

(2007) 09 JH CK 0015
In the Jharkhand High Court

The State of Bihar (Now Jharkhand) and Others	APPELLANT
Vs	
Hari Lal	RESPONDENT

Date of Decision : 26-09-2007

Acts Referred:

Arbitration Act, 1940 — Section 17
Civil Procedure Code, 1908 (CPC) — Section 80
Contract Act, 1872 — Section 25

Citation : (2011) 2 JCR 223

Hon'ble Judges : Dabbiru Ganeshrao Patnaik, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.G.R. Patnaik, J.—The defendants / appellants have filed this appeal against the judgment dated 7.7.2000 and its corresponding decree dated 15.7.2000, passed in Title Suit No. 45 of 1999, whereby the learned court below decreed the suit in favour of the plaintiff/ respondent, directing the defendants / appellants to pay a sum of Rs. 2,85,389/- together with interest at the rate of 12% per annum to the plaintiff/ respondent.

2. The suit was filed by the plaintiff / respondent for the declaration that amount of Rs. 2,85,389/-, claimed by the plaintiff, is payable to him as approved and awarded on 20.12.1997 by the Superintending Engineer / designated Arbitrator (defendant No. 4) and for a decree in terms of the Award, together with interest at the rate of 18% per annum.

3. The plaintiff is a registered contractor, whereas the defendants No. 2 to 6 are the officers of N.H. wing of P.W.D. (Road) Department under the State Government.

The case of the plaintiff / respondent is that under separate agreements executed between 1978-79, 1980-81 and 1981-82, the plaintiff was awarded contract for construction of Highway roads under the P.W.D. Department. The

plaintiff executed work as per the terms of the agreements. In addition to the works specified in the agreements, the plaintiff was called upon to execute extra work under the provisions of Clause-23 of the agreement on payment of extra cost. The plaintiff executed the extra work, the details of which were entered into the measurement book by the concerned engineers of the Public Works Department and the extra work which was executed, was duly certified and confirmed by the concerned officer of the Department. The plaintiff thereupon raised a Bill for payment of Rs. 2,85,389/- toward;; cost of the extra work and submitted the same to the Engineer who was the in-charge of the Department. The plaintiffs further claim is that the Superintending Engineer (defendant No. 4) who is also the designated Arbitrator, as per Clause-23 of the Agreement, had approved the plaintiffs claim vide his order dated 20.12.1997 and had also sought for funds from his superior officer to enable payment of the amount of the plaintiff. The plaintiff issued notices to the defendants on 3.3.1997, 12.9.1997 and lastly on 20.12.1997 to make payment of the Bill to satisfy the plaintiffs claim for payment of Rs. 2,85,389/-, but the same was not paid and hence, the suit.

4. The defendants/appellants had contested the suit mainly on the ground that the suit is not maintainable under the provisions of Indian Contract Act as also under the provisions of Arbitration Act of 1940 since the Act was repealed by the Arbitration and Conciliation Act, 1996 and further, that the suit is barred by limitation and also by the principle of estoppel, waiver and acquiescence. Defendants have pleaded that the plaint itself was liable to be rejected under the provisions of Order 7 Rule I C.P.C. as because, it does not contain the specific date of cause of action, nor does it contain any averment regarding the valuation of the suit. The defendants have further pleaded that the plaintiff was awarded contract job of road construction under different agreements and, after completion of the job, the plaintiff was paid of in full and final satisfaction of his entire dues which he had received without any murmur. The plaintiff having received his dues as full and final payments, without any protest, is estopped from making any further claim of money. The defendants also denied and disputed the plaintiffs claim of executing any extra work, on the ground that the plaintiff has failed to produce any paper or documents of approval of the Chief Engineer in respect of the extra work done by the plaintiff, if any, and therefore, the plaintiffs claim is not maintainable. It is also pleaded that the defendants have never admitted or acknowledged any debt in favour of the plaintiff and the alleged acknowledgment of the defendant No. 4 cannot bind the defendant No. 1, nor can it be claimed as the basis, for the plaintiff, to claim for payment of money to him.

