State Of Orissa And Anr vs Damodar Das on 15 December, 1995

Equivalent citations: AIR 1996 SUPREME COURT 942, 1996 AIR SCW 351, 1996 ( ) ALL CJ 641, (1997) 1 SERVLR 460, (1997) 75 FACLR 692, (1996) 82 CUT LT 110, (1997) 1 SCT 797, 1996 (1) ARBI LR 221, 1996 (2) SCC 216, (1996) 1 LJR 447, (1996) 1 ARBILR 221, (1996) 2 ICC 528, (1996) 2 CIVLJ 86, (1997) 1 CALLT 1

Bench: K. Ramaswamy, B.N. Kirpal

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           CASE NO.:
Appeal (civil)  2987 of 1982

PETITIONER:
STATE OF ORISSA AND ANR.

RESPONDENT:
DAMODAR DAS

DATE OF JUDGMENT: 15/12/1995

BENCH:
K. RAMASWAMY & FA1ZAN UDD1N & B.N. KIRPAL

JUDGMENT:
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JUDGMENT 1995 Suppl. (6) SCR 800 The Judgment of the Court was delivered by RAMASWAMY, J. These appeals arise from the orders of the High Court of Orissa dated February 15, 1982 made in Miscellaneous Appeal No. 65 of 1982 etc. The respondent-contractor was entrusted with the work "construction of sump and pump chamber etc. for pipes W/s to village Kentile" as per agreement dated September 21,1967, "Village Kentile water supply scheme construction of 20,000 gallons capacity R.R. masonary underground Reservoir" as per agreement dated July 19, 1976 and "Piped water supply to Kentile - Construction of 0.135 M.G.D. Treatment Plant" as per agreement dated October 6, 1977 for the years 1967-68,1975-76 and 1976-77 respectively. In respect of latter two contracts, after executing some work, he abandoned the contract and accepted the measurements and payment of the fourth running bill without any objection on July 19, 1976 and October 6,1977 respectively. With regard to the first, he accepted the measurement and payment of the bill without raising any objection.

On September 15, 1980 the respondent wrote a letter to the Chief Engineer, Public Health, Orissa alleging that disputes had arisen out of and relating to the aforesaid agreement for the works clone and called upon the Chief Engineer to nominate an arbitrator who in turn informed the respondent that since there was no arbitration clause in the agreement, the question of reference to arbitrator did not arise. The respondent thereon filed applications under Sections 8 and 20 of the Arbitration Act. in the Court of Subordinate Judge, Bhubaneswar for appointment of an arbitrator. By orders

dated September 7 and 14, 1981, the Subordinate Judge allowed the application under Section 8 and directed the parties to file the agreement in the court and also to nominate panel of names for appointment as an arbitrator. On revision and appeals having been filed, the High Court, by its order dated February 15, 1982, dismissed the revision and miscellaneous appeals. Different arbitrators came to be appointed by the Court in each case. Thus, these appeals for special leave.

Two contentions have been canvassed before us impugning the legality of the order of the Subordinate Judge as confirmed by the High Court to appoint the arbitrator. The first contention is that there is no arbitration agreement between the parties. Therefore, the question of reference does not arise. It is further contended that works having been executed as earlier as in 1967 and 1976, the dispute is barred by limitation. Another contention raised is that the respondent having received the amounts without any protest, cannot avail of the arbitration. The learned counsel for the respondent, on the other hand, contended that the decision of the Public Health Engineer is final in respect of any claim, right, matter or thing whatsoever in any way arising out of, or relating to. the contract or conditions or otherwise concerning the works or execution or failure to execute the same or any orders or conditions during the progress of the work or after the completion or sooner determination thereof by necessary implication envisages, within its ambit, an arbitration of a dispute or difference between the appellants and the respondent. The respondent having issued a notice calling upon the Chief Engineer to appoint or nominate an arbitrator and the Chief Engineer having failed to do so, he is entitled to invoke the jurisdiction of the Court under Sections 8 and 20 of the Act. The Subordinate Court and the High Court, therefore, were right in their conclusion that the clause in question provides for an arbitration of the dispute. The claim was made on September 15, 1980 and the applications are immediately filed thereafter. Therefore, the claims are not barred by limitation.

