(2005) 07 DEL CK 0042

In the Delhi High Court

Case No : CS (OS) No. 1125 of 1979

Orissa Cement Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 28-07-2005

Acts Referred:

Arbitration Act, 1940 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 34
Industries (Development and Regulation) Act, 1951 — Section 18, 25

Citation : (2005) 3 ARBLR 140 : (2005) 123 DLT 358 : (2005) 83 DRJ 684

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Ravinder K. Das, for the Appellant; Rajive Mehra, for defendant Nos. 1 to 3, for the Respondent

Judgement

Swatanter Kumar, J.—Orissa Cement Limited, the plaintiff filed this Suit for recovery of Rs. 30,64,312.51 in this Court in the year 1979. According to the plaintiff, the Central Government in exercise of its power conferred on them u/s 18(g) and 25 of the Industrial Development and Regulation Act, 1959 issued Cement Control Order, 1961 which was deposed and re-deposed in the year 1967 which was subsisting till institution of the Suit. The Rate Contract was renewed by the by the Officers of Union of India from year to year. The plaintiff has placed the lease of renewal on record till 31st March, 1980.

2. In April 1973, the defendants issued a circular dated 21st April, 1973 amending the Rate Contract and added the clause in regard to payment of sales tax on freight. The amended clause reads as under:-

"Clause 8(VI) Sales tax is not legally livable on the element of freight but in the event of the seller being assessed to the payment of sales tax on the element of freight in the sale price, the purchaser agrees to reimburse on provisional basis the seller to the extent of the amount thus assessed or the portion thereof as he may be required to pay in pursuance of notice of demand issued by the sale tax authorities on the express condition that the seller will exhaust all remedies under the relevant statute for the purpose of contesting the correctness of such assessment and challenging the correctness of the assessment order tested in writ proceedings in the High Court and Supreme Court, if necessary. The Seller agrees and undertakes to refund to the purchaser the aforementioned amount of sales tax paid to him on provisional basis if it is held not payable by the seller as soon as the consequential refund is obtain by him from the sales tax authorities. The seller also agrees and undertakes to pursue the aforesaid proceedings to contest the assessment of sales tax and for obtaining refund in the event of assessment of sales tax being held illegal diligently and with expedition."

3. The amended clause was accepted by the plaintiff and the plaintiff continued to discharge the quantities of cement by rail to the defendants in accordance with the demand raised upon the plaintiff. Again on 28th July, 1976 the plaintiff received a circular dated 15th July, 1976 issued by defendants No. 3 stating that the ''sales tax on railway freight on cement is not payable to the producers with effect from the date of issues of the letter.'' This is altered clause 8 (vi) of the rate contract. The plaintiff did not accept this amendment and supplied the materials as per the unamended clause. On 23rd November, 1978, defendant No. 3 further gave a proposal to the plaintiff to say that ''sales tax on the element of freight on cement wherever legally livable is hereby allowed in respect of cement supplies with effect from 22.8.1978.'' As per this term of the Rate Contract, the defendants are bound and liable to the plaintiff to pay all sales tax legally livable in addition to the prices stipulated therein. While relying upon the judgment of the Supreme Court in the case of Hindustan Sugar Mills Ltd. v. State of Rajasthan and Ors., Civil Appeal No. 1122 of 1976, the plaintiff has stated that the court held that sales tax is legally livable on freight. In view of this and as per the terms and conditions of the contract, the defendants were bound to pay sales tax on freight to the plaintiff. From 1st December, 1969 till 21st August, 1978 the plaintiff raises a claim and submitted bills to the defendants for a sum of Rs. 25,67,898.95 as per Annexure ''B'' annexed to the plaint. The defendants had undertaken to discharge the said liability, as such the plaintiff served a notice upon them and thereafter filed the present suit for recovery of Rs.30,64,312.51 including the above principle and interest claimed at the rate of 18% per annum from 22nd August, 1978 till 17th September, 1979, which amounted to 4,96,413.51.

4. This suit was instituted on 25th September, 1979. On 8th September, 1979 the defendants had appeared and filed an application u/s 34 of the Arbitration Act, 1940 praying for the stay of this suit. The case was adjourned from time to time. The defendants for all these years, did not file a written statement, while the plaintiff did not file reply to the application u/s 34 of the Arbitration Act. The case was fixed before the Deputy Registrar on 4th August, 1980 for admission and/or denial of documents which again was not done for all this period. Vide its order dated 21st April, 1981 the court had noticed that the application u/s 34 should be decided and fixed the same for 21st May, 1981. On that date the court

passed the following order:-

"21.5.81 Present : Mr. R.K. Sanghi for counsel for the plaintiff. Mr. M. Chandrasekharan, counsel for defendant. S.No. 1125/79 It is stated that there is every likelihood of the matter being compromised inasmuch as the principles have been settled and certain modalities have to be worked out. At request, adjourned to 24th July, 1981.