5. On the basis of rival pleadings, the learned court below had framed a long list of issues, which are as follows:

A. Whether the suit is maintainable in its present, form?

B. Whether the plaintiff has any cause of action?

- C. Whether the suit is barred under the provisions of C.P.C. ?
- D. Whether the suit suffers from misjoinder and non-joinder of the parties?
- E. Whether the amount claimed by the plaintiff is admitted dues in view of the approval of rates of the items of extra work done by the Superintending Engineer, defendant who is none but an Arbitrator under Clause 23 of the Agreement?
- F. Whether the cause of action arose much prior to the date of amendment in Arbitration Act 1996 and whether the entire extra works of the agreement No. 24 F 2 of 80-81. Agreement No. 5 F 2 of 81-82 Agreement No. 12 F of 78-79 were not completed before the amendment in Arbitration Act?
- G. Whether there was continuous demand of the claimed amount duly approved and entered in measurement book of all the extra works done by the plaintiff till December, 1997 i.e. 20.12.1997? Whether the plaintiff is entitled to a decree of judgment for Rs. 2,85,389/- as claimed amount and admitted for the extra work done in view of the agreement in suit with interest by the rate of 18% per annum against the defendants.
- H. Whether there was compliance of the mandatory provisions u/s 80 of the C.P.C. by the plaintiff while he sent notices dated 3.3.97, 12.9.97 and later on 20.12.97?
- I. Whether the S.E./Arbitrator did not demand find amounting to Rs, 2,85,389/- from the Chief Engineer, N.I.I. Wing, Bihar, Patna vide letter No. 152(ori.) dated 2.1.12.97 to make the payment of claimed approved amount and whether he has not endorsed that in case of non payment, the plaintiff contractor may knock the door of the competent court of jurisdiction?
- J. Whether is it not sufficient for compliance of the provisions of Section 80 of the C.P.C?
- K. Whether the defendants are fair and clean in respect of submission of the original papers and documents as required by this learned court for proper and just decision of the suit?
- L. Whether the defendants have designed and planned to suppress the facts by saying that old records are not available only with a view to deprive the plaintiff from his due claimed amount and whether in such circumstances the defendants are not liable to be compensated to the plaintiff as additional relief?
- M. Whether the claim and relief sought for by the plaintiff is genuine and correct and payable with up to date heavy rate of interest?
- N. Whether the defendants with mala fide intention have submitted written statements in belated stage while they have already cross examined the witnesses of the plaintiff? And whether such written statement has not become infructuous?

6. The Trial Court after discussing the evidences adduced by the plaintiff, has recorded its findings in favour of the plaintiff on each of the issues and has held that the plaintiff is entitled to claim and receive the amount claimed from the defendants and a decree accordingly was passed in favour of the plaintiff and against the defendants.

7. The defendants have challenged the impugned judgment and decree of the court below in this appeal, mainly on the ground that the suit as framed, was not maintainable and the learned trial court has erred in failing to consider that framing of the plaint itself was improper and not in consonance with the law and the suit should have been rejected at the very outset. Mr. S. Akhtar, learned Counsel representing the appellants, submits that the suit is also hit by rules of Arbitration Rules 1956 framed by the Hon'ble Patna High Court, as per the provisions under Arbitration Act 1940, as it then was. Learned Counsel argues that even otherwise, the suit was filed on the ground that the Award for the sum as claimed by the plaintiff, was purportedly passed by the Superintending Engineer (defendant No. 4) in terms of Clause-23 of the contract between the plaintiff and the defendants and, the plaintiff had prayed for a decree in terms of the Award. The said suit was filed purportedly under the provisions of Arbitration Act, 1940 in the year 1999, whereas the Act of 1940 was repealed by the Arbitration and Conciliation Act, 1996. The plaintiff had basically filed the suit for a decree in terms of the alleged Award and yet, the suit was tried by way of regular money suit and not under the Arbitration Act. The plaintiff has neither specified any date of cause of action, nor the valuation of the suit and neither has deposited any court fee on the valuation of the suit. Learned Counsel argues next that the learned court below ought to have considered that the suit is thoroughly barred by law of limitation since the alleged dues had accrued to the plaintiff way back in the year 1981, whereas the suit was filed in May 1999. Learned Counsel explains that no acknowledgement of debt was ever made by any of the defendants and the endorsement of the defendant No. 4 (Superintending Engineer) on the plaintiffs letter dated 20.12.1997 can, by no stretch of imagination, be considered as acknowledgment of debt in favour of the plaintiff.

8. The main issues which call to be addressed in this appeal are;

i. Whether the suit in the form as filed by the plaintiff for the relief(s) claimed, is maintainable?

ii. Whether the plaintiff / respondent is entitled to claim and recover the amount claimed by him from the defendants?

