (respondent No. 2).

3. In both contracts between the appellant and the first respondent, there were arbitration clauses. However, by the time, these contracts were awarded, the Government had set up a permanent machinery of arbitration in terms of two decisions of the Supreme Court in the case of 1992 (61) ELT 3 (SC) and Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, . Consequently, when disputes arose, the appellant and respondent No. 1 decided to invoke the permanent machinery of arbitration set up in pursuance to the aforesaid directions of the Supreme Court. There, claims and counter claims were made by respondent No. 1 and the appellant against each other. On 28.02.1997, the arbitrator pronounced two awards, by virtue of which, respondent No. 1 was awarded a total sum of Rs. 16,87,61,981.11 and appellant was awarded Rs. 56,05,000 as counter claim. Dissatisfied with the awards, both the appellant as well as respondent No. 1 preferred two separate appeals to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice (Appellate Authority) under the said permanent machinery. They were Appeal No. 67/1998 pertaining to supply of equipments and Appeal No. 64/1999 pertaining to works and services contract.

4. In the meanwhile, respondent No. 2, who had independently entered into a relationship with respondent No. 1 with regard to the contracts in question, filed a suit No. 450/1999 in this Court on 25.02.1999 against both the appellant and respondent No. 1, praying for an order of injunction restraining respondent No. 1 from settling the disputes with the appellant. It is the appellant's case that it learnt of respondent No. 2's involvement only when this suit for injunction was filed by the second respondent. In that suit, an interim order was passed to the effect that the award of the appellate authority, if delivered, shall not be implemented. Respondent No. 1 contends that the factum of sub-contracting by respondent No. 1 to respondent No. 2 was in the knowledge of appellant and with its consent. Be that as it may, this appeal is not concerned with that suit and these facts are only being mentioned in the context of the appellant's stand about its knowledge of the involvement of the second respondent, as well as the stand of the appellant in that suit that there is no privity of contract between itself and the second respondent, and that the latter is a stranger to the contract.

5. Ultimately, the appeal No. 67/1998 that was filed by the first respondent before the Appellate Authority, and which related to the supply of equipments, came to be decided by that authority in an award pronounced on 1st December, 1999. By this award, the matter was remanded back to the arbitrator for reconsideration. In the other appeal, bearing No. 64/1999, which was filed by the appellant in relation to the works and services contract, the Appellate Authority rendered an award on 13th November, 1999 whereby the sum of Rs. 15,84,50,000/- along with Rs. 3.73 crores as interest, was awarded in favour of first respondent.

6. Thereafter, on 2.08.2000, the appellant instituted suit No. 1709/2000 in this Court for a declaration that respondent No. 1 breached Clause 3 of the terms of

the Contracts by sub-letting the contracts to respondent No. 2, and that therefore, the contracts between the appellant and the first respondent had become null and void and that, consequently, the respondents are not entitled to any claims under those contracts. The appellant also contended that the arbitral awards passed by the Appellate Authority are illegal, ex-facie bad and suffering from error apparent on the face of the record and are liable to be set aside. On 4.08.2000, the Single Judge granted an interim stay of the implementation/ execution of the awards passed by the Appellate Authority.

7. At this stage, interim applications under Order 7, Rule 11(d) were preferred by respondent No. 1 and 2 in the above suit, for rejection of the plaint. It was claimed that the suit was barred in view of the existence of a specially prescribed procedure for challenging the award passed in arbitration in disputes between government enterprises whereby recourse to the Court without seeking permission from the Committee of disputes, is not permitted. In reply, the appellant contended that the suit was maintainable and no such permission is required, because the dispute involved a private party, who was not a party to the arbitration. These applications were allowed by the learned Single Judge on 10.7.2007 and the appellant's suit was rejected on the grounds, inter alia,

- a. an arbitral award cannot be set aside in a suit;
- b. There is no privity of contract between appellant and respondent No. 2; and
- c. suit is between two public sector undertakings, therefore the suit could not have been filed without clearance from the Committee of Disputes.

