

(2017) 02 CHH CK 0014
In the Chhattisgarh High Court
Case No : 257 of 2016

State Of Chhattisgarh

APPELLANT

Vs

Vineet Singh Construction Company Pvt. Ltd.

RESPONDENT

Date of Decision : 02-02-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, <a href=3859 — Order 21Rule
13>Order 21Rule 13 -
Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983, Section 18

Citation : (2017) 02 CHH CK 0014

Hon'ble Judges : Prashant Kumar Mishra

Bench : Single Bench

Advocate : U N S Deo, Apoorva Tripathi

Final Decision : Allowed

Judgement

1. This petition under Article 227 of the Constitution of India has been preferred by the petitioners/State for setting aside the execution proceedings initiated by the respondent/ Contractor before the District Judge, Bilaspur, in MJC No.310/2015 and Execution Case No.962/2015, as being wholly untenable.

2. The respondent's tender for the subject work of Amamuda Diversion Plan in River Arpa Hasdeo Kachhar was accepted and the work order was issued for completion of the work up to 21.01.2013, which was later on extended by four months, to be completed up to 31.05.2013, but the respondent failed to complete the work and left it midway, therefore, as per clause 4.3.3.3 the contract was cancelled (under the risk and cost clause).

3. Against the termination of tender and forfeiture of earnest money, the respondent invoked clause 4.3.29 of the agreement petitioning the Superintending Engineer for appropriate orders. The Superintending Engineer passed an order on 25.11.2013 rejecting the claim of the respondent.

4. In WPC No.90/2015 decided on 20.01.2015, the Division Bench of this Court set aside the order dated 16.9.2014 passed by the Superintending Engineer remitting the matter back to him to pass a reasoned and speaking order in accordance with law in the light of observations made in the order passed by the Division Bench.

5. On remission, the Superintending Engineer passed an order on 14.05.2015 allowing claim of Rs.79,73,240/- in favour of the respondent. Treating this order as an award the respondent moved execution application before the District Judge under Section 36 of the Act, 1996 read with Section 18 of the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983 (for short "the Adhiniyam, 1983") on 09.07.2015 together with an application under Order 21 Rule 13 of the Code of Civil Procedure, 1908 (for short "the CPC") for attachment of the Department's Bank account. The petitioner, on its turn, has moved an application under Section 9 of the Act, 1996 for grant of temporary injunction on the plea that the respondent had withdrawn WPC No.2550/2014 before the Division Bench of this Court on 05.01.2015 seeking liberty to raise dispute before the Arbitration Tribunal, however, it again preferred WPC No.90/2015 wherein the matter was remitted back to the Superintending Engineer for passing fresh orders, meaning thereby that the respondent moved two successive writ petitions without informing the subsequent Division Bench that it has already withdrawn the earlier writ petition. The petitioners also stated that the order passed by the Superintending Engineer is not the award being simply the decision by the Departmental Authority on the claim raised by the respondent and not an award under the Act, 1996 or the Adhiniyam, 1983. The petitioner placed reliance upon the decisions rendered in *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur*, (1999) 2 SCC 166, *State of M.P. and Another v. K.K. Shukla and Co.*, (2001) 10 SCC 194, *State of Madhya Pradesh and Ors. v. Chahal and Company*, 1995 MPLJ 885 and *Ishwarlal v. State of M.P. and Ors.*, 2015 (1) MPLJ 463

6. Per contra, learned counsel appearing for the respondent/contractor would argue that the State has submitted to the jurisdiction of the Arbitrator, therefore, it cannot question the award passed by the Superintending Engineer. It is also argued that in the claim preferred before the Tribunal, State has referred the Superintending Engineer as Arbitrator and moreover in the pleadings made before the Superintending Engineer, he has been referred as Arbitrator, therefore, the order passed by the Superintending Engineer is an award to resolve the dispute between the parties against which Section 9 application is not maintainable before the District Judge. Reliance is placed upon the decisions rendered in *Smt. Rukmanibai Gupta v. Collector, Jabalpur and Others*, (1980) 4 SCC 556, *Mallikarjun v. Gulbarga University*, (2004) 1 SCC 372, *Bihar State Mineral Development Corporation and Another v. Encon Builders (I) (P) Ltd.*, (2003) 7 SCC 418, *Punjab State and Others v. Dina Nath*, (2007) 5 SCC 28, *Gas Authority of India Ltd. and Another v. Ketu Construction (I) Ltd. and Others*, (2007) 5 SCC 38, *Jai Singh & Ors. v. Municipal Corporation of Delhi & Anr.*, 2010

