
(1989) 03 MP CK 0039
In the Madhya Pradesh High Court
Case No : M.P. No. 4042 of 1987

Super Construction Company, Durg	Vs	APPELLANT
State of Madhya Pradesh and Others		RESPONDENT

Date of Decision : 10-03-1989

Acts Referred:

Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 — Section 20, 7

Citation : AIR 1990 MP 115 : (1989) MPJR 876 : (1989) MPLJ 685

Hon'ble Judges : S. Awasthy, J; B.C. Varma, J

Bench : Division Bench

Advocate : Ajit Singh, for the Appellant; Deepak Verma, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Varma, J.

This order shall also govern the disposal of M.P. No. 3516 of 1987 (Ramratan Gupta v. State of Madhya Pradesh and four others); M.P. No. 964 of 1988 (Super Construction Company, Durg v. The State of Madhya Pradesh and four others) and M.P. No. 966 of 1988 (Ramratan Gupta v. State of Madhya Pradesh and four others).

The petitioners in all these petitions are contractors. They undertook to execute certain work/contracts for the State of Madhya Pradesh in Irrigation Department and executed standard form of contract document. The works were taken up pursuant to the contracts and each of the petitioners was subjected to certain demands. Not only this, the demands so raised were sought to be collected and recovered through the Collector as arrears of land revenue. The petitioners' contention is that they have been always protesting against the demands, and had been requesting the department to refer the dispute to Arbitrator as envisaged by the terms of the contract even prior to coming into force of the Madhya Pradesh Madhyasthan Adhikaran Adhiniyam, 1983. Even thereafter request was made to the department to refer the dispute to the Arbitration

Tribunal appointed under the said Act. It appears from Ann. P/17 that the petitioners were given to understand that if they withdrew their demands for reference to Arbitration, they shall be given due opportunity of personal hearing to contract the claim. That, however, was not done and the alleged dues are sought to be recovered by coercive process as land revenue. The petitioners allege that they have committed no breach of any term of the contract agreement and also deny the quantum of damages arbitrarily assessed by the department. The contention is that the demands cannot be made and the alleged due cannot be recovered unless there is a proper adjudication of the issue after due notice to the petitioners/contractors. There appears that after the establishment of the Arbitration Tribunal under the M.P. Madhyashtham Adhikaran Adhiniyam, 1983, the dispute should be referred to the Arbitration Tribunal for its decision and the recovery proceedings initiated should be either quashed or kept in abeyance pending adjudication of an award by the Arbitration Tribunal.

As against the petitioners' claim the respondents' contention is that the authorities have passed final order in presence of the petitioners' attorney and a final decision has been taken by the concerned Superintending Engineer. That being so, it is now for the petitioners to invoke the arbitration clause in the contract/agreement and avail of the reference to the Arbitration Tribunal appointed under the M.P. Madhyastham Adhikaran Adhiniyam.

What is clear from the respective version of the parties and can now be taken as undisputed circumstance is that the department is accusing the petitioners of the breach of the contract and claims certain amount from them as damages and penalty. The petitioners contest this claims by the department and instead allege that it is the department which is liable for breach and thus completely deny their liability. It is also not in dispute that the contract-agreement contains an arbitration clause permitting reference of the dispute to the Arbitrator. The only question is as to who should approach the Arbitrator.

The dispute in all these cases existed from before the M.P. Madhyastham Adhikaran Adhiniyam, 1983 come into force. The petitioners did not invoke the arbitration clause in the contract agreement. No application was made to the Court for appointment of Arbitrator in terms of the agreement and for a reference of the dispute to him. As alleged by the petitioners, they were persuaded to withdraw their demand for a reference to Arbitrator. Now when the M.P. Madhyastham Adhikaran Adhiniyam has come into force and the Arbitration Tribunal has been established thereunder, reference may be made only to the provisions of the Adhiniyam. This is so because Section 7(b) of the Adhiniyam prescribes that either party to a works contract shall, irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal. Further Section 20 of the Adhiniyam oust the jurisdiction of the Civil Court notwithstanding anything contained in the Arbitration Act, 1940 or any other law or in any agreement or usage to the contrary to entertain or

decide any dispute of which cognizance can be taken by the Tribunal under the Adhiniyam. "Works contract" as defined in Section 2(1)(i) means an agreement for the execution of any work relating to construction repairs or maintenance of.... dam, weir, canal, reservoir tank, lake, bridge, culvert....of the State Government or public undertaking, as the State Government may, by notification, specify in this behalf,.....and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works. The term "dispute, with the meaning of Section 2(1)(d) means any difference relating to any claim valued at Rs. 50,000/- or more, arising out of the execution or non-execution of a works contract or part thereof." It is an admitted position in all these petitions that the subject matter of all these petitions is a "dispute" arising out of the execution or non-execution of works contract. In view of Section 7 read with Section 20 of the Adhiniyam this dispute can only be decided by the Tribunal on reference to it in writing.

Shri Ajit Singh, learned counsel for the petitioners in all these petitions strenuously urged that the demands raised against the petitioners cannot be enforced against them unless the department referred the matter to the Arbitrator for adjudication and obtain an award and the department cannot be permitted to be the Judge of its own cause. The contention, therefore, is that it is the department which should approach the Arbitration Tribunal before enforcing the demands. We are, however, not impressed with this argument. Clause 4.3.38.1 of the contract agreement is as follows :---

"4.3.38.1 -- Recovery of dues from the contractor :

Whenever any claim, against the contractor for the payment of a sum or money arises out of or under the contract, Government shall be entitled to recover such sum by appropriating in part or whole, the security deposit of the contractor, and to sell any Government promissory notes etc., forming the whole or part of such security. In the event of the security being insufficient or if no security has been taken from the contractor, then the balance or the total sum recoverable, as the case may be, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under this or any other contract with Government should this sum be not sufficient to cover the full amount recoverable from the contractor, then it shall be recovered from him as an arrears of land revenue."

