
(1995) 09 DEL CK 0020

In the Delhi High Court

Case No : I.A. 10885 of 1992 in Suit No. 3209 of 1991

Vivek Jain

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 09-09-1995

Acts Referred:

Citation : (1995) 09 DEL CK 0020

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : Mr. S.K. Khanna, for the Appellant; Mr. Ashok Bhasin, for the Respondent

Judgement

Mr. Jaspal Singh, J.—To the dissatisfaction of the petitioner, the Arbitrator has dismissed his claim on the ground that the same is barred by res-judicata. While petitioner insists it is not, the respondent not only claims that it is, it also stresses that I cannot adjudicate on the matter. The battle lines are thus clearly drawn.

2. The scenario does not require a broad canvass. The Award itself provides it for us. The Delhi Electric Supply Undertaking (D.E.S.U. for short) intended to sell the old "B" Thermal Power Station of the Rajghat Power House and invited tenders for the same. Among the tenders offered one was from the petitioner and it so happened that his tender offer was accepted and a sale letter was issued. The agreed sale price was Rs. 1,65,61,007/- besides local taxes. The petitioner deposited in all a sum of Rs. 44,06,251/- but the D.E.S.U. cancelled the contract on the grounds that the petitioner had not made payments towards the sale value as per the agreed schedule. It also forfeited the earnest money or rupees one lakh and withheld the amount of Rs. 44,06,251/-. This gave rise to rounds of litigation. The first was in the form of a writ petition challenging the order of cancellation of the contract of sale. It was CW 2440 of 1988 and was dismissed by a Division Bench of this court on December 2, 1988. A SLP in the Supreme Court against that order met its Waterloo on December 7, 1988. The order of the

Supreme Court runs as under :

"ORDER

After hearing learned counsel for the petitioner we do not find any merit in the petition. The petitioner's contention that the amount deposited by him is liable to be refunded to him, cannot be covered in the present petition. If the petitioner may approach the appropriate authority this may be considered. SLP is dismissed."

Thereafter, the petitioner filed a suit for declaration that the subsequent sale of "B" Thermal Power Station in favor of M/s. S. S. Jain and Co. was null and void and in the alternative that the contract of sale in favor of the present petitioner was valid and subsisting and the cancellation thereof was illegal, null and void. Along with the suit there was an application for ad interim injunction. The learned Single Judge dismissed the application holding that in view of the judgment in the writ petition, the relief claimed was barred by res-judicata. In appeal the Division Bench confirmed that order and the petitioner once again saw himself in the portals of the Supreme Court. The Supreme Court dismissed the SLP on February 15, 1989 and what is important is that while referring to its earlier order of December 7, 1989, it observed :

"This court further made it clear that the petitioner's contention that the amount deposited by him with the tender filed by him was liable to be refunded to him was not covered in the aforesaid writ petition."

On January 12, 1990, the suit of the plaintiff was dismissed in default. It was never got restored.

3. Yet another round of litigation took the form of arbitration proceedings. The basis was provided by a claim for a sum of Rs. 72,44,585/- set up by the present petitioner. The claim was contested and the DESU on its own part set up a claim for Rs. 26,601.45 paise. The learned Arbitrator by his Award dated September 23, 1991 rejected the claim of the DESU and as regards the claim of the petitioner the same was held to be barred by res-judicata with the following remarks :

"It is evident that the claimant's claims are dependent on the issue of cancellation of the contract and the rest of the claims flow there from. It is crystal clear that the reliefs sought by the claimants in the Writ Petition No. 2240/88 and Suit No. 3074/88 and in the present arbitration proceedings were substantially the same and those issues have already been decided by the court as discussed above. In view of the above I hold that the claimants' claims in the present arbitration proceedings could not be re-opened being barred by the principles of res judicata. Hence the claimants' claims are not maintainable. The claimants contention that since the suit was dismissed on default and as such the issues have not been finally decided, is not tenable. They had abandoned the suit and it was not withdrawn by them. So the consequences follow."

The petitioner is an unhappy man. He says there was no justification for the Arbitrator to apply the principle of res-judicata or to otherwise reject his claim.