AIR SCW 5968, Union of India v. Pam Development Private Limited, (2014) 11 SCC 366 and M.P. Housing Board and Anr. v. Satish Kumar Raizada, 2003 (2) MPLJ 346

7. Before proceeding to deal with the submissions made by the learned counsel appearing for the parties, it would be necessary to refer to the orders passed by this Court in earlier writ petitions preferred by the respondent herein.

(A) WPC No.325 of 2014 was preferred seeking a direction to hold the act of retendering by the respondents No.1 to 4 as illegal and arbitrary and the process of retendering including the award of contract be quashed. The petitioner therein also sought a direction to the respondent authorities to allow the petitioner to complete the work order. This petition was dismissed by the Division Bench of this Court on 17-2-2014 with observation, on petitioner's submission, that the matter is likely to be resolved amicably.

(B) The respondent herein, thereafter, preferred WPC No.1795 of 2014 seeking setting aside the order dated 19.8.2014 whereby the Chief Engineer, Hasdeo Basin, Water Resources Department, Bilaspur, had cancelled his registration. The writ petition was allowed on 30.4.2015 setting aside the order and reserved the liberty in favour of the State authorities to issue fresh show cause notice and decide the matter afresh after obtaining reply from the petitioner therein.

(C) WPC No.1880 of 2014 was allowed on 7-10-2014, in which the Division Bench of this Court set aside the Superintending Engineer's order dated 28-8-2014 whereby the Superintending Engineer has declined to consider respondent's representation on the ground that his contract has already been cancelled and fresh tenders have been invited. The Superintending Engineer, thereafter, passed an order on 12.11.2014 cancelling the Executive Engineer's order dated 7.7.2014 whereby the contract was cancelled.

(D) The respondent herein then preferred WPC No.2550 of 2014 seeking a direction to the Superintending Engineer to decide the petitioner's claim by passing a reasoned and speaking order and to allow it to complete the work. The said writ petition was dismissed as withdrawn on 5.1.2015 seeking liberty to avail remedies before the State Arbitration Tribunal.

(E) Without disclosing the order passed in WPC No.2550 of 2014 the respondent herein preferred WPC No.90 of 2015 seeking quashment of the order dated 16.9.2014 whereby the EMD, Additional EMD & security amount totaling Rs.79,73,240/- was forfeited. This petition was decided by the Division Bench of this Court on 20.1.2015 setting aside the order dated 16.9.2014 and remitting the matter back to the Superintending Engineer to pass a reasoned and speaking order within four weeks.

8. It appears pursuant to the order passed in WPC No.90 of 2015 the Superintending Engineer passed fresh order on 14.5.2015 allowing respondent's claim to the tune of Rs.79,73,240/- and it is this order which is put to execution

before the District Judge wherein the impugned order has been passed.

9. To deal with the issue as to whether the Superintending Engineer's order would be an award, therefore, it can straightaway be put to execution without the matter being considered by the Arbitration Tribunal, it would be beneficial to refer to arbitration clause contained in the agreement. Clause 4.3.29.2 is quoted below for ready reference :

4.3.29.2 Except where otherwise specified in the contract, for the claim valued at Rs.50,000/- or more the decisions of the S.E. of the Circle for the time being in respect of all questions and disputes relating to the meaning of the specification, designs, drawings, and instructions hereto before mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those

conditions or otherwise concerning the work of execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be final provided that the S.E. shall be before giving his decision in writing in the matter gives an opportunity of being heard to the parties to the contract.

