
(2003) 12 OHC CK 0008
In the Orissa High Court
Case No : ARBA No. 14 of 2003

State of Orissa and Another

APPELLANT

Vs

Sri Durga Charan Routaraya

RESPONDENT

Date of Decision : 22-12-2003

Acts Referred:

Arbitration Act, 1940 — Section 39

Citation : (2004) 1 OLR 298

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : Additional Government Advocate, for the Appellant; R.K. Rath and N.R. Rout, for the Respondent

Final Decision : Allowed

Judgement

B.P. Das, J.—This appeal is at the instance of the State challenging the judgment and decree passed by the Civil Judge (Senior Division), Bhubaneswar in O.S. No. 98 of 1999 making the award of the Arbitration Tribunal a rule of the Court.

2. The brief facts leading to this appeal are that the claimant, i.e., the sole respondent was entrusted with construction of Earth Dam to Kharkhai Irrigation Project up to R. L. 316.15, (Balance work) for a sum of Rs. 13,78,810/- for which agreement was entered into between the appellant and the claimant wherein it was stipulated that the claimant would commence the work on 1.1.1976 and complete the same by 31.7.1976. However, the work could not be completed in time due to various reasons. According to the respondent, delay is mainly due to change of design by the appellants resulting in financial loss to the claimant-respondent and according to the respondent the appellant No. 2, the Executive Engineer, while making payment did not consider the extra expenditure incurred by the claimant on different counts, which gave rise to dispute and difference between the parties. The respondent served a notice on the appellants to settle the dispute and as the State failed to resolve the dispute or to refer the matter for arbitration as per the clause in the agreement, the respondent approached

the Civil Court i.e.. Subordinate Judge, Bhubaneswar, who referred the dispute to the Arbitration Tribunal for adjudication. The Tribunal ultimately passed its award for a sum of Rs. 1,23,774/- along with interest at the rate of 10% per annum on the principal awarded amount. The aforesaid amount was awarded mainly on claim item No. 4 made on account of price escalation after issue of work order. The Tribunal found that the Labour Employment and Housing Department by its notification dated 16.4.1976, which came into force from 1st May, 1976 made an up-ward revision of minimum wages of unskilled labourer, which was computed to be 14% increase in the rate of labour. Taking labour component at Rs. 1,74,145.50 and the increase of 14% on such labour component, an extra amount of Rs. 24,380/- was awarded in favour of the respondent. In respect of claim item Nos. 5 and 6, which related to supply of morum and reimbursement of royalty charges deducted from the bills of the claimant, the Tribunal found that the respondent was entitled to the differential cost of supply of morum of 47,106 Cum. i.e., at the differential cost of earth and morram which was quantified at Rs. 78,667.00 and allowed the claim item No. 6 in full so far as reimbursement of cost of royalty, which comes to Rs. 20,727/- In total the Tribunal awarded Rs. 1,23,774/- which included Rs. 24,380/- in respect of claim item No. 4, Rs. 78,667/- for claim item No.5, and Rs. 20,727/- for claim item No. 6. That apart, an amount of Rs. 2,00,293/- has been awarded towards interest on the awarded amount of Rs. 1,23,744/-. The total claim amount was quantified at Rs. 3,24,067/- which was directed t(c) be paid by the present appellants to the claimant within 120 days of receipt of the notice u/s 14(1) of the Arbitration Act and on failure to pay the said amount within 120 days, the appellants were made liable to pay further interest at the rate of 10% per annum on the principal awarded amount of Rs. 1,23,774/-

3. The main ground of challenge before the Civil Court was that the award passed by the Tribunal suffered from infirmity, errors apparent on the face of the record and the Tribunal committed legal misconduct and exceeded its jurisdiction by taking into consideration some extraneous matters for which the award as well as the order passed by the Civil Court were liable to be set aside. The respondent resisted the said objection of the State stating that the Misc. Case filed by the State was liable to be dismissed, as the same was filed beyond the period of limitation and further supporting the award stated that there was no error to set aside the same.

