REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 6107-6108 OF 2017

M/S S.D. SHINDE TR. PARTNER …APPELLANT(S)

VERSUS

GOVT. OF MAHARASHTRA & ORS. …RESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 6109 OF 2017

J U D G M E N T

S. RAVINDRA BHAT, J.

1. These appeals challenge a common judgment of the Aurangabad Bench of the Bombay High Court[1]. The appellant was aggrieved by the judgment of the trial court[2]. The trial court had set aside an award made in the appellant's favour[3] awarding substantial amounts towards its claim, in the backdrop of a road construction contract.

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1 Dated 13.08.2009, in AO 108/2005; the appeal to the Division Bench was rejected on the ground of maintainability.
2 Joint Civil Judge, Senior Division, Ahmednagar, in R.C.S. No.595/1997.
3 Dated 14.12.1997.

2. The first respondent, the Government of Maharashtra Irrigation Department, through Executive Engineer (hereafter EE), issued a tender notice for the work "*Construction of Earth Work, structure and lining in Km. No.91 to 110 Kukadi Left Bank Canal*". This tender was accepted, and a work order was issued on 23.07.1983; the estimated cost of the work was ₹ 4,01,77,153/-. The contract between the parties visualized the period for completion of work to be 18 (Eighteen) English calendar months. The due date for completion of work, thus, was 22.01.1985. It was, however, not completed; several extensions were given, on the understanding that they were not due to the contractor's fault.

3. Disputes arose; the appellant approached the civil court for appointment of an arbitrator, in terms of the contract. Eventually, the Civil Judge, Ahmednagar[4], appointed an arbitrator for "*settling the dispute in respect of payment of additional and extra work carried by the petitioner outside of Contract LCB 9/83 -84.*"

4. The arbitrator, by his award[5], held the claimant/contractor entitled to the sum of ₹ 1,50,07,000/- towards various heads and interest at 12% p.a. for the period 10.12.88 to the date of commencement of arbitration (working out to ₹ 133.22 lakhs). The arbitrator rejected the state's counter claim.

5. The respondent state, aggrieved by the award of the arbitrator, challenged it under Sections 30/33 of the Indian Arbitration Act (hereafter

4 By order dated 25.02.1997 in Arb MA 1/1995.
5 Dated 14.12.1997.

"the Act"), claiming that it was the result of legal misconduct. The trial court set aside the award; this impelled the contractor to approach the High Court, which rejected his appeal.

Findings of the Court below

6. Both the trial court and the High Court held that the award was vitiated by the legal misconduct of the arbitrator under the old Arbitration Act[6]. The courts concluded that the claim was time-barred since the disputes in relation to the contract originally awarded in 1983 with the stipulation of the work being completed within eighteen months were no doubt extended with parties' consent. It was only in 1991 that the claim for nomination of the arbitrator was made, which finally led the contractor to approach the Court under Section 8 of the Act in 1995. It was next held that the order referring the disputes to arbitration [by the Civil Judge (Senior Division)] on 25.02.1997 (in Arb. M.A. 1/1995) were in relation to the works carried on by the contractor under the contract. The courts held that the award of amounts exceeded the terms of reference in respect of at least three items. Consequently, it could not be sustained.

7. It was held that the claims could not be pursued because the original contractor died and all legal representatives had not joined in the proceedings: there appeared to be *inter se* disputes amongst them. This fact was not disclosed

6 Indian Arbitration Act, 1940.

during arbitration proceedings, vitiating the award. It was also found that in terms of the contract, the claim had to be lodged within a particular time - within 30 days of the expiration of the defect liability period. In this regard, it was held that the claim was made much beyond that period of time and, therefore, contractually precluded.

