

(2008) 08 CHH CK 0002
In the Chhattisgarh High Court

R.S. Bajwa and Company

APPELLANT

Vs

State of Chhattisgarh and Others

RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 34, 35, 36, 4
Constitution of India, 1950 — Article 226, 227
Madhya Pradesh Re-organisation Act, 2000 — Section 79

Citation : AIR 2008 Chh 75 : (2008) 4 MPHT 105

Hon'ble Judges : Dharendra Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dhirendra Mishra, J.—This writ petition is directed against the order dated 5-5-2007 passed by the learned District Judge, Sarguja (Ambikapur) in Execution Proceedings No. 1/2007 whereby the execution application of the petitioner has been rejected with a finding that the Executing Court has no jurisdiction to execute the arbitration award.

2. Briefly stated the case of the petitioner is that the petitioner was awarded work of construction of masonry Dam over flow Block No. 7, 8 and 9 and non-over flow Block 10 and 11 with Right Key Wall including RCC Piers, Gallery, Bucket and Bridge etc. of Shyam (Ghunghutta) Project Ambikapur. Agreement No. 24/DL/82-83, dated 25-3-1983 was executed between the parties. The petitioner successfully completed the work under the contract, including the extra works and items, on 30-7-1992 within the extended period of the contract. Clause 51 of the agreement provides for settlement of the dispute. The petitioner, invoking Clause 51, applied for settlement of the dispute vide his letter dated 26-4-1994 (Annexure P-1). The respondent after inordinate delay of more than 11 years gave its decision under Clause 51 on 28-11-2005 (Annexure P-3) and rejected the claims of the petitioner. Invoking Clause 52 of the agreement, which provides for arbitration proceedings, the petitioner addressed

a letter dated 3-10-2003 for appointment of Sole Arbitrator (Annexure P-3). The petitioner also addressed a letter dated 18-12-2003 (Annexure P-5) to the respondent State that the authority competent to decide the dispute as per Clause 51 of the agreement has failed to give his decision, therefore, decision in the matter may be given at the earliest. The respondent No. 2 in his reply dated 24-11-2003 (Annexure P-6) informed the petitioner that the claim raised by the petitioner against the additional items is pending consideration, therefore, appointment of Sole Arbitrator is not possible. However the respondent No. 2 vide order dated 13-3-2006 (Annexure P-7) appointed Shri C.M. Malhotra, Retired Superintending Engineer as the Sole Arbitrator, canceling the earlier appointment order dated 22-2-2006 of Shri V.K. Chelani, Retd. Chief Engineer as Sole Arbitrator and referred the dispute for adjudication. Learned Arbitrator, after completing the arbitration proceeding, passed arbitration award on 22-8-2006 (Annexure P-8) and awarded a sum of Rs. 2,19,64,449/-. The petitioner addressed several communications to the authorities of the respondents for compliance of the award in his favour and ultimately filed application under Order 21 Rule 11 of the CPC for execution of the award before the District Judge, Ambikapur as per the provisions of Arbitration and Conciliation Act, 1996 (For short, hereinafter referred to as "the Act of 1996")- Learned District Judge, on the objection of the respondent State dated 14-3-2007 (Annexure P-14), rejected the application.

3. The petitioner has impugned the above order on the ground that the arbitration proceedings commenced on 3-10-2003 when the petitioner requested the respondents for appointment of arbitrator. No Arbitration Tribunal under the C.G. Madhyastham Adhikaran Adhiniyam, 1983 (For short, hereinafter referred to as "the Adhiniyam of 1983") was in existence until 2-9-2005. Therefore, the petitioner rightly invoked Clause 52 of the agreement for appointment of arbitrator. The respondent, after appointing arbitrator as per the provision of the agreement, also participated in the arbitration proceedings before the Sole Arbitrator. The award passed by the Sole Arbitrator has attained finality as the respondents did not apply for setting aside the award u/s 34 of the Act of 1996 and the same is binding on the parties as per the provisions of Section 35 of the Act of 1996. The award was executable in the same manner as if it were a decree of the Court as per Section 36 of the Act of 1996. It was not open to the Executing Court to travel behind the decree sought to be executed. The Executing Court has passed the impugned order by ignoring documents available on record on mere presumption.