9. Issue No. i - From perusal of the plaint, it would appear that the same was filed as a suit for declaration and fixed court fee was paid for the suit. The declaration prayed for was to treat the "order dated 20.12.1997 of the defendant No. 4 (Superintending Engineer / Arbitrator)" as an Award and a decree be passed in terms of the same u/s 17 of the Arbitration Act. The suit was

accordingly registered as Title Suit. It is apparent from the form of the plaint that the plaintiff did not file it as a regular money suit, nor did he pay the requisite court fee on the money claimed. Even from the averment in the plaint, the plaintiff has claimed that under Clause-23 of the Agreement of the works contract, executed by and between him and the defendants, dispute relating to execution of the work under contract could be settled and adjudicated by the Superintending Engineer (defendant No. 4), who in terms of the contract, was the designated Arbitrator. The plaintiff claims that the Superintending Engineer (defendant No. 4) had acknowledged that the money claimed by the plaintiff, was due and payable to the plaintiff and such acknowledgement amounts to an order which under the provisions of Arbitration Act, amounts to an Award and that a decree should be passed in terms of the Award u/s 17 of the Arbitration Act. It may be noted that throughout the proceeding, no attempt was made by the plaintiff to convert the Title suit into a regular money suit. On the contrary, vide petition dated 6.1.2000, filed before the trial court, the plaintiff had prayed that the trial court should act as an Arbitrator in the light of the judgment of the Supreme Court reported in AIR 1958 SC 565, wherein it was laid down that in appropriate cases, the court is also empowered to act. as an Arbitrator and pass order in capacity of an Arbitrator. Though the aforesaid judgment of the Supreme Court was entirely in a different context and on different facts, the trial court allowed the prayer of the plaintiff and assumed its role as an Arbitrator in the said proceeding vide its order dated 7.6.2000. However, by subsequent order dated 27.6.2000 the trial court recalled its earlier order dated 7.6.2000 and by accepting the pleadings of the defendants that since the agreement of work contract between the plaintiff and the defendants had a specific clause designating Superintending Engineer as an Arbitrator, the court cannot assume the role of an Arbitrator unless the name of the Superintending Engineer as an Arbitrator is cancelled. The fact that the proceeding had already progressed considerably and had reached the stage of pronouncing judgment, had also weighed heavily on the mind of the trial court. Thereafter, the trial court proceeded to decide the suit as a regular money suit and passed its impugned judgment and decree.

10. From perusal of the records, it appears that there was considerable delay on the part of the defendants to file their written statement and even before the defendants could file their written statement, the trial court proceeded with the trial by taking evidences adduced on behalf of the plaintiff. Apparently, the suit was registered as a title suit for declaration and the trial court had proceeded to consider the claim of the plaintiff as to whether the purported other dated 20,12,1997 be treated ? art Award and if to, whether a decree in terms of the Award be passed in favour of the plaintiff ? When this matter was pointed out to the trial court by the learned Counsel for the defendants, the trial court brushed aside the objection of the defendants, by observing that though, the suit was filed for declaration and relief under the Arbitration Act, the trial had proceeded as a regular suit allowing both the parties to adduce evidences on the material

issues involved. On the point of maintainability, the trial court has totally evaded the main issue and has merely observed that the suit is not barred either under the Arbitration Act or under the law of limitation or under the provisions of Contract Act, nor under the provisions of estoppel. This observation does not appear to be enjoined with any discussion or specific reasons. This despite the fact that the defendants had consistently pleaded in their written statement, though belatedly, that the suit was not maintainable in its present form and for the relief(s) claimed.

11. As would appear from the pleadings of the plaintiff, the suit was filed on assumption that the endorsement recorded by defendant No. 4 who was the Superintending Engineer, on a letter issued by the plaintiff on 20.12.1997, amounted to an Award acknowledging the amount claimed by the plaintiff as the amount due and payable to him and that a decree could be passed under the provisions of Section 17 of the Arbitration Act by the court. Though, not specifically mentioned by the plaintiff in his plaint, the pleadings and the relief(s), claimed by him, indicate abundantly that the suit was filed u/s 17 of the Arbitration Act 1940.

12. Learned Counsel for the appellants has rightly argued that in the form in which the suit was filed and relief(s) claimed, there was no scope for the trial court to proceed with the trial as if it was a money suit. Furthermore, this suit was filed on 3.5.1999 i.e. long after the repeal of the Arbitration Act of 1940. Though, a new Arbitration and Conciliation Act came into existence in 1996, but the suit does not declare that the same was filed under the provisions of the new Act. Rather, reference to Section 17 suggests that it was filed under the provisions of 17 of the Arbitration Act of 1940. It cannot be said that under the repeal and saving clause of the new Act, the suit as filed by the plaintiff, could be maintainable.

