

CASE NO.:
Appeal (civil) 8052 of 2001

PETITIONER:
State of Rajasthan

RESPONDENT:
M/s Nav Bharat Construction Co.

DATE OF JUDGMENT: 28/03/2005

BENCH:
CJI, D.M. Dharmadhikari & P. K. Balasubramanyan

JUDGMENT:
J U D G M E N T
With

CA No.8053/2001, CA No.8054/2001, CA No.8055/2001

And

CIVIL APPEAL NO. 1400 OF 2002

M/s Nav Bharat Construction Co.
Thr. Partner

Appellant

State of Rajasthan

Vs.

Respondent

Dharmadhikari J.

These appeals arise out of an award dated 29.9.1997 passed by the sole Arbitrator viz. S.S. Mathur, retired Additional Chief Engineer, Public Works Department, on a reference of dispute concerning civil construction work awarded to the Contractor by the State of Rajasthan. The arbitration proceedings were regulated by provisions of the Arbitration Act, 1940 (for short 'the Act'). The sole Arbitrator awarded a sum of Rs.6,68,058.16 with interest @ 18% per annum from the date of the award till date of decree or payment, whichever is earlier.

The State of Rajasthan under Section 30(1) of the Act filed objections to the Award. The Contractor by application under Section 17 of the Act prayed for passing a decree in terms of the Award. The objections of the State were rejected by the Court of the District Judge who made the Award. Rule of the Court by passing a decree in terms thereof on 5.10.1999. In the order making award Rule of the Court and passing a decree thereon, there was omission of not mentioning the interest payable on the amount awarded. On the application under Section 152 of the Code of Civil Procedure (CPC) filed by the Contractor for rectification of the decree, the court passed the order on 29.4.2000 and granted a decree of interest @ 12% p.a. on the awarded sum of Rs. 6,68,058.16 from the date of award i.e. 29.9.1997 till the date of payment. Pursuant to the above order a modified decree for the above-mentioned amount with 12% future interest was passed.

We shall first dispose of the appeals preferred by the State against the revisional and appellate orders of the High Court arising out of orders passed by the civil court during proceedings of the arbitration.

Civil Appeal No. 8052 of 2001

Civil Appeal No.8052 of 2001 arises from of an order of the High Court passed in appeal confirming the order of the civil court dated 24.8.1992 whereby, in exercise of powers under Section 8B read with Section 41(b) of the Act, in place of the arbitrator initially appointed, new arbitrator was substituted on the suggestions and proposals of the parties.

Learned counsel appearing for the State of Rajasthan invited our attention to the contents of clause 23 of the Agreement on the basis of which the arbitration proceedings were initiated. Clause 23 reads thus:

"Clause 23: Except where otherwise specified in the contract the decision of the Chief Engineer of the Government of Rajasthan for the time being shall be final conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, decisions, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, of the contract by the contractor shall be final, conclusive and binding on the contractor."

On behalf of the State, it is argued that the aforesaid clause, making a provision for settlement of questions relating to specification, design, quality and workmanship and other technical aspects by the sitting Chief Engineer of the Government, has not been held to be an arbitration clause in a series of the decisions of this Court. Reliance is placed on Executive Engineer, REO vs. Suresh Chandra Panda (d) through LR's. [1999 (9) SCC 92]; State of UP vs. Tipper Chand [1980 (2) SCC 341]; State of Madhya Pradesh vs. KK Shukla [2001 (10) SCC 194]; and Prabartak Commercial Corporation Ltd. vs. Chief Administrator, Dandakaranya Project [1991 (1) SCC 498].

The submission made on behalf of the State that the above-quoted clause 23 of the Agreement is not an arbitration clause has to be accepted because exactly similar clause was held to be not an arbitration clause in the case of Bharat Bhushan Bansal vs. UP Small Industries Corporation Ltd [AIR 1999 SC 899].

Learned counsel for the State then argued that both the award and the decree having been passed on a reference under clause 23, which is not an arbitration clause, are liable to be set aside on that short ground.