4. The respondents State in their reply to the petition have averred that the petitioner was paid entire amount due to him after completion of the contract on 30-7-1992. After filing letter of reference dated 26-4-1994, the petitioner abandoned the proceeding and filed Writ Petition No. 505/1997 in the High Court of M.P. and the High Court, vide order dated 30-4-1998, permitted the petitioner to make detailed representation. His representation was rejected by the respondents on 5-8-1998. Therefore, since the petitioner did not invoke

arbitration clause, the order rejecting his claim became final. A subsequent reference dated 10-8-2000 was rejected on 30-6-2002. However the petitioner made 3rd reference for settlement of the dispute under Clause 51 of the Agreement vide letter dated 17-3-2005 (Annexure R-3) and the same was rejected by the Superintending Engineer on 28-11-2005. The petitioner again invoked arbitration Clause 52 of the agreement and requested for appointment of Sole Arbitrator vide his application dated 7-1-2006 and the Chief Engineer on this application appointed Sole Arbitrator which is without authority of law. The Adhiniyam of 1983 was in force and the Tribunal constituted under the aforesaid Adhiniyam was functional with effect from 3-9-2005 and, therefore, appointment of arbitrator under Clause 52 of the agreement stands superseded by Clause 7 of the agreement and the dispute, if any, could be adjudicated only by the Tribunal. The petitioner has been already paid amount due to him vide Running Bill of Annexure R-1. The petitioner had undertaken not to claim any amount on any other head in addition to the amount paid to him vide undertaking of Annexure R-2.

5. The petitioner in his rejoinder to the return has specifically denied that the order dated 5-8-1998 by the respondents has become final and he has averred that the Arbitration Tribunal was not constituted by the State of C.G. under the Adhiniyam of 1983 between 1-11-2002 to 2-9-2005. Other factual submissions of the return have not been specifically denied.

6. Learned District Judge by the impugned order has dismissed the application for execution of the award with the following findings:

(i) In view of Section 79 of the M.P. Reorganization Act, 2000, the Adhiniyam of 1983 was in force in the State of Chhattisgarh;

(ii) The work under the agreement between the parties, falls within the definition of "Work Contract" u/s 2(i) of the Adhiniyam of 1983;

(iii) Section 3 provides for constitution of Arbitration Tribunal for resolving all the disputes arising out of the work contract, Sub-section (1) of Section 7 provides for reference to a Tribunal of any dispute in relation to work contract whereas Section 20 bars jurisdiction of the Civil Court to entertain or decide any dispute of which cognizance can be taken by the Tribunal under the Act;

(iv) The Tribunal u/s 3 of the Adhiniyam of 1983 was constituted on 1-3-2005. The Sole Arbitrator was appointed on 13-3-2006 after the State Government accorded sanction for payment on 20-5-2005 and only thereafter, the decree holder must have made request for appointment of arbitrator and thus the cause of action arose to the petitioner after 25-5-2005 and by that time, the Arbitration Tribunal was already constituted and therefore, the Chief Engineer had no jurisdiction to appoint arbitrator for resolving the dispute;

(v) The Adhiniyam of 1983 is a special Act for resolution of dispute/difference between the decree holder and the judgment debtor. In view of the specific

provision of the Adhiniyam of 1983, the provisions of the Act of 1996 are not applicable for resolution of the dispute between the parties;

(vi) Neither the Chief Engineer had jurisdiction to appoint Sole Arbitrator and refer the dispute between the parties to the arbitrator so appointment for resolution nor that Court had any jurisdiction to adjudicate any dispute in relation to execution of the award passed by the Sole Arbitrator.

7. Shri Anand Tiwari, learned Counsel appearing for the petitioner vehemently argued that arbitral proceedings commenced on 3-10-2003 when the petitioner requested the respondents for appointment of arbitrator as per Section 4 and 21 of the Act of 1996. The date on which the arbitration proceedings commenced, the Arbitration Tribunal was not in existence in the State of Chhattisgarh as the same came into existence only on 3-9-2005. Therefore, the petitioner had no option but to invoke Clause 52 of the agreement. The respondent State after appointing the arbitrator as per Clause 52 of the Agreement, participated in the arbitration proceedings and thereafter the impugned award was passed. Since the respondent did not initiate proceeding u/s 34 of the Act of 1996 for setting aside the award, the award has attained finality and the same is binding on the respondents. In view of Section 35, the award is executable as a "decree" of the Court and the Executing Court cannot travel behind the decree. The order is based on conjecture and surmises. There is nothing on record to show that the petitioner requested for appointment of arbitrator after 25-5-2005.