Contentions of the parties

8. Mr. Vinay Navare, learned senior counsel appearing for the contractor/appellant urged that the findings of the courts below are unsustainable. He submits firstly that as a matter of law, the finding with respect to the claims being time-barred in law is untenable; he relies upon the judgment of this Court reported as *Major (Retd.) Inder Singh Rekhi v Delhi Development Authority*[7]. It was urged in this regard that the final bill relating to the contract was furnished to the appellant's predecessor on 14.12.1992. The contractor's claim for the amounts made earlier; were rejected by the EE; the Superintending Engineer (hereafter "SE") had been approached, yet no decision was taken for a while. It was in the light of these facts that the contractor sought for nomination of arbitrator on 21.01.1991. Thereafter, the final bill was prepared on 14.12.1992. Therefore, the contractor preferred an application under Section 8 of the Act, which was ultimately decided on 25.02.1997. The arbitrator's appointment was within the knowledge of the department, which was represented through the government pleader.

7 1988 [3] SCR 351.

9. Learned counsel pointed out to specific findings of the Arbitrator on aspects such as delay on the part of the Engineer in handing over the site; delay in handing over drawings and deciding technical issues; shortage in cement supply; release of waters into the canal which impeded the work and their duration; shortage of finances and funds for timely release of interim payments; unabsorbed overheads or loss of profit. It was pointed out that the arbitrator did not allow all these claims but was discerning in the findings, in allowing them partially. Counsel pointedly referred to the contractor's claim mentioned in the letter written to the EE on 23.09.1988. That led to the rejection of the initial claim, which resulted in an appeal to the Superintending Engineer which proved futile. It is pointed out that the overheads were standing charges and increased for all the work beyond the stipulated period, which had to be compensated. The main subheads of this claim included salaries of supervisory staff; camp establishment; interest of borrowed capital; stationery; postage; cost of tools and plants; extra cost for maintenance of labour camps; water supply; medical aid; remobilization of labour; restarting machinery and plants after every working season; uncovered advances from piece rate workers and skilled labourers; charges towards security of the colony, camp etc. and extra wear and tear of tyres and tubes, etc.

10. It is pointed out that all these claims were duly taken into account, and the findings of the High Court that the arbitrator travelled beyond the claim and

the contract was without factual basis. Regarding the sum granted with respect to the stoppage of work during the release of canal, the arbitrator took into account the actual period based upon the evidence produced (C55 and C57), the duration was between 23.08.1987 to 15.10.1987 and 20.07.1988 to 28.08.1988 and between 10.03.1989 to 02.07.1989. It was pointed out that the arbitrator found that the department had released waters in the *Kharif* and *Rabi* weather without notice. Furthermore, not only was it impossible to carry on work during the release of water it was not possible even for a limited duration after that during the canal drying up process, which entailed some time.

11. Learned counsel urged the court to interfere with the findings arguing that the jurisdiction of the Civil Court to interfere with the factual findings and in the award as also on the interpretation placed by the Arbitrator, to the terms of the contract to be considered within the narrow confines of what is legitimately "legal misconduct".

12. Mr. Rahul Chitnis, appearing for the state, urged that the final bill was prepared on 14.12.1992 and was paid on 31.12.1992. It was accepted under protest. However, notice was given under clause 54A of the agreement dated 23.09.1988, and thereafter, appeal was filed before Superintending Engineer. The contractor approached the court on 18.01.1995, long after the period of limitation had expired.

13. Learned counsel relied on Clause 55A of the contract to urge that unless the claims were preferred within 30 days of expiry of the defect liability period, they could not be entertained. This condition required that no extra items or claims could be pressed unless they were sought within that period. In this case, the claim was not lodged within that period, as it was filed much later. Therefore, it was contractually barred, and the courts below correctly concluded it to be the case.

14. Learned counsel also invited attention of this court to the observations of courts below, highlighting that the original contractor had died and all his legal heirs and representatives were not disclosed, and brought on the record, which became defective. It was lastly urged that in terms of the contract, claims for loss of profit and for overheads were inadmissible. The award granted the claim for overheads, which is in clear error, and consequently, it was rightly set aside by the courts below.