The interim stay on the implementation/ execution of the appellate authority's decision regarding the arbitral awards was also vacated.

8. The case of the appellant broadly is that the real beneficiary of the contract being a private party, a mechanism for resolution of disputes between the government undertakings cannot apply; secondly, the sub-letting of the contracts was in blatant violation of the Clause (3) of the terms and conditions of the contract; thirdly, a disputed question has been decided by the Ld. Single Judge while dealing with an application under O.7, R.11 Code of Civil Procedure.

9. As far as the mechanism for resolution of disputes between government undertakings is concerned, the establishment of an extra-judicial machinery for settlement of disputes between two or more Public Sector Undertakings dates back to the directions of the Supreme Court in 1992 (61) ELT 3 (SC) , where the Supreme Court deprecated the practice of disputes between two government undertakings to be brought before the court. The Supreme Court in that case observed:

3. This Court has on more than one occasion pointed out that Public Sector Undertakings of Central Government and the Union of India should not fight their litigations in Court by spending money on fees of counsel, court fees, procedural expenses and wasting public time. Courts are maintained for appropriate

litigations. Court's time is not to be consumed by litigations which are carried on either side at public expenses from the source."

Later on, in the same case, reported as Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, , the Supreme Court directed the Government of India to "set up a Committee... to monitor disputes between ... public sector undertakings, to ensure that no litigation comes to [a] court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation.

The Court further directed that:

4. It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with.

10. In State Bank of Indore v. Shri N. C. Jain and Ors. ILR (2004) 1 Del 367, one of us (Manmohan Sarin, J.) has also traced the genesis of this permanent machinery of arbitration, thus;

12. It would be pertinent to consider the genesis of the permanent machinery for arbitration. The Supreme Court in its judgment 1992 (61) ELT 3 (SC) expressed its concern over public sector undertakings of the Central Government and the Union of India fighting their litigations in Court by spending money on fees of counsel, court fees and wasting public time. The Court noted that its time was not to be consumed by litigations which are carried on either side at public expenses. By the said order, the Cabinet Secretary was called upon to look into this matter and report to the Court why the litigation is conducted when the two sides are public sector undertakings or departments or ministries of Union of India. This was followed by the second Order passed in the case Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, . The Cabinet Secretary conveyed that Governments accept the views of the Court. Court was informed that instructions have been issued to all departments of the Government of India as well as public sector undertakings of the Central Government that all disputes regardless of the type, should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government or through arbitration and recourse to litigation should be eliminated.

13. The Court thereupon directed Government of India to set up a Committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law to monitor disputes between the Ministry of Government of India, public sector undertakings of the Government of India and in between themselves. The Committee was also to ensure that no litigation comes to Court or Tribunal without a matter having been first examined by the Committee and its clearance for litigation being given. Pursuant to the foregoing instructions issued by the Government of India and the directions by the Court to

constitute the Committee, instructions were issued by the Department of Public Enterprises, Ministry of Industry by which the permanent machinery of arbitration was also constituted....

11. This was again reiterated by the Supreme Court in *Chief Conservator of Forests, Govt. of A.P. Vs. The Collector and Others*, : thus;

14. Under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or CPC that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. In the case of disputes between public sector undertakings and the Union of India, this Court in *Oil and Natural Gas Commission v. CCE [Supra]* called upon the Cabinet Secretary to handle such matters. In *Oil and Natural Gas Commission v. CCE [Supra]* this Court directed the Central Government to set up a committee ...

15. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the government.

12. The working of the scheme was further clarified by the Supreme Court in *Oil and Natural Gas Commission Vs. Collector of Central Excise*, :

4. There are some doubts and problems that have arisen in the working out of these arrangements which require to be clarified and some creases ironed out. Some doubts persist as to the precise import and implications of the words "and recourse to litigation should be avoided". It is clear that the order of this Court is not to the effect that - nor can that be done - so far as the Union of India and its statutory corporations are concerned, their statutory remedies are effaced. Indeed, the purpose of the constitution of the High-Powered Committee was not to take away those remedies.