4. The Civil Court ultimately found that in respect of item No. 4, as against the claim of respondent for a sum of Rs. 2,00,000 the Tribunal granted a sum of Rs. 24,380/- only which is on account of compulsory nature of statutory escalation on labour cost. The objection of the appellant to this on the ground that there is no provision under the agreement for any price escalation was negated by the Civil Court, taking note of the price escalation on account of compulsory nature of statutory escalation of labour cost, referring to fair wage clause, enshrined in clause 33 of the agreement. As regards objection to claim item Nos. 5 and 6, the finding of the Civil Court was that as there was no error apparent on face of the

award and as the findings of the Tribunal were based on evidence, the same could not be interfered with. In addition to this the Civil Court observed that it could not sit as a Court of appeal and reassess the evidence.

5. In respect of Claim Item No. 9, i.e., interest, the Civil Court relying upon the decision of the apex Court reported in *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, held that the claimant was entitled to pendente lite interest when the agreement did not prohibit grant of such interest. That too, the Civil Court further found that the suit was registered on 9.2.1999 and though the State entered appearance on 21.12.1999, the Misc. Case under Sections 30 and 33 of the Act was filed on 6.3.2000. that is, much after the period of limitation of 30 days as enshrined in the Limitation Act, and in absence of prayer for condonation of delay, the Misc. Case was barred by limitation. On the findings stated above, the Civil Court dismissed the application under Sections 30 and 33 of the Indian Arbitration Act on merit.

6. The said order is challenged in this proceeding mainly on the following grounds :

(a) That the respondent having already been paid the final bill, there was no further dispute to be adjudicated by the learned Arbitration Tribunal.

(b) That there having no clause in the agreement for payment of escalation cost on account of revision of rates, the Tribunal as well as the Civil Court fell into an error by awarding amount on that head.

(c) That claim item Nos. 5 and 6 being beyond the scope of reference and the contract, the award is a nullity.

(d) That the interest awarded is not as per law.

7. Learned counsel for the appellants relying upon a decision of the Apex Court reported in *Union of India Vs. M/s. Popular Builders, Calcutta*, submitted that once final bill was accepted by the contractor without protest, if the contractor subsequently raised certain demands on the ground that some additional works done by him were not included in the final bill, the said claim cannot be entertained in view of the receipt of the final bill by the contractor without any protest. According to the learned counsel for the appellants after submission of the final bill and acceptance of final payment, the agreement entered into between parties comes to an end for which the Contractor cannot invoke the arbitration clause of the said agreement as the same has already spent its force. On the other hand, learned counsel for the respondent submitted that this appeal should be dismissed in limine as the objection under Sections 30 and 33 of the Arbitration Act was filed by the appellants much after the expiry of the period of limitation of 30 days and therefore, the objection filed could not be treated to be an objection in the eye of law to set aside the award. In this regard, learned counsel for the respondent relied upon a decision of the apex Court reported in *Madan Lal Vs. Sunderlal and Another*, wherein it has been held that if a party

wants an award to be set aside on any of the grounds mentioned in Section 30, it must apply within 30 days of the date of service of notice of filing of the award as provided in Article 158 of the Limitation Act. The apex Court further held that no special form is prescribed for making such an application and in an appropriate case an objection to an award in the nature of a written statement may . be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation, it cannot be treated as an application to set aside the award, and if it is so treated, it will be barred by limitation. Basing upon the aforesaid decision, it was further argued that in the case at hand there is no objection in the eye of law, for which there is no order refusing to set aside the award and as such the appeal u/s 39 of the Arbitration Act, 1940 is not maintainable.

8. At the outset, it would be profitable to examine whether the application filed by the State under Sections 30 and 33 of the Arbitration Act was in time and in terms of Section 193 of the Limitation Act. If ultimately it is found that the application was filed by the State under Sections 30 and 33 of the Act after expiry of the period of limitation, then there would be no point in going into the merits of the other objections raised by the State. If the contention of the counsel for the respondent that the objection filed by the State was barred by limitation fails, then the next question to be gone into would be whether the matter could have been referred to arbitration after the contractor received the final bill without any objection.

9. On perusal of the lower Court records, I find that the award was received by the Civil Court on 2.2.1999. On 22.2.1999 notice was issued to the State and the present appellants entered appearance on 21.12.1999. On that date the Government Pleader filed a petition praying for time to file the objection and the Civil Court allowed time till 7.3.2000 for the said purpose. On 6.3.2000 the objection under Sections 30 and 33 of the Arbitration Act was filed.