The diverse Contentions give rise to the question whether the claims are barred by limitation and whether the clause in the contract gives rise to an arbitration. Section 37(1) of the Arbitration Act, 1940 (for Short, 'the Act') provides that all the provisions of the Indian Limitation Act, 1908 (since repealed and adopted by Limitation Act 1963) shall apply to arbitrations as they apply to the proceedings in Court. Sub-section (2) with non obstante clause provides that "a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement". An arbitration shall be deemed to have commenced under sub- section (3) when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement requiring that the difference be submitted to the person so named or designated. Section 3 of the Limitation, 1963 enjoins the court to consider the question of limitation whether it is pleaded or not.

Russell on Arbitration by Anthony Walton (19th Edition) at page 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of the arbitration runs from, the date on which, had there been no arbitration clause, the cause of action would have accrued: "just as in the case of actions the claim is

not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued". Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred until an award is made time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

In Law of Arbitration by Justice Bachawat at page 549 commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date. when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of" a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) 'action' and 'cause of arbitration' should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.

In Panchu Gopal Bose v. Board of Trustees for Port of Calcutta, [1993] 4 SCC 338, this Court had held that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any terms in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question is when the cause of arbitration arises in I hi- absence of issuance of a notice ..or omission to issue notice for long time after the contract was executed? Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after considerable lapse of time, would be a harassment to the opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to he barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12(2)(b) of the Act.

It is seen that the first contract was of year 1967-68 and was executed in 1967 itself. The amount was stated to have been received in September 1967 itself. The notice admittedly was issued on September 15, 1980 which is hopelessly barred by limitation. Any other construction would feed impetus to choose the covenant at convenience or in concert. With regard to other two claims, it is

slated by the learned counsel for the respondent that the appellant had extended the time for execution of work till 1979 but admittedly in respect of the claim arising out of Civil Appeal Nos. 2544 and 2987 of 1982, he admittedly completed the execution of work on December 30, 1977. In the third case, he abandoned the work. However, in view of the dispute that the respondent had the benefit of extension of the execution of the work, it cannot be laid that there would be no dispute as to whether the claims are barred by limitation. Under those circumstances, it would be difficult to decide whether the two claims are barred by limitation. That would be a matter for decision by arbitrator.

The question, therefore, is whether there is any arbitration agreement for the resolution of the disputes. The agreement reads thus:

> "25. Decision of Public Health Engineer to be final - Except where otherwise specified in this contract, the decision of the Public Health Engineer 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; drawings and instructions hereinbefore 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, 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 the sooner determination thereof of the contract.' Section 2(a) of the Act defines "arbitration agreement" to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not" Indisputably, there is no recital in the above clause of the contact to refer any dispute or difference present or future to arbitration. The learned counsel for respondent sought to contend from the marginal note, viz., "the decision of Public Health Engineer to be final" and any other the words "claim, right, matter or thing, whatsoever in any way arising out of the contract, 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 the sooner determination thereof of the contract" and contended that this clause is wide enough to encompass within its ambit, any disputes or differences arising in the aforesaid execution of the contract or any question or claim or right arising under the contract during the progress of the work or after the completion or sooner determination thereof for reference to an arbitration. The High Court, therefore, was right in its conclusion that the aforesaid clause gives right to arbitration to the respondent for resolution of the dispute/claims raised by the respondent. In support thereof he relied -on Ram Lal Jagan Nath v. Punjab Slate through collector, Hissar & Anr., AIR 1966 Punjab 436. It is further contended that for the decision of the Public Health Engineer to be final, the contractor must be given an opportunity to submit his case to be heard either in person or through counsel and a decision thereon should be given, It envisages by implication existence of a dispute between the contractor and the Department. In

