
(2002) 02 GAU CK 0045
In the Gauhati High Court
Case No : M.A. (F) No. 219 of 1994

Union of India (UOI) and Others

APPELLANT

Vs

Hindustan Construction

RESPONDENT

Date of Decision : 14-02-2002

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(4), 41, 8, 8(1)

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 6 Rule 17, 11

Citation : (2003) 2 GLT 204

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : K.K. Mahanta, C.G.S.C, for the Appellant; N.M. Lahiri, N. Choudhury and S.C. Kayal, for the Respondent

Judgement

J.N. Sarma, J.—This matter has been placed before me to be heard as ordered by Hon"ble the Chief Justice because of the difference of opinion between the two learned Judges of this Court.

2. By judgment dated 13th February, 1997 the learned Single Judge of this Court dismissed the appeal and by Anr. judgment the learned Single Judge allowed the appeal.

3. Originally the appeal arose out of the judgment and order dated 1.10.94 passed by the learned Asstt. District Judge No. 1, Cachar at Silchar in T.S. No. 100/91. There was a contract agreement dated 26.5.90 between the Superintending Engineer, Silchar Central Circle, C.R.W.D., Malugram, Silchar on behalf of the Union of India and the Respondent-claimant for the work "Development of site for Central School Building at Silchar." The work order was awarded after negotiation with the Respondent-claimant vide offer dated 20.5.89 for Rs. 12,92,406/- in a single time tender at the rate of Rs. 41.90 per Cu.M. for 31.000 Cu.M. As per the terms of the contract the date of commencement of the work was 10.6.90 and time allowed for completion of the work was 12 months from the date of commencement of the work. Thereafter, a supplementary

agreement was entered into between the parties vide agreement dated 28.9.90 under original agreement for further quantity of 100 Cu.M. @ Rs.41.69 per Cu.M. as per the original agreement the work in question should have been completed on or before 9.6.90. However, in view of the supplementary agreement, the date of completion was extended. The bill in respect of the work was paid to the contractor in running account bill from time to time and the final bill was settled and paid to the contractor during May, 1991 after sanctioning of Extra Item Statement No. 1 by the competent authority vide letter dated 8.12.90 and a total of Rs. 16,51,704/- was paid to the contractor.

4. That neither during the currency of the agreement nor soon after the period of completion of the work in question the contractor claimed either for escalation charge under Item No. 7 of the agreement or for any other risk claim. After the completion of the work and after receiving the payment the contractor issued a notice to the Union of India on 16.8.91 for payment under Clause 25 of the agreement raising various disputes which included escalation charge for Rs. 94,00/- for Item No. 7 of the claim under Clause 10 of the agreement. This was after one year from the date of completion of the work. On receipt of the said notice the Chief Engineer asked the contractor to produce the documentary evidence in support of his claims.

5. The contractor instead of replying to the aforesaid letter dated 23.8.91 filed an application on 1.10.91 u/s 20 of the Arbitration Act, 1940 (hereinafter referred to Act for the sake of brevity) in the Court of the Asstt. District Judge No. 1, Silchar with a prayer to refer the alleged disputes to the Arbitrator for adjudication. The said application was registered as T.S. No. 100/81. The Court below by judgment and order dated 30.11.92 allowed the application and interalia passed the following order:

Considering all these and after perusing the relevant clauses of agreement, it is ordered that the dispute (claim of the applicant) should be referred to arbitration as per Clause 25 of the contract agreement under Sub-section (4) of Section 20 and 8(1)(a) of the Arbitration Act.

6. Thereafter vide the order of the Court the competent authority i.e., Chief Engineer appointed one Sri T.K. Misra as the arbitrator. Before the arbitrator the parties filed their statement of claims, objection and counter claims and the arbitrator heard the case on 11.3.94 and 6.5.94 but before the conclusion of the hearing of the above case an undertaking was given before the arbitrator in the following terms:

We state that in the arbitration proceedings all due and reasonable opportunities were given to place our case properly. We have duly placed our case before the arbitrator and we have nothing further to add to what has been placed.

7. That out of the total award of Rs. 2,46,261/- awarded by the arbitrator a sum of Rs. 94,000/- was awarded in respect of the Claim No. 7 and that Claim No. 7 is only relevant for the purpose of present case and that part of the award is

quoted below:

Claim No. 7: The claimant claims for escalation bills on gross amount of final bill. This is required to be paid as per Clause 10 cc of the agreement according to the price index increased during the work period. Escalation bill also to be paid on claim amount....

8. In this connection it is stated that till today no decree in terms of the award dated 29.7.94 passed by the arbitrator for Rs. 2,46,261/- has been passed by a competent Court and the matter is still pending for disposal in the Court of the learned Asstt. District Judge No. 1, Cachar at Silchar in T.S. No. 84/94.