10. While dealing with the question of limitation, it is profitable to quote the orders passed by the Civil Court on different dates to which the matter was posted. The orders passed on two different dates read as follows :

"21.12.99. - Advocate for claimant has filed hazira. G.P. has filed memo of appearance for the respondent and has filed a petition for time. Heard. Time is allowed till 7.3.2000 for filing of objection.

6.3.2000 - Petitioner files objection under Sections 30 and 33 of the Arbitration Act praying to set aside the award. Register. Put up on 7.3.2000 with office note."

This being the position, it is to be seen whether the Civil Court was correct in saying that the objections were filed beyond the period of limitation.

11. This Court while dealing with a similar situation in the case of Executive Engineer, Rural Engineering Division, Puri Vs. Construction India, , held that in the circumstances indicated in the judgment and in view of the change brought

about in Section 29 of the new Limitation Act, it must follow that a Court has jurisdiction to condone the delay in filing an objection beyond 30 days.

12. In the present case the Civil Court itself extended the time for filing the objection on the application of the State till 7.3.2000 and the objection was filed under Sections 30 and 33 of the Apt on 6.3.2000. So it must follow that the Court did extend the time for filing the objection and therefore the objection filed under Sections 30 and 33 of the Arbitration Act cannot be said to have been filed beyond time. So the finding of the Civil Court that the objection filed beyond the period of limitation is not sustainable in the eye of law.

Now let me deal with the question whether the dispute could have been referred to Arbitration when the contractor had already prepared and received the final bill without protest. The award of the Tribunal transpires that the respondent-claimant was paid the final bill on 24.3.77 vide M.B. No. 195 (Ext.C) page 15 and the 6th Final Bill (Ext.B/5). The claimant accepted the final measurements and received the final bill as per Voucher No. 83 dated 24.3.77. The claimant after receipt of the final bill on 24.3.77 moved the present appellants as per the copy of his letter dated 26.5.1978, Ext. 9 with a request to refund the royalty deducted towards collection of morum not covered in the agreement within a month failing which he would move the Chief Engineer to appoint an Arbitrator to decide the matter. Basing upon this, learned counsel for the appellants submitted that after submission of the final bill and acceptance of final payment, the agreement came to an end and the arbitration clause in the agreement thereby did not survive for which it called for consideration whether the respondent-contractor could invoke the arbitration clause as it was extinguished along with the contract. In order to decide this question, it is worthwhile to quote the relevant portion of the agreement :

"Clause 23-Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions herein before mentioned and as to the quality of workmanship, or materials used on the work, or as to any other questions, claim, right matter, or thing whatsoever, if any way arising out of, or relating to the contract, designs, drawings, specifications, estimates instructions, orders, or these conditions, or otherwise concerning the work or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. If there be no such Superintending Engineer, it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a Government Servant. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to these contract."

13. Fact remains that the appellants entered into a contract for work and that the claimant accepted the final measurement and received the final bill as per

voucher No. 23 dated 24.3.1997.

Clause 8 of the agreement speaks that the final bill shall be prepared by the offices of the Public Works Department in accordance with the rules of the department in the presence of the contractor within one month of the date fixed for completion of the work.

14. In the present case the contractor raised certain claims only after receipt of the final bill and not even in course of preparation of the final bill. It can safely be said that the agreement between the parties came to an end along with the arbitration clause therein. This view of mine gets support from the decision of this Court reported in 79(1995) C.L.T. 41 : 1995 (I) OLR 18 (J. K. Agarwala v. National Aluminum Co. Ltd.) wherein this Court held thus :

"It is the agreement between the parties with an Arbitration Clause therein which makes a claim arbitrable, but since the agreement itself had come to an end the Arbitration Clause of the agreement cannot survive independently and therefore any further dispute between the parties cannot become arbitrable."

15. In view of the aforesaid position of law and in view of the fact that no agreement subsisted after final bill was received by the claimant, the order passed by the learned Civil Judge (S.D.), Bhubaneswar in. O.S. No. 98 of 1999 by making the award rule of the Court is not sustainable in law. Accordingly, the same is set aside.

In view of the aforesaid finding, there is no need to go into the merits of other objections. Accordingly, the Arbitration Appeal is allowed.