8. On the other hand, Shri N.K. Agrawal, Sr. Advocate contended that from uncontroverted pleadings of the respondent State and the documents available on record, it would be evident that reference of the petitioner for settlement of the dispute was firstly rejected on 5-8-1998. Thereafter, it was again rejected on 30-6-2002. However, the petitioner vide his letter dated 17-3-2005 (Annexure R-3) addressed to the Superintendent Engineer again applied for settlement of the dispute under Clause 51 of the agreement and the order was passed on the above reference on 28-11-2005 and claim of the petitioner was rejected. It was further argued that the petitioner received payments against all the extra work vide Annexure R-1. He had submitted undertaking dated 25-5-2005 that he shall not claim under any other head except the amount payable on the basis of the rate fixed by the Claim Committee for the above 5 items (Annexure R-2). It was vehemently argued that the arbitral proceedings did not commence on 3-10-2003. The award was passed on 28-11-2005 on the basis of the representation dated 17-3-2005.

9. I have heard learned Counsel for the respective parties.

10. On the basis of the pleadings of the respective parties and arguments advanced by them, the questions for determination before this Court are:

(i) Whether learned District Judge was justified in rejecting the Execution Proceedings on the ground that the Chief Engineer had no jurisdiction to appoint the Sole Arbitrator and to refer the dispute for arbitration to him?

(ii) Whether the arbitration proceedings commenced on 3-10-2003?

(iii) Whether the award was a nullity as the same was passed by an Arbitration Tribunal which lacked inherent jurisdiction?

Whether learned District Judge was justified in rejecting the Execution Proceedings on the ground that the Chief Engineer had no jurisdiction to appoint the Sole Arbitrator and to refer the dispute for arbitration to him?

11. It is settled law that the Court executing the decree cannot go behind the decree. Any objection that the decree was incorrect in law, was, in fact, cannot be entertained, until it is set aside by an appropriate proceeding in an appeal or in a revision. A decree even if it is erroneous is still binding between the parties. When a decree is a nullity i.e., where the same is made by a Court which had no inherent jurisdiction to make it, its nullity can be set up in an execution proceeding as lack of inherent jurisdiction goes to the root of competence of the Court to try the case. The decree which is a nullity is void and the same can be declared to be void by any Court in which it is presented. Its nullity can be set up whenever it is sought to be enforced or relied upon and even at the stage of execution or even in collateral proceedings. The Executing Court can, therefore, entertain an objection that the decree is a nullity and can refuse to execute the decree. By doing so, the Executing Court would not incur the reproach that it is going behind the decree, because the decree being null and void, there would really be no decree at all. *Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others*, , *Sunder Dass Vs. Ram Prakash*, , *Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs.*, , *Kesar Singh and Others Vs. Sadhu*, and *Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others*, .

12. Reliance of the petitioner in the judgment in the matter of *Mallikarjun Vs. Gulbarga University*, , is not applicable in the facts of the present case as in the above cited case, the execution of the award was not objected to on the ground of lack of inherent jurisdiction of the Arbitration Tribunal making the award.

13. Thus, it is held that objection as to validity of the decree can be raised even in Execution Proceedings, if on the face of record, it appears that the decree is made by a Court which had no inherent jurisdiction to make it.

Whether the arbitration proceedings commenced on 3-10-2003?

14. From the pleading of the respective parties, it is not in dispute that the petitioner vide application of Annexure P-1 dated 26-4-1994 raised certain claims before the Superintending Engineer and requested to instruct the Executive Engineer to release the claimed amount. He also filed a writ petition which was disposed of with liberty to file a detailed representation. His representation was rejected on 5-5-1998. The petitioner applied for appointment of Arbitrator on 3-10-2003 to the Chief Engineer (Annexure P-3). The request was reiterated subsequently on 20-11-2003 (Annexure P-4) and 18-12-2005 (Annexure P-5). However, he was apprised by the Chief Engineer that his claim for payment

towards extra item in pending and, therefore, the request cannot be acceded to (Annexure P-6). The award of Annexure P-2, dated 28-11-2005 has been passed on his representation dated 17-3-2005 and the claim of the petitioner was rejected under Clause 51 of the agreement. Thereafter, the present arbitrator was appointed on 13-3-2006 when earlier appointed Arbitrator expressed his inability to arbitrate in the matter. From perusal of the representation dated 17-3-2005 (Annexure R-3), it is manifestly clear that the petitioner had applied for decision on his claim to the Superintending Engineer as no decision was taken even after three years when the request was made.

