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Hindustan Steel Ltd., Bhilai Vs Ram Dayal Das and Company, Durg.

Court: Madhya Pradesh High Court

Date of Decision: Nov. 14, 1969

Acts Referred: Arbitration Act, 1940 â€" Section 33

Citation: (1972) JLJ 520

Hon'ble Judges: R.J. Bhave, J

Bench: Single Bench

Advocate: H.L. Khaskalam and D.P. Agrawal, for the Appellant; N.S. Kale and N.S. Sharma, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Bhave, J.

The non-applicant-Company takes building contracts. It entered into a contract with the applicant-Hindustan Steel Limited for construction of 624

units of single-roomed quarters in the Second and Fourth Sector in Bhilainagar. On 20-9-1962 the work was completed. On 10-7-1963 the

measurements taken by the Hindustan Steel Limited was accepted by the representative of the non-applicant-Company and on the basis of the

said measurements the bills were prepared and payments were made in final discharge of the contract. On 18-10-1963 the partner of the non-

applicant-Company made the following endorsement:

Certified that the final bill, measurements and recoveries thereon are accepted in full and final settlement of this contract. Further it is certified that

we have no other claims of whatsoever in respect of this '' work after payment of this 1 and Receipt.

The actual payment of Rs. 1,95,580 was made on 22-10-1963. These facts are not disputed. It appears that under the contract the contractor-

Company was required to make miscellaneous deposits and was also required to deposit ''Certain amount towards royalty for the material

removed from Government quarries. These deposits were returned to the contractor on 11-12-1964 and 12-5-1965. On 28-3-1966 the

contractor Company, however, served a notice on the Hindustan Steel Limited calling upon it to appoint an Arbitrator as the Company had

decided to refer the matter to arbitration under Clause 61 of the contract, as certain dues amounting to over Rs. 65,000 with interest thereon

remained to be recovered from the Hindustan Steel Limited. In reply to that "notice, the Hindustan" Steel Limited informed that they were

nominating an arbitrator on their side, but at the same time protested that inasmuch as the contract was finally settled, no reference to arbitration

could be made under Clause 61 of the contract. On 10-5-1966 the non-applicant-Company filed a claim before the Arbitrators. Before the

Arbitrators also the Hindustan Steel Limited protested that they bad no jurisdiction to proceed with the arbitration; but as their contention was

over-ruled by the Arbitrators, the Hindustan Steel Limited filed an application u/s 33 of the Arbitration Act claiming therein that inasmuch as there

had been full and final settlement of the contract on 22-10-1963, the contract stood fully settled and discharged and the arbitration agreement

contained in Clause 61 of the General Conditions of the Contract was extinguished and that the Arbitrators had no jurisdiction to adjudicate upon

the claim preferred by the non-applicant-Company. Learned District Judge, Durg, however, rejected the application on the ground that the so-

called endorsement by the partner of the Company witnessing full and final satisfaction of the contract was merely formal and was given under

duress and that the agreement still survived. The Hindustan Steel Limited das, therefore, preferred this revision challenging the order of the learned

District Judge.

2. The learned District Judge held that from the endorsements of the parties it did appear that apparently the intention of the parties was to dissolve

the contract and extinguish it, but the District Judge posed a further question : whether the intention was teal ? The learned District Judge observed

that though on the face of it a document may appear to be clear, there may be ambiguities or equivocations and extrinsic evidence was admissible

in such cases. The allegation of the contractors that they made the endorsement pertaining to the discharge of the contract under duress, pressure

and out of fear that they would be harassed with regard to other contracts and that they would be otherwise refused payments was held to be

plausible because even after the final payment on 22-10-1963, on two occasions, that is, on 11-12-1964 and 12-5-1965 certain payments were

made to the contractors. These circumstances clearly indicated that the endorsements by the parties on the document in question were merely

formal in nature and the parties in fact had not intended to extinguish the contract, and that the parties by their conduct kept the contract alive. In

this view of the matter, it was held that since the contract was subsisting, the arbitration clause also continued and the dispute raised by the

contractors could be referred to the Arbitrators.

3. Now, the words in the endorsement, referred to above, are quite clear There is neither any ambiguity, latent or patent, in the endorsement. No

extrinsic evidence was, therefore, admissible to show any such ambiguity. Apart from this, the two subsequent payments, referred to by the District

Judge, are not with respect to the work done by the contractors for which they were to be made payment under the contract in question. The

payments only represented the return of the deposits which they had made with the Hindustan Steel Limited from time to time. That cannot furnish

any evidence to show that the endorsement was merely formal. Now, whether the extinction of the contract was brought about by the fraud of a

party cannot be a matter which can be decided by the Arbitrators because their jurisdiction depends on the existence of the contract. Whether the

contract existed or not can only be decided by the Civil Court. The proper remedy in such cases is to move the Civil Court for a declaration that

the extinction of the contract was brought about by fraud by a party. The allegation that it was brought about by fraud cannot confer any

jurisdiction on the Arbitrators.