May 21, 1981 JUDGE"

5. Thereafter, the case was adjourned form time to time and on 2nd July, 1981 the following order was passed:-

"2.11.81 Present : Miss Beena Gupta, Advocate, for the plaintiff. Suit No. 1125/79. I am told by the learned counsel for the plaintiff that the plaintiff is expecting payment from the Union of India on account of the Supreme Court judgment and that as soon as the payment is received, suit will be withdrawn. She, Therefore, prays for further adjournment of at least one month. Adjourned to December 3, 1981.

November 2, 1981 JUDGE"

6. Thereafter, none of the parties took effective steps in the suit. However, it was stated on different occasions that in view of the judgment of the Supreme Court the Government has to refund the sales tax and after the refund is made the case will become infructuous. This state of affairs continued without any progress in the suit and on 18th March, 1985 the court passed the following order:-

"18-3-1985 Present : Miss Rukmani Nair for the plaintiff. Mrs. Bhattacharya for the defendants. The counsel for the plaintiff states that since the defendants are making payments the matter may be adjourned sine-die. Ordered accordingly. The parties are given the liberty to file application for the revival of the proceedings.

March 18, 1985 Judge."

7. The plaintiff took no steps whatsoever to revive the suit or take any other steps by filing appropriate applications. The suit remained in the Registry of this court for the last 20 years without any progress. The case was ordered to be listed before the court, being one of the oldest cases and was listed on 19th July, 2005 and in the interest of justice was adjourned to 20th July, 2005. On that date the counsel for the plaintiff was present, however nobody appeared on behalf of the defendants. Liberty was granted to the counsel for the plaintiff to inform the counsel for the defendants and the case was adjourned to 22nd July, 2005. On 22nd July, 2005 the counsel for the parties were heard and a request was made on behalf of the Union of India and the case was adjourned to 25th July, 2005 on which date the case was heard on merits and order was reserved.

8. During the course of arguments, it was commonly conceded that out of the principle sum of Rs.25,67, 898.95, the Union of India has already paid to the

plaintiff a sum of Rs.23,16,743.94. The balance due to the plaintiff after settlement of the bills and settling the accounts, now is stated to Rs. 1,30,732/-. Even the officers of the respondents were present in court and were hardly able to assist the court. However, the application u/s 34 (which itself is not traceable on record) hardly survives as not only that by their conduct or otherwise by taking steps in the proceedings and keeping this suit pending for all these years, the parties have frustrated the said application but the defendants have even paid off the amount claimed by the plaintiff in the present suit. That the amount is due has not been disputed by the defendants, even during the course of arguments. But what is stated is that they wish to consider the bills and the accounts of the plaintiff to finally give the amount payable to the plaintiff. I have already noticed that the defendants neither pursued their application u/s 34 in accordance with law nor they filed the written statement for all this period. On the contrary, by their own conduct the parties have frustrated the very purpose of filing the application u/s 34 of the Act. Even on this account, the plaintiff would be entitled to the decree. The averments made in the plaint remain unrefuted till today and the court would be well within its right to infer that averments made in the plaint are accepted by the defendants. Documents have been filed by the plaintiff on record to show that the amount claimed by the plaintiff is correct and due to the plaintiff.

9. The question to be considered is whether the plaintiff is entitled to any interest on the amount claimed in the plaint in the facts and circumstances of the case. In the plaint, no specific averments have been made by the plaintiff that under the terms of the agreement, the plaintiff is entitled to the interest at the rate of 18%. It is also not averred anywhere in the plaint that there is a custom usage or that the plaintiff is entitled to the said rate of interest. In absence of any such pleadings, to claim interest, the plaintiff can only rely upon the provisions of Section 34 of the Code of Civil Procedure. For granting or declining interest under the provisions of Section 34 of the Act, the Court essentially must consider the facts and circumstances of the case and conduct of the parties. The plaintiff, at its own, got the suit adjourned sine die in the year 1985 and took no steps for revival of the suit till the year 2005.

10. In view of the above discussion, I decree the suit of the plaintiff to the extent of Rs. 1,30,732/-. This as per the case of the plaintiff is the amount due to them. The plaintiff would be entitled to this amount with interest at the rate of 6% per annum from the date the bills were last submitted by the plaintiff to the defendants, till institution of the suit and then from July 19th, 2005 when the suit was directed to be revived by the court at its own motion, till the date of realisation.

11. In the facts and circumstances of the case, parties are left to bear their own costs in their suit.