other words, the parties construed that he Public Health Engineer should be the sole arbitrator. When the claim was made in referring the dispute to him, it was not referred to the Court. The respondent is entitled to avail the remedy under Sections 8 and 20 of the Act. We find it difficult to give acceptance to the contention, A reading of the above clause in the contract as a conjoint whole, would give us an indication that during the progress of the work or after the completion or the sooner determination thereof of the contract, the Public Heath Engineer has been empowered to decide all questions relating to the meaning of the specifications, drawings, instructions hereinbefore mentioned and as to the quality of workmanship or material 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 drawings specification's estimates, instructions, orders or those conditions :or otherwise concerning the works or the execution or failure to execute the same has been entrusted to the Public Health Engineer and his decision shall be final. In other words, he is nominated only to decide the questions arising in the quality of the work or any other matters enumerated herein-before and his decision shall be final and bind the contractor. A clause in the contract cannot be split into two parts .so as to consider one part to give rise lo difference or dispute and another part relating to execution of work, its workmanship etc. It is settled now that clause in the contract must be read as a whole. If the construction suggested by the respondent is given effect then the decision of the Public Health Engineer would become final, and it is not even necessary to have it made rule of the Court under the Arbitration Act. It would be hazardous to the claim of a contractor to give such instruction and give power to the Public Health Engineer to make any dispute final and binding on the contractor. A careful reading of the clause in the contract would give us an indication that the Public Health Engineer is empowered to decide all the questions enumerated therein other than any disputes or differences that have arisen between the contractor and the Government. But for Clause 25, there is no other contract to refer any dispute or difference to an arbitrator named or otherwise.

This Court was called upon to consider similar clause in State of U.P. v. Tipper Chand, [1980] 2 SCC 341. The clause was extracted therein. After consideration thereof, this Court held that after perusing the contents of the said clause and hearing learned counsel for the parties "we find ourselves in complete agreement with the view taken by the High Court. Admittedly, the clause does not contain any express arbitration agreement. Nor can such an agreement be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time". It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for the arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio. It is obvious that for resolution of

any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties. The ratio in Smt, Rukmanibai Gupta v. Collector, Jabalpur & Ors., [1980] 4 SC 556 does not assist the respondent. From the language therein this Court inferred, by implication, existence of a dispute or difference for arbitration. The Full Bench judgment of the Punjab & Haryana High Court relied on by the counsel was expressly overruled by this Court in Tipper Owners case (supra). Therefore, it is no longer good law. Moreover, notice Was not given to the Public Health Engineer to enter upon the reference but was issued to Chief Engineer to refer the dispute to an arbitrator. The contention in the rejoinder of the appellants that the respondent received the amount with protest to conclude that the amount was received in full and final settlement of the Act, cannot be accepted unless there is proof or admission in that behalf. The ratio in P.K. Ramaiah & Co. v. NTPC, [1904] Supp. 3 SCC 126 has no application to the facts of the case.

We, therefore, hold that clause 25 of the agreement does not contain an arbitration agreement nor it envisages any difference or dispute that may arise or had arisen between the parties in execution of the works for reference to an arbitrator. The High Court following its earlier decision in M/s. Praharaj Partners v. State of Orissa & Ors., in Miscellaneous appeal No. 153/79 and Civil Revision No. 478/79 dated February 26, 1981. The learned Judge in that judgment relied on the Full Bench Judgment of the Punjab & Haryana High Court and on Rukmanibai Gupta's case (supra). The High Court's decision has already been overruled and Rukmanibai Gupta's case (supra) has no application. The decision of the High Court, therefore, is clearly unsustainable in law.

The appeals are accordingly allowed. Appointment of the arbitrator in furtherance of the orders of the Subordinate Judge stands set aside. The respective petitions filed by the respondent under Sections 8 and 20 stand dismissed but, in the circumstances, parties are directed to bear their own costs throughout.