15. Clauses 51 and 52 of the Contract Agreement provide for settlement of disputes and arbitration which are as under:

51. Settlement of disputes.- If the Contractor considers any work demanded of him to be outside the requirements of contract, or considers any drawings, record of ruling of the EE., Shyam Project Division, Ambikapur on any matter in connection with or arising out of the contract or the carrying out of the work to be unacceptable, he shall promptly ask the EE, Shyam Project Division, Ambikapur in writing, for written instructions or decision. Thereupon the EE, Shyam Project Division, 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 EE, Shyam Project Division, 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 EE, Shyam Project Division, Ambikapur, the Contractor may within thirty days after receiving the instruction 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. This 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 the receipt of the decision shall indicate his intention to refer the dispute to 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 then 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 officer 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 one 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.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the majority of arbitrators shall be final and binding on the parties thereto, The arbitrators shall determine the amount of costs or arbitration to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and payments due to the Contractor shall not be withheld unless they are the subject-matter of the arbitration proceeding.

All awards shall be in writing and in case of awards amounting to Rs. 1.00 lakh and above, such award, shall state the reasons for the amount awarded.

Neither party is entitled to bring a claim to arbitration if the arbitrator has not been appointed before the expiration of thirty days after defect liability period.

16. From perusal of the Clauses of the agreement reproduced above, it is evident that Contractor is to first approach the Executive Engineer for settlement of dispute. If he is dissatisfied with the decision of the Executive Engineer, he may prefer appeal before the Superintending Engineer within 30 days. If the Contractor is dissatisfied with the decision of the Superintending Engineer, he may indicate his intention to refer the dispute to arbitration. If he fails to do so within 30 days, the decision of the Superintending Engineer becomes final and conclusive.

17. In the instant case, the petitioner raised claim before the Superintending Engineer on 17-3-2005 under Clause 51 of the agreement. The Superintending Engineer gave his decision vide award dated 28-11-2005 (Annexure P-2). The petitioner could indicate his intention to refer the dispute for arbitration only after the decision of the Superintending Engineer i.e., 28-11-2005. In that view of the matter, the contention of the petitioner that the arbitration proceedings commenced from 3-10-2003, the date, on which he requested the Chief Engineer for appointment of arbitrator as per Clause 52 of the agreement, cannot be accepted. His prayer for appointment of arbitrator was already rejected on 24-11-2003 by the Chief Engineer on the ground that his claim is under consideration at the Government level (Annexure P-6). The representation dated 17-3-2005 clearly indicates that the process of settlement in accordance with Clause 51 of the agreement was still going on between the parties, which was ultimately rejected on 28-11-2005 (Annexure P-2).

18. Various judgments of Hon''ble the Supreme Court relied upon by the petitioner in support of his contention that the arbitration proceeding commenced from 3-10-2003 when he applied for appointment of arbitrator as per Sections 4 and 21 of the Act of 1996, are not applicable in the facts of the present case as settlement proceeding under Clause 51 of the agreement was still going on between the parties and the Superintending Engineer gave his decision only on 28-11-2005.

Whether the award was a nullity as the same was passed by an Arbitration Tribunal which lacked inherent jurisdiction?

19. It is not in dispute that the disputed work for which the agreement was entered between the parties is "Work Contract" as defined in Section 2(i) of the Adhiniyam of 1983. The cause of action for appointment of arbitrator, accrued to the petitioner Contractor on 28-11 -2005 when his representation was rejected by the Superintending Engineer under Clause 51 of the Agreement. Undisputedly, Arbitration Tribunal under the Adhiniyam of 1983 was functional in the State of Chhattisgarh on that date, therefore, in the considered opinion of this Court, appointment of arbitrator by the Chief Engineer and reference of the dispute to the arbitrator so appointed for adjudication of the dispute, was without jurisdiction, in view of the bar contained in Section 20 of the Adhiniyam of 1983. Consequently, the award of Annexure P-8, dated 22-8-2006, was made by a Tribunal which lacked inherent jurisdiction to make an award.

20. The reasons assigned by the learned District Judge for rejecting the execution proceeding in the impugned order are strictly in accordance with law.

21. For the aforesaid reasons, there is no illegality, infirmity or jurisdictional error committed by the Court below while passing the impugned order, which warrants interference in exercise of jurisdiction under Article 226/227 of the Constitution of India.

The petition deserves to be dismissed and is accordingly dismissed.

No order as to costs.