We have heard the Contractor appearing in person. It is not disputed that the sitting Chief Engineer, on reference of dispute in terms of clause 23, failed to decide the dispute, therefore, an application under Section 8 of the Act was made to the civil court to substitute him by an arbitrator. The record of the proceedings before the civil court, (copies of which are before us) show that on the application seeking substitution of the arbitrator, the Contractor and the State through their counsel were heard. Suggestion of names for new arbitrator were taken from the parties. The court on 14.3.1995 passed a consent order appointing Shri SS Mathur, retired Additional Chief Engineer as the sole arbitrator to adjudicate upon the disputes and decide the claims made by the Contractor. The relevant part of the order of the civil court made on 14.3.1995 reads:

"The Advocates of the concerned parties have given their consent for

appointment of Shri SS Mathur retired Additional Chief Engineer, Udaipur as Sole Arbitrator. The advocate of the applicant has no objection.

Hence, the application of the applicant is accepted. Shri SS Mathur retired Additional Chief Engineer, Udaipur is appointed Arbitrator for deciding the dispute in accordance with the agreement No.75 of 77-78 executed between the parties. The arbitrator shall pass the award after hearing the parties in accordance with the provisions of the Act and the terms and conditions of the agreement.

The arbitrator be informed accordingly."

The sole arbitrator, thus, substituted on consent of parties conducted and concluded the arbitration proceedings. The State participated in the arbitration proceedings without any demur or protest.

We asked the learned counsel appearing for the State whether in their objection petition filed against the award under Section 30 of the Act, any objection on the competence of the substituted arbitrator to make the award in terms of clause 23 was raised. The copy of the application under Section 30 of the Arbitration Act raising objection to the award filed by the State has been made part of record in these appeals. We have gone through the objection petition preferred under the said Section 30 of the Act. We find that no objection was raised on the competence of the arbitrator or the validity of the arbitration proceedings under Clause 23 of the agreement.

Clause 23 of the Agreement is undoubtedly not an arbitration clause and the sitting Chief engineer, to whom earlier reference was made, could not have acted as an arbitrator and made the award. The sitting Chief Engineer to whom initial reference was made did not complete the arbitration proceedings. The substituted arbitrator was a retired Chief Engineer and parties agreed to his appointment and submitted to his jurisdiction. By consent of parties, he was chosen sole arbitrator and disputes were referred to him. The State, without demur or protest, submitted to the jurisdiction of the arbitrator and participated in the proceedings. The State is estopped on the doctrine of acquiescence and waiver from raising objection to the competence of the substituted arbitrator and validity of the arbitration proceedings by taking recourse to clause 23 of the agreement on the basis of which initial reference was made to sitting Chief Engineer. See following observations in the case of *Prasun Roy vs. Calcutta Metropolitan Development Authority* [1987 (4) SCC 217]:

"The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction... Basically the principle of waiver and estoppel is not only applicable where the award had been made but also where a party challenges the proceedings in which he participated."

Therefore, this appeal i.e. CA No.8052 of 2001, preferred by the State, also deserves to be dismissed.

Civil Appeal No. 1400 of 2002

CA 1400 of 2002 has been preferred by the Contractor whereby its civil revision petition against the order granting 12% and not 18%

future interest on the awarded sum under his application under Section 152 CPC, was dismissed. This court issued notice on the SLP and subsequently granted leave to appeal on a limited question as to why the decree drawn up in conformity with the order making award rule of the court should not direct payment of interest pendente lite and future at the rate of 18% per annum. During pendency of this appeal, IA No.4 of 2002 has been made by the Contractor seeking permission to argue the appeal on the additional ground that interest awarded by the arbitrator on pre reference period, pendente lite, and post award should in aggregate be deemed as principal amount awarded for the purpose of awarding future interest on the composite sum at the rate of 18% per annum.

The civil court on the application of the Contractor under Section 152 CPC had modified the decree by directing payment of interest @ 12% on the awarded principal amount specified to be Rs. 6,68,058.16. The period for which interest has been awarded is from the date of the award 29.9.1997 till the date of payment.