4. The learned Counsel for the respondent argued that since the Arbitrator had returned a finding on question of law, the Award could not be interfered with on the ground of error of law apparent on its face. Reliance was placed on Russel's Law of Arbitration (20th Edn.) where at page 22 it is stated :

"A pure question of law may be referred to an Arbitrator and where such a question is specifically referred his award will not be set aside merely upon the ground that his decision is wrong."

And, to the following in Halsbury's Laws of England (Vol. 2 para 623 4th Edn.) :

"If a specific question of law is submitted to the Arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside"

Unfortunately for the respondent the passages reproduced above have no application to the case in hand since no specific question of law was referred to the Arbitrator.

5. It is essential to remember that a case where disputes are referred to an Arbitrator in the decision of which a question of law becomes material would be distinct from a case in which a specific question of law has been referred for decision. To quote Lord Russel :

"The authorities make a clear distinction between these two cases, and as they appear to me, they decide that in the former case the court can interfere if and when an error of law appears on the face of the award, but that in the later case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

(E. R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd. (1933) All ER 616.

6. In a case like the present one where the question of law is not specifically referred, erroneous application of law Constituting the very basis of the award and apparent on its face would render the award invalid (See : State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, ; Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, .

7. This much with regard to the first question.

8. Is this a case of erroneous application of law ? This is the next question which stares at us and craves for an answer.

9. I have already furnished above the essentials of the past litigation and the orders passed therein. That the first writ petition did not involve the question with regard to the refund of the amount deposited by the petitioner and that the question had been left open is clearly borne out from the order of the Supreme

Court of December 7, 1988. Had this question been covered or had this question been decided, the Supreme Court would not, with respect, have observed :

"The petitioner's contention that the amount deposited by him is liable to be refunded to him cannot be covered in the present petition. If the petitioner may approach the appropriate authority this may be considered."

The decisions on res-judicata are large in number and I need not deal with them individually. What needs to be mentioned is that Section 11 of the CPC is not an exhaustive statement of the doctrine of "res-judicata" and the principle has a wider application than is warranted by the strict language of the Section (see : *Munni Bibi v. Trilokinath* 53 All 103. However, it also needs to be emphasised that to the extent Section 11 goes and in relation to the cases falling within its enacted words, it would not be permissible to disregard or go outside the conditions and limitation imposed by the Section. And, what are the conditions and limitations ? The Supreme Court delineates them in *Sheodan Singh v. Daryao Kunwar* (AIR 1966 SC at page 1334), as follows :

"A plain reading of Section 11 shows that to constitute a matter res-judicata, the following conditions must be satisfied, namely (1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit; (2) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim; (3) The parties must have litigated under the same title in the former suit; (4) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and (5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further Explanation I shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order Therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied."

The learned Arbitrator states that the matter directly and substantially in issue before him was directly and substantially in issue in the writ petition. It would not be taken to be so as the claim for refund of the amount deposited by the petitioner was held by the Supreme Court to be not "covered" in the writ petition and further as the Supreme Court had left it open to the petitioner to "approach the appropriate authority" with regard to it. This much as far as the writ petition is concerned.

10. The learned Arbitrator has also sought to justify his finding regarding res judicata by holding that the civil suit instituted by the present petitioner was "abandoned" by him inasmuch as it was got dismissed on default of appearance and as the claim of the petitioner in that suit as also in the writ petition was

"dependent on the issue of cancellation of the contract."

11. The claim in the suit was held by the learned Single Judge as well as by a Division Bench and the Supreme Court to be barred by res-judicata in view of the finding in the earlier writ petition. However, as in the earlier writ petition the claim for refund of the deposit was held to be not "covered", The argument of the learned Arbitrator that the question of claim for refund "flows" from the issue of "cancellation of the contract" cannot be accepted.

12. It is true that the suit was dismissed in default. The word "abandoned" in that context is a novelty. Can that dismissal attract the principles of res-judicata ? with respect, I do not think so. In order that a matter may said to have been heard and finally decided, the decision the former suit must have been on the merits. Where, as in the case in hand, the suit is dismissed for default, it cannot be said to have been heard and finally decided and the decision not being on the merits would not be res-judicata in a subsequent suit.

For the reasons recorded above, I set aside the award so far as it relates to the claim of petitioner and remit the same for a fresh look and decision in accordance with law.

Award set aside.