If any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter he may within 26 days after receiving notice of such decision may refer such dispute to the Arbitration Tribunal constituted under the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (sic 1982) (No. 2 of 1983).

10. Bare reading of the arbitration clause in the agreement would manifest that the jurisdiction conferred on the Superintending Engineer to decide claim raised by the party to the contract is only an internal mechanism provided in the contract and the Superintending Engineer does not become nor would attain the status of an Arbitrator even under the terms of the contract because the substantial arbitration clause begins in the later part of the clause where it is mentioned that if any party is dissatisfied with the final decision of the Superintending Engineer he may refer such dispute to the Arbitration Tribunal. The order passed by the Superintending Engineer remains a decision on the claim, but the dispute as is understood for referring the matter to arbitration arises only when a party to the contract is not satisfied with the decision of the Superintending Engineer.

11. In drawing the above interpretation in view of the specific language of second part of the relevant clause dealing with the arbitration, this Court would draw support from the law laid down by the Supreme Court in Bharat Bhushan Bansal (supra) wherein dealing with the similar clause the Supreme Court held that the authority conferred on any officer of the Department or any other authority and making the said decision to be final does not contemplate an arbitration covered by the Arbitration Act. The Supreme Court referred to S.K.

Chawla's Law of Arbitration and Conciliation and extracted the following paragraph from the said Author's commentary :

"4. Arbitration agreement to be distinguished from agreement for decision by an engineer or expert.-Contracts may contain a clause that on certain questions the decision of an engineer, architect or another expert shall be final. The decision given in such cases by the engineer etc. is not an award. As pointed out by Bernstein, such a person is under no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own expertise and investigations. The procedure involved is not arbitration, and the Arbitration Act does not apply to it. The primary material on which such person acts is his own knowledge and experience, supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conform to rules of "evidence") put up before him by either party. An arbitrator on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a less thorough investigation. Only one mind will be brought to bear on the problem. There will be no discovery of documents, there will not normally be any oral "evidence" or oral submissions."

(Emphasis supplied)

The Supreme Court, thereafter, held thus, in paras 6 & 7 :

6. A clause very similar to the present clause was also held to be not an arbitration clause by this Court in the case of State of Orissa v. Damodar Das. The language of that clause was very similar to the present clause. Under the clause in question, (at SCC p. 222, para 9)

"except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being, (was to) be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract ... or otherwise concerning the works or the execution or failure to execute the same ...".

This Court held that this clause did not spell out any intention to refer any disputes and differences between the parties to arbitration.

7. The wording of the clause in the present case is very similar to the wording which was interpreted as not an arbitration clause in the above case. Both the above judgments of this Court have relied upon an earlier decision of this Court in the case of State of U.P. v. Tipper Chand. The clause which was interpreted in the above case was also materially similar to the clause before us. Clause 22 of the contract in that case provided: (SCC p. 341, para 2)

"Except where otherwise specified in the contract the decision of the

Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, ... or otherwise concerning the works, or the execution or failure to execute the same, ... shall also be final, conclusive and binding on the contractor."

This Court held that the clause did not contain an arbitration agreement either expressly or by implication. The intention was to vest the Superintending Engineer with supervision and administrative control over the work.

12. The Supreme Court in *State of Orissa and Another v. Damodar Das*, (1996) 2 SCC 216, was considering as to what amounts to arbitration agreement for resolution of the dispute.

Interpreting the definition of arbitration clause under Section 2 (a) of Arbitration Act, 1940 it held thus in para 10 :