The Contractor who appeared in person submitted that for carrying out the work awarded under the contract he had to raise loan and borrow money from banks and financial institutions at the rate of interest ranging between 18% per annum to 21% per annum. The arbitrator has awarded interest at the rate of 18% p.a. from the date of award till the date of decree or payment. When the award was made rule of the court, the civil court could not, without assigning any reason, reduce the rate of future interest from 18% to 12% on the awarded amount of Rs.6,68,058.16 by treating it to be the total principal sum. Reliance is placed on the five Judges Bench decision of this Court in the case of Central Bank of India vs. Ravindra [2002 (1) SCC 367].

The submission of the contractor is that on the aggregate amount that is principal sum plus pendente lite and future interest from date of award to the date of decree or payment whichever is earlier, he was entitled to grant of decree by civil court of future interest @ 21% as claimed by him and in any case @ 18% as awarded by the arbitrator.

On behalf of the State, the award of interest on the aggregate sum, that is, the principal sum plus all interests payable, upto the date of decree or payment has been questioned on the ground that it would amount to directing payment of interest on amount of interest which is not permissible under section 29 of the Act. It empowers the court to award future interest only on the 'principal sum' excluding the interest amount.

On the question of rate of future interest from the date of decree to the date of payment, Section 29 of the Act empowers the Court to order payment of interest at such rate as the court deems reasonable to be paid on the principal sum as adjudged by the award and confirmed by the decree. The decision in the case of Central Bank of India vs. Ravindra (supra) was based on Section 34 of the Code of Civil Procedure as it stood prior to and after its amendment by Act No.66 of 1956 and has no direct application to the rate of future interest payable on the principal sum awarded by the arbitrator in the proceedings under the Arbitration Act. The interest @ 12% awarded on the principal sum by the court cannot be held to be so low as to treat it as unreasonable. We decline to interfere under Article 136 of the Constitution in the rate of interest awarded by the civil court treating it to be a reasonable rate. The appeal, preferred by the Contractor claiming future interest at higher rate, is dismissed.

Civil Revision Petition filed by the State of Rajasthan against the order rejecting objection under Section 30 of the Act was dismissed by the High Court by impugned order dated 21.12.2000 on the ground that Revision was barred by limitation and there was no sufficient cause to condone the delay under Section 5 of the Limitation Act.

We have perused the impugned order whereby application seeking condonation of delay was rejected and the Revision Petition was dismissed as barred. The cause for the delay stated was long strike of government employees. In the application seeking condonation of delay there was no mention as to when the strike commenced and terminated. The application was completely vague and the High Court committed no error in rejecting it. We find no ground to interfere in the said order. Civil Appeal No.8053 of 2001 is, therefore, dismissed.

Civil Appeal No. 8055 of 2001:

Against the order of the Civil Court rejecting objection under Section 30 of the Act and making award rule of the Court, an appeal was also filed by the State. The said appeal was also barred by time and the cause shown for seeking condonation of delay was same that there was strike of government employees. For the same reason on which the connected civil revision was dismissed by the High Court, the appeal against rejection of objection under Section 30 of the Act and passing decree in terms thereof was also dismissed as barred by time. Since we have found no error in the order of the High Court dismissing the revision petition as barred by time, the dismissal of appeal as barred by limitation on the same ground also deserves to be maintained. This appeal stands dismissed.

Civil Appeal No. 8054 of 2001

Civil Appeal 8054 of 2001 has been preferred by the State of Rajasthan against the order whereby the High Court has upheld the modification of the decree passed by the civil court in terms of the award which directs payment of future interest on the awarded amount from the date of award till the date of payment. The High Court in dismissing the appeal against the said order has stated that merely an accidental error or an omission in the initial decree passed, was corrected and that too with the consent of the parties. This appeal preferred against the order of the High Court passed on consent of parties cannot be interfered with. It is also, accordingly, dismissed.

In the conclusion, all the appeals preferred by the State and the appeal and the interlocutory application preferred by the Contractor are dismissed. We direct the parties to bear their own costs in these appeals.