4. It was also pointed out to me by Shri Khaskalam, Learned Counsel for the applicant-Hindustan Steel Limited, that the allegation about

subsequent payments having been made was made by the non-applicant Company, for the first time, in an affidavit filed before the District Judge

after the case was closed for orders and that was done behind the back of the Hindustan Steel Limited and that the Hindustan Steel Limited had no

opportunity to explain as to under what circumstances such payments were made.

5. In The Union of India Vs. Kishorilal Gupta and Bros., , their Lordships of the Supreme Court, after review of the case law on the point,

enunciated the following principles :

(i) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it;

(ii) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation, it

perishes with the contract;

(iii) the contract may be nonest in the sense that it never came legally into existence or it was void ab initio;

(iv) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely

governing their rights and liabilities thereunder;

(v) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it

is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes

with it; and

(vi) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In

those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of

disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these

purposes.

Now, from this enunciation of law by the Supreme Court it is clear that however comprehensive the terms of an arbitration clause may be, the

existence of the contract is a necessary condition for its operation and that it perishes with the contract. It is only when a contract is repudiated, or

there is frustration, or there is a breach of the contract, that disputes arise regarding the terms of the contract and though the performance of the

contract is no longer sought, still the contract exists for the purposes of disputes arising under it, and hence the arbitration clause also exists but

where the contract has come to an end by mutual agreement as having been completely satisfied, the arbitration clause must also be deemed to

have been extinguished along with the contract. Now, from the certificate given by the managing partner, referred to above, it is clear that there

was complete settlement of the contract in question and no dispute remained thereafter. The allegation of the contractors that the contract was put

an end to under duress, pressure and out of fear cannot be enquired into by the arbitrators. That is a matter within the jurisdiction of the civil Court.

The finding of the learned District Judge that because after the final settlement certain payments were made to the contractors it clearly indicated

that the contract was still alive cannot be sustained. Even when the contract was completely satisfied, there was nothing to prevent the Company

from returning some of the deposits which were lying with them, as they had nothing to do with the carrying out of the contract as such. In the

Supreme Court Case, referred to above, their Lordships were considering whether extrinsic evidence could be looked into for the purposes of

finding out whether in the substituted contract the term of reference to arbitration, which was present in the original agreement, could be read. Their

Lordships held that as the document did not disclose any ambiguity, no scrutiny of the subsequent conduct of the parties was called for to ascertain

their intention. This principle is equally attracted in the present case. The certificate, referred to above, is not at all ambiguous. The subsequent

conduct of the Hindustan Steel Limited in returning some of the deposits lying with it to the contractors cannot be taken into consideration while

deciding the question as to whether the contract was put an end to on complete satisfaction. It must, therefore be held that the District Judge was in

error in relying on those factors in holding that the certificate was a mere formal certificate without any intention to put an end to the contract. The

principle of estoppel should also be invoked in this case. The plea of the contractors is that they gave the certificate falsely to secure immediate

payment of the amount because otherwise they would have been harassed by the Hindustan Steel Limited in other contracts and their payments

would have been withheld. The contractors having secured the benefit to themselves by issuing false certificate must be estopped from urging that

the certificate was not genuine and that it did not put aft end to the contract.

6. For the aforesaid reasons, it must be held that the learned District Judge was in error in holding that the contract was still subsisting and that the

matter could be referred to the arbitrators.

7. Shri Kale, Learned Counsel for the non-applicant, however, urged that the Supreme Court Case was not applicable in the present case because

the only question considered by the Supreme Court in that case was of a substituted contract. It is no doubt true that in that case the question was,

about a substituted contract; but the principles laid down by their Lordships are clear enough that if the contract is put an end to by the parties, the

arbitration clause also goes along with it. Shri Kale, then, urged that, in any case, this Court was not entitled to interfere with the decision of the

learned District Judge in exercise of its revisional powers. Me urged that even an illegal decision is not open to correction in revision. He relied on

certain Supreme Court decisions in support of his contention. It is no doubt true that even an illegal decision cannot be interfered with in exercise of

revisional powers by the High Court if the lower Court has acted with jurisdiction and there is no material irregularity or illegality in the exercise of

that jurisdiction. Even so, in my opinion, where by an illegal decision of a Court jurisdiction is conferred'' on some one, who has none in law, the

decision must be set aside in exercise of revisional jurisdiction, as that has intimate connection with jurisdictional facts.

8. For the aforesaid reasons, the revisions is allowed, the order of the District Judge is set aside and it is held that the arbitration clause in the

contract in question no longer survives, as the contract itself was put an end to by the parties, and that the arbitrators have no jurisdiction to

proceed with; the reference made by the non-applicant. The non-applicant shall pay the costs of the applicant here as well as in the Court below.

Hearing fee is fixed at Rs. 150.