Analysis and Findings

15. Before proceeding with the analysis of the rival contentions, it would be necessary to discuss the relevant terms of the contract. Clause 54A deals with the settlement of disputes. It stipulated that wherever the contractor considered any work demanded to be outside the requirements of the contract or considers any drawings, records or rulings of the EE in any matters in connection with or arising out of the EEs decisions, the contractor had to seek written instructions

or decisions. The EE had to give his written decision or instruction within 30 days. Thereupon, the contractor had to proceed to comply with the instructions. In case the EE did not decide on any issue after being requested, or the contractor was dissatisfied with the decision, the latter could "*appeal to the upward authority who shall afford an opportunity to the contractor to be heard"* in support of the appeal. The higher authority, i.e., in this case, the SE had to give a decision within 60 days of the receipt of the appeal.

16. The stipulation for arbitration was at clause 55A, which was to be in respect of matters arising out of the contract. Clause 58 dealt with compensation in respect of delay. One of the conditions for arbitration stipulated in clause 55A is as follows:

> *"Neither party is entitled to bring a claim in arbitration if the arbitrator has not been appointed before the expiration of 30 days after defects liability period."*

17. The State's argument is that the concurrent findings are justified, both on the ground that the claim was time-barred and also on the ground that the letter and condition for initiating arbitration, i.e., claiming amounts within 30 days after the expiry of the defects liability period and that they were also beyond the stipulated 30 days period after the expiry of the defect liability period.

18. As far as the argument with regard to delay is concerned, the judgments of this court have clearly held that in such matters, the claim crystallizes upon the issuance of the final bill – which in this case was on 14.12.1992. The

contractor's complaint with respect to payment was first aired to the EE in 1988; the rejection resulted in an appeal before the SE, who never rendered his opinion or decision. Even in 1993, (after the final bill was drawn), the SE's decision was not given. In the circumstances, the claim before the civil court for the appointment of the arbitrator: made in January, 1995 was within the period of limitation. In *Inder Singh Rekhi* (supra), it was held that:

> *"It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28th February, 1983 and there was non-payment, the cause of action arose from that date, that is to say, 28th of February, 1983.*
> *It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim.*
> *The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. (See Law of Arbitration by R.S. Bachawat, 1st Edition, page 354.)*
> *There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."*

In *J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd. and Another,*[8] this court again addressed the question of limitation as follows:

> *"…The Appellant is obviously confusing the limitation for a petition under Section 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced.*

8 2008 [2] SCC 444.

> *26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition Under Section 8(2) of the Act. Insofar as a petition Under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration."*

In these circumstances, the state's arguments are insubstantial and are rejected, with regard to the correct position in law, and the facts of this case.

19. As far as the question of claims not being within the contracted period, i.e., within the 30-day time granted after foreclosure of the contract is concerned, in the opinion of the court, that issue does not arise having regard to the facts. On account of the inordinate delay (which occurred in the decision by the authorities, resulting in five extensions of time by mutual consent), the contractor voluntarily sought foreclosure. That request was acceded to by the department. There is no dispute that originally, the period of completion of the contract/works was eighteen months. The request for foreclosure, therefore, was deemed reasonable by the department and accepted upon receipt of the appellant contractor's letter dated 06.04.1990. Such being the case, there could have been no objection to delay in submission of the claim for dispute resolution or arbitration – given that the department itself had sat over the request for settlement of disputes for more than 6 years. Moreover, the defect

liability period would end only upon both parties expressing satisfaction and recording it in an agreed manner or predetermined manner. Concededly, that event never occurred.

20. Another area in which the state had argued and succeeded concurrently was that the award granted compensation in respect of days when water releases were made in the canal that led to disruption in work. The award[9] noted that the explanation carved out for the purpose of the work was the period when no work could be carried on during water releases in the canal at the time of the *rabi* period. The tribunal noted that the work was to be done during the *kharif* period. Further, the tribunal granted award in respect of three periods, 23.08.1987 to 15.10.1987; 20.07.1988 to 08.08.1988 and 10.03.1989 to 02.07.1989. The tribunal consciously refused to grant damages for the period 28.11.1986 to January 1987, when the canal release took place during the *rabi* period. It was only in respect of the other three periods when the releases were not during the rabi season and the period beyond the contract that damages or compensation was calculated at differential rates, aggregating ₹14,18,228/-.