9. That while the matter was at this stage a revised statement of claim was filed by the contractor claiming sum of Rs. 6,29,296/- resorting to Clause 10 of the agreement. The arbitrator without conducting hearing of the said revised claim under Clause 10 of the agreement called for the submission of stamp paper of proper value from the claimants on 10.6.94 and subsequently on 17.6.94. Meanwhile, the contractor filed an objection on 16.6.94 before the Court below praying for modification of the order dated 30.11.92 passed in T.S. No. 100/91 against the item No. 7 of the original claim. The said application was filed u/s 20 of the Act and by that application a prayer was made for second reference in respect of the subject matter on disputes. This application was filed almost after a lapse of two years from the original order dated 30.11.92.

10. After receipt of this application, the Union of India entered appearance and filed objection to the aforesaid claim of the Respondent claimant. In paragraph 6 of the said objection dated 11.7.94 it was contended inter alia that the revised claim under Clause 10 C.C. is not maintainable inasmuch as in the absence of an application under Clause 10 C.C., Clause 10 C.C. is applicable in the instant case. Moreover, after awarding a sum of Rs. 94,000/- against Claim No. 7 of the original claim vide award dated 29.7.94 a revised claim for escalation is not maintainable. But the Court by the impugned order dated 1.10.94 referred the claim of the contractor under Clause 10 C.C. of the agreement to the arbitrator for adjudication and final award in purported exercise of power u/s 8 and 20 of the Act. By the impugned judgment the Court below granted four months time to the arbitrator to pronounce and submit the final award from the date of the order.

11. That as against this order dated 1.10.94 this present appeal was filed before the Division Bench.

12. Before we go further let us have a look at the application filed in original. In the original application item 7 of the claim reads as follows:

7. Escalation payment on gross amount of final bill. This is required to be paid as per Clause 10 C.C. of the agreement according to price index increase during the work period. Escalation payment also to be paid on claimed amount.

13. The order dated 30.11.92 modification of which was sought has already been quoted above. The subsequent application was filed and in paragraph 5 of the

application for modification it has been stated as follows:

That your humble Plaintiff Petitioner pursuant to the said order dated 6.5.94, of the arbitrator submitted his claim/comment in regard to co-efficient of Clause 10 C.C. bill vide his Memo No. HC/554/94 dated 12.5.94 (photocopy enclosed). Petitioner state that the dispute in principle in regard to Claim No. 7 remain unaltered and modification in regard to claim amount only based on factual aspect.

Particulars of claim Original amount Modified amount

Claim No.7 Escalation payment on payment on gross amount of final bill. This is required to be paid as per Clause 10 C.C. of the agreement according to price index increase during the work period. Escalation payment also to be paid on claimant amount. Rs. 94,000/- Rs. 6,29,696/- (approx.)

And the prayer made is as follows:

Under the circumstances stated above, your humble Plaintiff-Petitioner most respectfully prays that your honour may be graciously pleased to call for the records of the Tile Suit No. 100 of 1991 from the District Record Room and then pass necessary order for forwarding the modified escalation statement to the above mentioned arbitrator for adjudication alongwith the claim already made by your humble Plaintiff-Petitioner.

14. The basic difference between the two Judges is that one Judge in paragraph 10 has held that this is merely an amendment Paragraph 10 of the judgment of learned Single Judge (Justice S.L. Saraf) is quoted below:

10. Inasmuch as Section 41 of the Arbitration Act has made all provisions of the CPC applicable in arbitration matters, Order 6, Rule 17, in our view of the matter, is applicable in the instant case. As such, the amendment sought for by the claimant before the award was made without raising any new cause of action but only correction of the quantification of the claim under Clause 10 C.C. was permissible in law. The modification sought for was not an attempt to file a fresh reference but it was by way of amendment of the first reference. It appears on the facts of the case that the Appellant even agreed to supply before the arbitrator the co-efficient under Clause 10 C.C. As such, in our view of the matter, the Court below has rightly permitted the arbitrator to decide the balance claim raised by the Petitioner under Clause 10 C.C. of the agreement. Further, the point raised by Mr Choudhury as to the applicability of Clause 10 C.C. is not for the Court to decide. This is exclusively a matter for the arbitrator. As such, the present application stands dismissed. There shall be no order as to costs.

On the other hand the other Judge i.e.. Hon"ble Justice V.D. Gyani has held as follows:

While it is true that an amendment to pleadings, should be liberally approached, what the claimant-Respondent is seeking is not a mere amendment or

modification of his claim, it is in substance and reality a new plea sought to be introduced and such a plea cannot be allowed both on principles of res-judicata as well as Order 2, Rule 2 of the Code of Civil Procedure. If the claimant Respondent could calculate his claim at Rs. 94,000/- and for want of co-efficient could not properly calculate, there was nothing to prevent him to come out with such a case that the quantification of his claim on account of escalation would be done on furnishing of co-efficient by the Appellant. But under the garb of non-furnishing of the coefficient, he can not be allowed to set forth a new claim which could and ought to have been taken in the first claim petition itself and not in a subsequent application u/s 8/20 of the Act.