There, the Supreme Court also reiterated the relevant portion of the memo referred to in the course of this Court's order in *Oil and Natural Gas Commission's* case decided in 1991 (*supra*):

It is in this context that the Cabinet Secretariat has issued instructions from time to time to all Departments of the Government of India as well as to Public Undertakings of the Central Government to the effect that all disputes, regardless of the type, should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government or through arbitration and recourse to litigation should be eliminated.

13. The Supreme Court in *Mahanagar Telephone Nigam Ltd. Vs. Chairman, Central Board, Direct Taxes and Another*, , while balancing the right to enforce a right in a court of law with the need for an alternative arrangement of dispute resolution between government undertakings, made the following observations:

8. Undoubtedly, the right to enforce a right in a court of law cannot be effaced. However, it must be remembered that courts are overburdened with a large number of cases. The majority of such cases pertain to government departments and/or public sector undertakings. As is stated in *Chief Conservator of Forests case [Supra]* it was not contemplated by the framers of the Constitution or CPC that two departments of a State or the Union of India and/or a department of the Government and a public sector undertaking fight a litigation in a court of law. Such a course is detrimental to public interest as it entails avoidable wastage of public money and time. These are all limbs of the Government and must act in coordination and not confrontation. The mechanism set up by this Court is not, as suggested by Mr Andhyarujina, only to conciliate between the government departments. It is also set up for purposes of ensuring that frivolous disputes do not come before courts without clearance from the High-Powered Committee. If it can, the High-Powered Committee will resolve the dispute. If the dispute is not resolved the Committee would undoubtedly give clearance. However, there could also be frivolous litigation proposed by a department of the Government or a public sector undertaking. This could be prevented by the High-Powered Committee. In such cases there is no question of resolving the dispute. The Committee only has to refuse permission to litigate. No right of the department/public sector undertaking is affected in such a case. The litigation being of a frivolous nature must not be brought to court. To be remembered that in almost all cases one or the other party will not be happy with the decision of the High-Powered Committee. The dissatisfied party will always claim that its rights are affected, when in fact, no right is affected. The Committee is constituted of highly placed officers of the Government, who do not have an interest in the dispute, it is thus expected that their decision will be fair and honest. Even if the department/public sector undertaking finds the decision unpalatable, discipline requires that they abide by it. Otherwise the whole purpose of this exercise will be lost and every party against whom the decision is given will claim that they have been wronged and that their rights are affected. This should not be allowed to be done.

9. In this case this is absolutely what has happened. The appellants wanted to approach the court only against a show-cause notice. It is settled law that

against a show-cause notice litigation should not be encouraged. The decision of the High-Powered Committee, set out hereinabove, merely emphasizes the well-settled position. It is an eminently fair and correct decision. The purpose of the decision was to prevent frivolous litigation. No right of the appellants is being affected. It has been clarified that the appellants could move a court of law against an appealable order....

14. It is contended by counsel for the appellant that the above cited judgments are not applicable to the facts of the case at hand and that the present case is squarely covered by the judgment of the Supreme Court in *Canara Bank and Others Vs. National Thermal Power Corpn. and Another*, where the Supreme Court permitted the matter to be brought before it on the reasoning that a) the beneficiary was a private entity; and, b) there was no real dispute between the government undertakings. The relevant paragraphs, which the appellant seeks to rely on read as under:

12 . What the Court has directed in ONGC case is that frivolous litigation between government departments and public sector undertakings of the Union of India should not be dragged in the courts and be amicably resolved by the Committee. The judgment is intended to prevent avoidable litigation between the government departments and the undertakings of the Union of India. In the present litigation there does not appear to be a genuine dispute between the Government of India undertakings. In this case one of the public sector undertaking is shown to be acting not as an undertaking but as Trustee of a Trust. The Board was, therefore, justified in holding "that the real litigation in this case, therefore, is between the Mutual Fund and NTPC" and not between the two undertakings. The meaning of the word "dispute" is, "a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other". In the instant case the claim preferred on behalf of the CBMF was not denied by the Corporation but in turn a counter-claim with respect to the liability of a subsidiary of the Bank was raised. The dispute raised is without laying any basis or placing on record any evidence in support thereof. Imaginative disputes raised only to defeat the undisputed claim of the Trustee could not be made the basis to deprive the Trustees and ultimately the public at large, of the value of the bonds which had, admittedly, been received by the Corporation with unambiguous undertaking to repay back the same.

13. A perusal of the bonds, purchased by the appellants, would indicate that such bonds were termed and styled as "instrument of bond in the nature of promissory bond". The Corporation had agreed "to pay on demand to the above-named bond-holder or order the sum of" In other words the bonds were transferable and the respondents undertaking, under a contractual and statutory obligation, to pay the value thereof to the transferee. Such a transferee could not be denied the payment of the value of the bonds on the ground of the liability of the transferor or any of its subsidiary. The perusal of the bond incorporating the condition of payment unambiguously shows that no dispute can be raised by the

Corporation for payment of the amount on demand to its holder or order. The claim of the Corporation, if any, can be enforced separately against the subsidiary of Canara Bank but cannot be made a ground to resist the claim of the appellants. We are of the opinion that the High Court was not right in referring the alleged disputes to the high-powered Committee with the aid of judgment in ONGC case. It was under an obligation to give a finding with regard to the directions given by the Board to pay the redemption amount to the appellants. The Trustees of the Trust constituted by Canara Bank as settlor for the benefit of numerous units holders cannot be termed and styled as a government company or public sector undertaking. The dispute raised by the respondents with the appellant was imaginary and even prima facie not real. We are further of the opinion that the Board in its order had dealt with all aspects of the matter and rightly concluded that ONGC judgment was not applicable in the facts and circumstances of the present case.

15. To our mind, the judgment relied on by the appellant has no application to the facts of the present case. Clearly, the term "Beneficiary" in the judgment was used in the sense it is used in law of trust, and not merely to denote any and every one to whom one of the contracting parties may have committed some of the consideration under the contract. The appellants in that case were trustees of a trust created for the benefit of numerous unit holders and for that reason it was held that the appellant cannot be styled as a public sector undertaking or a government company in relation to that dispute.

16. The beneficiary of a trust, with which the Supreme Court in Canara Bank's case (supra) was concerned, is also known as a "cestui que trust", which according to the Black's Law Dictionary (6th Edition) means "He who has a right to a beneficial interest in and out of an estate the legal title to which is vested with another" or "the person for whose benefit a trust is created or who is to enjoy the income or the avails of it." In Official Trustee of West Bengal Vs. Stephen Court Ltd., the Supreme Court referring to Bouvier's Law Dictionary and Concise Encyclop?dia, 3rd Revision by John Bouvier, held that:

34. ...A cestui que trust has the beneficial interest in trust estate while the trustee has the legal estate. If A makes as contract with B to pay C a sum of money, C has the beneficial interest in the contract.

In Mathalone Vs. Bombay Life Assurance Co. Ltd., , the Supreme Court held that:

24. ...It is part of the general law of trust that a trustee must act in a manner most beneficial to the cestui que trust and he can retain no benefit to himself from the corpus of the trust estate or from anything that accrues to that estate subsequently....

Further, a trustee according to Black's Law Dictionary (6th Edition) means a person holding property in trust. One who holds legal title of the property "in trust" for the benefit of another person (beneficiary) and who must carry out specific duties with regard to the property. The Trustee owes a fiduciary duty to

the beneficiary.