Undoubtedly, this clause provides for the mode of recovery of a claim against the contractor for payment of his sum or money arising out of or under the contract. Similar term fell for consideration by the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, strongly relied upon on behalf of the petitioners. It was held that such a clause does no more than provide an additional mode of recovery and the purchaser is entitled to exercise the right conferred under such clause only where there is a claim for a sum which is presently due and payable by the contractor. (Underlining is ours). It was further pointed out that it can be taken as settled law that a claim for unliquidated damages does not give right to

debt until the liability is adjudicated and the damages assessed by a decree or order of the Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt from the other party. It was further pointed out that Section 74 of the Indian Contract Act eliminates the elaborate refinements made under the English Common Law in distinguishing between stipulations providing for liquidated damages and stipulations in the nature of penalty. Recently in a decision in *State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli*, AIR 1987 SC 1359, where a clause in the agreement read "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party", it was held that the adjudication by the officer regarding the breach of contract cannot be sustained under the law because a party to the agreement cannot be an arbiter in his own cause. It was emphasized that interest of justice and equity require that where a party to a contract disputes the committing of any breach of the conditions the adjudication should be by an independent person or body and not by the other party to the contract. The Court further went on to say : "The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. Reference may also be made to the decision in *Masum Hussain Vs. State of Madhya Pradesh and Others*, In that case, a sum of Rs. 31,625/- was sought to be recovered from Masum Hussain on the allegation that he failed to deposit the lease money and, therefore, a fresh action was instituted putting the Government to a loss to that extent. It was held that the proceedings for recovery of damages without preliminary adjudication as to quantum of loss by the Collector were invalid and a direction was issued to the Collector to ascertain the loss after hearing the parties as a result of breach on the part of the lessee Masum Hussain in performance of the contract. The parties were permitted to lead evidence and raise such contentions which in the opinion of the Collector were open to them. Legitimate inference that may be drawn from the aforesaid decisions of the Supreme Court is that when the claim for damages arises and such an amount on account of such claim is sought to be recovered under the terms of that contract as arrears of land revenue against a contractor by the authorities, it should be done only after some inquiry in which the contractor should be allowed to participate. The demand so raised may be accepted by the contractor in which event it shall become a sum presently due and payable and could be recovered as arrears of land revenue. If, however, the contractor is not satisfied with the demand so raised, he could have resort to such proceedings as may be available to him under the law for determining the dispute as to the breach of the contract and the consequent liability to pay damages. When there is an arbitration clause in the contract, the contractor is at liberty to avail of such clause and get the matter referred to the Arbitrator. There he can well urge that since the liability is yet to be determined by the Arbitrator, the opposite party is not entitled to recover any amount assessed by itself as damages as if it were arrears of land

revenue despite a clause in the contract-agreement in that behalf. Whereas in the present case a statutory Arbitration Tribunal is appointed and a demand is raised claiming damages for breach of the contract, the contractor aggrieved by such demand can well approach the Arbitration Tribunal disputing the claim. If he does not choose so to do, he should be deemed to have accepted the liability and in that event the claim can well be enforced against him as due and payable.

In the present case, the averments in the return indicate that while the petitioner was contesting the claim; by the department and was demanding reference to Arbitration even prior to the enforcement of the M. P. Madhyastham Adhikaran Adhiniyam, 1983, he was permitted to participate in the inquiry for determining the question of liability. Annexure-R/1 dated 15-6-84 indicates that pursuant to the clauses 4.3.29.1 of the contract agreement the Superintending Engineer concerned called upon the petitioner to attend the hearing for final settlement of the dispute. After hearing the petitioner's representatives, the Superintending Engineer decided that the demand raised earlier cannot be revised and is maintained. This decision by the Superintending Engineer was taken in terms of clause referred to above. The course so adopted by the department is in consonance with the rule laid down in Masum Hussain Vs. State of Madhya Pradesh and Others, (supra). The petitioners who seem to be dissatisfied with the decisions of the Superintending Engineer have a right to approach the Arbitration Tribunal for a decision of the dispute as it appears clear that they are questioning the decision of the Superintending Engineer holding them liable for payment of certain amount as damages on account of breach of the contract, that is the only way the petitioners can now question their liability for the alleged breach of the contract and obtain a decision thereupon. This decision shall be the decision of the Arbitration Tribunal. Question whether or not the liability so determined by "the department can be enforced and the amount assessed as damages as arrears of land revenue pending decision by the Arbitrator may be raised before the Arbitration Tribunal. In our opinion the petitioners are not right in saying that the Superintending Engineer under the clause of the contract-agreement as referred to above could not hold the petitioners liable for breach of the contract or could not raise a demand for damages. It appears that since the contractors did not obtain any reference under the relevant clause of the agreement to the Arbitrator nor did they refer the dispute to the Arbitrator/ Arbitration Tribunal under Section 7 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, the department cannot be said to be unjustified in enforcing the demand in terms of the agreement on an assumption that the petitioners had little grievance to make against the demand so raised.

For these reasons we do not think that the petitioners are entitled to any writ or direction as claimed and the petitions have to be dismissed. We accordingly dismiss these petitions but without any order as to costs. It is made clear that the petitioners shall be at liberty to refer the matter to the Arbitration Tribunal for adjudication in accordance with Section 7 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 and pray for suspension of the

recovery of the demand raised as arrears of land revenue pending decision of the dispute by the Arbitration Tribunal.