10.....We find it difficult to give acceptance to the contention. A reading of the above clause in the contract as a conjoint whole, would give us an indication that during the progress of the work or after the completion or the sooner determination thereof of the contract, the Public Health Engineer has been empowered to decide all questions relating to the meaning of the specifications, drawings, instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to, the contract drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works or the execution or failure to execute the same has been entrusted to the Public Health Engineer and his decision shall be final. In other words, he is nominated only to decide the questions arising in the quality of the work or any other matters enumerated hereinbefore and his decision shall be final and bind the contractor. A clause in the contract cannot be split into two parts so as to consider one part to give rise to difference or dispute and another part relating to execution of work, its workmanship etc. It is settled now that a clause in the contract must be read as a whole. If the construction suggested by the respondent is given effect then the decision of the Public Health Engineer would become final and it is not even necessary to have it made rule of the court under the Arbitration Act. It would be hazardous to the claim of a contractor to give such instruction and give power to the Public Health Engineer to make any dispute final and binding on the contractor. A careful reading of the clause in the contract would give us an indication that the Public Health Engineer is empowered to decide all the questions enumerated therein other than any disputes or differences that have arisen between the contractor and the Government. But for clause 25, there is

no other contract to refer any dispute or difference to an arbitrator named or otherwise.

(Emphasis supplied)

13. The Supreme Court in *K.K. Modi v. K.N. Modi and Others*, (1998) 3 SCC 573 , held thus in paras 17, 18, 19 & 24 :

17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.

19. In *Russell on Arbitration*, 21st Edn., at p. 37, para 2-014, the question how to distinguish between an expert determination and arbitration, has been examined. It is stated,

"Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as "arbitrator", "arbitral tribunal", "arbitration" or the formula "as an expert and not as an arbitrator" are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive.... Where there is no express wording, the court will refer to certain

guidelines. Of these, the most important used to be, whether there was an "issue" between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a "formulated dispute" between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion...."

24. In the case of *Cursetji Jamshedji Ardaseer Wadia v. Dr R.D. Shiralee* the test which was emphasised was whether the intention of the parties was to avoid disputes or to resolve disputes. In the case of *Vadilal Chatrabhuj Gandhi v. Thakorelal Chimanlal Munshaw* the emphasis was on judicial enquiry and determination as indicative of an arbitration agreement as against an expert opinion. The test of preventing disputes or deciding disputes was also resorted to for the purpose of considering whether the agreement was a reference to arbitration or not. In that case, the agreement provided that the parties had agreed to enter into a compromise for payment of a sum up to, but not exceeding, Rs 20 lakhs,

"which shall be borne and paid by the parties in such proportions or manner as Sir Jamshedji B. Kanga shall, in his absolute discretion, decide as a valuer and not as an arbitrator after giving each of us summary hearing".

The Court said that the mere fact that a judicial enquiry had been held is not sufficient to make the ultimate decision a judicial decision. The Court held that Sir Jamshedji Kanga had not to decide upon the evidence led before him. He had to decide in his absolute discretion. There was not to be a judicial enquiry worked out in a judicial manner. Hence this was not an arbitration. (Emphasis supplied)

14. The above analysis of the judgments of the Supreme Court would dispel the submission made by the learned counsel for the respondent that the Superintending Engineer in the present case has acted as an Arbitrator because if the Superintending Engineer is considered to be an Arbitrator and has passed an award, the later part of the agreement could not authorise the parties with right to challenge such decision before the Chhattisgarh Madhyastham Adhikaran which itself is an Arbitration Tribunal. To put it simply, if Superintending Engineer's decision is an arbitration award, the same cannot be questioned once again by making reference to the Arbitration Tribunal because one Arbitrator cannot set aside the award passed by another Arbitrator.

15. Moreover, as Russell on Arbitration {para 19 of K.K. Modi (supra)} and S.K.

Chawla's Law of Arbitration and Conciliation on arbitration have commented, the expert is only required to provide opportunity of hearing to the parties, but has no authority to record evidence of the parties. The intention in the language used in the first part of the clause appears to be to avoid or minimise the dispute and not to refer and resolve the dispute, as is done in a judicial proceeding before the Arbitration Tribunal.

16. For all the above-stated reasons, since the order passed by the Superintending Engineer does not amount to an award, the respondent is not entitled to initiate the execution proceeding before the District Judge, therefore, the MJC No.310/2015 and the Execution case No.962/2015 arising out of purported award passed by the Superintending Engineer being without jurisdiction or authority of law deserves to be and is hereby set aside.

17. Ex-consequenti, the writ petition is allowed, leaving the parties to bear their own cost(s).