17. In the case at hand, it cannot be said that the object of the contracts in question, between the appellant and the first respondent, was to pay the second respondent any sum of money. It follows therefore that the second respondent cannot be said to have acquired a beneficial interest of such a nature in the said contracts that would classify it as a Cestui que trust, as held by the Supreme Court in the Official Trustee's case (supra). In other words, the first respondent was not dealing with the appellant as a trustee on behalf of the second respondent, and it cannot be said that the second respondent was the "Cestui que trust" in respect of the contracts in question between the appellant and the first respondent. Therefore, Canara Bank's case (supra) has no application in this case.

18. Furthermore, in Canara Bank's case (Supra), the plaintiff, who happened to be a government undertaking, had accepted the claim of the second respondent, which was also a government undertaking, and therefore there was really no dispute to that extent. The term "dispute" as defined in that case means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other. Before us, the appellant, which is admittedly a government undertaking, is claiming that the first respondent, also a government undertaking, has violated and breached a contract between them. In particular, Clause 3 of the said contract is stated to have been breached. Respondent No. 1, of course, says that no such breach has occurred. This, then, is the dispute. Merely because the appellant feels that the breach committed by the first respondent has benefited a third party, will not change the nature of the dispute from being one between the appellant and respondent No. 1, i.e., the two contracting parties. Since both of them are government undertakings, therefore, the permanent machinery provided for resolving disputes between public sector undertakings ought to have been followed.

19. It has been contended by counsel for respondent No. 1 that respondent No. 2 is a stranger to the contract between the appellant and respondent No. 1 and there is no privity of contract between the second respondent and the appellant. On perusal of the file, it has come to our notice that the fact that there is no privity of contract between the appellant and respondent No. 2 and that respondent No. 2 has no locus standi to file a suit against the appellant, was actually averred by the appellant itself in its written statement in CS(OS) No. 450/1999. This also necessarily points towards the fact that the dispute is essentially between the appellant and respondent No. 1, i.e. between a public sector undertaking & a government company. Therefore it does not lie in the mouth of the appellant to change its stance now.

20. It has also been contended by the appellant that the learned Single Judge while dealing with an application under Order 7, Rule 11 has erred in concluding that the real beneficiary is not respondent No. 2 and the real and genuine

dispute is between the appellant and respondent No. 1. According to the appellant, this was a disputed question of fact and such questions cannot be decided at the time of considering such applications. For this proposition, the appellant has relied on a case of Supreme Court in Popat and Kotecha Property Vs. State Bank of India Staff Association, where the Court held that:

10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.

While the aforesaid decision of the Supreme Court is unexceptionable, it is of no assistance to the appellant. It is clearly open to the Court to go into the true nature of the averments made in the plaint. A bald averment that the second respondent is "the real beneficiary" of the contract between the appellant and the first respondent, would not automatically constitute the first respondent a trustee on behalf of the second respondent. Consequently, no substantially disputed question as to whether the first respondent was acting as a trustee for and on behalf of the second respondent, even arises in this case, and it cannot be said that any disputed question of fact has been decided by the learned Single Judge in this behalf. By the impugned order, the learned Single Judge has examined the question whether the appellant is entitled to seek a declaration that the appellate awards are illegal and liable to be set aside by way of a suit or whether the same is barred by any law. The learned Single Judge has held that an arbitral award cannot be set aside in a suit. It was further held that once the parties have subjected themselves to permanent machinery for redressal of dispute between public sector undertakings, then the mechanism prescribed therein should be followed and, therefore, the suit in question could not have been filed without clearance of the Committee of Disputes. By merely noting the contention of the appellant that the root of the dispute is violation of Clause 3 of the terms of the contracts, it cannot be said that the learned Single Judge has decided disputed question of facts. It has merely taken note of the appellant's own case in stating that the key players are the two public sector undertakings which have entered into the contract in question with each other, and therefore, the special procedure prescribed for such disputes should have been followed. Consequently, the learned Single Judge rightly held that the plaint was liable to be rejected, inter alia, for that reason.

21. Under the circumstances, we find no infirmity in the impugned decision.

22. The appeal is dismissed.