15. In support of his judgment Justice Saraf, J relied on the following decisions:

- i) AIR 1949 78 (Privy Council) That was a case under Order 2, Rule 2 of the Code of Civil Procedure. Previously a suit was filed and subsequently Anr. suit was filed and the Privy Council pointed out the evils with regard to splitting of claims.
- ii) 1957 SC 363 (Pirgunda H. Pathil v. Kalgunda S. Pathil)
- iii) A.K. Gupta and Sons Vs. Damodar Valley Corporation,
- iv) AIR 1977 Mad 378 (Md. Saleh v. T.C. Adam).

16. All these cases are with regard to the amendment of pleadings wherein the Court pointed out that the Court should be always liberal with regard to the amendment of pleadings.

17. The principles of amendment particularly can be stated as follows:

- i) Generally all amendments are permissible when they are necessary for determination of real controversy in suit;
- ii) All the same, substitution of one cause of action or nature of the claim for Anr. in the original plaint or change of the subject matter of controversy in the suit is not permissible.
- iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position of facts or mutually destructive allegations of facts are also not permissible through inconsistent pleas on the admitted position can be introduced by the amendments.
- iv) Generally the amendments should not cause prejudice to the other side which cannot be compensated in costs.
- v) Amendment of a claim or relief which is barred by limitation should not be allowed to defeat a legal right accrued except when such consideration is outweighed by the case.
- vi) The basic test of amendment is that whether such amendment will subserve the ends of justice and whether it would cause such a prejudice to the other side which cannot be compensated in terms of money.

18. In the earlier application, the claim for escalation was 94,000/- (Rupees ninety four thousand) only and that was awarded and after long lapse of time this was sought to be raised to 6,00,000/- and odd. Even if this is considered as application for amendment it is at a belated stage and an amendment sought at a belated stage may always be rejected one of the test to reject the amendment is that it should not cause injustice to the other side and Anr. test is that whether the affect of the amendment is to take away the right from the Defendant accrued to him by lapse of time. Even if the matter is considered from that angle this application for amendment should not have been allowed by the trial Court. But I am not holding that this is an application for amendment. Rather as held by the learned Single Judge i.e. Justice Gyani this is basically an application to introduce new case and new cause of action. Further, an undertaking was taken before the arbitrator which has been quoted above, and that undertaking also bars the contractor from raising a new claim. If the contractor really was entitled to Rs. 6.00 lacs and odd he should have raised his claim in his first application and he cannot raise it after the award is passed by the arbitrator taking help of the subsequent order of arbitrator. Hon"ble Mr Justice Gyani has placed reliance in 1960 SC 53 (K.V. George v. The Secretary to Govt. Water and Power Deptt. Trivandrum and Anr.). That also was a case with regard to the arbitration and the Supreme Court categorically held in that case that Order 2, Rule 2 applies to arbitration proceeding. The relevant paragraph is paragraph 16 wherein the law has been laid down as follows:

In the instant case, the contract was terminated by the Respondents on April 26, 1980 and as such all the issues arose out of the termination of the contract and they could have been raised in the first claim petition filed before the arbitrator by the Appellant. This having not been done the second claim petition before the arbitrator raising the remaining disputes is clearly barred.

19. So, this claim not having been raised earlier cannot be raised at a subsequent point of time and it will be hit by Order 2, Rule 2 CPC as pointed out by the Supreme Court. Hon"ble Justice Gyani also has relied in Daryao and Others Vs. The State of U.P. and Others, with regard to the position of law that the principle of res-judicata as contained in Section 11 of the CPC is also applicable to arbitration case, and that is also the law laid down by the Apex Court in AIR 1987 SC 833 (Satish Kumar v. Surinder Kumar) wherein the Supreme Court pointed out that the award is not mere a waste paper but has some legal effect and it is final and binding on the parties and it cannot be said that it is a waste paper unless it is made a rule of the Court. The Supreme Court further pointed out that the award is, in fact, a final adjudication of the Court of the parties" own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award which is on the face of it regular, is conclusive upon the parties of the controversy submitted. As between the parties and their privies, an award is entitled to that respect which is due to judgment of a Court last resort. Even from that angle also the second claim is barred. The learned Single Judge Mr Justice Gyani relied on 1995 (6) SCC 933 (Deva Ram v. Iswar

Chand) wherein it was pointed out that if the requirement of law is that in one suit the whole claim should be raised failing which if the subsequent claim is not based on different cause of action the subsequent claim will be a bar.

20. Considering the matter from all these angles I agree with the judgment of Hon"ble Mr Justice Gyani and set aside and quash the impugned order of the learned Asstt. District Judge, Cachar at Silchar.

21. I have heard Mr K.K. Mahanta, learned advocate for the Appellant and Mr N.M. Lahiri, learned advocate for the Respondents.