21. This court finds no merit in the respondent state's submission that the record became defective and procedurally the claim became untenable because the tribunal was not informed and the appellant did not bring all heirs of the late SD Shinde on the record. It is noteworthy that this irregularity was cured, so to

9 *Refer para 06.04.2002.*

say, because the trial court's judgment had arrayed all legal representatives of the deceased. Consequently, there is no merit in this submission.

22. The last question relates to the award of damages. Here, this court notices that the arbitrators consciously eschewed the grant of compensation for loss of profit[10]. The contractors had led evidence disclosing the idle machinery charges during the reduced turnover of work during the original period of contract. The charges claimed were based upon evidence such as the number of workmen employed, the value of equipment, interest on the value and the total number of working days adopting a shortfall factor of 0.7192. The sum awarded on this head was ₹15,72,000. The findings on this aspect are fully supported by evidence. Likewise, the compensation for the extended period of the contract was granted at ₹91,28,000. The contractor's evidence and computations were not disputed by the respondent state. This court observes that there is nothing wrong as this award was based upon the materials placed by the parties during the arbitration proceeding. The state did not question them apparently during the arbitral proceedings. So far as the balance amount (₹1.33 crores is concerned), the tribunal granted interest @ 12 % per annum for the period from when notice or interest was given, i.e., 10.12.1988 till the date of the award. The respondent state was granted a reasonable period of two months for payments. Likewise, in the event of failure, 12% future interest was awarded. Given the prevailing

10 *Refer Para 6.1.3 of the Award*

interest rates at that time when the contract was in force, again the court finds the award of such rate of interest neither implausible nor illegal.

23. It is axiomatic that courts, while adjudging whether an arbitration award calls for interference has to be conscious that the arbitrator is the sole judge of facts; unless an error of law is shown, interference with the award should be avoided. In *Bijendra Nath Srivastava v Mayank Srivastava,*[11]*it was observed,*

> *"If the arbitrator or umpire chooses to give reasons in support of his decision it would be open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator umpire on the basis of the recording of such reasons. The reasonableness of the reasons given by the arbitrator cannot, however, be challenged. The arbitrator is the sole judge of the quality of the evidence and it will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal. [See Champsey Bhara & Co v Jivraj Baloo Spq and Wvg. Co. Ltd. (AIR 1923 PC 66); Jivrajbhai Ujameshi Sheth v Chintamanrao Balaji (1964 (5) SCR 480); Sudarshan Trading Co v Govt of Kerala (1989 (2) SCC 38); Raipur Development Authority v Chokamal Contractors (1989 ((3) SCR 144); and Santa Sila Devi v Dhirendra Nath Sen (1964 (3) SCR 410)."*

24. It is also noteworthy that the scope of jurisdiction of a court, under Section 30/33 of the Act, never extended beyond discerning if the award disclosed an *"error apparent on the face of the award"* which is an *"error of law apparent on the face of the award and not an error of fact. The error of law can be discovered from the award itself or from a document actually incorporated therein."* (Refer to *Trustees of Port of Madras v Engineering Constructions*[12]). In the facts of the present case, the award did not, facially

11 1994 Supp (2) SCR 529.
12 1995 (Supp 2) SCR 672.

disclose any error of law; damages were awarded in accordance with principles embodied in law, and the findings were based on the evidence placed before the tribunal. The ruling of the trial courts and the High Court is nothing short of intense appellate review, which is impermissible in law and beyond the courts' jurisdiction.

25. For the above reasons, this court is of the opinion that the impugned judgment as well as the judgment of the trial court, cannot be sustained; they are accordingly set aside. The award is restored. The respondents shall ensure full payment in terms of the award, to the appellant, within eight weeks from today. The appeas are allowed in these terms. The appellant shall be entitled to costs throughout.

.....J.
[S. RAVINDRA BHAT]

.....J.
[DIPANKAR DATTA]

NEW DELHI
AUGUST 22, 2023