13. Even otherwise, in order to claim the amount, the plaintiff was obliged first to show that the Award was passed in a arbitration proceeding adjudicating upon the dispute relating to the claim of the plaintiff and only then, can it be said that, an Award exists and in terms of which, a decree could be passed. From the entire pleadings and evidences adduced by the plaintiff in the instant case, it appears that he has entirely relied upon the endorsement (Ext.-1/B) made by the defendant No. 4 on the margin of the plaintiffs own letter. On perusal of the contents of the endorsement, and the nature thereof, it would be apparent that it was a mere recommendation addressed to the Executive Engineer to pay to the plaintiff a sum of Rs. 2,85,389/-, on the ground that the said amount was by way of admitted dues. The endorsement appears to have been signed on 20.12,1997 by the maker thereof. It would be clear from the nature of the endorsement that it has not been passed by the Superintending Engineer (defendant No. 4) in his capacity as an Arbitrator, nor does it indicate that any arbitration proceeding was initiated and any dispute involving the claim of the plaintiff was adjudicated upon and Award was passed for the payment of money to the plaintiff. The

endorsement may, at best, indicate that the defendant No. 4 had acknowledged that the plaintiff had executed certain work for which certain amount should be paid to him. Thus, the very basis of the plaintiffs claim that the endorsement amounted to an Award passed by the defendant No. 4 in his capacity as a designated Arbitrator, fails and, therefore, in absence of a regular Award, no decree could have been passed on the basis of the endorsement (Ext.-I/B) even under the Arbitration Act.

14. The defendants have pleaded that the suit was thoroughly barred by limitation. This plea has been taken on the ground that the amount which the plaintiff has claimed, was admittedly due to him ever since the plaintiff had made his formal demand of payment after execution of the work and later, after the work executed by him was confirmed by the concerned Engineer in 1983-84 and later, when approval of the plaintiffs claim was made by the concerned Engineer on 20.12.1990. After a gap of about seven years thereafter, the plaintiff issued a demand notice on 3.3.1997 followed by another notice on 12.9.1997 and lastly on 20.12.1997 and finally in 1999, he had filed the present suit on the ground that his claim of dues was admitted by the defendants and, therefore, the same should be paid to him by way of a decree against the defendants. It is apparent that though, the amount claimed by the plaintiff was purportedly due to him ever since 1981, but the suit was filed in the year 1999. The plaintiff has wanted to plead that the suit is not barred by limitation on account of the acknowledgment of his dues made by the defendant No. 4 vide endorsement dated 20.12.1997 (Ext.-I/B) and that a fresh period of limitation commenced on and from 20.12.1997 and it was within a period of three years thereafter, the suit was filed. Apparently, the plea of limitation, though taken by the defendant, was not discussed by the trial court. It was incumbent upon the trial court to discuss as to whether the endorsement (Ext.-I/B) amounted to an acknowledgment of debt to the plaintiff by and on behalf of the defendants? It was also incumbent upon the trial court to record its finding as to whether by making the endorsement, the defendant No. 4 had bound himself and the defendant No. 1 in particular.

15. Section 25 of the Indian Contract Act, 1872 declares the Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law. The provision relating to promise to pay a debt barred by limitation is laid down u/s 25(3) of the Indian Contract Act, which reads as follows:

25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law. An agreement made without consideration is void, unless:

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but

for the law for the limitation of suits.

16. In the instant case, the endorsement (Ext.-1/B) cannot be deemed to be a written promise made by the defendant No. 4 to the plaintiff either acknowledging the amount at debt or promising to pay the same to the plaintiff. There is no averment in the pleadings of the plaintiff, nor is there any such evidence to suggest that the defendant No. 4 was specially authorized on behalf of the defendant No. 1 to make any such promise to pay any debt to the plaintiff. A time barred debt in order to get fresh lease of life for the purpose of limitation, should be clear and specific and should acknowledge in clear terms to the creditor that the debt was due to him and the debtor should undertake to pay the amount. The endorsement (Ext.-1/B) cannot, therefore, be considered to be an acknowledgement of debt in favour of the plaintiff, nor does it offer any cause of action for filing the suit even by way of a regular money suit for realization of the amount. On consideration of the facts of the case, it is apparent that the suit, even if it is treated as a regular money suit, is barred by limitation.

17. Issue No. ii - Since the suit is not maintainable, the plaintiff/ respondent is not entitled to claim and recover the amount claimed by him from the defendants/appellants.

For the reasons discussed above, I find merit in this appeal. Accordingly, this appeal is allowed. The impugned judgment and decree as passed by the trial court, is hereby set aside and the suit of the plaintiff is dismissed. No order as to cost.